THE ARMY LAWYER

ARTICLES

Once Bitten, Twice Shy: How the Department of Defense Should Finally End its Relationship with the Court of Federal Claims Second Bite of the Apple Bid Protests
Major T. Aaron Finley, USAF

Keep Your Commanders off the Fiscal Naughty List—How to Spot and Prevent Common Antideficiency Act Violations
Major Russell R. Henry, USMC

Construction Changes: A True Story of Money, Power, and Turmoil
Major Nolan T. Koon

Encourage Your Clients to Talk to Offerors: Understanding Federal Acquisition Regulation 15.306
Major Brendan J. Mayer

September Grasshoppers: Why Federal Agencies Spend so Much at the End of the Fiscal Year
Captain Charles Reiter, USMC

TJAGLCS FEATURES

Lore of the Corps

From Infantry Officer to Judge Advocate General to Provost Marshal General and More: The Remarkable Career of Allen W. Gullion

New Developments

Contract and Fiscal Law

Recent Developments in the Availability of Appropriated Funds for Disposable Cups, Plates, and Cutlery
Major Dale McFeatters

Historical Note

The Curious Court-Martial of Daniel Boone
Major Jonathan E. Fields

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Lore of the Corps

From Infantry Officer to Judge Advocate General to Provost Marshal General and More: The Remarkable Career of Allen W. Gullion 1

Articles

Once Bitten, Twice Shy: How the Department of Defense Should Finally End its Relationship with the Court of Federal Claims Second Bite of the Apple Bid Protests
Major T. Aaron Finley, USAF 6

Keep Your Commanders off the Fiscal Naughty List—How to Spot and Prevent Common Antideficiency Act Violations
Major Russell R. Henry, USMC 16

Construction Changes: A True Story of Money, Power, and Turmoil
Major Nolan T. Koon 25

Encourage Your Clients to Talk to Offerors: Understanding Federal Acquisition Regulation 15.306
Major Brendan J. Mayer 36

September Grasshoppers: Why Federal Agencies Spend so Much at the End of the Fiscal Year
Captain Charles Reiter, USMC 53

TJAGLCS Features

Contract and Fiscal Law

Recent Developments in the Availability of Appropriated Funds for Disposable Cups, Plates, and Cutlery
Major Dale McFeatters 63

Historical Note

The Curious Court-Martial of Daniel Boone
Major Jonathan E. Fields 65

Lore of the Corps

From Infantry Officer to Judge Advocate General to Provost Marshal General and More: The Remarkable Career of Allen W. Gullion

By Fred L. Borch
Regimental Historian & Archivist[*]

Allen W. Gullion was an extraordinary Soldier by any measure. He saw combat in the Philippines, served on the border with Mexico, and joined the Judge Advocate General's Department shortly before the United States entered World War I. After a number of significant assignments as a lawyer, he became The Judge Advocate General (TJAG) in 1937. When he retired from his position as TJAG on December 1, 1941, Major General Gullion assumed full-time duties as the Army's Provost Marshal General—a position that had not existed since World War I. He subsequently supervised the handling of all Axis prisoners of war, both in the United States and overseas. He also was the chief architect of the Army's framework for the post-World War II occupation of Austria, Germany, Japan, and Korea. In early 1944, Major General Gullion accepted an invitation from General Dwight D. Eisenhower to join his staff as the Chief, Displaced Persons Branch. In this unique job, Major General Gullion oversaw Allied efforts involving the repatriation of millions of refugees and other civilians displaced by the chaos of World War II. With basic plans for this project completed, Gullion retired in December 1944. He died eighteen months later, in June 1946. What follows is the story of his remarkable career—unique in the history of the U.S. Army and The Judge Advocate General's Corps.

Born in New Castle, Kentucky, on December 14, 1880, Allen Wyant Gullion graduated with a Bachelor of Arts from Centre College, Danville, Kentucky, in 1901. As a student, he excelled in the subjects of Greek, Latin, and oratory (he won the school's prize in oratory),[1] but decided to pursue a career as an Army officer. Consequently, he obtained an appointment to the U.S. Military Academy at West Point, and after graduating in 1905, he was commissioned as a second lieutenant (2LT) in the Infantry branch.[2]

After service with the 2nd U.S. Infantry Regiment at Fort Logan, Colorado, 2LT Gullion sailed to the Philippines in 1906.[3] He served two years in the Philippine Islands, where he saw combat in military operations against Filipino insurgents.[4]

Major General Allen W. Gullion, The Judge Advocate General, U.S. Army, 1937

After returning to the United States in 1908, Gullion was assigned to Fort Thomas, Kentucky.[5] In 1911, he was promoted to first lieutenant and transferred to the 20th U.S. Infantry Regiment.[6] Gullion was then detailed as a Professor of Military Science and Tactics at the University of Kentucky, and during his two-year assignment, he attended law school earning a Bachelor of Law degree in 1914.[7]

When National Guard units were sent to the Mexican border in 1916, Gullion accepted a commission as a colonel in the 2nd Kentucky Infantry.[8] He served on the border until

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[*] The author thanks General Thomas S. Moorman Jr., U.S. Air Force, Retired, for his help in preparing this *Lore of the Corps*. General Moorman is the grandson of Major General Gullion. General Moorman served as Vice Chief of Staff of the Air Force from 1994 to 1997.

[1] DOUGLAS WALLER, A QUESTION OF LOYALTY 222 (2004).

[2] U.S. ARMY JUDGE ADVOCATE GENERAL'S CORPS, THE ARMY LAWYER 155 (1975).

[3] WALLER, *supra* note 1, at 222.

[4] *Id*.

[5] *Id*.

[6] *Id*.

[7] J.T. White & Co., *Allen Wyant Gullion*, WHITE'S BIOGRAPHY 254 (1949).

[8] *Id*.

May 1917, then gave up this rank and position in order to accept an appointment as a Regular Army major (MAJ) in the Judge Advocate General's Department.[9]

As the United States began mobilizing for World War I, MAJ Gullion was ordered to Washington for duty as Assistant Executive Officer and Chief of the Mobilization Division in the Provost Marshal General's Office. Major General Enoch H. Crowder, who had been the Army's Judge Advocate General since 1911, took a leave of absence from this position to become the Provost Marshal General and oversee the implementation of the first wartime draft since the Civil War.[10] Gullion assisted Crowder in administering the new Selective Service Act, and as a result of his superlative performance of duty, Gullion—who had been previously promoted to Lieutenant Colonel—was awarded the Distinguished Service Medal.[11] His citation read, in part:

> As chief of publicity and information under the provost marshal general, he successfully conducted the campaign to popularize selective service. Later, as acting executive officer to the provost marshal general, he solved many intricate problems with firmness, promptness, and common sense. Finally, as the first chief of mobilization, division of the provost marshal general's office, he supervised all matters relating to the making and filling of calls and the accomplishment of individual inductions. To each of his varied and important duties he brought a high order of ability and remarkable powers of application. His services were of great value in raising our National Army.[12]

In March 1918, Lieutenant Colonel (LTC) Gullion deployed to France, where he served as a member of the General Staff, American Expeditionary Force and as Judge Advocate, Advance Session and III Corps.[13] After the end of hostilities, Gullion remained in Europe, and marched with III Corps into Germany as part of the Allied occupation.[14]

Allen Gullion returned to the United States in early 1919 and was assigned to Governors Island, New York.[15] For the next five years, he was the legal advisor to Lieutenant General Robert L. Bullard, a distinguished Soldier who had successfully commanded a brigade before taking charge of the First Division, III Corps, and Second Army in World War I.[16] Since Gullion had been Bullard's lawyer while Bullard commanded III Corps from September 1918 to October 1918, it is likely that the two Soldiers had forged a strong professional relationship during wartime that continued in peacetime in New York.[17]

In June 1924, LTC Gullion was transferred to the Office of the Judge Advocate General in Washington, D.C.[18] The next year, he earned accolades for his performance in the court-martial of World War I aviation hero Colonel (COL) William "Billy" Mitchell.[19] In September 1925, after two aeronautical accidents involving the loss of a Navy dirigible and three Army Air Corps aircraft, Mitchell claimed in a press conference that these air disasters were "the direct result of the incompetency, criminal negligence, and almost treasonable administration of our national defense by the Navy and War Departments."[20]

The White House and leaders in the Navy and War Departments were outraged by Mitchell's intemperate words, and he was ordered to stand trial by general court-martial. At a high-profile trial that was on the front page of virtually every American newspaper for weeks, Mitchell was found guilty of insubordination, conduct to the prejudice of good order and military discipline, and bringing discredit on the War Department.[21] But, while the court-martial left Billy Mitchell's reputation in tatters, Gullion emerged as "one of the most skilled and aggressive prosecutors" in the Army.[22] His withering cross examination of Mitchell's testimony had been featured in newspaper stories throughout the country, and Gullion's closing argument on findings and sentencing likewise brought him to the attention of both the public and the Army's leadership.[23] He certainly seemed destined for higher rank and positions of greater responsibility.

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[9] *Id*.

[10] *Id*.

[11] For a biography of Crowder, see DAVID A. LOCKMILLER, ENOCH H. CROWDER: SOLDIER, LAWYER AND STATESMAN (1955). *See also* Fred L. Borch, *The Greatest Judge Advocate in History? The Extraordinary Life of Major General Enoch H. Crowder (1859–1932)*, ARMY LAW., May 2012, at 1–3.

[12] War Dep't, Gen. Order No. 9 (1923).

[13] WALLER, *supra* note 1, at 222.

[14] U.S. ARMY JUDGE ADVOCATE GENERAL'S CORPS, *supra* note 2, at 155.

[15] *Id.*

[16] For more on Robert Lee Bullard, see ALLAN R. MILLETT, THE GENERAL: ROBERT L. BULLARD AND OFFICERSHIP IN THE UNITED STATES ARMY (1975).

[17] III Corps took part in the Meuse-Argonne offensive in September and October 1918, the largest U.S. operation in World War I. LAURENCE STALLINGS, THE DOUGHBOYS: THE STORY OF THE AEF, 1917-1918 293-95 (1963).

[18] J.T. White & Co., *supra* note 4, at 254.

[19] *Id.*

[20] WALLER, *supra* note 1, at 222.

[21] *Id*.

[22] *Id*. at 221-22.

[23] For more on the legal aspects of the Mitchell court-martial, see Fred L. Borch, *The Trial by Court-Martial of Colonel William "Billy" Mitchell*, Army Law., Jan. 2012, at 1.

But Gullion was also recognized by his contemporaries as an eccentric.[24] Although "he played polo and enjoyed watching boxing matches, he smoked heavily (always with a cigarette holder) and thought exercise could be bad for his health."[25] When reading the newspaper in bed, he wore "white gloves so the print wouldn't soil his hands."[26] On car trips from Washington back to Kentucky, he would stop at each railroad crossing and order his son out to inspect the track both ways and then signal him to pass over it.[27]

Like many officers of the period, Gullion was intensely apolitical.[28] He never voted in an election, believing that officers must stay out of politics.[29] Finally, officers who acted in an ungentlemanly or unprincipled manner deeply offended him.[30] Certainly, COL Billy Mitchell fell into this category.

Major General Gullion (left) and Colonel Myron C. Cramer (right), December 1941. Colonel Cramer replaced Major General Gullion as The Judge Advocate General, U.S. Army.

In 1929, LTC Gullion was selected to represent the United States as the senior War Department representative at an international conference in Geneva, Switzerland.[31] This gathering of forty-seven nations came together to formulate a code for prisoners of war and revise the Geneva Convention of 1906.[32] The result of this conference were two new international treaties on July 27, 1929: The Geneva Convention Relative to the Treatment of Prisoners of War (GPW) and the Geneva Convention for the Amelioration of the Wounded and Sick of Armies in the Field.[33] According to a War Department press release, Gullion was "chiefly responsible for the creation of" the 1929 GPW, and in May 1944, benefited personally from his work.[34] This was because the American Prisoner of War Bureau, created in compliance with U.S. obligations under the GPW, informed him that his youngest son, an Army Air Forces officer, had been captured by the Germans in France and was a prisoner of war (POW).[35]

In 1930, the War Department sent LTC Gullion to the Army War College, located at Fort Myer, Virginia.[36] After graduating in 1931, the War Department sent him to advanced schooling at the Naval War College, from which he graduated in 1932.[37] Gullion then sailed for Hawaii, where he assumed duties as the top military lawyer in the Hawaiian Department.[38]

In late 1934, in an unusual turn of events, LTC Gullion took off his uniform to become the civilian administrator of the National Recovery Administration (NRA) for the Territory of Hawaii.[39] Congress created the NRA in 1933 as a way to stem, at least in part, the deflation of the Great Depression in October 1929.[40] The goal of the NRA, which adopted a blue eagle as its symbol and "We Do Our Part" as its slogan, was to bring industry and labor together to create codes of "fair practice" and set prices that would raise consumer purchasing power and increase employment.[41]

Hugh S. Johnson, who had been a member of the Judge Advocate General's Department in World War I, was the first

[24] WALLER, *supra* note 1, at 222.

[25] *Id*.

[26] *Id*.

[27] *Id*.

[28] *Id*.

[29] *Id*.

[30] *Id*.

[31] J.T. White & Co., *supra* note 4, at 254.

[32] *Id*.

[33] *Id*.

[34] *Id*.

[35] Press Release, War Department, Bureau of Public Relations, Maj. Gen. Allen W. Gullion Retires, 1 (Jan. 1, 1945) (on file with author). Gullion's son, Allen Wyant Gullion Jr., graduated from the U.S. Military Academy in 1943. Commissioned in the Air Corps, he was a pilot assigned to the 416th Bombardment Group when he was shot down and taken prisoner. After being released from captivity in 1945, he remained on active duty and served in a variety of Air Force assignments until retiring as a lieutenant colonel in 1966. He died in Cadiz, Spain, in 1985. THE U.S. MILITARY ACAD., WEST POINT, THE REGISTER OF GRADUATES & FORMER CADETS 352 (1992).

[36] J.T. White & Co., *supra* note 4, at 254.

[37] *Id*.

[38] *Id*.

[39] *Id*.

[40] *Id*.

[41] For more on the National Rifle Association, see JOHN K. OHL, HUGH S. JOHNSON AND THE NEW DEAL (1985).

Director of the NRA.[42] Johnson selected administrators like Gullion, whom he knew from his years as a judge advocate, to implement NRA goals.[43] These included: a minimum wage of between twenty and forty-five cents per hour and a maximum work week of thirty-five to forty-five hours.[44] For the next year, Gullion and his staff drafted and implemented rules and regulations that governed almost every aspect of the economy in the islands.[45] Within months, he was so popular in the community that the local newspapers reported that Gullion was considered to be a possible future governor of the Territory.[46] But Gullion was abruptly out of a job in 1935, after the U.S. Supreme Court declared the NRA unconstitutional in *Schechter Poultry Corp. v. United States.*[47] He then returned to Washington, D.C., to become the Chief, Military Affairs Division, in the Office of the Judge Advocate General.[48]

Colonel Gullion became Assistant Judge Advocate General in 1936, and the following year, after the retirement of Major General Arthur W. Brown in November 1937, Gullion was promoted to Major General and became TJAG.[49]

The following year, Major General Gullion was the delegate of the United States at an international conference of judicial experts in Luxembourg.[50] At the conference, Gullion spoke "on the subject of protection of civil populations from bombardment from the air."[51] Given the role of airpower in World War II and the destruction wrought by aerial bombardment, his remarks must have been prescient. After Luxembourg, Major General Gullion continued to participate in high-profile events. In 1941, he represented the War Department and the American and Federal Bar Associations at the first convention of the Inter-American Bar Associations in Havana, Cuba.[52]

In September 1939, after the outbreak of war in Europe and as the U.S. Army began preparing for war, Gullion and his staff were heavily involved in drafting legislation to transform the Army into a wartime body.[53] However, as TJAG, Gullion was apparently most proud that during his tenure, the general court-martial rate was reduced "to its lowest rate in the peacetime history of the Army."[54]

Major General and Provost Marshal General Gullion, Provost Marshal General School, Arlington, Virginia, March 1942

On July 3, 1941, five months before his four-year term as TJAG ended, Major General Gullion was appointed as the Provost Marshal General (PMG).[55] Shortly after Gullion assumed his new position, he took on responsibility for manning and training the new Military Police Corps, soon universally known as "MPs," which was created by the Secretary of War in September 1941.[56] Under Major General Gullion's guidance, the Military Police Corps of World War II "emerged as a trained specialist equipped to handle the difficult task of law enforcement."[57]

As PMG, Gullion did much more than oversee law enforcement operations in the Army; he was in charge of handling all Axis prisoners of war and was responsible for developing the framework for occupying liberated and conquered Axis territories.[58] This was a significant

[42] *Id.*

[43] J.T. White & Co., *supra* note 4, at 254.

[44] *Id.*

[45] *Id.*

[46] *Gullion for Governor?*, HONOLULU STAR BULLETIN, Sept. 24, 1938.

[47] A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[48] J.T. White & Co., *supra* note 4, at 254.

[49] *Id.*

[50] War Department, Bureau of Public Relations, *supra* note 35.

[51] *Id.*

[52] *Id.*

[53] U.S. ARMY JUDGE ADVOCATE GENERAL'S CORPS, *supra* note 2, at 156.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

responsibility.[59] By the end of World War II, approximately 425,000 Axis POWs were living and working in 700 camps in the United States, and the Office of the PMG was responsible for every detail of POW welfare, from food, pay, and housing to medical care, mail, and recreation.[60]

As for military occupation, Gullion and his staff formulated the policies for military governance adopted by President Franklin D. Roosevelt, including an important 1943 revision to Field Manual (FM) 27-5, *Military Government*.[61] The FM ultimately was seen as the bible for all those involved in civil affairs and military occupation duties because "it provided guidance on how to train, to plan, and eventually implement military government."[62] Major General Gullion also established a Military Government School at the University of Virginia.[63] In "a tough 16-week course," Army "civil affairs officers" were "thoroughly grounded in Army organization, international law, and public administration"[64] so that the United States could effectively and efficiently govern in Germany, Italy, and Japan. Later, on Gullion's recommendation, the Army also created a Civil Affairs Division (as part of the War Department General Staff), to utilize the military personnel (some of whom were judge advocates) being educated at the University of Virginia.[65]

In May 1944, Gullion was offered the chance to join General Dwight D. Eisenhower in France as the Chief, Displaced Persons (DPs) Branch.[66] Major General Gullion accepted the position, and "he was relieved [of his duties as PMG] at his own request in order to accept the appointment."[67] In his new assignment, Gullion consulted and coordinated with other Allied governments (most of which were "in exile" in London) regarding repatriating nationals who had been displaced by the war.[68] Since at least 15 million Europeans had been displaced, (war refugees, political prisoners, forced laborers, deportees, civilian internees, concentration camp inmates, ex-POWs, and stateless persons) returning them to their homes, or otherwise finding a country that would accept them, was a huge task.[69] Within months, however, Major General Gullion and his staff were able "to develop the framework of the organization" [70] for the rehabilitation and return of these DPs. Although this must have given Gullion great satisfaction, he certainly must have been frustrated since in November 1944 poor health required him to be "invalided at home."[71] He retired "because of disability incident to the service" December 31, 1944.[72]

Eighteen months later, on June 19, 1946, Major General Gullion died of a heart attack at his son's home. At the time of his death, he and his son were listening to a radio broadcast of the heavyweight boxing championship bout between Joe Louis and Billy Conn.[73] Guillion was 65 years old.

Allen W. Gullion served nearly forty years as a Soldier. With more than ten years as an Infantry officer, nearly twenty-five years as an Army lawyer, and World War II service as Provost Marshal General and a member of Eisenhower's staff in France, he was a truly remarkable Soldier by any measure.

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website
https://www.jagcnet.army.mil/8525736A005BE1BE

Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.

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[59] *Our Growing Prison Camps: How U.S. Treats War Captives*, NATIONAL WEEKLY, May 28, 1943, at 22. For more on German and Italian Prisoners of War (POWs) in the United States during World War II, see ARNOLD KRAMMER, NAZI PRISONERS OF WAR IN AMERICA (1979).

[60] *Id.*

[61] WALTER M. HUDSON, ARMY DIPLOMACY 72 (2015).

[62] *Id.*

[63] *Id.* at 135-55.

[64] *When the Yanks Take Over*, LOOK, July 13, 1943.

[65] HUDSON, *supra* note 62, at 135-55.

[66] War Department, Bureau of Public Relations, *supra* note 17.

[67] *Id.*

[68] For more on displaced persons, see MARK WYMAN, DPS: EUROPE'S DISPLACED PERSONS, 1945-1951 (1998).

[69] *Id.*

[70] U.S. ARMY JUDGE ADVOCATE GENERAL'S CORPS, *supra* note 2, at 156.

[71] *Gen. Gullion Retires*, ARMY NAVY J., Jan. 1945.

[72] *Id.*

[73] *Maj. Gen. Allen Gullion Dies While Hearing Fight*, THE NEWS DEMOCRAT (Carrolton, Kentucky), June 20, 1946; *Louis Stops Conn in Eighth Round and Retains Title*, N.Y. TIMES, June 20, 1946, at 1. Before the Louis-Conn fight, Louis was asked whether Conn might "outpoint" him because of Conn's hand and foot speed. In a reply that still is remembered today, Louis quipped: "He can run, but he can't hide." The Louis-Conn bout, held at Yankee Stadium, was seen by more than 45,000 fans. The bout also was televised by the NBC network and was the first televised world Heavyweight championship fight ever. It was watched by 146,000 people, which set a record for the most viewed world Heavyweight bout in history. *Id.* Thousands more—like Gullion—listened to the fight on their radios.

Once Bitten, Twice Shy: How the Department of Defense Should Finally End its Relationship with the Court of Federal Claims Second Bite of the Apple Bid Protests

Major T. Aaron Finley[*]

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time.[1]

I. Introduction

As of August 19, 2014, nearly 9,900 U.S. service members and Department of Defense (DoD) civilians were frustratingly waiting to see their privately-owned vehicles again after returning from or going to overseas assignments.[2] International Auto Logistics LLC (IAL), the new DoD contractor responsible for the processing, storage, and worldwide shipping of their personally-owned vehicles (POVs), had struggled to meet the demand of the hectic DoD summer permanent change of station season. International Auto Logistics blamed delays on having to begin performance of the contract on May 1, 2014, just before the greatest volume of yearly DoD moves would occur.[3] The DoD contracting agency responsible for the award had scheduled the performance to begin on December 1, 2013.[4] However, two successive bid protests from the incumbent contractor to two separate bid protest forums led to a five-month delay.[5] After having failed to convince the Government Accountability Office (GAO) that the DoD contract award to IAL was unreasonable, the incumbent contractor, American Auto Logistics, LP, protested anew to the Court of Federal Claims (COFC) on February 5, 2014, ultimately delaying IAL's performance for another three months.[6]

The ability of would-be federal contractors to protest successively at two separate forums as described in the above scenario has received attention in the DoD contracting community over the past several years. This attention culminated with DoD attempting in both its 2013 and 2014 National Defense Authorization Act (NDAA) legislative proposals to persuade Congress to end these repetitive protests.[7] Although the DoD proposals provided solid data and arguments to support the change, they ultimately failed to gain traction in Congress.

However, a few key changes to DoD's proposal may provide for a more supportable piece of legislation. This paper will begin by providing a brief historical overview of the current bid protest fora and their development. Next, it will discuss the arguments for and against the DoD's proposed legislation to end second bite protests at the COFC. Finally, it will provide analysis and support for the proposition that the DoD could gain wider support for future legislative proposals if it makes the following changes: (1) increase the COFC filing deadline from ten days to thirty days; (2) strengthen the GAO reconsideration review process by requiring a separate, higher echelon GAO attorney conduct the reconsideration review; and (3) allow for an exception to the COFC filing deadline in situations where the agency decides not to follow a GAO recommendation.

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[1] *Abraham Lincoln*, 2 COLLECTED WORKS THE ABRAHAM LINCOLN ASSOCIATION, SPRINGFIELD, ILLINOIS 81 (Roy P. Basler ed., 1953) [hereinafter Collected Works: Lincoln].

[2] Adam Mathis, *Servicemembers File Class-Action Lawsuit Against Car Shipping Contractor*, STARS & STRIPES (Aug. 22, 2014), http://www.stripes.com/news/servicemembers-file-class-action-lawsuit-against-car-shipping-contractor-1.299486. The author obtained the 9,900 figure by multiplying the total number of vehicles in transit as of August 19, 2014 (14,154) by the estimated seventy percent of vehicles missing the required delivery date. *Id*.

[3] Karen Jowers, *Troops Complain About New POV Shipping Company*, NAVY TIMES (Jul. 17, 2014), http://www.navytimes.com/article/20140717/BENEFITS07/307170076/Troops-complain-about-new-POV-shipping-company.

[4] Am. Auto Logistics, LP v. United States, 117 Fed. Cl. 137, 147 (2014). The period of performance under the contract would begin December 1, 2013. *Id*. at n.5.

[5] *Id*. at 141, 171-72.

[6] *Id*. United States Transportation Command (TRANSCOM), the Government agency awarding the contract, agreed to voluntarily stay performance of the contract so that "litigation could proceed." Accordingly, the COFC judge orally denied the protestor's motion for an injunction prohibiting performance. *Id*. at 141.

[7] *See* U.S. Dep't of Def., Sixth Package of Legis. Proposals Sent to Cong. for Inclusion in the Nat'l Def. Auth. Act for Fiscal Year 2013, DOD.MIL (April 12, 2012), http://www.dod.mil/dodgc/olc/docs/25April 2012Proposals.pdf [hereinafter DoD 2013 NDAA Proposal]; *See also* U.S. Dep't of Def., Dep't of Def.'s Proposed Nat'l Def. Auth. Act for Fiscal Year 2014—Section-by-Section Analysis, DOD.MIL (April 26, 2013), http://www.dod.gov/dodgc/olc/docs/26April2013NDAASectionalAnalysis.pdf [hereinafter DoD 2014 NDAA Proposal].

II. The Bid Protest Playing Field

As of January 1, 2001, a person desiring to protest the award of a government procurement has three choices of forum.[8] First, the disappointed offeror may file a bid protest with the agency that awarded the contract.[9] Second, the offeror may file a bid protest with the GAO.[10] Lastly, the offeror may file a bid protest claim with the COFC.[11] Although it is typically beneficial to all parties involved to solve bid protests at the agency level, the focus of this paper is the issues caused by the availability of both the GAO and the COFC as successive bid protest forums. Accordingly, this section will include a discussion of only the GAO and COFC bid protest forums.[12]

A. GAO—The Quick, Informal Protest of Choice

Congress created the GAO in June 1921 by passing the "Budget and Accounting Act, 1921."[13] It created the GAO as an organization independent from the Executive departments and under the direction of the Comptroller General.[14] The Comptroller General and the Deputy Comptroller General are both appointed by the President with and by the advice of the Senate for fifteen year terms.[15] The GAO's duties include the investigation of all matters involving the "receipt, disbursement, and use of public money."[16]

The first recorded GAO bid protest decision occurred in 1925 when it declared Panama Canal construction officials had unlawfully modeled a solicitation's specifications after particular brand name components.[17] The GAO would remain the sole bid protest forum until 1970, when the U.S. District Court of Appeals for the D.C. Circuit held that citizens may bring actions under the Administrative Procedure Act in U.S. district courts for agency decisions that are "arbitrary and capricious abuses of discretion."[18]

The GAO obtained its formal, congressionally-designated ability to adjudicate bid protests in 1984 upon passage of the Competition in Contract Act (CICA).[19] Congress, in passing CICA, expressed its intent that the Comptroller General "shall provide for the inexpensive and expeditious resolution of protests."[20] In order to meet this intent, Congress included several provisions that would serve to shape the GAO bid protest procedure into the popular forum it is today.[21]

What is arguably the most appealing of these provisions to would-be government contractors, or "disappointed offerors," is the automatic "CICA stay."[22] As long as the agency receives the protest within ten days of award or five days of a required debriefing, whichever is later, the agency must stay performance of the awarded contract.[23] An agency may override the stay if the Head Contracting Authority (HCA) determines in writing that it is "in the best interests of the United States" or that "urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting."[24] However, any override decisions by the agency are immediately appealable to the COFC where they are subject to a strict review.[25]

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[8] The U.S. District Courts' jurisdiction to hear bid protests ended January 1, 2001. Pub. L. No. 104-320, 110 Stat. 3875 (Oct. 19, 1996). Congress ended the jurisdiction in order to provide for a more uniform bid protest law and eliminate "forum shopping" between the U.S. District Courts and the Court of Federal Claims (COFC). 142 CONG. REC. S6155 (statement of Sen. Cohen).

[9] FAR 33.103 (2014).

[10] 31 U.S.C. §§ 3551-3556 (2009).

[11] 28 U.S.C. § 1491(b) (2011).

[12] For a more thorough discussion of all three forums, one article to consider is Michael Schaengold, Michael Guiffré & Elizabeth Gill, *Choice of Forum for Bid Protests*, BRIEFING PAPERS, Oct. 2008, at 08-11.

[13] Pub. L. No. 67-13, 42 Stat. 20 (June 10, 1921).

[14] *Id*.

[15] 31 U.S.C. § 703(a)-(b) (2014).

[16] 31 U.S.C. § 712(1) (2014).

[17] Daniel I. Gordon, *Bid Protests: The Costs Are Real, But The Benefits Outweigh Them*, 42 PUB. CONT. L.J. 489, 490 (2013).

[18] Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 869 (D.C. Cir. 1970). While addressing the appellee (Government) argument that citizens should exhaust all administrative remedies, including the Government Accountability Office (GAO), before bringing action in district court, the D.C. Circuit court held that while the GAO is a "useful alternative procedure under certain circumstances, it is not a prerequisite to court review." *Id*. at 876. The Administrative Dispute Regulation Act (ADRA) of 1996 ended the district courts' jurisdiction, effective January 1, 2001, thereby paving the way for the COFC to obtain sole jurisdiction for judicial, post-award bid protests. *See* Pub. L. No. 104-320, § 12(a), 110 Stat. 3870, 3874 (1996).

[19] Pub. L. No. 98-369, 98 Stat. 1200 (July 18, 1984) (codified as amended at 31 U.S.C. § 3553(a) (2014)).

[20] 31 U.S.C. § 3554(a)(1) (2013).

[21] MOSHE SCHWARTZ, KATE M. MANUEL, & LUCY P. MARTINEZ, CONG. RESEARCH SERV., R40227, GAO BID PROTESTS: TRENDS AND ANALYSIS 2 (2013).

[22] 31 U.S.C. § 3553(d) (2014). Other important provisions arising from the Competition in Contracting Act (CICA) include its time limits on the GAO's review period. The Comptroller General, in accordance with the mission of providing for an "inexpensive and expeditious resolution" of bid protests, must issue a final decision within 100 days of receiving a bid protest. 31 U.S.C. § 3554(a)(1) (2013). The Comptroller General must also offer a sixty-five-day "express option" for cases it determines suitable for expedited review. 31 U.S.C. § 3554(a)(2) (2013).

[23] 31 U.S.C. § 3553(d) (2014).

[24] *Id*. The U.S. Army override authority is the Deputy Assistant Secretary of the Army (Procurement) (DASA(P)) or the U.S. Army Materiel Command's (AMC's) Counsel in the case of an AMC override. AFAR 5133.104(b)(1)(B) (2014).

[25] *See, e.g.*, Beechcraft Def. Co., LLC v. United States, 111 Fed. Cl. 24, 31 (2013) (explaining that in reviewing an override decision, COFC considers: "(1) 'whether significant adverse consequences will necessarily occur if the stay is not overridden;' (2) 'whether reasonable alternatives to the override exist that would adequately address the circumstances presented;' (3) 'how

Preparing and filing GAO bid protests is also quicker and less arduous than what one would experience in dealing with a more formal adjudicative body, such as a judicial forum. A disappointed offeror need only submit a signed, written protest detailing, among other administrative items, the concerned contract number, factual and legal grounds for the protest, a request for relief by the Comptroller General, and the form of relief requested.[26] Attorney representation is not required to file with GAO.[27] If an attorney is used and the protest is sustained, GAO may recommend the agency pay attorney fees.[28]

If GAO determines the agency's evaluation was not consistent with the evaluation criteria or applicable law and regulation, it will recommend the agency take one or more corrective actions to remedy the violation.[29] These corrective actions may include recompeting the protested award, issuing a new solicitation, terminating an awarded contract, or awarding a contract consistent with a particular statute or regulation.[30] Agencies may choose not to implement GAO recommendations on corrective action,[31] although in such cases the agency procurement activity must provide notice to the Comptroller General within sixty-five days of the GAO recommendation.[32]

B. COFC–Protest Decisions with Teeth

Congress created the Court of Federal Claims in 1992 through passage of the Federal Courts Administration Act.[33] The COFC initially retained jurisdiction to hear only pre-award bid protests.[34] However, in 1996 the COFC received post-award jurisdiction after passage of the Administrative Dispute Resolution Act (ADRA).[35] The ADRA also contained a sunset provision that ended the U.S. district courts' bid protest jurisdiction, thereby making the COFC the sole judicial forum for bid protests as of January 1, 2001.[36]

The COFC is an Article I, legislative court and its judges serve fifteen-year terms.[37] The filing process for bid protest complaints at the court is more formal than that of GAO. Claimants must comply with the strict procedures and pleading requirements of the Rules of United States Court of Federal Claims (RCFC).[38] Claimants are also normally required to obtain legal representation by an attorney barred before the court.[39] The COFC may award attorney fees to a "prevailing party"[40] pursuant to the Equal Access to Justice Act (EAJA) if the U.S. position was not "substantially justified" and "special circumstances" making reimbursement unjust do not exist.[41] But there are limits on claimants' net worth before they qualify for reimbursement under EAJA.[42]

The COFC's standard of review for bid protests involves whether an agency action, findings, or conclusions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[43] With regard to remedies available, the COFC may "award any relief that the court considers proper, including declaratory and injunctive relief[,]" as long as any monetary relief is "limited to bid preparation and proposal costs."[44] The court has accordingly declined to award lost profits where an agency has improperly awarded a

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the potential cost of proceeding with the override, including the costs associated with the potential that the GAO might sustain the protest, compare to the benefits associated with the approach being considered for addressing the agency's needs;' and (4) 'the impact of the override on competition and integrity of the procurement system'") (quoting Reilly's Wholesale Produce v. United States, 73 Fed. Cl. 705, 711 (2006)).

[26] 4 C.F.R. § 21.1(c) (2008).

[27] GAO, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE 8 (GAO-09-471SP, 9th ed. 2009).

[28] 31 U.S.C. § 3554(c)(1) (2013). The GAO may also recommend the agency pay expert fees if the protestor utilized an expert in preparing the protest filings. *Id*.

[29] 31 U.S.C. § 3554(b)(1) (2013). GAO's standard of review for bid protests involves determining whether the agency's judgment "was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations." *See* Intelligent Decisions, Inc., B-409686, 2014 CPD ¶ 213, 33 (Comp. Gen. Jul. 15, 2014) (citing Shumaker Trucking & Excavating Contractors, Inc., B-290732, 2002 CPD ¶ 169, 3 (Comp. Gen. Sept. 25, 2002)). *See also* 31 U.S.C. § 3552(a) (2014) (directing that a "protest concerning an alleged violation of a procurement statute or regulation shall be decided by the Comptroller General.").

[30] 31 U.S.C. § 3554(b)(1) (2013).

[31] 31 U.S.C. § 3554(b)(3) (2013).

[32] *Id*.

[33] Pub. L. No. 102-572, § 902, 106 Stat. 4506 (Oct. 29, 1992) (changing the name of the U.S. Claims Court to the Court of Federal Claims). The U.S. Claims Court began operations in 1982 after Congress passed the Federal Courts Improvement Act. Pub. L. No. 97-164, § 105, 96 Stat. 26 (Apr. 2, 1982).

[34] *See* United States v. John C. Grimberg Co., 702 F.2d 1362, 1374 (Fed. Cir. 1983) (holding the Court of Claims has only pre-award bid protest jurisdiction).

[35] Pub. L. No. 104-320, § 12(a), 110 Stat. 3870, 3874 (1996).

[36] *Id*. at § 12(d).

[37] 28 U.S.C. §§ 171(a), 172(a) (2014).

[38] R. CT. FED. CL.

[39] R. CT. FED. CL. 83.1(a)(3) (allowing pro se representation only if representing oneself or a family member).

[40] 28 U.S.C. §2412(d)(2)(H) (2014).

[41] 28 U.S.C. §2412(d)(1)(A) (2014).

[42] *See generally* 28 U.S.C. §2412(d) (2014) (explaining that individual protestors with a net worth of less than $2 million dollars or protesting corporations with a net worth of less than $7 million may qualify for attorney fees of not more than $125 an hour).

[43] 28 U.S.C. § 1491(b)(4) (2011) (incorporating the Administrative Procedure Act (APA) judicial review standard found at 5 U.S.C § 706 (2014)).

[44] 28 U.S.C. § 1491(b)(2) (2011).

contract.[45] It has also repeatedly refused to require agencies to award to specific contractors as a form of relief.[46]

The COFC's jurisdiction does not extend to a review of GAO's "substantive or procedural decisions."[47] Further, the GAO's decisions are not binding on the COFC.[48] Nonetheless, agencies defending bid protest claims at the COFC must include any related GAO decisions as part of their required administrative record filing.[49] The court's use of GAO decisions most often occurs in one of two ways. First, it may use a GAO decision for "instructive" purposes.[50] The COFC has described such purposes as receiving "general guidance to the extent it is reasonable and persuasive in light of the administrative record" and aiding the "court in better understanding and evaluating the procurement."[51] Second, it will consider a GAO decision when adjudicating a bid protest of an agency's decision to take corrective action based upon a GAO recommendation.[52]

Claimants may appeal final decisions of the COFC to the United States Court of Appeals for the Federal Circuit (CAFC).[53] The CAFC reviews COFC findings of fact for clear error and findings of law without deference, or *de novo*.[54]

III. The Second Bite Debate

Despite the benefits of the COFC's binding decisions and injunctive relief, Abraham Lincoln's sentiments on litigation[55] hold true today in the realm of bid protests. The GAO, as an alternative to the more burdensome COFC litigation, continues to receive an overwhelming number of the federal government's bid protests.[56] Even so, a number of those protestors filing with the GAO will later file anew with the COFC after receiving an unsatisfactory decision.[57] This section will discuss the DoD's recent attempts to end these serial protests.

A. DoD Proposes an End to Second Bites

In 2012, the DoD first sought to end second bite protests through its 2013 NDAA legislative proposal to Congress.[58] The proposal contained a significantly revised version of 28 U.S.C. § 1491, which created a ten-day post-award bid protest filing deadline at the COFC.[59] Because the GAO filing deadline is also ten days,[60] the change would effectively end follow-up protests to the COFC by forcing disappointed offerors to choose between the two fora.

The supporting analysis for the proposal explained that the change would eliminate "forum shopping" between GAO and COFC, reduce the amount of time procurement awards are engaged in protest, save agency resources by preventing personnel from defending protests in two successive forums, and provide potential savings to the DoD of $6 million per year.[61] Ultimately, Congress did not include the language in its 2013 NDAA.

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[45] *See* Gentex Corp. v. United States, 61 Fed. Cl. 49, 54 (2004); *See also* Lion Raisins, Inc. v. United States, 52 Fed. Cl. 629, 635 (2002).

[46] FirstLine Transp. Sec., Inc. v. United States, 100 Fed. Cl. 359, 401 (2011); *See also* MVM, Inc. v. United States, 46 Fed. Cl. 137, 144 (2000); and Hydro Eng'g, Inc. v. United States, 37 Fed. Cl. 448, 461 (1997).

[47] Centech Grp., Inc. v. United States, 78 Fed. Cl. 496, 506-07 (2007).

[48] *Id*.

[49] 31 U.S.C. § 3556 (2001).

[50] Centech Grp., Inc. v. United States, 554 F.3d 1029, 1038 n. 4 (Fed. Cir. 2009) (noting that while GAO decisions are not binding authority, they may be "instructive in the area of bid protests").

[51] Cubic Applications v. United States, 37 Fed. Cl. 339, 342 (1997).

[52] *Centech Grp., Inc.*, 78 Fed. at 507. *See also* Sys. Application & Techs. v. United States, 100 Fed. Cl. 687, 722 (2011); Honeywell, Inc. v. United States, 870 F.2d 644, 648 (Fed. Cir. 1989).

[53] 28 U.S.C. §1295(a)(3) (2014).

[54] John R. Sand & Gravel Co. v. United States, 457 F.3d 1345, 1353 (Fed. Cir. 2006).

[55] See introductory quote at beginning of paper. Abraham Lincoln once expressed his belief that winners in litigation are oftentimes nominal winners and "real loser[s]" when it comes to "fees, expenses, and waste of time." *See* Collected Works: Lincoln, *supra* note 1.

[56] *See* James W. Nelson, *GAO-COFC Concurrent Bid Protest Jurisdiction: Are Two Fora Too Many?*, 43 PUB. CONT. L.J. 587, 606-07 (2014) (explaining that in 2011 there were 2,353 GAO bid protests compared to 98 COFC bid protests; and in 2012 there were 2,475 GAO bid protests compared to 99 COFC bid protests).

[57] *Id*. at 608-09 (explaining that in 2011, there were ten protesters who filed a bid protest complaint at COFC after losing a bid protest at GAO; in 2012 there were eight). According to data tracked by the Contract and Fiscal Law Division, U.S. Army Legal Services Agency (KFLD), the Army defended six second bite, post-award bid protests before the COFC in Fiscal Year (FY) 2014; and as of February 12, 2015, five in FY 2015. E-mail from Scott Flesch, Chief, Bid Protests, U.S. Army Legal Services Agency, Contract & Fiscal Law Division, to author (Feb. 12, 2015, 17:00 EST) (on file with author). Although these figures seem to indicate a recent increase in the number of second bite protests, they could also be influenced by the difficulty in compiling COFC data. Not only does the COFC not publish all of its opinions, but the court also does not publish data specific to its bid protest decisions as does the GAO. *See* Raymond M. Saunders & Patrick Butler, *A Timely Reform: Impose Timeliness Rules for Filing Bid Protests at the Court of Federal Claims*, 39 PUB. CONT. L.J. 539, 551 n. 73 (2010); KATE M. MANUEL & MOSHE SCHWARTZ, CONG. RESEARCH SERV., R40228, GAO BID PROTESTS: AN OVERVIEW OF TIME FRAMES AND PROCEDURES 20 tbl. 5 (2010).

[58] *See* DoD 2013 NDAA Proposal, *supra* note 7.

[59] *Id*. Although COFC may apply laches in certain circumstances where a disappointed offerer has unreasonably delayed in filing a claim, the statute of limitations for filing a claim with COFC is six years. *See* 28 U.S.C. § 2501 (2014); *See also* CW Gov't Travel, Inc. v. United States, 61 Fed. Cl. 559, 568-69 (2004) (explaining what is required to establish the affirmative defense of laches).

[60] 4 C.F.R. § 21.2(a)(2) (2014).

[61] *See* DoD 2013 NDAA Proposal, *supra* note 7.

Undeterred, the DoD again proposed the language in its 2014 NDAA proposal.[62] The supporting analysis for the 2014 proposal took a different approach than that of 2013 by citing specific cases illustrating how the change would further the GAO and COFC goals of "expeditious resolution" of bid protests.[63]

The analysis included a discussion of *Axiom Res. Mgmt., Inc. v. United States*, a COFC case that had seen two corrective actions and a denial at GAO before the protestor finally filed at the COFC.[64] The protestor's decision proved fruitful as the COFC disagreed with the GAO's analysis and set aside the agency award.[65] However, following an agency appeal, the CAFC ultimately reversed the COFC decision.[66] After nearly two years of litigation, the agency found itself in virtually the same position it had been in after the GAO protests.

The analysis also included three other examples of bid protests obtaining decisions at the GAO, only to experience more delay at the COFC before achieving the same result as at the GAO.[67] One such case was *Labatt Food Serv. v. United States*.[68] Similar to *Axiom*, *Labatt* involved a disappointed offeror who, after multiple protests to GAO, filed a claim with COFC.[69] Even though the claimant achieved temporary success at the COFC, the CAFC ultimately reversed COFC's decision to vacate the agency award.[70] After nearly one year of litigation at the COFC and CAFC, the agency in *Labatt*, as in *Axiom*, found itself in nearly the same position it had been after the GAO protests.

Although Congress ultimately chose not to include DoD's proposed language in its 2014 NDAA,[71] DoD's proposed changes to 28 U.S.C. § 1491 could serve to prevent serial protests as seen in *Axiom* and *Labatt*. If such changes are instituted, agencies would no longer be forced to defend their contract award decisions *de novo* at both the GAO and COFC forums. Agencies could save their already-limited manpower, money, and resources by defending bid protests in a more predictable, one-forum environment. Most importantly, the changes would serve the Congressional goal of achieving "expeditious resolution" of bid protests for all interested parties.[72] Despite these noble intentions, the DoD's proposal to end repetitive protests at the COFC has had its fair share of dissenters.[73]

B. DoD Proposal Hits a Wall

Critics from both within and outside the government contracting community have expressed their opposition to the DoD proposal to end second bite protests.[74] Some opponents of the proposal have argued that these protests are rare and not a problem considering the total number of bid protests filed every year.[75] One critic of the proposal estimated that only twenty-five out of the nearly five thousand bid protests filed between 2011 and 2012 were reviewed at both the GAO and COFC.[76] The commentator concluded that such a small number is "infinitesimal" and "nothing to fear" considering the federal government awards nearly 200,000 procurements a year.[77] However, one could also conclude from these same figures that ending second bite protests would not significantly impact due process for protestors. Given the opportunity to file a bid protest at the two separate forums, very few actually do. This indicates protesters, in nearly all cases, are satisfied with the due process received solely at the GAO or COFC.

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[62] *See* DoD 2014 NDAA Proposal, *supra* note 7.

[63] *Id*.

[64] *Id*. (citing Axiom Res. Mgmt., Inc. v. United States, 80 Fed. Cl. 530, 539 (2008)).

[65] *Id*.

[66] *Id*. (citing Axiom Res. Mgmt., Inc v. United States, 564 F.3d 1374 (Fed. Cir. 2009)).

[67] *Id*. (citing MASAI Technologies Corp. v. United States, 79 Fed. Cl. 433 (2007); Labatt Food Serv., Inc. v. United States, 577 F.3d 1375 (Fed. Cir. 2009); Ala. Aircraft Indus., Inc.-Birmingham v. United States, 586 F.3d 1372 (Fed. Cir. 2009)).

[68] *Labatt Food Serv., Inc.*, 577 F.3d at 1375.

[69] *Id*.

[70] *Id*.

[71] The Department of the Navy, Office of the General Counsel (DON-OGC) provided language and analysis for the 2014 DoD NDAA proposal to end second bite protests. Telephone Interview with Thomas L. Frankfurt, SES, Assistant General Counsel (Research, Development & Acquisition), Office of the General Counsel, Department of the Navy (Feb. 12, 2015). Although DON-OGC held meetings with House Armed Services Committee (HASC) staffers regarding details of the proposed bill's text, progress stalled when the House Judiciary Committee was solicited for coordination. *Id*.

[72] *See* 28 U.S.C. § 1491(b)(3) (explaining the COFC goal of "expeditious resolution" of claims); 31 U.S.C. § 3554(a)(4) (explaining the Comptroller General's duty to provide for the "expeditious resolution of protests").

[73] *See, e.g.*, Ken Weckstein & Tammy Hopkins, *DOD Proposes a Legislative 'Fix' for Something That Isn't Broken*, 100 FCR 46 (2013) (opposing view of a private Government Contracts and Litigation Firm); Nelson, *supra* note 56, at 609 (opposing view of an U.S. Army Judge Advocate working in the Army's Contract and Fiscal Law Division); Daniel I. Gordon, *Bid Protests: The Costs Are Real, But the Benefits Outweigh Them*, 42 PUB. CONT. L.J. 489, 505-06 (2013) (opposing view of Associate Dean for Government Procurement Law Studies at The George Washington University Law School and the former Administrator for Federal Procurement Policy).

[74] Nelson, *supra* note 56, at 609.

[75] *See* Weckstein, *supra* note 73 (stating that "[i]n reality, there just aren't that many second bite protests"); *See also* Nelson, *supra* note 56, at 609 (stating that in CY11 and CY12 only twenty-five out of five thousand bid protests were second bite protests); and Gordon, *supra* note 73, at 505-06 (stating that the number of second bite protests are so small they "cannot legitimately be seen as a significant cost of the bid protest system").

[76] *See* Nelson, *supra* note 56, at 608-09.

[77] *Id*.

Considering the benefits of second bite protests to due process are so small, the importance of retaining such a process is outweighed by the impact they have on federal agencies. One supporter of the DoD proposal has argued that second bite protests, like "killer tornadoes," have significant negative effects on agencies when they do happen.[78] As illustrated by the aforementioned cases of *Am. Auto Logistics*, *Axiom Res. Mgmt., Inc.*, and *Labatt Food Serv.*, they often add months, if not years, of delay to a bid protest system that is designed to work efficiently.

What has added further angst and uncertainty for agencies under the current framework is the catch-22 scenario involving corrective action, as highlighted by recent cases such as *Sys. Application & Techs. v. United States* and *Rush Constr., Inc. v. United States*.[79] In *SA Tech*, the COFC found an awardee had standing to protest a Department of the Army decision to terminate its contract after the GAO had recommended the agency take the corrective action.[80] In *Rush*, the COFC held that the U.S. Army Corps of Engineers was arbitrary and capricious in accepting the GAO's recommendations to terminate the awardee's contract and award to the next lowest bidder.[81] *SA Tech* and *Rush* are but a few examples of why agencies must routinely weigh the risks of implementing GAO recommendations against the alternative of not following them and the GAO reporting them to Congress. Because of Congress's power of the purse, agencies are understandably averse to disregarding a GAO recommendation. By allowing the COFC to second guess agency decisions to follow ostensibly lawful GAO recommendations, an undesirable environment is created in which agencies must choose between following one authority at the risk of violating another.

Opponents of the DoD proposal have also argued that second bite protests are often not disruptive to agencies since the COFC does not always issue preliminary injunctions before litigation.[82] But this argument discounts the compounding administrative costs of agencies having to defend bid protests successively at both the GAO and COFC. Numerous agency contracting personnel, to include contracting specialists, contracting officers, and attorneys, are required to prepare agency responses and litigation materials in defense of such protests. These labor commitments have an opportunity cost to the agency, which amounts to less contracting manpower to effectively administer the agency's procurement needs.

Additionally, the argument does not consider the fact that it is not uncommon for agencies to voluntarily stay performance pending a COFC appeal.[83] Pursuant to the RCFC, agencies are required to discuss at the COFC initial status conference whether they agree to voluntarily stay performance.[84] It is reasonable to expect some agencies to implement such a measure depending on the litigation risk[85] involved in the specific bid protest.

Finally, opponents of the DoD proposal have argued it will actually decrease the efficiency of the bid protest system by influencing more protestors to go directly to the COFC.[86] Opponents argue this would occur for two reasons. First, the GAO does not offer decisions that are binding on the agency.[87] Although this is true, the factor would likely have little impact on the number of protestors choosing the COFC over the GAO considering the rare occasions in which agencies choose not to follow GAO recommendations.[88] Nonetheless, it does highlight a fundamental fairness issue to

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[78] Vernon J. Edwards, *Postscript: Pathologies of the Protest System*, 27 No. 8 NASH & CIBINIC REP. NL ¶ 38 (2013).

[79] *See* Sys. Application & Techs. v. United States, 691 F.3d 1374, 1384 (2012) (holding that COFC had proper jurisdiction to enjoin the agency from taking corrective action based upon informal advice of GAO); Rush Constr., Inc. v. United States, 117 Fed. Cl. 85 (2014) (holding that the agency was arbitrary and capricious in implementing an irrational GAO recommendation); *See also* Centech Group, Inc. v. United States, 79 Fed. Cl. 562, 574 (2007).

[80] Sys. Application & Techs. v. United States, 100 Fed. Cl. 687, 707-08 (2011). COFC rejected Department of Army's (DA's) contention that the court lacked jurisdiction because the termination involved a Contract Disputes Act (CDA) matter. *Id*. at 705. The court was also not persuaded by DA's argument that the awardee had no standing because the awardee would not suffer harm until DA awarded to a different offeror. *Id*. at 707-08.

[81] *Rush Constr., Inc.*, 117 Fed. Cl. at 104.

[82] *See* Nelson, *supra* note 56, at 605; Dietrich Knauth, *DOD Revisions To Bid Protests Would Limit Chances To Appeal*, LAW360 (Oct. 2, 2014, 2:20 PM), http://www.law360.com/articles/445221/dod-revisions-to-bid-protests-would-limit-chances-to-appeal; *PSC: DoD Bid Protest Proposal Denies Due Process*, PSC (Oct. 2, 2014, 245 P.M.), http://www.pscouncil.org/News2/NewsReleases/2012/PSC__DoD_Bid_Protest_Proposal _Denies_Due_Process.aspx; and Gordon, *supra* note 73, at 505-06.

[83] Depending on the facts of the procurement involved, it is not uncommon for the Department of Army to voluntarily stay performance during a COFC bid protest. Telephone Interview with Raymond Saunders, Chief Trial Attorney, Contract and Fiscal Law Division, U.S. Army Legal Services Agency (Oct. 7, 2014); *See also* Am. Auto Logistics, LP v. United States, 117 Fed. Cl. 137 (2014); Sentrillion Corp. v. United States, 114 Fed. Cl. 557, 566 (2014); ST Net, Inc. v. United States, 112 Fed. Cl. 99, 106 (2014); Sotera Def. Solutions v. United States, 118 Fed. Cl. 237, 237 (2014).

[84] *See* R. CT. FED. CL. Appx. C, ¶ 15(c) & (d) (requiring a discussion of whether the government will agree to a voluntary stay of performance pending final decision on the merits).

[85] It is not uncommon to have differing legal interpretations among the COFC judges or between the COFC judges and GAO recommendations. Schaengold, *supra* note 13, at 5. Agencies must take into account these subtle differences in interpretation and determine the appropriate level of litigation risk associated with the COFC agreeing with the the GAO recommendation(s) involved in their specific protest.

[86] *See* Weckstein, *supra* note 74; Marcia G. Madsen & David F. Dowd, *Protests–Another Turn of the Wheel*, 97 FCR 531 (2012); Knauth, *supra* note 83.

[87] *See* sources cited *supra* note 87.

[88] The GAO received notification of nine occasions between 2009 and 2013 in which a federal agency chose not to follow a GAO recommendation. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-276SP, GAO BID PROTEST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2013 1 (2014); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-162SP, GAO BID PROTEST

consider for those occasions when an agency would choose not to follow a GAO recommendation.

Second, protestors choosing the GAO as a forum would have no judicial appeal rights if they disagree with a GAO decision.[89] This assertion is also true. However, considering the limited number of COFC second bite protests per year, most disappointed offerors choose not to enter the judicial forum even after receiving an unfavorable GAO decision.[90]

Additionally, of those protestors receiving an unfavorable decision at the GAO, more choose to file for GAO reconsideration than to file anew at the COFC.[91] In the end, protesting to the GAO would remain the cheapest, quickest way to achieve a performance stay and have a bid protest competently adjudicated. A mass exodus of disappointed offerors to the more expensive, time-consuming COFC for the off-chance they may want to appeal is unlikely. Nevertheless, the concerns described above do emphasize the need to ensure any change to a hard forum choice between the GAO and COFC will offer adequate assurances of an independently fair process.

IV. Championing the Change

Achieving the right balance of independent due process for both the GAO and COFC bid protests is paramount to realizing an end to second bite protests at the COFC. Congress has once before expressed an appetite for curbing litigation in favor of Administrative Dispute Resolution (ADR).[92] In order to now garner congressional buy-in and withstand arguments from those wishing to preserve the current framework, the DoD should consider tailoring its proposal as discussed below.

A. Close the Non-follow Loop

First, the DoD should add an exception to its proposed COFC bid protest filing deadline that tolls any time used for GAO bid protests in which the agency ultimately decides not to follow a GAO recommendation. This measure would relieve a fundamental problem with instituting the change as previously proposed. As opponents to DoD's proposals have asserted, GAO recommendations are not binding on agencies. As such, under the framework suggested by the previous two DoD proposals, a disappointed offeror could potentially file with the GAO, incur costs during the nearly 100-day process, only to receive no recovery or corrective action upon the GAO sustaining the protest. Adding to the protestor's frustration, he would be further time-barred from filing at the COFC and essentially have no other legal recourse. In these situations it would be fundamentally unfair to hold a bid protester to his decision to file with the GAO if the agency later chooses not to follow the GAO recommendation.

Proponents of the previous DoD proposals could discount the need for such an exception, considering it is customary practice for agencies to follow GAO recommendations. However, as mentioned previously, agencies occasionally do not follow them.[93] Congress should then not deny an exception for such occurrences based on their rarity for reasons converse to why Congress should end second bite protests despite their infrequency. In these situations, the minimal adverse effects to agencies in allowing such a rare exception are outweighed by the substantial due process concerns in preventing the abovementioned protesters from later filing at the COFC.

Including the exception could also help settle important legal disagreements between the GAO and federal agencies. For example, in *Mission Critical Solutions v. United States*, the COFC was able to rule on a statutory interpretation disagreement between the Department of the Army (DA) and the GAO regarding the order of precedence among socioeconomic set-asides.[94] The DA, on advice from the Department of Justice (DoJ) and Small Business Administration (SBA) had notified the GAO that DA would not follow GAO's recommendations following their sustainment of the post-award bid protest.[95] After the COFC

ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2012 1 (2012); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-199SP, GAO BID PROTEST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2011 1 (2012); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-211SP, GAO BID PROTEST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2010 1 (2011); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-264SP, GAO BID PROTEST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2009 1 (2010).

[89] *See* Weckstein, *supra* note 74; Madsen, *supra* note 86; Knauth, *supra* note 86.

[90] One author has estimated that twenty-five out of the nearly five thousand bid protests filed between 2011 and 2012 were reviewed at both GAO and COFC. *See* Nelson, *supra* note 56, at 608-09.

[91] *See* KATE M. MANUEL & MOSHE SCHWARTZ, CONG. RESEARCH SERV., R40228, GAO BID PROTESTS: AN OVERVIEW OF TIME FRAMES AND PROCEDURES 19-20 tbls. 4 & 5 (2010) (providing data from GAO showing the number of reconsideration requests GAO received as 65 in 2002, 83 in 2003, 98 in 2004, 71 in 2005, 57 in 2006, and 93 in 2007; as well as data showing the number of COFC bid protest decisions published following a GAO protest as 6 in 2002, 17 in 2003, 20 in 2004, 23 in 2005, 25 in 2006, and 23 in 2007). All updates to the CRS Report R40228 following the March 15, 2010 report have not included data regarding the number of COFC bid protest decisions published following a GAO decision.

[92] Senator William Cohen, in introducing the Alternative Dispute Resolution Act of 1995, described an emerging consensus that traditional litigation is inefficient and explained that "[p]rivate corporations recognized many years ago that certain types of disputes could be resolved much less expensively and with less acrimony by relying on techniques such as mediation, arbitration, and partnering . . . ." 142 CONG. REC. S6155.

[93] In accordance with the agency reporting requirements of 31 U.S.C. § 3554(e)(2), the GAO received notification of nine occasions between 2009 and 2013 in which a federal agency chose not to follow a GAO recommendation. *See* sources cited *supra* note 89.

[94] Mission Critical Solutions v. United States, 91 Fed. Cl. 386 (2010).

[95] *Id*. at 391 (explaining that even though GAO interpreted 15 U.S.C. § 657a(b)(2) to require an agency to consider Historically Underutilized Business Zones (HUBZones) small business concerns before other socioeconomic programs, the Department of the Army chose not to follow

ultimately sided with the GAO and disagreed with the DA, DoJ, and SBA interpretation of the statute concerned, Congress stepped in and settled the issue with new legislation.[96] Without the COFC's decision on the issue, it arguably would have taken much longer to obtain Congressional attention and action on the ambiguity in the law.

For these reasons, the DoD should add a tolling exception that would allow any protester faced with such a result at the GAO a reasonable amount of time to then file a claim with the COFC. The exception would be similar in location and language to the one proposed by the DoD for agency protests preceding a COFC protest.[97] The measure would also have no effect on the number of second bite protests experienced by the DoD since they occur only after a protestor is first unsuccessful at the GAO. Ultimately, such an exception would ensure proper due process is maintained for protestors in the rare circumstances in which agencies choose not to follow GAO recommendations.

B. Strengthen the GAO Reconsideration Process

In addition to closing the non-follow loop, any future DoD proposals should seek to strengthen the GAO reconsideration process by mandating a separate, next-level echelon GAO attorney conduct the review.[98] As discussed in subsection III.B. above, eliminating the COFC second bite option for bid protestors will likely not significantly affect due process as asserted by opponents of the DoD proposal. However, in making this change, Congress would ensure bid protestors are provided a more comprehensive, independent review process at the GAO in the event that second-chance protests to COFC are ended.

The requirement would not significantly affect the way the GAO currently processes bid protest reconsiderations. Pursuant to its own internal processes, the GAO Procurement Law Control Group (PLCG) coordinates each reconsideration review through an attorney from a different bid protest team than the one conducting the initial recommendation.[99] The reconsideration decision then goes to that attorney's team lead for coordination.[100] The GAO's Bid Protest Descriptive Guide alludes to the procedure in that it explains it is "generally GAO's practice to assign a different attorney to the reconsideration."[101]

Despite this informal, internal policy, bid protesters in a post-second bite framework should have more certainty regarding the independence of their potential GAO reconsiderations. Congressional codification of such a requirement would ensure an independent review is obtained in all cases and would remove the possibility of the same GAO attorney making both the initial and reconsideration decision.[102] Creating a next-level echelon of reconsideration attorneys, instead of the current practice of shifting the review to a different bid protest team, would also serve to strengthen the process by concentrating the level of expertise of those conducting the reviews as well as bolstering their independence from the attorneys completing the initial decisions.

These requirements would also formally align the GAO reconsideration process with what a protestor would expect to receive at the other two bid protest fora in terms of a separate, independent review. As explained in subsection II.B. above, claimants at the COFC may appeal their bid protests to the next higher judicial forum, the CAFC.[103] With regard to bid protests to the agency, protestors may appeal contracting officer decisions to the next level above the contracting

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GAO's recommendations based on guidance from the Department of Justice and the Small Business Administration). *See also* Mission Critical Solutions, B-401057, 2009 CPD ¶ 93 (Comp. Gen. May 4, 2009) (explaining GAO's interpretation of 15 U.S.C. § 657a(b)(2)).

[96] *See* Pub. L. No. 111-240, §1347, 124 Stat. 2504, 2546 (2010) (removing the mandatory "shall" language from 15 U.S.C. § 657a(b)(2) which required contracting officers award to HUBZone small businesses when they reasonably expected two or more HUBZone small businesses would submit offers).

[97] *See* DoD 2013 NDAA Proposal, *supra* note 7 (proposing a new 28 U.S.C. §1491(b(1)(C) that allows for protestor receiving an adverse decision at the agency to then file at COFC if within 10 days). For example, the DoD could include an exception at 28 U.S.C. §1491(b)(1)(D) specifying that if a timely GAO protest is filed, and the agency concerned later notifies Congress it will not follow the GAO recommendation, the protestor will then have a specified number of days to file with COFC. DoD's most recently-proposed 28 U.S.C. §1491(b)(1)(D) that addresses dismissal of untimely protests could be shifted to 28 U.S.C. §1491(b(1)(E). *See* DoD 2013 NDAA Proposal, *supra* note 7.

[98] Although not ultimately included in the DoD's 2014 NDAA proposed legislation, the OGC DON considered including language creating an appeal option from the GAO to the United States Court of Appeals for the Federal Circuit (CAFC). Telephone Interview with Thomas L. Frankfurt, SES, Assistant General Counsel (Research, Development & Acquisition), Office of the General Counsel, Department of the Navy (Feb. 12, 2015). Similar to the appeal rights offered at the Armed Services Board of Contract Appeals (ASBCA), the measure would have allowed disappointed protestors at GAO an opportunity to appeal the legal merits of GAO's decisions to CAFC. *Id*. The greatest difficulty in including such a measure would likely be that agencies do not have a legal obligation to follow GAO recommendations. Thus, disappointed protestors at GAO would likely have no standing or legal interest to then appeal to CAFC.

[99] E-mail from Louis A. Chiarella, Senior Attorney, Procurement Law Control Group (PLCG), GAO, to author (Feb. 10, 2015, 17:00 EST) (on file with author).

[100] *Id*. Once the team lead has reviewed the reconsideration it then goes to the PLCG's Managing Associate General Counsel for coordination before the decision is issued. *Id*.

[101] GAO, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE 31 (GAO-09-471SP, 9th ed. 2009).

[102] Congress could create the requirement by including appropriate language at 31 U.S.C. § 3554 (explaining the Comptroller General's responsibilities in issuing bid protest decisions).

[103] *See* 28 U.S.C. §1295(a)(3) (2014) (allowing for an appeal to CAFC from a COFC decision on a bid protest).

officer.[104] As such, codifying a requirement for next-level echelon reconsideration attorneys at the GAO would more equally align its review procedures with what is mandated in these other fora. In doing so, Congress could not only strengthen public confidence in the reconsideration process in the event second bite protests are eliminated, but also reinforce the federal government's commitment to achieving another of its overarching goals for bid protest resolution—maintaining the proper accountability within the federal procurement system.[105]

C. Extend the Protest Period to Thirty Days

Lastly, the DoD should consider increasing its proposed COFC post-award bid protest filing period. Neither opponents nor proponents of the previous two DoD proposals have provided significant written discussion regarding the feasibility of bid protestors meeting a ten-day filing deadline at the COFC. The proposed ten-day deadline, which mirrors that of the GAO protest requirements, is intended to ensure second bite protests to the COFC are eliminated by leaving would-be protestors with no time left to potentially file in both forums. However, a ten-day filing requirement at the COFC may prove too brief for its more formal and rigorous filing requirements.

As discussed in subsection II(B) above, COFC bid protests almost always require attorney representation.[106] This requirement will likely lengthen the claim preparation process for many bid protestors choosing the COFC over the GAO. The COFC also requires its claimants to adhere to the formal pleading requirements of the Rules of the United States Court of Federal Claims,[107] which is more administratively and legally exhaustive than that of GAO's protest requirements. Considering these two factors together, as well as the Congressional intent and structuring of the GAO to provide for a more expedited bid protest process, one could reasonably expect a longer filing period is needed for COFC bid protests.

In order to test this assumption, a review of the filing history of recent COFC bid protest claims is warranted. According to an analysis of the procedural history of 102 COFC post-award bid protest decisions published on or after January 1, 2012, approximately fourteen percent of claims filed directly with the COFC from the agency are accomplished in ten days or less.[108] Of the three bid protests that were filed within ten days of agency decision or debriefing date, two of them had followed an initial bid protest to the agency lasting two weeks or more.[109] If a protester were to file directly with the COFC after an agency award or debriefing date, he would have more difficulty meeting the ten-day requirement without the benefit of a multi-day toll period resulting from an agency protest.

Perhaps thirty days would be a more reasonable bid protest filing period for the COFC. An analysis of the same sampling described above revealed that approximately fifty-five percent of the claims filed with the COFC were accomplished within thirty days of agency award or debriefing; and approximately seventy-three percent were within forty-five days. The mean number of days from award or debriefing to filing at the COFC was forty-five days.[110] Because Congress has yet to create deadlines for bid protesters choosing to file at the COFC,[111] there has been less incentive on the part of the protestor to file his or her claim quickly and within a specific timeframe. Thus, the figures described above would most certainly decrease if Congress established filing deadlines as the DoD has proposed. On the other hand, to decrease claimants' time to file with the more formal COFC to ten days, from an average of forty-five days, might prove too aggressive of a reduction. Rather, a thirty-day deadline would provide for a more achievable compromise.

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[104] *See* FAR 33.103(d)(4) (2014) (allowing for an independent review of a contracting officer's decision on an agency bid protest).

[105] *See* FAR 1.102(a) (2014) (stating that the "vision for the Federal Acquisition System is . . . maintaining the public's trust and fulfilling public policy objectives"); *See also* Raymond M. Saunders & Patrick Butler, *A Timely Reform: Impose Timeliness Rules For Filing Bid Protests at the Court of Federal Claims*, 39 PUB. CONT. L.J. 539, 548 (2010) (stating that the "federal bid protest system is shaped by two powerful, yet competing, policy goals: (1) ensuring accountability in the procurement process while at the same time (2) expeditiously resolving bid protests").

[106] R. CT. FED. CL. 83.1(a)(3)(2014) (allowing pro se representation only if representing oneself or a family member).

[107] *See* R. CT. FED. CL. Titles II & III (2014) (explaining strict requirements for the commencement of an action; service of process, pleadings, motions, and orders; and pleadings and motions).

[108] The author determined this figure by analyzing the procedural history of 102 post-award bid protest COFC cases decided between the dates of January 1, 2012 and November 1, 2014. The author retrieved the cases by conducting a search on the Lexis Advance Research tool for all COFC cases decided between the dates of January 1, 2012 to November 1, 2014 with the topical head notes of "Public Contract Law, Dispute Resolution, and Bid Protest." The author then further narrowed the results using the search terms "post w/2 award." Of the 102 post-award, bid protest COFC cases analyzed, 22 went directly to COFC from the agency decision. Only three of these cases were filed with COFC within 10 days of the agency decision or debriefing date.

[109] *See* V.I. Paving, Inc. v. United States, 103 Fed. Cl. 292 (2012); J.C.N. Constr., Inc. v. United States, 107 Fed. Cl. 503 (2012).

[110] One of the twenty-two cases was excluded from the mean calculation by the author due to it being ultimately dismissed by COFC for laches. *See* Aircraft Charter Solutions, Inc. v. United States, 109 Fed. Cl. 398, 409 (2013).

[111] Although there are currently no filing deadlines for bid protest claims at COFC, the court may apply laches in certain circumstances where a disappointed offerer has unreasonably delayed in filing a claim. *See* CW Gov't Travel, Inc. v. United States, 61 Fed. Cl. 559, 568-69 (2004) (explaining what is required to establish the affirmative defense of laches). Also, there is a six-year statute of limitations for filing a claim with COFC. *See* 28 U.S.C. § 2501 (2014).

Extending the filing period from ten days to thirty days should also still achieve DoD's goal of ending second bite protests. Considering thirty days is less than one third the total number of days the GAO has to decide a bid protest and half the number of days it has to decide a sixty-five day, "express option" bid protest,[112] protestors would achieve little to no benefit in filing with the GAO before then filing with the COFC. This is because the GAO dismisses any of its pending protests whenever a claim involving the same matter is filed with the COFC.[113] Further, because the agency report is normally due thirty days after the agency receives notice of the GAO protest, the GAO will most often dismiss a case later filed with the COFC before the agency even distributes the report.[114] Thus, increasing the proposed filing period to thirty days would still serve the interests of preventing serial protests while also providing an adequate number of days to file for those choosing to protest to the COFC.

V. Conclusion

Second bite protests can oftentimes cause significant detrimental effects on a government contracts system that thrives on efficiency and expediency. They compound costs for all parties involved, as well as frequently add delay to already-suspended contract performance periods. As seen in the DoD's contract with IAL to provide worldwide POV shipping, an additional performance delay of just three months can be the difference in whether or not thousands of service members are forced to wait idly by while their vehicles' shipments are mismanaged by an overwhelmed government contractor.[115]

Fortunately, the DoD has highlighted the issue and made attempts at correcting it with proposed legislation. However, the attempts have failed to garner the congressional interest needed to ensure passage. By extending the proposed filing deadline, strengthening the reconsideration process, and allowing for a tolling exception when an agency chooses not to implement a GAO recommendation, future DoD proposals should provide the impetus needed to secure more widespread support for the measure.

The success of such a proposal will require not only effective coordination with the appropriate Congressional committees,[116] but also another factor often necessary for successful legislation: compromise. As eloquently described by Kentucky Senator Henry Clay Sr. in February of 1850, "the nature of the government and its operations" sometimes requires opposing parties to make concessions in order to further important government interests.[117]

The government interests concerned here—efficiency and accountability in bid protest resolution—must achieve a more supportable balance than what is gained simply by implementing a ten-day filing deadline for the COFC. These proposed changes can do that by not only maintaining the efficiency goals hoped for by the original DoD proposals, but by strengthening the amount of accountability expected by those in the government contracting community. In doing so, the DoD may finally realize an end to the practice of second bite protests.

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[112] 31 U.S.C. § 3554(a)(1)&(2) (2013).

[113] *See* 4 C.F.R. § 21.11(b) (2014).

[114] In most cases, the agency report is due to GAO within thirty days after they receive notice from GAO of the protest. 31 U.S.C. § 3553(b)(2) (2014). In bid protest cases where the express option is used, the agency report is due to GAO within twenty days of notice. *Id*.

[115] *See* Jowers, *supra* note 3.

[116] In addition to coordinating with both the House and Senate Armed Services Committee, the DoD will likely need to coordinate the proposed legislation with the House and Senate Judiciary Committee (with regard to effects to COFC) as well as the Senate Homeland Security and Governmental Affairs Committee and House Committee on Oversight and Government Reform (with regard to effects to Government procurement and GAO). Telephone Interview with Robert Cover, Senior Counsel, Office of Legislative Counsel, DoD Office of the General Counsel (Oct. 22, 2014).

[117] WILLIAM J. BENNETT, THE BOOK OF MAN: READINGS ON THE PATH TO MANHOOD 318-20 (2011). Lauded by Abraham Lincoln as his "beau ideal of a great man," Senator Henry Clay Sr. became known as the "Great Compromiser" on account of his willingness to reach across the aisle when circumstances so required. *Id*.

Keep Your Commanders off the Fiscal Naughty List—
How to Spot and Prevent Common Antideficiency Act Violations

Major Russell R. Henry[*]

The wise man learns from someone else's mistakes, the smart man learns from his own, and the stupid one never learns.[1]

I. Introduction

On a crisp autumn morning in our nation's capital, the President of the United States was savoring his second cup of coffee as the Chief of Staff approached his desk in the Oval Office. It had been a long week for the President. Besides the usual awe-inspiring demands on the leader of the free world, he was also dealing with increasingly volatile situations in the Middle East, Eastern Europe, and Africa while watching his party's chances in the midterm elections plummet. Needless to say, his sleep had suffered over the last few nights. "Please tell me you have some good news in that folder," the President muttered. The Chief of Staff simply shook his head laterally while handing over the correspondence sent to 1600 Pennsylvania Avenue by the Office of the Undersecretary of Defense (Comptroller). "Dear Mr. President: This letter is to report a violation of the Antideficiency Act (ADA) by the Department of the Navy." The President's weary eyes scrolled down to focus on the paragraph fingering the culprit. "Colonel Troy H. Thatcher is responsible for the violation. He was orally admonished and required to receive additional training."

Aside from the ADA violation during his tenure as an O-6 installation commander, Colonel Thatcher was, in the parlance of Marine promotion board briefers, a "water walker"[2] who had excelled at every level of command and in various staff positions. The fiscal law foul, which was largely the result of poor staff work, was the sole blemish on his otherwise impeccable record. From leading Marines in the first Gulf War as a platoon commander to shepherding a battalion through bitter fighting in Afghanistan, he had a bias for action which perfectly balanced mission accomplishment with troop welfare. Not surprisingly, this highly decorated Marine was selected for promotion to brigadier general on his very first look. However, a massive roadblock to his promotion was erected during the U.S. Senate's advice and consent portion of the promotion process. The senior senator from Idaho put a hold on the promotion due to Colonel Thatcher's aforementioned ADA violation. It was never lifted, and Colonel Thatcher retired as a colonel.

While the specifics of ADA violations may be a mystery to most, it is universally understood that ADA violations are to be avoided at all costs. While the preceding story was fictional, ADA violations receive high visibility. Letters are sent to the President throughout the year reporting ADA violations,[3] and ADA violators' hopes for career advancement can be dashed or delayed.[4]

Judge advocates can play a significant role in keeping commanders, and other potential responsible officials, off the ADA naughty list if they are able to properly identify potential ADA violations and prevent them before funds are obligated. Part II of this paper provides historical context for the ADA and identifies the actual law along with its applicability, effect, and penalties. Part III focuses on the prevention of ADA violations by examining recent Department of Defense (DoD) *in excess of* and *in advance of* violations. This part spotlights the frequent *in excess of* violations found in areas

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[1] Vitaliy Katsenelson, *Burj Khalifa: Wise Men Learn From Mistakes of Others*, FORBES (Jan. 11, 2011, 5:24 PM), http://www.forbes.com/sites/greatspeculations/2011/01/11/burj-khalifa-wise-men-learn-from-mistakes-of-others/ (identifying the quote as a Russian expression).

[2] *See John* 6:16-24 (story of Jesus walking on water). *See also* ALAN AXELROD, WHISKY TANGO FOXTROT: THE REAL LANGUAGE OF THE MODERN AMERICAN MILITARY (2013) (A water walker is "any noncom or officer who receives the maximum rating on his or her efficiency report from both the rater and the endorser. It is generally believed that only Jesus Christ could possibly achieve such miraculous ratings—but, then, he could also walk on water.").

[3] *See* 31 U.S.C. § 1517(b) (2013) (requiring the head of an executive agency to immediately report to the President and Congress "all relevant facts and a statement of actions taken" when Antideficiency Act (ADA) violations are confirmed).

[4] *See* 139 CONG. REC. S9230 (daily ed. Jul. 22, 1993) (statement of Sen. Leahy).

> I would like to take a few moments this morning to discuss, once again, something I discussed a couple times earlier this year: The pending promotion of an Air Force Col Claude M. Bolton, Jr. It may sound insignificant to discuss this before the Senate, but this is an example of a person being recommended for promotion to brigadier general and the fact that this individual was involved in what I would consider a waste of taxpayers' money. . . . Colonel Bolton's promotion to brigadier general should not be approved, at least it should not be approved until we have all the facts bearing on his role in the Antideficiency Act violations and the reprocurement scheme while program manager.

Id.

where Congress has not appropriated any funds and military construction projects. By examining mistakes of the past, judge advocates will hopefully be in a better position to prevent future ADA violations in these common, yet preventable, areas.

II. Background

A. History of the ADA

The power of the purse is definitively granted to the legislative branch in Article I, Section 9, of the U.S. Constitution: "No money shall be drawn from the treasury, but in consequence of appropriations made by law . . . ."[5] The language is unmistakable; the constitutional framers did not desire the executive branch to make independent decisions regarding the expenditure of funds.[6] However, the amount of actual power exercised by Congress was severely lacking initially due to dubious fiscal practices by the executive branch.[7] There were two main tactics employed by agencies in the executive branch to undermine the power of the purse.[8] The first approach was for agencies to create obligations before, or of a sum greater than, their actual appropriations.[9] The legislative branch then felt morally compelled to cover the unauthorized promises made by executive agencies in order to uphold the government's good name or to keep the country running and adequately protected.[10] The military appears to have been the worst offender in this area.[11] The second method was to spend all of the agency's money during the first few months of the fiscal year and come back to Congress asking for more funds in order to continue operations.[12] This approach led Representative John Randolph of Virginia, in 1908, to quip, "Those who disburse the money are like a saucy boy who knows his grandfather will gratify him, and over-turns the sum allowed him at pleasure."[13] The "saucy boy" in this quote was the executive branch, while Congress played the role of the benevolent grandfather.[14] Though it happened after the original ADA in 1870, a prime example of this strategy can be found in 1879 when the postmaster general requested a deficiency appropriation over a third of the amount originally requested and appropriated.[15] Congress denied the request and asserted that the post office had already been adequately funded.[16] The postmaster general's countermove was to shut down the mail service for the remainder of the fiscal year; Congress promptly responded with additional funds.[17] Such questionable behavior could be seen from the Madison administration[18] up until the years immediately following the Civil War.[19]

In response to all of the fiscal mismanagement by the executive branch, Congress struck back by passing several pieces of legislation collectively known as the ADA.[20] Following the initial offering in 1870, the ADA was subsequently amended in 1905, 1906, 1951, 1956, and 1957.[21] The ADA has been described as "the cornerstone of Congressional efforts to bind the Executive branch of government to the limits on expenditure of appropriated funds set by appropriation acts and related statutes."[22] The ADA finally provided "teeth" to the fiscal powers granted to the legislative branch in the form of potential adverse administrative actions and criminal penalties[23] along with mandatory reporting requirements to the President and Congress.[24]

B. The Law, its Applicability, and its Effect

As previously stated, the ADA has evolved from the legislative branch's first attempts to regain control over the country's purse strings in 1870.[25] The ADA, as currently constituted, prohibits:

> Making or authorizing an expenditure from, or creating or authorizing an obligation under, any

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[5] U.S. CONST. art. I, § 9.

[6] Andrew Cohen, *The Odd Story of the Law that Dictates How Government Shutdowns Work*, THE ATLANTIC (Sep. 28, 2013, 8:00 AM), http://theatlantic.com/politics/archive/2013/09/the-odd-story-of-the-law-that-dictates-how-government-shutdowns-work/280047/.

[7] *Id*.

[8] WILLIAM G. ARNOLD, THE ANTIDEFICIENCY ACT ANSWER BOOK 5 (2009).

[9] *Id*.

[10] Cohen, *supra* note 6.

[11] *Id*.

[12] ARNOLD, *supra* note 8, at 5.

[13] Cohen, *supra* note 6.

[14] *Id*.

[15] LUCIUS WILMERDING, JR., THE SPENDING POWER: A HISTORY OF THE EFFORTS OF CONGRESS TO CONTROL EXPENDITURES 137–40 (1943).

[16] *Id*.

[17] *Id*.

[18] Cohen, *supra* note 6.

[19] ARNOLD, *supra* note 8.

[20] *Id*.

[21] CONTRACT & FISCAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, FISCAL LAW DESKBOOK, at 4-2 (2014) [hereinafter FISCAL LAW DESKBOOK].

[22] Major Gary L. Hopkins & Lieutenant Colonel Robert M. Nutt, *The Anti-Deficiency Act (Revised Statutes 3697) and Funding Federal Contracts: An Analysis*, 80 MIL. L. REV. 56 (1978).

[23] *Antideficiency Act Background*, U.S. GOV'T ACCOUNTABILITY OFF., http://www.gao.gov/legal/lawresources/antideficiencybackground.html (last visited Nov. 10, 2014) [hereinafter *ADA Background*].

[24] *See* 31 U.S.C. § 1517 (b) (2013).

[25] ARNOLD, *supra* note 8.

> appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law. 31 U.S.C. § 1341(a)(1)(A).
>
> Involving the government in any contract or other obligation for the payment of money for any purpose in advance of appropriations made for such purpose, unless the contract or obligation is authorized by law. 31 U.S.C. § 1341(a)(1)(B).
>
> Accepting voluntary services for the United States, or employing personal services in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property. 31 U.S.C. § 1342.
>
> Making obligations or expenditures in excess of an apportionment or reapportionment, or in excess of the amount permitted by agency regulations. 31 U.S.C. § 1517(a).[26]

As for applicability, the plain language shows that federal employees are subject to the ADA.[27] However, the DoD, via the DoD Financial Management Regulation, narrows the scope of application to "commanding officers, budget officers, or fiscal officers . . . because of their overall responsibility or position."[28] This places responsibility for ADA violations squarely in the purview of military commanders and not just financial managers.

The intent and effect of the ADA was summarized in a Comptroller General opinion published in 1962[29]:

> These statutes evidence a plain intent on the part of the Congress to prohibit executive officers, unless otherwise authorized by law, from making contracts involving the Government in obligations for expenditures or liabilities beyond those contemplated and authorized for the period of availability of and within the amount of the appropriation under which they are made; to keep all the departments of the Government, in the matter of incurring obligations for expenditures, within the limits and purposes of appropriations annually provided for conducting their lawful functions, and to prohibit any officer or employee of the Government from involving the Government in any contract or other obligation for the payment of money for any purpose, in advance of appropriations made for such purpose; and to restrict the use of annual appropriations to expenditures required for the service of the particular fiscal year for which they are made.[30]

The U.S. Government Accountability Office (GAO)[31] proclaims that the preceding passage is the best possible summation of appropriations law in a single paragraph.[32] In short, the ADA delivered the de facto power of the purse back to the legislative branch by binding the executive branch to the specific appropriations provided each fiscal year.[33]

C. Penalties

Sanctions for ADA violations can be both administrative or criminal in nature.[34] The ADA is unique among fiscal statutes in that it "prescribe[s] penalties of both types [administrative and penal], a fact which says something about congressional perception of the Act's importance."[35] Administrative discipline, according to the statute, includes suspension from duty without pay or removal from office.[36] A knowing and willful ADA violation carries the following penalties: fine of up to $5,000, imprisonment for up to two years, or both.[37] To date, however, no ADA violators have faced criminal prosecution.[38]

III. Preventing Common Violations

In practice, the ADA requires three levels of fiscal controls: appropriations, apportionment, and administrative subdivisions.[39] While it is important to understand all three, appropriations is, by far, the fiscal control that produces the most DoD ADA violations.[40] Beyond a basic understanding

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[26] U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, VOL. II, ch 6, pt. C, sec. 1, at 6-36 to 6-37 (3d ed. 2004 & Supp. 2013) [hereinafter GAO RED BOOK].

[27] *ADA Background*, *supra* note 23.

[28] U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 14, ch. 05 (Apr. 2013).

[29] GAO RED BOOK, *supra* note 26, at 6-37.

[30] To The Sec'y of the Air Force, B-144641, 42 Comp. Gen. 272, 275 (1962).

[31] *About GAO*, U.S. GOV'T ACCOUNTABILITY OFF., http://www.gao.gov/about/ (last visited Dec. 1, 2014) ("The U.S. Government Accountability Office (GAO) is an independent, nonpartisan agency that works for Congress. Often called the 'congressional watchdog,' GAO investigates how the federal government spends taxpayer dollars.").

[32] GAO RED BOOK, *supra* note 26, at 6-38.

[33] *Id*.

[34] *Id*. at 6-143; s*ee* 31 U.S.C. §§ 1349(a), 1518 (2013) (providing adverse personnel actions for ADA violations); *see also* 31 U.S.C. § 1350 (2013) (providing criminal penalties for ADA violations).

[35] *Id*.

[36] 31 U.S.C. § 1349(a) (2013).

[37] 31 U.S.C. § 1350 (2013).

[38] GAO RED BOOK, *supra* note 26, at 6-144.

[39] FISCAL LAW DESKBOOK, *supra* note 21, at 4-3.

[40] *See generally View Antideficiency Act Reports*, U.S. GOV'T ACCOUNTABILITY OFF., http://www.gao.gov/legal/

of the reasons behind the ADA and the statutes themselves, judge advocates need to possess a solid working knowledge of appropriations in order to identify potential violations and stop them before funds are obligated. While there are possible remedial measures for potential ADA violations, the best outcome is to stop a potential ADA violation before it occurs. As such, it is wise to examine past violations, draw lessons, and avoid them.

A. Appropriations and Limitations

The most important provision of the ADA, according to the GAO, is 31 U.S.C. § 1341(a)(1)[41]:

> An officer or employee of the United States Government . . . may not:
>
> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;
>
> (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.[42]

The statute above outlines two distinct prohibitions on expenditures: *in excess of* appropriations and *in advance of* appropriations.[43] Although this seems extremely simple (e.g., do not spend more money than you have and do not spend money before you have it), numerous violations still occur in this area.[44]

1. In Excess Of

There were quite a few *in excess of* ADA violations reported by the DoD in fiscal year (FY) 2005 through FY 2012.[45] Some *in excess of* DoD violations involve over-obligations of personnel funds.[46] This has been due to either mismanagement—as seen by the Air National Guard,[47] the Army,[48] and the Navy[49] respectively—or by overwhelming, unplanned events such as the increased personnel requirements in the aftermath of September 11, 2001.[50] Either way, these are cases which are probably outside a judge advocate's sphere of influence.

However, *in excess of* violations also occur when funds are obligated for items in which Congress has not provided any appropriation.[51] The two areas[52] where DoD ADA *in excess of* violations are most likely to occur are obligating funds on unauthorized expenditures, also known as "no appropriation available" offenses, and using incorrect appropriations for military construction projects.[53] Judge advocates can oftentimes play a significant role in preventing these types of *in excess of* ADA violations by knowing the law and proactively preventing violations before they occur.

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lawresources/antideficiencyrpts.html (last visited Jan. 9, 2015) [hereinafter *GAO ADA Reports*].

[41] GAO RED BOOK, *supra* note 26, at 6-38 ("Not only is section 1341(a)(1) the key provision of the Act, it was originally the only provision, the others being added to ensure the enforcement of the basic prohibitions of section 1341.").

[42] 31 U.S.C. § 1341(a)(1)(A)-(B) (2013).

[43] GAO RED BOOK, *supra* note 26, at 6-39.

[44] *Id*.

[45] *GAO ADA Reports*, *supra* note 40 (providing all reported ADA violations from fiscal year (FY) 2005 to the last full fiscal year of reports, which, as of this writing, is through FY 2013).

[46] *Id*.

[47] *Antideficiency Act Reports–Fiscal Year 2012*, U.S. GOV'T ACCOUNTABILITY OFF., 7, http://www.gao.gov/assets/660/650531.pdf (last visited Jan. 10, 2016) (GAO No. 12-07) [hereinafter *FY12 ADA Reports*] ("The Air National Guard (ANG) reported that it over-obligated its fiscal year 2009 Military Personnel (MILPERS) account when it failed to recalculate an applicable Man-Day Factor, a composite workday rate, to reflect changing information for ANG members . . . .").

[48] *FY12 ADA Reports*, *supra* note 47, at 15 (GAO No. 12-15) ("Army reported that a violation occurred when the Office of Deputy Chief of Staff, G-1, did not properly manage the fiscal year 2008 Military Personnel (MILPERS) account.").

[49] *Antideficiency Act Reports–Fiscal Year 2011*, U.S. GOV'T ACCOUNTABILITY OFF., 10, http://www.gao.gov/assets/600/590553.pdf (last visited Jan. 10, 2016) (GAO No. 11-11) ("The Bureau of Naval Personnel (BUPERS) overobligated the Navy's 2008 Military Personnel (MP) account in violation of the Antideficiency Act. The BUPER's Comptroller Office was unable to properly exercise internal control and management oversight of the MP account . . . .").

[50] Letter from Tina W. Jonas, Comptroller, Dep't of Def., to The President (Aug. 26, 2005), http://www.gao.gov/ada/gao-ada-05-14.pdf (providing an over-obligation of MILPERS funds by the Department of the Navy when the Marine Corps made over-disbursements of the Military Personnel, Marine Corps appropriation in the amount of $21,800,000 in FY 2002 due to "the complexities associated with the increased workload of mobilizing thousands of reservists and no accurate process for tracking the costs.").

[51] U.S. DEP'T OF DEF., DEF. CONTINGENCY CONTRACTING HANDBOOK, VERSION 4, at 47 (Oct. 2012), http://www.acq.osd.mil/dpap/ccap/cc/jcchb/Files/DCCHB_Oct_2012.pdf; *see also* United States v. MacCollum, 426 U.S. 317 (1976) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.").

[52] Though not nearly as common and therefore not covered in-depth in this paper, a third *in excess of* violation occurs when funds are expended when there are statutory prohibitions on funding. *See* Letter from Tina W. Jonas, Comptroller, Dep't of Def., to The President (Aug. 21, 2005), http://www.gao.gov/ada/gao-ada-06-23.pdf (providing an example of a statutory prohibition on funding *in excess of* ADA violation). Specifically, during FY 2001, members of The U.S. Army Corps of Engineers "exceeded the cost limit and maximum space permitted for the renovation of General/Flag Officer's Quarters at Fort Lee" as provided in 10 U.S.C. § 2825."). *Id*.

[53] *See generally* GAO ADA Reports, *supra* note 40.

a. No Appropriation Available

GAO ADA reports of violations are littered with unauthorized DoD purchases that judge advocates may be able to identify and prevent before they happen.[54] In five separate fiscal years, light refreshments were purchased using operations and maintenance (O&M) funds by the Air Warfare College during regional studies events hosted at Maxwell Air Force Base by the Air University.[55] Naval Recruiting Command spent almost $20,000 in O&M funds in FY 2006 to purchase food and mementos for employees at a banquet. Upon investigation, these purchases violated the bona-fide needs rule.[56] The Naval Hospital, Camp Pendleton, improperly used O&M funds to purchase food and gifts for participants at Breast Cancer Awareness conferences.[57] In FYs 1999 and 2000, the 204th Military Intelligence Battalion (an Army unit) "improperly used appropriated funds [$11,173.90] to purchase wine glasses, pay personal entertainment-related expenses, purchase aviation patches, pay per diem and other costs for a non-official event, and purchase food and food-related items including food services at several non-official events and locations."[58]

Additionally, the Army and the Navy both recorded ADA violations dealing with unauthorized purchases of bottled water.[59] In FYs 1996 through 2006, $701,479.69 in Navy Working Capital funds were used to purchase bottled water at Naval Surface Warfare Center, Port Hueneme, California.[60] The Army violation occurred when the Defense Contract Management Agency used O&M funds to purchase bottled water in FYs 1997 through 2002.[61]

Like bottled water, coins are a typical questionable expense with tight regulations dictating the narrow instances when appropriated funds can be used for their purchase.[62] Moreover, coins have also caused the DoD to appear on the GAO ADA list more than once.[63] In FYs 2003 and 2004, the Public Affairs Officer, Chemical Material Agency, Aberdeen Proving Ground, Maryland, used $13,420 in "Chemical Agents Munitions Destruction, Army" funds to procure "metallic information products" (e.g., coins) to dispense as gifts at ceremonial events.[64] Though branding coins as "metallic information products" could be read as consciousness of guilt regarding a willful violation of the purpose statute, no criminal action was taken against the civilian employee.[65] However, the letter submitted to the President does a good job of capturing the essence of the ADA violation:

> The procurement of the [] ["metallic information products"] was a violation of the Purpose Statue [sic], Title 31, United States Code, Section 1301(a). No other appropriation was found to be an appropriate source of funds for the procurement of these items under the circumstances. This situation resulted in a violation of Title 31, United States Code, Section 1341(a)(1)(A).[66]

The key to preventing improper expenditures on food, entertainment, bottled water, and coins is twofold. For starters, it is essential that judge advocates know fiscal law rules as they relate to these typical questionable expenses. Additionally, judge advocates must share this information with the key members of the command involved in the expenditures. However, absolute knowledge is useless if a judge advocate is unaware of the expenditure. Therefore, it is imperative that judge advocates be aware of the potential expenditures. This can be accomplished by working with the executive officer to ensure "legal" is included in any meeting, or on any routing sheet, dealing with these type of expenditures.

Some "no appropriations available" violations, however, are more difficult to proactively prevent. For example, the Department of the Air Force violated the ADA when personnel at Dover Air Force Base, Delaware, used government purchase cards for personal items.[67] "Such acquisitions were found to be personal items for which no

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[54] *Id*.

[55] *Antideficiency Act Reports–Fiscal Year 2009*, U.S. GOV'T ACCOUNTABILITY OFF., 2, http://www.gao.gov/assets/600/590637.pdf (last visited Jan. 10, 2016) (GAO No. 09-03) [hereinafter *FY09 ADA Reports*].

[56] *Antideficiency Act Reports–Fiscal Year 2007*, U.S. GOV'T ACCOUNTABILITY OFF., 8, http://www.gao.gov/assets/600/590635.pdf (last visited Jan. 10, 2016) (GAO No. ADA-07-19) [hereinafter *FY07 ADA Reports*]; *see also* FISCAL LAW DESKBOOK, *supra* note 21, at 3-7 (providing "the *bona fide* needs rule is a timing rule that requires both the timing of the obligation and the *bona fide* need to be within the fund's period of availability.").

[57] *Id*.

[58] *Antideficiency Act Reports–Fiscal Year 2005*, U.S. GOV'T ACCOUNTABILITY OFF., 2, http://www.gao.gov/assets/600/590633.pdf (last visited Jan. 10, 2016) (GAO No. ADA- 05-06) [hereinafter *FY05 ADA Reports*].

[59] *See generally GAO ADA Reports*, *supra* note 40.

[60] *Antideficiency Act Reports–Fiscal Year 2008*, U.S. GOV'T ACCOUNTABILITY OFF., 2, http://www.gao.gov/assets/600/590636.pdf (last visited Jan. 10, 2016) (GAO No. ADA-08-04) [hereinafter *FY08 ADA Reports*].

[61] *FY05 ADA Reports*, *supra* note 58, at 4 (GAO No. ADA-05-12).

[62] FISCAL LAW DESKBOOK, *supra* note 21, at 2-49, 2-50; *see also* Major Kathryn R. Sommercamp, *Commander's Coins: Worth Their Weight in Gold?*, ARMY LAW., Nov. 1997 (providing an in-depth paper on commander's coins and their potential issues).

[63] *See Antideficiency Act Reports–Fiscal Year 2006*, U.S. GOV'T ACCOUNTABILITY OFF., 2, http://www.gao.gov/assets/600/590634.pdf (last visited Jan. 10, 2016) (GAO No. ADA-06-04); *see also FY07 ADA Reports*, *supra* note 56, at 6 (GAO No. ADA-07-15).

[64] Letter from Tina W. Jonas, Comptroller, Dep't of Def., to The President (Apr. 23, 2007), http://www.gao.gov/ada/gao-ada-07-15.pdf.

[65] *Id*.

[66] *Id*.

[67] *FY05 ADA Reports*, *supra* note 58, at 2 (GAO No. ADA-05-06).

appropriated funds were available, as they were unnecessary to accomplish the military organization's mission."[68] While judge advocates may not be able to prevent such illicit activities, they can ensure this information gets properly channeled into the military justice system.

b. Military Construction Projects

While "prohibited appropriations" and "no appropriations available" violations appear regularly in the ADA reports, improperly funded military construction projects are the main source of *in excess of* ADA violations committed by the DoD.[69] By statute, military construction includes "any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements . . . ."[70] Judge advocates must work to have a thorough knowledge of military construction laws in order to prevent these types of ADA violations.[71] The key is involvement in the process. Judge advocates need to find a way to maintain situational awareness of all construction projects to ensure the projects are funded from the proper appropriation and not split or phased to stay beneath a threshold.[72]

The Joint Improvised Explosive Device Defeat Organization (JIEDDO), formally established by DoD Directive in 2006 to counter the growing improvised explosive device (IED) threats in Iraq and Afghanistan,[73] decided to establish an IED device sensor testing facility in FY 2006.[74] The concept, named Project Iraqi Village, was "to construct buildings that had the same characteristics as those constructed in Iraq to provide a real-world environment for testing and evaluating advanced sensor techniques."[75] While the project certainly seems to fall within the unit's mandate, the following passage from the report of ADA violation to the President highlights the fiscal flaw:

> The misunderstanding of what [Research Development Test and Evaluation-Army] and [Joint IED Defeat Funds] may be used for and the characterization of Project Iraqi Village as a testing facility were the root causes of the violation. A failure in correctly identifying the project as one involving construction that exceeded the unspecified minor construction threshold of $750,000 precipitated the ADA violation. Project Iraqi Village should have been authorized by Congress . . . and funded with Military Construction Funds.[76]

The Joint Improvised Explosive Device Defeat Organization is certainly not alone in producing ADA violations of this ilk. The U.S. Army Corps of Engineers committed a comparable ADA violation in FY 2007 when $8 million of O&M funds were used to construct a classified information facility on Fort Sam Houston, Texas.[77] Similarly, the Oklahoma City Air Logistics Center Product Support Directorate, Tinker Air Force Base, Oklahoma, used O&M funds and Other Procurement, Air Force funds to construct "a complete and usable real property facility in excess of $2 million" during FYs 2003 through 2005.[78] "Since military construction funds were not appropriated nor approved for the project, the [ADA] violation is uncorrectable.[79]"

In addition to identifying the relevant appropriation, judge advocates also need to be on the lookout for improper project splitting.[80] Perhaps the most infamous case in this area involves the rapid "construction" of the Army Materiel Command (AMC) Headquarters Building at Fort Belvoir, Virginia in the early 2000s.[81] Following the events of September 11, 2001, AMC wanted to relocate from their

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[68] Letter from Robert F. Hale, Comptroller, Dep't of Def., to The President (Dec. 20, 2010), http://www.gao.gov/ada/GAO-ADA-11-05.pdf.

[69] *See generally GAO ADA Reports*, *supra* note 40.

[70] 10 U.S.C. § 2801 (a) (2013).

[71] *See* FISCAL LAW DESKBOOK, *supra* note 21, ch.8 (providing a comprehensive overview of the laws associated with military construction funding).

[72] *See* FISCAL LAW DESKBOOK, *supra* note 21, at 8-6 (providing that "project splitting and/or incrementation is prohibited").

[73] *About JIEDDO*, JOINT IMPROVISED EXPLOSIVE DEVICE DEFEAT ORGANIZATION, https://www.jieddo.mil/about.htm (last visited Jan. 10, 2016).

[74] Letter from Robert F. Hale, Comptroller, Dep't of Def., to The President (Mar. 30, 2012), http://www.gao.gov/assets/660/650541.pdf.

[75] *Id*.

[76] *Id*. *But see* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 2802 (2014) [hereinafter FY15 NDAA] (increasing the O&M ceiling to $1 million and the general UMMC ceiling to $3 million).

[77] Letter from Robert F. Hale, Comptroller, Dep't of Def., to The President (Sep. 19, 2012), http://www.gao.gov/assets/660/650551.pdf.

[78] Letter from Robert F. Hale, Comptroller, Dep't of Def., to The President (Jul. 22, 2011), http://www.gao.gov/ada/GAO-ADA-11-16.pdf [hereinafter Hale Letter 11-16].

[79] *See* FISCAL LAW DESKBOOK, *supra* note 21, at 4-19 (providing that a potential purpose statute violation can be corrected, thus avoiding an ADA violation, if "proper funds (the proper appropriation, the proper year, the proper amount) were available at the time of the erroneous obligation" and "proper funds were available (the proper appropriation, the proper year, the proper amount) at the time of correction for the agency to correct the erroneous obligation"). However, in this case, since no military construction funds were ever available for this project, this obligation is not correctable under the GAO-sanctioned two-part test; Hale Letter 11-16, *supra* note 78.

[80] *See* FISCAL LAW DESKBOOK, *supra* note 21, at 8-6 (providing that "project splitting and/or incrementation is prohibited").

[81] *FY09 ADA Reports*, *supra* note 55, at 2 (GAO No. 09-12).

leased space in Arlington, Virginia to Fort Belvoir, Virginia, in order to be on a military installation and enjoy improved force protection.[82] In FYs 2002 through 2005, AMC sent $44 million in O&M funds to the General Services Administration (GSA) for a services contract to relocate their headquarters building to Fort Belvoir.[83] On January 17, 2007, Mr. Thomas F. Gimble, then Acting DoD Inspector General, offered the following explanation to the Senate Armed Services Committee's Subcommittee on Readiness:

> GSA used the funds to contract for the construction of two modular two-story office buildings totaling about 230,000 square feet at Fort Belvoir. The buildings serve as the headquarters of the Army Materiel Command and provide office space for about 1,400 civilian and military personnel. Although the Army contended that construction did not occur, no buildings existed at the site prior to the contract. Army officials stated that using operations and maintenance funds was correct because the contractor was providing a service: the use of the buildings. However, the procurement of these buildings was clearly a construction project. The Army should have used Army Military Construction funds, even though the approval of construction projects is a far lengthier process in DoD than in GSA.[84]

While finding creative solutions to problems is usually a desired trait for a judge advocate, military construction is an area where a novel approach (e.g., executing a multi-million dollar service contract for the use of a building on a military installation) can quickly lead to an ADA violation. Not surprisingly, the AMC Headquarters Building incident can be found in the GAO ADA Report for FY 2009.[85]

In another example of smaller pieces being used to construct large complexes in an attempt to skirt the rules, the U.S. Army Intelligence Center (USAIC) and School used $15,449,992.49 in O&M funds to "construct a multiple building training complex consisting of classrooms, interrogation booths, and latrine facilities."[86] Understanding the O&M threshold,[87] USAIC scoped the project in increments in order to stay below threshold amounts.[88] That practice is not permitted.[89]

> The command ordered 435 shelters that were manufactured to a pre-determined building design and constituted the components of the complex configuration. They were assembled and connected by construction tradesmen. Site preparation construction work conducted by U.S. Army Installation Management Command for the training complex project was mistakenly scoped as three projects, and each was funded . . . . The entire project, including the site preparation work, constituted a single specified military construction project, and should have been authorized in accordance with law and funded from Military Construction, Army appropriation.[90]

Third Army, U.S. Central Command and U.S. Army Garrison (USAG) Grafenwoehr proved, in separate ADA violations, that improperly using O&M funds for military construction projects is not just a stateside problem.[91] In FY 2004, Third Army used $16,802,792 in O&M funds to construct a detention facility at Camp Bucca, Iraq.[92] For a military construction project of this size, even if carried out in a deployed environment, O&M funding is the wrong appropriation.[93] Though the price associated with the Camp Bucca violation ($16,802,792) is certainly greater (just under $3 million),[94] the ADA violation at USAG Grafenwoehr seems a bit more sinister. Specifically, the U.S. Army Installation Management Command "split construction costs into four military construction projects on a new building addition. The splitting of these construction costs allowed

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[82] Memorandum from Deputy Assistant Sec'y of the Army (Financial Operations) to Deputy Chief Financial Officer, Office of the Under Sec'y of Defense (Comptroller), subject: Report on Antideficiency Act Violation No. 06-07, Enclosure 1, p. 3 (31 Jul 2008).

[83] *Services and Inter-Agency Contracting: Hearing Before the Subcomm. on Readiness S. Comm. on Armed Serv.*, 110th Cong. 9-10 (2007) (statement of Mr. Thomas F. Gimble, Acting Inspector General, Department of Defense), http://www.dodig.mil/iginformation/archives /DoD%20OIG%20prepared%20Statement%2001-17-2007.pdf).

[84] *Id*.

[85] *FY09 ADA Reports*, *supra* note 55, at 8 (GAO No. 09-12).

[86] Letter from Robert F. Hale, Comptroller, Dep't of Def., to The President (Jun. 28, 2010), http://www.gao.gov/ada/gao-ada-10-10.pdf.

[87] *See* FISCAL LAW DESKBOOK, *supra* note 21, ch.8, at 45-46 (providing at the time of the ADA violation, the following statutory thresholds for military construction projects: for projects $750,000 or less, use Operations & Maintenance (O&M) funds; for projects between $750,000 and $2 million, use Unspecified Minor Military Construction (UMMC) funds (some exceptions apply); and if greater than $2 million, use specified Military Construction funds). *But see* FY15 NDAA, *supra* note 76 (increasing the O&M ceiling to $1 million and the general UMMC ceiling to $3 million).

[88] *Antideficiency Act Reports–Fiscal Year 2010*, U.S. GOV'T ACCOUNTABILITY OFF., 9, http://www.gao.gov/assets/600/590638.pdf (last visited Jan. 10, 2016) (GAO No. 10-10).

[89] FISCAL LAW DESKBOOK, *supra* note 21, ch. 8, at 5-6.

[90] Letter from Robert F. Hale, Comptroller, Dep't of Def., to The President (Jun. 28, 2010), http://www.gao.gov/ada/gao-ada-10-10.pdf.

[91] *FY09 ADA Reports*, *supra* note 55, at 1 (GAO No. 09-01); FY12 ADA Reports, *supra* note 47, at 19 (GAO No. 12-19).

[92] Letter from Douglas A. Brook, Comptroller (Acting), Dep't of Def., to The President (Nov. 3, 2008), http://www.gao.gov/ada/gao-ada-09-01.pdf.

[93] *Id*. ("The Army should have funded the project with Military Construction, Army funds or sought Contingency Construction Authority under Section 2808 of the National Defense Authorization Act for FY 2004.").

[94] Letter from Robert F. Hale, Comptroller, Dep't of Def., to The President (Sep. 14, 2012), http://www.gao.gov/assets/660/650550.pdf.

each project to remain below the $750,000 OMA [O&M, Army] minor construction ceiling."[95] The total cost of the military construction project was $2,957,489.00,[96] so the proper pot of money clearly should have been Military Construction funds.[97]

The examples above are just a sampling of the numerous DoD ADA violations involving military construction.[98] However, this is certainly an area where judge advocates can proactively prevent attempts to circumvent thresholds before they become ADA violations. The key to success is participation in the process. Attend meetings that discuss construction projects. Ensure "legal" is on the routing sheet for construction matters. Find a way to educate the staff on common construction funding failures, either through structured training or hip-pocket classes when a potential issue arises.

2. *In Advance Of*

In order for an appropriation to be available, there are three separate required events: (1) Congress must pass the appropriation act, (2) the President must sign the appropriation act, and (3) the date must be at least 1 October in the FY for which the appropriation becomes available.[99] The *in advance of* prohibition from 31 U.S.C. §1341(A)(1)(b) seems, on its face, as simple as the 31 U.S.C. §1341(A)(1)(a) *in excess of* prohibition (e.g., do not spend money before it is appropriated).[100] However, a surprising number of ADA violations by the DoD can be found in this area.[101] In fact, a half-dozen DoD *in advance of* ADA violations are contained in the GAO's FY 2008 report, split equally between the Army and the Navy.[102]

In FY 2003, responsible officials from the U.S. Army Corps of Engineers used FY 2003 O&M funds for services from the General Services Administration which extended into FY 2004.[103] "Because the orders were placed before the enactment of the FY 2004 appropriations act and did not include a clause providing that the obligation was contingent upon enactment of appropriation, the obligations in FY 2003 for FY 2004 services violated the ADA."[104] The other two Army ADA violations recorded in 2008 deal with the improper obligation of one-year funds for multi-year leases.[105] In this first one, responsible officials from U.S. Army Pacific Command obligated $16,329,687.68 of FY 2001 O&M funds (which have a one-year period of availability)[106] for two-and four-year severable leases for equipment.[107] As for the latter, the Information Technology Business Center, Fort Sam Houston, Texas, "entered into two multiyear leases for storage area network software and improperly obligated FYs 2003 through 2007 [O&M, Army] funds in advance of appropriations without legal authority in violation of 31 U.S.C. § 1341(a)(1)(B)."[108]

Not to be outdone by their sister department, the Navy's three *in advance of* violations were equally avoidable with proper oversight and a basic understanding of fiscal law. Responsible officials at Naval Base Ventura County, Point Mugu, California, using O&M, entered into a fourteen-month severable services contract running from September 30, 2004 through November 30, 2005. Since severable services contracts are limited, by statute, to one year,[109] "the amounts obligated beyond the 12-month period constitute obligations in advance of an appropriation, a violation of the ADA."[110] Moreover, the Fleet Numerical Meteorology and Oceanography Center "obligated FY 2004 O&M funds for services that were needed and provided in FY 2005 and FY 2006."[111] Finally, the Joint Intelligence Operations Center obligated FY 2005 funds to purchase furniture which was to be delivered in future fiscal years.[112]

IV. Conclusion

The U.S. fiscal landscape has come a long way from the days when the Postmaster General had the audacity to spend all appropriated funds and hold mail delivery hostage until Congress supplied more funds.[113] The consequences for

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[95] *Id*. *But see* FY15 NDAA, *supra* note 76 (which changed the basic O&M threshold to $1 million).

[96] *Id*.

[97] *See* FISCAL LAW DESKBOOK, *supra* note 21, at 8-25 ("Congress typically specifically authorizes only those military projects expected to exceed $2 million."). *But see* FY15 NDAA, *supra* note 76 (changing the basic UMMC threshold to $3 million.) Therefore, an identical project, if scoped post-FY15 NDAA, could potentially be funded with UMMC funds or specifically authorized military construction funds.

[98] *See generally GAO ADA Reports*, *supra* note 40.

[99] FISCAL LAW DESKBOOK, *supra* note 21, at 4-9.

[100] 31 U.S.C. § 1341(A)(1) (2013).

[101] *See generally GAO ADA Reports*, *supra* note 40.

[102] *FY08 ADA Reports*, *supra* note 60, at 1 (GAO No. 08-02).

[103] *Id*.

[104] *Id*.

[105] *Id*. at 8 (GAO No. ADA-08-13); *id*. at 16 (ADA-08-16).

[106] FISCAL LAW DESKBOOK, *supra* note 21, at 3-3.

[107] *FY08 ADA Reports*, *supra* note 60, at 8 (GAO No. 08-13).

[108] *Id*.

[109] *See* 10 U.S.C. § 2410(a) (2013).

[110] *FY08 ADA Reports*, *supra* note 60, at 5 (GAO No. 08-08).

[111] *Id*. at 5 (GAO No. ADA-08-09).

[112] *Id*. at 6 (GAO No. ADA-08-10).

[113] WILMERDING, *supra* note 15.

ADA violations are real.[114] The potential administrative and criminal sanctions for ADA violations present a strong deterrent to potential fiscal troublemakers.[115] Leaders generally do not want the President of the United States, the President of the Senate, and the Speaker of the House of Representatives receiving a letter identifying them as the officials responsible for an ADA violations.[116] While there have been no criminal prosecutions under the ADA,[117] there have been plenty of adverse consequences.[118] Ultimately, the series of statutes that make up the ADA have been effective.[119] The ADA is the stick that caused the power of the purse to shift back into the firm control of the legislative branch.[120]

As such, ADA violations, mainly due to their administrative consequences and the overall sign of incompetence attributed to violators, are to be avoided at all costs. Judge advocates can play a pivotal role in preventing ADA violations before they occur. This requires a proactive approach of becoming thoroughly familiar with the fiscal issues in the command and understanding key fiscal law concepts. While some ADA violations are simply outside the judge advocate's sphere of influence, there are some areas where violations are frequent and preventable.[121]

The violations covered in this paper likely could have been turned into good, non-ADA violating obligations with effective legal oversight. Focused, well-written legal reviews can quash the use of O&M funds for common questionable expenses such as unauthorized gifts, entertainment, food, bottled water, and "metallic information products."[122] Attentive judge advocates can ensure military construction projects are properly scoped and funded via the correct appropriation before ground is broken.[123] Finally, the *in advance of* violations can also be prevented by a judge advocate plugged into the situation with a solid grasp on requirements as they relate to time.[124] If only Colonel Troy A. Thatcher, USMC (Ret.) had a knowledgeable and proactive judge advocate to intervene—and ultimately help prevent—his ADA violation, he probably would have become the Commandant of the Marine Corps.

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[114] GAO RED BOOK, *supra* note 26, at 6-143; *see* 31 U.S.C. §§ 1349(a), 1518 (2013) (providing adverse personnel actions for ADA violations); *see also* 31 U.S.C. § 1350 (2013) (providing criminal penalties for ADA violations).

[115] *Id.*; *see* 31 U.S.C. §§ 1349(a), 1518 (2013) (providing adverse personnel actions for ADA violations); *see also* 31 U.S.C. § 1350 (2013) (providing criminal penalties for ADA violations).

[116] *See* 31 U.S.C. § 1517 (b) (2013) (requiring the head of an executive agency to immediately report to the President and Congress "all relevant facts and a statement of actions taken" when ADA violations are confirmed).

[117] GAO RED BOOK, *supra* note 26, at 6-144.

[118] *See generally GAO ADA Reports*, *supra* note 40 (providing numerous examples of the consequences to officials found responsible for ADA violations). The consequences include removal from duty, pay grade demotion, suspension without pay, letters of reprimand, letters of caution, verbal admonishments, oral reprimands, downgraded awards. *Id.*

[119] Cohen, *supra* note 6.

[120] ARNOLD, *supra* note 8, at 5.

[121] *See GAO ADA Reports*, *supra* note 40.

[122] *See* FISCAL LAW DESKBOOK, *supra* note 21, ch. 3, at 33-52 (providing analysis on typical questionable expenses to include clothing, food, bottled water, entertainment, and coins).

[123] *See* Major Brian A. Hughes, *Uses and Abuses of O&M Funded Contruction: Never Build on a Foundation of Sand*, ARMY LAW., Aug. 2005, at 1 (providing an overview of common military construction funding issues, specifically as they relate to using O&M funds in lieu of appropriate funds).

[124] *See* FISCAL LAW DESKBOOK, *supra* note 21, ch. 3 (providing a chapter devoted to "Availability of Appropriations as to Time").

Construction Changes: A True Story of Money, Power, and Turmoil

Major Nolan T. Koon[*]

Certainty of change is a constant of the construction process. Construction "rarely proceeds as planned," because "there are always unexpected events and conditions that occur during construction and impact the contractor's ability to complete the project as planned."[1] *To those unschooled in the process, construction is perceived as organized "chaos," where "even the most painstaking planning frequently turns out to be mere conjecture and accommodation to changes must necessarily be of the rough, quick, and ad hoc sort, analogous to ever-changing commands on the battlefield.*[2]

I. Introduction

On July 8, 2014, the U.S. Government Accountability Office (GAO) reported to Congress its dire findings regarding the U.S. Embassy construction project in Kabul, Afghanistan.[3] In 2009 and 2010, the Department of State (DOS) awarded two construction contracts with an aggregate cost of $625.4 million.[4] The GAO found numerous shortcomings and deficiencies with respect to the projects. "Since the two contracts were awarded[,] . . . construction requirements have changed, costs have increased, and schedules have been extended."[5] Specifically, the GAO determined that, because of multiple contract modifications (i.e., changes), project costs ballooned by nearly 24% and completion dates were delayed by almost two years.[6]

Cost overruns and schedule delays are hardly limited to the DOS or contingency environments. The GAO recently completed an audit of the Department of Veterans Affairs' (VA's) largest medical-center construction projects.[7] In its sobering report to Congress, the GAO found that costs exploded and schedules bloated, in large part, because of construction changes.[8] Project costs swelled from 59% to 144%, with an aggregate increase of almost $1.5 billion.[9] Schedule delays varied from fifteen months to more than six years.[10]

The purpose of this primer is to familiarize judge advocates with construction changes. As a roadmap, Part II provides an overview of Federal Acquisition Regulation (FAR) 52.243-4 (changes clause), including the authority to issue change orders, the scope of the changes clause, and fiscal and competition considerations. Part III discusses constructive changes and theories of liability against the Government premised on a contractor's performance of additional work because of some fault or order of agency officials.

The roles of the legal advisor are as varied as they are immutable. In addition to being a steward of the public purse, the judge advocate must always be prepared to advise command and staff regarding risk management. When risk takes the form of construction changes, it can be especially perilous and chaotic. Contract changes are historically one of the most frequently litigated claims in public contracting.[11] Extensive mission and acquisition planning can mitigate the need and quantum of contract changes. Nevertheless, as German military strategist Helmuth von Motke famously observed, "No battle plan survives contact with the enemy."[12]

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[1] PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER & O'CONNOR ON CONSTRUCTION LAW 499 (2002).

[2] *Id.* (quoting Blake Const. Co., Inc. v. C.J. Coakley Co., Inc., 431 A.2d 569, 575 (D.C. 1981)).

[3] U.S. DEPT. OF DEF. INSPECTOR GENERAL, DODIG-2012-057, GUIDANCE NEEDED TO PREVENT MILITARY CONSTRUCTION PROJECTS FROM EXCEEDING THE APPROVED SCOPE OF WORK (2012).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-302, VA CONSTRUCTION: ADDITIONAL ACTIONS NEEDED TO DECREASE DELAYS AND LOWER COSTS OF MAJOR MEDICAL-FACILITY PROJECTS (2003).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *See* RALPH C. NASH, JR., GOVERNMENT CONTRACT CHANGES 86 (1st ed. Supp. 1981); CONT. & FISCAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., CONT. ATT'Y'S DESKBOOK 21-1 (2014).

[12] Kennedy Hickman, *Franco-Prussian War: Field Marshall Helmuth von Moltke the Elder*, ABOUT.COM (May 20, 2015, 9:00 AM), http://militaryhistory.about.com/od/1800sarmybiographies/p/vonmoltke.html.

II. Change Orders

A. Background

It is axiomatic that, under common law, a party cannot unilaterally change the bargained for duties and obligations without breaching the contract.[13] In order to modify a contract, the parties must agree to the terms of the change and execute a bilateral modification supported by new consideration.[14] However, the Government does not avail itself of the normal rules of commercial contracts between private parties. Public contracting is distinct from its private counterpart by the prevalent and long-standing use of the changes clause, which allows the Government to unilaterally alter work within the general scope of the contract.[15]

The advent of the changes clause was born from the realities of the challenges inherent to construction and the limitations of bilateral modifications. It is commonplace and, oftentimes anticipated, that construction contracts will be repeatedly modified in order to adjust agency requirements, incorporate new technologies, account for unanticipated variables (e.g., site conditions), and correct errors in the plans and specifications.[16] Absent the changes clause, the fluidity of the construction process would be arrested by the back-and-forth nature of offers and counteroffers.[17] As noted by at least one commentator, bilateral modifications have the potential to fatally disrupt the construction process—under the guise of negotiations—by sanctioning delays, holding the project hostage and unduly leveraging the contractor's bargaining position.[18]

Accordingly, the Government has the power and the flexibility to unilaterally direct additions or deletions within the general scope of work through the change order process.[19] A change order is a written order, signed by the contracting officer, directing the contractor to make a change that the changes clause authorizes the contracting officer to order *without* the contractor's consent.[20] The contracting officer must issue a modification in writing.[21] When the change will result in an increase in the contractor's cost of performance, the contracting officer should make every effort to negotiate an equitable adjustment to the contract price and execute a bilateral modification.[22] The changes clause requires the contractor to tender its right to an equitable adjustment within thirty days after receipt of a written change order.[23] However, in practice, requests for equitable adjustment submitted to the contracting officer prior to final payment are timely unless the late notice is prejudicial to the Government.[24]

Pursuant to FAR 43.205(d), all federal fixed-price construction contracts exceeding $150,000 must incorporate the following changes clause:

> (a) The Contracting Officer may at any time, by written order . . . make changes within the general scope of this contract. . . .
>
> (b) If any such change causes an increase or decrease in the cost of, or the time required for, performance[,] . . . the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.
>
> (c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.[25]

When confronted with construction issues, a judge advocate must be familiar with the change order process. As more fully set forth below, and detailed in Appendix A, the infancy of the change order process begins with the contracting officer's insertion of FAR 52.243-4 into the solicitation.[26] After the contract has been awarded, and construction has commenced, a need for a change may arise. It is immaterial whether the contractor agrees to perform the additional work.[27] Under the duty to proceed, the contractor must prosecute the change so long as it is within the general scope of the contract (i.e., in-scope).[28] A proposed change that is outside the general scope of the contract (i.e., out-of-scope), is a cardinal change, and will result in a breach of contract by the Government, relieve the contractor of its contractual obligations, and expose the Government to contract damages.[29] A judge advocate can minimize the risks

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[13] *See* BRUNER, *supra* note 1, at 501.

[14] *See id*.

[15] 48 C.F.R. § 52.243-4 (2014). *See also* NASH, *supra* note 11, at 37.

[16] BRUNER, *supra* note 1, at 500.

[17] *Id*. at 502.

[18] *Id*.

[19] *Id*. at 501.

[20] *See* BRUNER, *supra* note 1, at 509.

[21] *See* 48 C.F.R. § 53.243 (2014).

[22] *See* 48 C.F.R. § 43.102(b) (2014).

[23] 48 C.F.R. § 52.243-4 (2014).

[24] Watson, Rice & Co., HUD BCA No. 89-4468-C8, 90-1 BCA ¶ 22,499.

[25] 48 C.F.R. § 52.243-4 (2014).

[26] *See id*.; BRUNER, *supra* note 1, at 509.

[27] *See* 48 C.F.R. § 52.243-4 (2014); FEDERAL PUBLICATIONS SEMINARS, BASICS OF GOVERNMENT CONTRACTING 12-2 (2003).

[28] 48 C.F.R. § 52.243-4 (2014); NASH, *supra* note 11, at 97.

[29] *See* DONALD P. ARNAVAS & WILLIAM J. RUBERRY, GOVERNMENT CONTRACT GUIDEBOOK 10-7 (1986).

associated with the change order process by working closely and proactively with the contracting officer.

B. Authority to Issue Change Orders

The contracting officer is central to the change order process. Generally, only a contracting officer acting within the scope of his authority can execute a modification and legally bind the Government.[30] Unlike private contract law, courts do not recognize the doctrine of apparent authority vis-à-vis the Government.[31] As such, a change order can only arise from actual authority. Any contract change directed by a Government official who is not a contracting officer is not authorized.[32] As a practical matter, a contracting officer can ratify the actions of a Government official, whose conduct induced the contractor to perform additional work, by accepting the contractor's performance and certifying final payment.[33]

In theory, the principle of actual authority should be simple. In reality and in practice it is not. Government officials and representatives—such as Army senior leaders, construction managers, design professionals, project superintendents, inspectors, and contracting officer representatives—regularly visit a construction site. When these individuals interact with the contractor, there is always the specter of concern and confusion regarding owner-directed changes.[34]

For example, consider the construction of a new headquarters building. During a site visit and meeting with the contractor, a senior leader expresses concerns regarding the configuration and layout of conference rooms. Erroneously believing that the senior leader has apparent authority to bind the Government, the contractor reconfigures the conference rooms at significant expense. When the contractor submits an equitable adjustment for the additional work, the contracting officer appropriately denies the request. Consequently, whenever Government officials, including contracting officer representatives, communicate a potential alteration to the work, the contractor must immediately notify the contracting officer to confirm that the Government is officially directing the change.[35]

C. Scope Determinations and Cardinal Changes

A contracting officer's authority to direct changes to the work is not limitless. A proposed change must be within the general scope of the contract.[36] The determination regarding what constitutes an in-scope change is as much art as it is science. In the seminal case of *Freund v. United States*, the Supreme Court reasoned that whether a change fell within the general scope of the contract was a function of foreseeability.[37] While changes are anticipated on construction projects, it is unreasonable to expect parties to foresee changes that alter the character and the essence of their contractual understanding, unless such risk is contractually assumed.[38]

A change that is outside of the general scope of the contract is often referred to as a cardinal change or abandonment. A cardinal change is a "substantial deviation that changes the nature of the bargain," and an alteration so profound that it constitutes a breach of contract.[39] Whether a particular change will result in abandonment of the contract must be "analyzed on its own facts and in light of its own circumstances."[40] Courts and boards will consider the following factors: (1) individual and cumulative impact of changes; (2) degree of added complexity and difficulty of the work; (3) disruption caused to the contractor's performance; (4) overall impact upon contract cost and time of performance; and (5) effect of change on compensation or risk allocation.[41]

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[30] 48 C.F.R. § 43.102 (2014); Hensel Phelps Constr. Co., GSBCA Nos. 14744, 14877, 01-1 BCA ¶ 31,249.

[31] Winter v. Cath-dr /Balti Joint Venture, 497 F.3d 1339, 1345 (Fed. Cir. 2007).

[32] *Id.*; *see also* NASH, *supra* note 11, at 86.

[33] *Id.* Implied ratification occurs where an unauthorized agent directed the contractor to perform additional work; the Government was aware of the contractor's performance; and the Government received the benefits thereof. William v. United States, 130 Ct. Cl. 435, 447 (1955).

[34] BRUNER, *supra* note 1, at 596. "[T]here is substantial opportunity for confusion over the authorization behind any communication . . . as either a 'directive' or a mere 'request.'" *Id.*

[35] 48 C.F.R. § 43.104 (2014). Although only a contracting officer acting within his scope of authority may execute a contract modification, he may expressly delegate approval authority to an administrative contracting officer. 48 C.F.R. § 43.202 (2014).

[36] FEDERAL PUBLICATIONS SEMINARS, *supra* note 27, at 12-3.

[37] Freund v. United States, 260 U.S. 60 (1922). An in-scope change includes all work "fairly and reasonably within the contemplation of the parties when the contract was entered into." *Id.* at 63.

[38] BRUNER, *supra* note 1, at 526. *See also* Becho, Inc. v. United States, 47 Fed. Cl. 595, 601 (2000).

[39] BRUNER, *supra* note 1, at 527. In *Wunderlich Contracting Co. v. United States*, the court stated:

> There is no exact formula for determining the point at which a single change or a series of changes must be considered to go beyond the scope of the contract and necessarily in breach of it. Each case must be analyzed on its own facts and in light of its own circumstances, giving just consideration to the magnitude and quality of the changes ordered and their cumulative effect upon the project as a whole.

351 F.2d 956, 966 (Ct. Cl. 1965).

[40] Edward R. Marden Corp. v. United States, 442 F.2d 364, 369 (Ct. Cl. 1971).

[41] BRUNER, *supra* note 1, at 532.

The mere number of changes, without more, does not necessarily cause a cardinal change.[42] A single change order may appear innocuous, but the aggregate impact of multiple changes may constitute a cardinal change.[43] Referred to by contractors as "death by a thousand cuts," multiple changes can result in abandonment when they alter the very character of, and materially impact, the contractor's work.[44] Conversely, substantial changes in the work may be within the general scope of the contract, provided the parties entered into a broad contract that contemplated such changes.[45]

A contracting officer has the authority to direct the performance of additional work that is within the general scope of the contract; however, a contracting officer cannot direct the performance of work that is outside the general scope of the contract.[46] Regardless, a contractor may simply elect to perform an out-of-scope change (i.e., a cardinal change) and seek compensation under the changes clause.[47] As set forth below in sections II.E and II.F, the contractor's performance of a cardinal change potentially raises significant fiscal and competition concerns for the command, the awarding authority, and the legal advisor.

D. Contractor Duty to Proceed

From the contractor's perspective, whether a proposed change is within the general scope or is a cardinal change is, in some respects, a distinction without a difference and an exercise in semantics. Under the changes clause, a contractor is required to execute the change order, irrespective of whether it disputes the contracting officer's pricing of the equitable adjustment or otherwise consents to the additional work.[48] A contractor's refusal to proceed with the proposed change constitutes a material breach and is a basis for termination for default.[49] Disagreements regarding pricing of change orders are resolved through the contract's dispute clause.[50] The contractor is not excused from proceeding with the contract as changed.[51]

Importantly, the duty to proceed only concerns claims arising under the contract, (i.e.–its applicability is limited to in-scope changes).[52] Because a cardinal change is by definition outside the scope of the contract, a contractor has no contractual duty to perform the proposed change.[53] Nevertheless, a contractor may perform work it believes to be out-of-scope so long as it is satisfied with the equitable adjustment.[54] Such willingness to perform work is occasionally motivated by more than just pecuniary interests. A contractor's refusal to proceed with the work brings great risk. Before rejecting a change order, a contractor must forecast with near mathematical certainty how a disinterested fact-finder such as a court or a board at some future date would classify the change as outside or within the general scope of the contract.[55] Should the contractor's prediction be wrong and the contractor stop work, then the contractor would have breached his duty to proceed and defaulted on the contract.[56]

E. Proper Funds Must be Available

Aside from this "contractor's dilemma," the proper classification of a change as in-scope or out-of-scope will have significant fiscal and competition ramifications. If a change is within the general scope of the contract, it is an antecedent liability and the Government must obligate funds available at the time of the original contract award.[57] Alternatively, if a change is out-of-scope, then it is a new acquisition and a new requirement.[58] Therefore, the Government must obligate funds current when the contracting officer executes the modification.[59] Obligation of the incorrect year funds may result in an Anti-Deficiency Act

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[42] PCL Constr. Serv. Inc. v. United States, 47 Fed. Cl. 745, 805 (2000) (finding a series of contract modifications did not constitute cardinal change).

[43] BRUNER, *supra* note 1, at 528.

[44] *Id*. at 529.

[45] AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1207 (Fed. Circ. 1993) (affording more latitude where the contract was for a state-of-the-art product); E.L. Hamm & Assocs., Inc., ASBCA No. 43792, 94-2 BCA ¶ 26,724 (finding a change from lease to lease/purchase was out-of-scope).

[46] FAR 43.201 (2014).

[47] ARNAVAS, *supra* note 29, at 10-7.

[48] *Id*. at 10-9.

[49] *Id*.

[50] The Contract Disputes Act of 1978 establishes the procedures for claims arising out of and relating to Government contracts. 48 C.F.R. § 52.233-1 (2014). Contractors must submit claims in writing to the contracting officer for a decision. 41 U.S.C. § 7103 (2014). The contracting officer is required to issue a decision within sixty days of receipt of the claim or notify the contractor when a decision will be issued. *Id*. If the contractor disagrees with the contracting officer's decision regarding the claim, it may (1) appeal the decision to the applicable agency board of contractor appeals within ninety days of receipt of the decision; or (2) bring suit in the United States Court of Federal claims within twelve months. 41 U.S.C. §§ 7101–7108 (2014).

[51] *See* 48 C.F.R. § 52.243-4 (2014).

[52] ARNAVAS, *supra* note 29, at 10-9.

[53] FEDERAL PUBLICATIONS SEMINARS, *supra* note 27, at 12-6.

[54] *See* ARNAVAS, *supra* note 29, at 10-7.

[55] NASH, *supra* note 11, at 101.

[56] *Id*.

[57] 3 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-978SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 14, pt. C, at 14-46 (3d ed. 2008).

[58] *Id*.

[59] *Id*.

(ADA) violation if the unauthorized commitment is uncorrectable.[60]

F. Competition Requirements

The intersection of contract modifications and competition rules is potentially wrought with more danger than just fiscal hazards and flash reports.[61] The Competition in Contracting Act (CICA) requires agencies, when procuring goods and services, to do so using full and open competition through the use of competitive procedures.[62] CICA does not require every modification to be competitively awarded.[63] Nevertheless, agencies and contractors cannot skirt competition rules through the changes clause. In *Cray Research, Inc. v. Department of Navy*, the court fashioned the "scope of the competition" test to determine when out-of-scope changes must be competed.

> The "cardinal change" doctrine prevents government agencies from circumventing the competitive process by adopting drastic modifications beyond the original scope of the contract. The basic standard is whether the modified contract calls for essentially the same performance as that required by the contract when originally awarded so that the modification does not materially change the field of competition.[64]

A contracting officer must competitively award an out-of-scope change to an existing construction project if it materially departs from the scope of the original procurement.[65] This fact-driven analysis focuses on the scope of the entire original procurement process relative to the scope of the modification.[66] A cardinal change does not have to be competed provided the original solicitation adequately advised offerors of the "potential for the type of changes . . . that . . . occurred, or whether the modification is of a nature which potential offerors would reasonably have anticipated."[67] The ramifications of a CICA violation vary depending on the circumstances. An aggrieved party can successfully protest the agency decision, stay the construction project, and require the awarding authority to compete the new requirement.[68] Responsible agency officials may also face adverse administrative action.

Consider the following illustration: The Army previously awarded a contract for repairs and improvements to an existing barracks building. The original solicitation was tailored narrowly and only specified electrical and mechanical upgrades to the building interior and made no reference to exterior site work. During construction, the contracting officer issues a change order directing the contractor to significantly expand the barracks parking lot. Although the proposed change constitutes a cardinal change, the contractor agrees to perform the additional work. However, upon learning of the modification, a competitor of the contractor files a complaint alleging a violation of CICA. The barracks renovation project is enjoined pending the court's ruling on the merits. After trial, the court finds potential offerors could not have reasonably anticipated the nature of the change at the time of the original award. The court enters judgment for the plaintiff and orders the Army to compete the barracks parking lot expansion as a new requirement.

III. Constructive Changes

A judge advocate's navigation of the change order process, with legal acumen, does not necessarily guarantee project success or negate all risk to his command or awarding authority. When describing the turmoil and the unpredictability associated with large construction projects, one court noted, "[E]xcept in the middle of a battlefield, nowhere must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences as in a huge construction project."[69] Chaos and turmoil on a construction project can take on many shapes and pose numerous challenges for the Government and the contractor alike. During the course of construction, a contractor may encounter constructive changes that impact the contractor's work and cost of performance.[70]

Unlike formal change orders, where the contracting officer can unilaterally modify the contract, constructive changes are neither derived from the FAR nor directed under

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[60] *See* 31 U.S.C. § 1341(a)(1) (2014). Consider a construction project that is funded with Operations & Maintenance, Army (OMA) funds. It is awarded in fiscal year one (FY1), and, in fiscal year two (FY2), the contracting officer issues a change order to address differing site conditions. If the change is within the general scope of the contract, then the change order must be funded with FY1 OMA funds. If the change is out-of-scope, then it must be funded with FY2 OMA funds.

[61] Once it is determined that there has been an Anti-Deficiency Act (ADA) violation, the agency head must immediately submit a report to the President and Congress detailing all relevant facts and actions taken, i.e.–a flash report. 31 U.S.C. §§ 1351, 1517(b) (2014).

[62] 41 U.S.C. § 253(a)(1)(A) (2006).

[63] AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1205 (Fed. Circ. 1993).

[64] Cray Research, Inc. v. Dep't of Navy, 556 F. Supp. 201, 203 (D.D.C. 1982).

[65] *AT&T Communications*, 1 F.3d at 1205. *See, e.g.*, Memorex Corp., B-200722, 81-2 CPD P 334 (Oct. 23, 1981) (finding a change of a contract from purchase to lease-to-ownership is a cardinal change requiring competitive procurement).

[66] BRUNER, *supra* note 1, at 541.

[67] *AT&T Communications*, 1 F.3d at 1207.

[68] *See Cray Research*, 556 F. Supp. at 203.

[69] Blake Const. Co., Inc. v. C.J. Coakley Co., Inc., 431 A.2d 569, 575 (D.C. 1981).

[70] *See* FEDERAL PUBLICATIONS SEMINARS, *supra* note 27, at 12-8.

the changes clause. A constructive change occurs when, absent a change order, a contractor is required to perform work beyond the scope of the contract because of some fault or order of the Government.[71] Because the contracting officer erroneously believes that the work is already specified in the contract, he will not issue a written change order.[72] Notwithstanding the absence of a change order, claims for constructive changes have traditionally been addressed through the changes clause.[73] The rationale is that, because of some Government action or inaction, the contractor has been required to perform additional work against its will and at the express or implied direction of the contracting officer.[74] In *Len Co. & Associates v. United States*, the court stated the following:

> We, as well as the Armed Services Board of Contract Appeals, have held that, if a contracting officer compels the contractor to perform work not required under . . . the contract, his order to perform, albeit oral, constitutes an authorized . . . unilateral change . . . and entitles the contractor to an equitable adjustment.[75]

The most common constructive changes arise from the following situations: (1) contract misinterpretation; (2) Government interference or failure to cooperate; (3) defective specifications; (4) nondisclosure of superior knowledge; and (5) constructive acceleration.[76]

Irrespective of the type of constructive change, a contractor must assert its right to an equitable adjustment for a constructive change within thirty days of notifying the Government that it has experienced a constructive change.[77] The content of the notice must assert a positive, present intent to seek recovery as a matter of legal right.[78] Similar to formal change orders, requests for equitable adjustment raised after final payment are untimely.[79]

A. Contract Misinterpretation

A constructive change may arise where, after contract award and during construction, the Government and the contractor encounter an ambiguity in the contract designs and specifications.[80] The Government may demand that the contractor perform the work in such a manner as to make it more costly.[81] A constructive change can result where: (1) a Government official authorized to interpret the contract documents directs the contractor to perform in accordance with the official's interpretation; (2) the contractor performs the disputed work against its will; and (3) the official's interpretation is later shown to be incorrect.[82] The resultant constructive change triggers the contractor's right to an equitable adjustment of the contract price.

A contract provision is ambiguous if it is susceptible to different interpretations and each interpretation is harmonious with the contract terms and the parties' objective and ascertainable intent.[83] When confronted with an ambiguity, the parties must rely upon intrinsic evidence and contract interpretation principles to resolve the disputed terms.[84] If after an examination of the four corners of the contract the ambiguity persists, the parties may consider extrinsic evidence.[85]

If an ambiguity cannot be resolved through intrinsic and extrinsic evidence, courts have fashioned two allocation of risk rules to interpret the disputed contract provisions. First, under the rule of *contra proferentum*, the ambiguity must be

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[71] Miller Elevator Co. v. United States, 30 Fed. Cl. 662, 678 (1994).

[72] BRUNER, *supra* note 1, at 549.

[73] *Id*. at 550.

[74] NASH, *supra* note 11, at 208.

[75] Len Co. Assocs. v. United States, 385 F.2d 438, 443 (Ct. Cl. 1967).

[76] FEDERAL PUBLICATIONS SEMINARS, *supra* note 27, at 12-8.

[77] 48 C.F.R. § 52.243-4(b) and (e) (2014). Except for claims based on defective specifications, a contractor cannot recover costs incurred more than twenty days prior to notification to the Government of the constructive change. 48 C.F.R. § 52.243-4(d) (2014).

[78] FEDERAL PUBLICATIONS SEMINARS, *supra* note 27, at 12-8.

[79] Design & Prod., Inc. v. United States, 18 Cl. Ct. 168, 193 (1989).

[80] *See* ARNAVAS, *supra* note 29, at 10-16.

[81] *See* FEDERAL PUBLICATIONS SEMINARS, *supra* note 27, at 12-9.

[82] J.F. Allen Co. & Wiley W. Jackson Co. v. United States, 25 Cl. Ct. 312, 320 (1992).

[83] Bennett v. United States, 178 Ct. Cl. 61, 64 (1967).

[84] *See, e.g.*, Big Chief Drilling Co. v. United States, 26 Cl. Ct. 1276, 1298 (1992) (holding all contract terms must be given their plain meaning so as to not render any part inconsequential). Construction contracts contain order of precedence clauses to settle discord between battling contract terms. 48 C.F.R. §§ 52.215-8; 52.236-32 (2014). For instance, if there is a conflict between the drawings and the specifications, as a matter of law and contract, the specifications trump the drawings. *Id*. Where a detail of work is omitted from the drawings or specifications, but contained in the other, then the contract must be interpreted as if the detail were in both the drawings *and* specifications. 48 C.F.R. § 52.236-21 (2014).

[85] FEDERAL PUBLICATIONS SEMINARS, *supra* note 27, at 12-12. An authorized Government representative can provide clarifying statements to help interpret ambiguous contract language; however, such statements cannot contradict express and clear contract terms. Turner Constr. Co. v. Gen. Servs. Admin., GSBCA No. 11361, 92-3 BCA ¶ 25,115. Custom and trade usage may provide context that can help explain ambiguous terms; however, it cannot be used to contradict unambiguous ones. W.G. Cornell Co. v. United States, 376 F.2d 299, 306 (Ct. Cl. 1967). The prior course of dealing between the contractor and the Government, as well as their actions during the course of performance, may evidence the parties' understanding of ambiguous contract terms. Macke Co. v. United States, 467 F.2d 1323, 1325 (Ct. Cl. 1972) ("[H]ow the parties act [during performance] is often more revealing than the dry language of the [contract] by itself."); Superstaff, Inc., ASBCA No. 46112, 94-1 ¶ 26,574.

construed against the drafter.[86] Second, where a solicitation contains an ambiguity that is patent (i.e., obvious), an offeror has a duty to seek clarification prior to award.[87] A contractor's failure to seek clarification of a patent ambiguity will materially prejudice any subsequent claim for an equitable adjustment.[88]

A judge advocate may not possess the necessary technical expertise in the fields of architecture, engineering, or construction methods. Nevertheless, when faced with a contract misinterpretation issue, a legal advisor should advise the contracting officer regarding the use of intrinsic and extrinsic evidence as well as the applicability of allocation of risk principles to help resolve the ambiguity.

B. Government Interference or Failure to Cooperate

In addition to ambiguous contract terms, a constructive change can manifest from the Government's failure to properly administer the contract.[89] Liability is premised on the theory that Government interference caused the contractor to perform work not required under the contract and to incur additional costs.[90] For example, courts and boards have allowed equitable adjustments for constructive changes where the Government: imposed hyper-technical inspections;[91] disapproved substitute items that were equal in quality and performance to the contract requirements;[92] unjustifiably disapproved or unreasonably delayed approval of shop drawings;[93] and failed to prevent interference by another contractor.[94] Likewise, an agency's failure to make a worksite available to the contractor has been held to violate the Government's implied duty to cooperate.[95] As the resident legal sentinel, the judge advocate must ensure Government officials—who are responsible for contract administration—do not unwittingly interfere with the contractor's performance by exercising their judgment and discretion in a manner that is inconsistent with the contract and the Government's implied duty to cooperate.

C. Defective Specifications

Some constructive changes arise during contract administration, while the genesis of others is conceived from mistakes made during the initial design and lay dormant until contractor performance. The Government may be liable for errors and omissions in its plans and specifications under two different but related theories of liability. First, a basic tenant of public construction law is that the Government impliedly warrants to a contractor the adequacy and the sufficiency of the Government-furnished plans and specifications.[96] Second, under the theory of impracticability or impossibility, the Government may be liable for increased performance costs associated with the contractor's attempts to conform its work to defective specifications.[97]

1. Spearin Doctrine

When the Government furnishes specifications, it impliedly warrants that the contractor can follow the contract drawings and specifications and perform without undue expense. In order to recover under the implied warranty of specifications, a contractor must show the following: (1) It was actually misled by the error in the design specifications; (2) It reasonably relied upon the defective design specifications and complied fully with them; (3) The defective design specifications caused increased costs; and (4) The contractor did not have actual or constructive knowledge of the defect prior to award.[98]

The seminal case regarding the implied warranty of specifications is *United States v. Spearin*.[99] In *Spearin*, the Government contracted for the construction of a naval dock which included relocating a sewer main.[100] After the contractor relocated the sewer main in accordance with the Government-furnished plans and specification, it overflowed

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[86] Sturm v. United States, 421 F.2d 723, 727 (Ct. Cl. 1970); Peter Kiewit Sons' Co. v. United States, 109 Ct. Cl. 390, 418 (1947). *See also* FEDERAL PUBLICATIONS SEMINARS, *supra* note 27, at 12-16.

[87] Hensel Phelps Constr. Co., ASBCA No. 49716, 00-2 BCA ¶ 30,925.

[88] RALPH C. NASH, JR. ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK 216 (3d ed. 2007).

[89] *See, e.g.*, R&B Bewachungsgesellschaft GmbH, ASBCA No. 42213, BCA ¶ 24,310. Notwithstanding, when performing a sovereign act, a Government's actions will not give rise to a breach of the implied duty of noninterference and failure to cooperate. Orlando Helicopter Airways, Inc. v. Widnall, 51 F.3d 258, 262 (Fed. Cir. 1995) (finding a criminal investigation of a contractor was a sovereign act and did not give rise to a constructive change).

[90] SIPCO Services & Marine v. United States, 41 Fed. Cl. 196, 217 (1998).

[91] *Id.* at 223 (finding a constructive change where a contracting officer technical representative imposed additional quality control testing that slowed contractor performance). *See also* Grumman Aerospace Corp., ASBCA No. 50,090, 01-1 BCA ¶ 31,316 (finding an agency's unilateral change to the inspection method constituted a constructive change that entitled the contractor to recover the costs associated with the extra effort); Neal & Co., Inc. v. United States, 36 Fed. Cl. 600, 632 (1996) (holding "nit-picking punch list" to be an overzealous inspection).

[92] Page Constr. Co., AGBCA No. 92-191-1, 93-3 BCA ¶ 26,060.

[93] Vogt Bros. Mfg. Co. v. United States, 160 Ct. Cl. 687, 706 (1963).

[94] *See* Northrop Grumman Corp. v. United States, 47 Fed. Cl. 20, 78 (2000).

[95] Summit Contractors, Inc. v. United States, 23 Cl. Ct. 333, 336 (1991).

[96] United States v. Spearin, 248 U.S. 132, 136 (1918).

[97] Oak Adec, Inc. v. United States, 24 Cl. Ct. 502, 504 (1991).

[98] FEDERAL PUBLICATIONS SEMINARS, *supra* note 27, at 12-20.

[99] *Spearin*, 248 U.S. at 132.

[100] *Id.* at 133.

and flooded the project.[101] The Government terminated the contractor for default, and the contractor sued for breach of contract.[102] On appeal, the Supreme Court held,

> Where one agrees to do . . . a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered. . . . But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans or specifications.[103]

The linchpin of the implied warranty of specifications is that liability follows responsibility. Under *Spearin* and its progeny, the assignment of liability hinges largely on whether the Government furnished the contractor with design—vice performance—specifications.[104] Design specifications state precisely how the contractor will perform the work and prohibit any contractor deviations.[105] Consequently, the Government accepts general responsibility for design errors and omissions.[106] By contrast, performance specifications simply state the objectives.[107] The contractor has discretion and responsibility regarding how to perform the work and achieve the stated goals.[108] As such, the contractor assumes the risk of any errors or omissions in the plans and specifications.[109] The applicability of the *Spearin* doctrine is more nuanced and difficult where plans and specifications are composite (i.e., have both design and performance qualities).[110] In such instances, courts and boards will test each portion of the specification to determine whether the Government or the contractor was responsible for the design error.[111]

2. Impracticability or Impossibility

A constructive change may also arise from defective specifications under a theory of impracticability or impossibility.[112] Unlike the implied warranty of specifications, it is immaterial whether the specifications are design or performance.[113] Instead, in order to establish a claim for impossibility or impracticability, a contractor must show the following: (1) The contractor experienced an unforeseen or unexpected occurrence;[114] (2) The contractor did not assume the risk of the unforeseen occurrence by agreement or custom;[115] and (3) Performance is commercially impracticable or impossible.[116] It is not necessary to make a showing of actual or literal impossibility.[117] Something is impractical when it can only be done at an excessive or unreasonable cost.[118] Some courts and boards apply the "willing buyer" test to determine whether performance is commercially impractical. That is, a contractor must show that there are no buyers willing to pay the increased cost of production plus a reasonable profit.[119]

Thus, whenever a contractor experiences difficulties performing its work in accordance with the plans and specifications, a legal advisor should ensure that these concerns are neither trivialized nor casually dismissed by project officials as the responsibility of the contractor. The Government may be liable for the additional work due to design error or impracticability.

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[101] *Id*. at 134.

[102] *Id*. at 135.

[103] *Id*. at 138.

[104] *See* NASH, *supra* note 11, at 266.

[105] *Id.*

[106] *Id*. at 272.

[107] *See* Interwest Constr. v. Brown, 29 F.3d 611, 615 (Fed. Cir. 1994).

[108] FEDERAL PUBLICATIONS SEMINARS, *supra* note 27, at 12-19.

[109] Aerodex, Inc., ASBCA No. 7121, 1962 BCA ¶ 3492, *aff'd*, 1964 BCA ¶ 4057.

[110] *See* NASH, *supra* note 11, at 273.

[111] Monitor Plastics Co., ASBCA No. 14447, 72-2 BCA ¶ 9626.

[112] BRUNER, *supra* note 1, at 566.

[113] Oak Adec, Inc. v. United States, 24 Cl. Ct. 502, 503 (1991) (finding the use of performance specifications does not automatically shift the risk of non-performance on the contractor for purposes of commercial impracticality).

[114] An unforeseen or unexpected occurrence may be caused by unanticipated technical difficulties that significantly increase the contractor's work and cost of performance. *Id*. For example, contractor performance may be frustrated because the specifications require performance beyond the state of the art. FEDERAL PUBLICATIONS SEMINARS, *supra* note 27, at 12-21. Courts and boards will consider the contractor's efforts and the ability of other contractors to meet the specifications as evidence of an unforeseen or unexpected occurrence. *Id.*

[115] A contractor may assume the risk associated with a defective specification by participating in its formulation. Costal Indus. v. United States, 32 Fed. Cl. 368, 373 (1994). In *J.A. Maurer, Inc. v. United States*, the court found that the contractor assumed the risk of impossible performance by proposing to extend the state of the art. J.A. Maurer, Inc. v. United States, 485 F.2d 588, 594 (Ct. Cl. 1973).

[116] *Id*. *See also* Hobbs Construction & Development, Inc., ASBCA No. 34890, 91-2 BCA ¶ 23,755 (finding where contract performance was impossible, a contractor was awarded compensation for its unsuccessful efforts to meet the specification tolerances). When deciding whether performance is commercially impracticable or impossible, a contractor must show that the increased cost of performance is commercially senseless. *See* Fulton Hauling Corp., PSBCA No. 2778, 92-2 BCA ¶ 24,858.

[117] Natus Corp. v. United States, 178 Ct. Cl. 1, 9 (1967).

[118] *Id.*

[119] RALPH C. NASH, JR., GOVERNMENT CONTRACT CHANGES, 13-37 to 13-39 (2d ed. 1989).

D. Nondisclosure of Superior Knowledge

Quite distinct from theories of design error and impracticability, the Government has a basic duty to disclose vital information of which the contractor is ignorant.[120] The claim for a constructive change is premised on the following elements: (1) The Government possesses knowledge of vital facts regarding a solicitation or contract; (2) The contractor does not know nor should have known of the facts; (3) The Government knew or should have known of the contractor's ignorance; and (4) The Government failed to disclose the facts to the contractor.[121]

The court's decision in *Miller Elevator Co. v. United States* is instructive and offers a cautionary tale to the legal advisor.[122] In *Miller Elevator Co.*, the Government awarded a three-year elevator maintenance contract.[123] Sixteen months after contract award, the Government awarded another contract to renovate the building.[124] The renovations significantly increased the contractor's work under the maintenance contract; accordingly, the contractor requested an equitable adjustment for the additional costs.[125] The contracting officer denied the claim, and the contractor brought suit.[126] In finding for the contractor, the court held that the Government was aware of the anticipated renovation at the time of award; the contractor did not know nor should have known of the renovation; and the Government did not disclose this vital information to the contractor.[127] In light of the court's ruling, a judge advocate should coordinate with the requiring and the awarding authorities to ensure that vital information—which will materially impact the work—has been provided to the contractor in a timely manner.

E. Constructive Acceleration

Under the changes clause, the Government may issue a change order that directs the contractor to accelerate its work schedule.[128] A claim of constructive acceleration arises when the Government requires the project to be completed within the original schedule notwithstanding the encountering of an excusable delay[129] by the contractor.[130] In order to establish a claim for constructive acceleration, a contractor must establish the following: (1) an excusable delay; (2) notice to the Government of such delay and request for an extension of time; (3) Government refusal of the request for schedule relief; (4) an express or implied order by the Government to accelerate; and (5) reasonable efforts by the contractor to accelerate which resulted in increased costs.[131]

Courts and boards have found constructive acceleration when the Government threatens termination[132] or liquidated damages[133] in response to a contractor's request for a schedule extension due to an excusable delay event.[134] However, a denial of a delay request simply because of insufficient information is not tantamount to an order to accelerate.[135] It is not necessary for the contractor's acceleration efforts to be successful; a reasonable attempt to meet the completion date is sufficient.[136]

In *Larry Azure v. United States*, the Government executed a contract for the construction of erosion control works on a drain way that emptied into a river.[137] After experiencing heavy rains and severe weather conditions, the contractor requested an extension of the project schedule.[138] However, the contracting officer refused to act on the extension until after completion of the project.[139] The contractor submitted a claim for a constructive change, which was ultimately denied by the contracting officer.[140] After the

[120] *See* Miller Elevator Co. v. United States, 30 Fed. Cl. 662, 678 (1994).

[121] *Id*. at 675. The information held by the Government must have a direct bearing on the cost or duration of contract performance. Bradley Const., Inc. v. United States, 30 Fed. Cl. 507, 510 (1994). The amount of interference caused by the nondisclosure is a factor in determining whether the information is vital. Johnson & Erector Co., ASBCA No. 23689, 86-2 BCA ¶ 18,931; Numax Elec., Inc., ASBCA No. 29080, 90-1 BCA ¶ 22,280 (finding an agency breached its duty to disclose by failing to inform a contractor that all previous contractors had been unable to manufacture in accordance with the specifications). There is no breach of the duty to disclose vital information if the contractor knew or should have known of the information. H.N. Bailey & Assoc. v. United States, 449 F.2d 376, 383 (Ct. Cl. 1971).

[122] *Miller Elevator Co.*, 30 Fed. Cl. at 662.

[123] *Id*. at 666.

[124] *Id*.

[125] *Id*. at 667.

[126] *Id*.

[127] *Id*. at 676-78.

[128] *See* 48 C.F.R. § 52.243-4 (2014); United Construction and Supply v. United States, 1997 U.S. App. LEXIS 29365 *8 (1997).

[129] An excusable delay is typically a delay that is unforeseeable and beyond the control of the contractor. *See, e.g.*, 48 C.F.R. §§ 52.249- 10 (2014). *See also* NASH, ET AL., *supra* note 88, at 237.

[130] Fraser Construction Co. v. United States, 384 F.3d 1354, 1361 (Ct. Cl. 2004).

[131] Fru-Con Constr. Corp. v. United States, 43 Fed. Cl. 306, 328 (1999).

[132] Intersea Research Corp., IBCA No. 1675, 85-2 BCA ¶ 18,058.

[133] Norair Eng'g Corp. v. United States, 666 F.2d 546, 549 (Ct. Cl. 1981).

[134] *See* BRUNER, *supra* note 1, at 572-73.

[135] Franklin Pavlov Constr. Co., HUD BCA No. 93-C-13, 94-3 BCA ¶ 27,078.

[136] Fermont Div., Dynamics Corp., ASBCA No. 53,073, 01 BCA ¶ 11,139.

[137] Azure v. United States, 1997 U.S. App. LEXIS 29365 (Fed. Cir. 1997).

[138] *Id*.

[139] *Id*. at *10.

[140] *Id*. at *5.

contractor filed suit, the court found, *inter alia*: (1) The extreme amounts of rain constituted an excusable delay; (2) The Government's failure to timely grant the extension constituted a denial; (3) The Government's inaction was tantamount to an implied order to accelerate; and (4) The contractor took reasonable efforts to accelerate the work.[141] The court held the Government constructively accelerated the project schedule and equitably adjusted the contract price.[142]

Project delays are seldom a cause for celebration and merriment. Nevertheless, prior to the rejection of any requests for a schedule extension, a judge advocate should coordinate with the contracting officer to ascertain whether an excusable delay event negatively impacted the contractor's performance. Otherwise, the Government may be responsible for the costs of constructively accelerating the contractor's performance.

IV. Conclusion

Numerous audits and investigations of construction projects have been conducted by the Commission on Wartime Contracting in Iraq and Afghanistan,[143] the Inspector General for the Department of Defense,[144] the Special Inspector General for Iraq Reconstruction,[145] and the Special Inspector General for Afghanistan Reconstruction.[146] Whether the projects were in a garrison or a deployed environment, construction changes have resulted in unauthorized expenditures, swollen project costs, and considerable delays.[147] Suffice to say, if carelessly administered, the changes process can quickly metastasize and adversely impact a commander's fiscal resources and mission capabilities.[148]

Because of the unpredictability and the inevitability of contract changes, the construction process is viewed as *organized chaos*. However, as Sun Tzu said, "In the midst of chaos, there is also opportunity."[149] Contract changes will not necessarily imperil a construction project, but their mishandling undoubtedly will. In order to minimize risk and liability to his command or awarding authority, a judge advocate must (1) navigate the formal change order process and (2) guard against Government action that could result in a constructive change. After all, as Napoleon Bonaparte noted, "The battlefield is a scene of constant chaos. The winner will be the one who controls that chaos, both his own and the enemies."[150]

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[141] *Id.* at *11.

[142] *Id.* at *22.

[143] *See* COMMISSION ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS (2011).

[144] *See* U.S. DEPT. OF DEF. INSPECTOR GENERAL, *supra* note 3.

[145] *See* COMMISSION ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, *supra* note 143, at 55.

[146] *Id.* at 80.

[147] *See, e.g.*, U.S. DEPT. OF DEF. INSPECTOR GENERAL, *supra* note 3, at 3; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 7, at 8.

[148] For example, significant delays in project completion of a detention facility or a medical treatment facility can impact a command's ability to hold detainees and provide medical care, respectively.

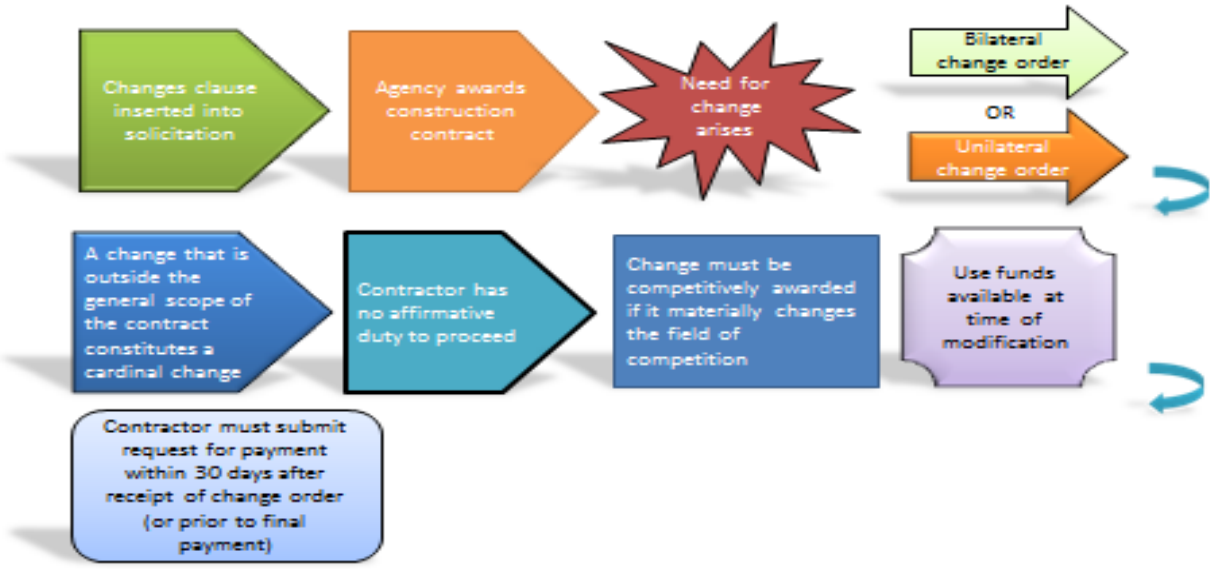
[149] *The Art of War*, HISTORY.COM, http://www.history.com/topics/the-art-of-war (last visited Jan. 10, 2016).

[150] *Napoleon Bonaparte Quote*, IZQUOTES.COM, http://izquotes.com/quote/20614 (last visited Jan. 10, 2016).

Appendix A.

FLOWCHART OF A CHANGE THAT IS WITHIN THE GENERAL SCOPE OF THE CONTRACT

FLOWCHART OF A CHANGE OUTSIDE THE GENERAL SCOPE OF THE CONTRACT (CARDINAL CHANGE)



Encourage Your Clients to Talk to Offerors: Understanding Federal Acquisition Regulation 15.306

Major Brendan J. Mayer[*]

From the moment the Government decides it needs to procure a good or service until it is delivered, the FAR governs the methods and types of communications that can take place between a CO and a potential contractor.[1]

I. Introduction

You have been the deputy command judge advocate at a contracting support brigade (CSB) for the last year, and you have just returned from the Contract Attorneys Course[2] at the Judge Advocate General's Legal Center and School. You arrive back at your home station full of new information and eager to put into practice all you learned at the course. You do not have to wait long for that opportunity.

Your command judge advocate (CJA) comes into your office at 1630 on Friday, November 7, 2014, and tells you, "

> I know you just got back, but I came down on orders to support our efforts battling Ebola in Liberia.[3] I leave next Friday. The only pressing issue is the post guard contract. We received five timely proposals on November 2, 2014, and the current contract expires at the end of the month. The boss wants the new contract awarded beforehand, and does not want a repeat of the guard contract up in Germany."[4]

After he leaves your office the weight of the situation sinks in as this is the first negotiated procurement you have seen.[5] You know from the Contract Attorneys Course and recent Government Accountability Office (GAO) decisions that high-dollar procurements are often subject to protest.[6] A commonly protested issue is whether the government's exchange with an offeror constitutes discussions. You turn to chapter eight of your Contract Attorneys Deskbook[7] and start reading about negotiated procurements—especially the permissible exchanges between the government and offerors after the receipt of proposals.[8]

Federal Acquisition Regulation (FAR) 15.306 governs the three forms of exchanges the government can have with offerors after receipt of proposals in negotiated procurements: clarifications, communications, and discussions.[9] Federal Acquisition Regulation 15.306, which was revised in the late 1990s, provided contracting officers with broad discretion to enter into these exchanges.[10] Contracting officers (COs) have been reluctant to use this authority. In fact, some academics have argued that "the discretion given to COs by the new rule turned out to be discretion *not to communicate* rather than to communicate."[11] This "discretion not to communicate"[12] may rise from the contracting officer's fear of protest or fear

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[1] Erin L. Craig, *Searching for Clarity: Completing the Unfinished FAR Part 15 Rewrite*, 39 PUB. CONT. L.J. 661 (Spring 2010).

[2] The Contract Attorneys Course "provides basic instruction in government contract law for entry-level attorneys at installations, the Army Materiel Command, and comparable contracting activities." *The Contract Attorneys Course (5F-F10)*, JAGCNET, https://www.jagcnet2.army.mil/sites/tjaglcs.nsf/homeContent.xsp?documentId=C7430FBBD6B8230585257C6A005E13B4 (last visited Jan. 11, 2016). It outlines, "[T]he fundamentals of the government contract system and the general principles of law applicable to government contracting. Students will depart the course understanding the government contracting process from requirement identification to receipt of the goods or services by the ultimate user." *Id.*

[3] *See* Chris Carrol, *DOD: 1,400 Troops To Deploy To Liberia To Fight Ebola, Starting in October*, STARS & STRIPES (Oct. 1, 2014), http://www.stripes.com/dod-1-400-troops-to-deploy-to-liberia-to-fight-ebola-starting-in-october-1.305906.

[4] *See* Matt Millham, *Army Cancels New Security Contract with Sicherheit Nord*, STARS & STRIPES (Mar. 25, 2014), http://www.stripes.com/news/army-cancels-new-security-contract-with-sicherheit-nord-1.274428 (The Army awarded a $322,000,000.00 Germany-wide guard contract only to have to cancel the award in response to two protests.).

[5] See Federal Acquisition Regulation (FAR) 15.000 (2002) for the applicability of Part 15.

[6] Memorandum from Administrator for Federal Procurement Pol'y, Office of Mgmt. & Budget, subject: "Myth-Busting": Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process (Feb. 2, 2011), http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/Myth-Busting.pdf [hereinafter Myth-Busting].

[7] CONT. & FISCAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., CONTRACT ATTORNEYS DESKBOOK (2013) [hereinafter CONTRACT ATTORNEYS DESKBOOK].

[8] *Id.* at 45-61.

[9] FAR 15.306 (2002).

[10] The Background section of this article looks into the Rewrite of FAR 15.306 in greater detail.

[11] Ralph C. Nash, Jr. & John Cibinic, Jr., *Postscript: Communications With Offerors Before Establishing a Competitive Range*, 24 NASH & CIBINIC REP. NO. 10, ¶ 47 (Oct. 2010).

[12] *Id.*

of adding time to the procurement schedule.[13] By foregoing these exchanges the government arguably is not obtaining "best value in its purchases."[14] This article is designed to illustrate the differences between the three types of exchanges, specifically "when they occur, their purpose and scope, and whether offerors are allowed to revise their proposals as a result of the exchanges."[15] A contract attorney who knows and can clearly articulate these distinctions will bolster his contracting officer's confidence in engaging with offerors after receipt of proposals. When the contracting officer properly executes them, these exchanges should result in the government obtaining best value for goods and services and also help minimize "issues that could give rise to a bid protest."[16]

This article will use the guard contract scenario above to explore the three types of exchanges authorized under FAR 15.306 and highlight their distinctions. For ease of reference, this article will address these exchanges in the order listed in FAR 15.306.[17] Part II of the article will look at the changes made to FAR 15.306 in 1997 and some of the unintended failures resulting from the rewrite. Part III of the article will examine clarifications under FAR 15.306(a). Part IV of the article will focus on communications under FAR 15.306(b). The article will then explain the contracting officer's establishment of the competitive range under FAR 15.306(c). Part VI will explore discussions under FAR 15.306(d). Finally, Part VII will discuss the government's responsibilities when conducting discussions under FAR 15.306(e).

II. Background

In the 1990s, the government sought to improve the acquisition process by making it more "businesslike."[18] One way the government attempted to achieve this goal was by rewriting FAR Part 15 to "infuse innovative techniques into the source selection process, and facilitate the acquisition of best value."[19] One of the techniques the rewrite encouraged was to have an open exchange between the government and industry in order to ensure the government received the best value in negotiated procurements.[20] "The [r]ewrite's most significant reforms address communications between COs and offerors"[21] throughout the procurement process, and "increase . . . the ability of COs to communicate with offerors"[22] through the use of clarifications, communications, and discussions.

The rewrite expanded the scope of clarifications. It accomplished this by allowing offerors the opportunity to clarify adverse past performance information, which the pre-rewrite FAR 15.306 did not allow.[23] The drafters hoped this expansion would assist those with limited experience in preparing proposals—to include small businesses—"by permitting easy clarification of limited aspects of proposals."[24] In addition to expanding the scope of clarifications, the rewrite also expanded the scope of discussions under FAR 15.306(d)(3).

Federal Acquisition Regulation 15.306(d)(3) now "requires the Government to identify, in addition to significant weaknesses and deficiencies, other aspects of a proposal that could be enhanced materially to improve the offeror's potential for award."[25] This expansion benefits all offerors "because it permits offerors to develop a better understanding of the Government's evaluation of their proposal, and permits them to optimize their potential for award."[26] However, it is important to remember that the scope and extent of discussions are solely a matter of contracting officer discretion.[27] Nonetheless, these two changes were just some of the ways the drafters of the rewrite hoped to increase exchanges between the government and offerors after the receipt of proposals.[28] While the rewrite increased the scope of exchanges, there is academic debate as to whether it accomplished its ultimate goal of increasing exchanges between the government and offerors.

The rewrite "expanded the exchanges of information permitted between COs and offerors during the procurement process;"[29] however, it failed to clearly set forth the distinction between clarifications and discussions within the text.[30] This has resulted in "a system in which participants do not clearly know the legal limits of their behavior and where

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[13] Myth-Busting, *supra* note 6, at 7.

[14] Craig, *supra* note 1, at 675.

[15] U.S. DEP'T OF ARMY, ARMY SOURCE SELECTION SUPPLEMENT (AS3) TO THE DEP'T OF DEF. SOURCE SELECTION PROCEDURES 26 (21 Dec. 2012) [hereinafter AS3].

[16] Myth-Busting, *supra* note 6, at 7.

[17] For ease of reference, FAR 15.306 (2002) is attached. *See infra* Appendix A.

[18] Craig, *supra* note 1, at 661.

[19] Federal Acquisition Regulation, Part 15 Rewrite, Contracting by Negotiation and Competitive Range Determination, 62 Fed. Reg. 51,224 (Sept. 30, 1997) (codified at FAR Part 15) [hereinafter Rewrite].

[20] *Id.*

[21] Craig, *supra* note 1, at 667.

[22] *Id.* at 674.

[23] *Id.* at 668.

[24] Rewrite, *supra* note 19, at 51229.

[25] *Id.*

[26] *Id.*

[27] FAR 15.306(d)(3) (2002).

[28] Craig, *supra* note 1, at 674.

[29] *Id.* at 678.

[30] *Id.* at 667-68.

adjudication on the issues can result in a variety of outcomes for a variety of reasons."[31] This failure has had a chilling effect on contracting officers' willingness to enter into these exchanges, and commentators have called for a new rewrite of FAR 15.306 which would clearly set forth the distinction between clarifications and discussions.

There are at least two recommended changes to the current FAR, which would arguably clarify the distinction between clarifications and discussions. The first recommended change would clearly define clarifications and discussions within the text of the FAR in order to "promote system transparency, integrity and competition."[32] The second recommended change would define the term "proposal."[33] The proponents of this view argued that the rewrite's failure is the result of the drafters not clearly defining what "proposal" means.[34] Both camps have called for another revision to FAR Part 15. "Almost all procurement professionals recognize that the present FAR 15.306 has failed to work as intended. But it's not carved on stone tablets. All that is needed is the will on the part of the members of the FAR councils to get the job done."[35] Until the distinction between clarifications and discussions is clearly established in the FAR, contract attorneys must be able to advise their clients on the differences between the three forms of exchanges FAR 15.306 permits. This article will assist contract attorneys provide effective advice in this area.

III. Clarifications and Award Without Discussions

The Department of Defense Source Selection Procedures[36] encourage the government to enter into discussions with all offerors in the competitive range. The belief is that the government obtains best value for the goods and services it contracts for when it enters into discussions with the most highly rated offerors,[37] and that discussions "afford[] the Government the opportunity to effectively understand and evaluate a proposal and permits industry the opportunity to clearly explain any aspects of a proposal that appear to be deficient, ambiguous, or non-compliant. Such dialogue leads to more efficient, effective and improved source selections."[38] It is for these reasons that "award without discussions shall occur in only limited circumstances."[39] However, this recommendation is not absolute, and FAR 15.306 permits the government to award a contract to an offeror based on its initial offer without any further exchange.[40]

In order for an agency to award a contract to an offeror based on its initial offer, the government must have put all offerors on notice of its intent to award the contract without discussions.[41] The government puts prospective offerors on notice of its intent by including in the solicitation "a statement that the proposals are intended to be evaluated and awarded without discussions, unless discussions are subsequently determined to be necessary."[42] The government's inclusion of standard provision 52.215-1, "instructions to offerors-competitive acquisition" as prescribed in FAR 15.209, "solicitation provisions and contract clauses," satisfies this notice requirement.[43]

This provision is important because it satisfies the notice requirement, and because it "provides incentive to offerors to provide in their initial proposal their best terms from a cost or price and technical standpoint as there may not be an opportunity to revise their proposals."[44] When the proposal contains standard provision 52.215-1, it is even possible for the government to award the contract "to a marginally higher offeror without conducting discussions if the offer of the lowest offeror is so ambiguous that it could not be accepted without discussion."[45] As such, it is clearly in the benefit of the offeror to submit a complete, clear, and well-reasoned proposal because the offeror may not have the chance to revise it before the government makes award.[46] However, the government may afford an offeror the opportunity to clarify certain aspects of its offer before award under FAR 15.306(a).[47]

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[31] *Id.* at 675.

[32] *Id.*

[33] Nash & Cibinic, *supra* note 11.

[34] *Id.*

[35] *Id.*

[36] U.S. DEP'T OF DEF., SOURCE SELECTION PROCEDURES 26 (4 Mar. 2011) [hereinafter SOURCE SELECTION PROCEDURES]; *see also* DFARS 215.306(c) (1998) (recommending contracting officers conduct discussions "for acquisitions with an estimated value of $100 million").

[37] SOURCE SELECTION PROCEDURES, *supra* note 36, at 26.

[38] *Id.* at 25.

[39] *Id.*

[40] FAR 15.306(a)(3) (2002); *see also* FAR 52.215-1(f)(4) (2002).

[41] FAR 15.306(a)(3) (2002).

[42] 1B-9 Government Contracts: Law, Admin. & Proc. § 9.30 (citing to 10 U.S.C. § 2305(b)(4)(A); 41 U.S.C. § 3703; 48 C.F.R. § 15.306(a)(3)).

[43] The Competition in Contracting Act (CICA), 10 U.S.C. §2305(a)(2)(A)(ii)(I) (2006), requires the agency to include its intent with regard to discussions in the solicitation. *See* FAR 15.209(a) (2002), (implementing the CICA provision); *see also* Kiewit Louisiana Company, B-403736, Comp. Gen. Oct. 14, 2010, http://www.gao.gov/assets/400/390273.pdf. For ease of reference, FAR 52.215-1 is attached. *See infra* Appendix B.

[44] SOURCE SELECTION PROCEDURES, *supra* note 36, at 25.

[45] 1B-9 Government Contracts: Law, Admin & Proc § 9.30 (citing SAI Comsystems Corp., B-189407, Comp. Gen. Dec. 19, 1977, http://www.gao.gov/products/451611#mt=e-report.

[46] SOURCE SELECTION PROCEDURES, *supra* note 36, at 25.

[47] FAR 15.306(a)(2) (2002).

Federal Acquisition Regulation 15.306(a) provides the government the opportunity to clarify certain aspects of an offeror's proposal.[48] The government "may, but is not required to"[49] allow offerors "the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor or clerical errors."[50] These limited exchanges are called "clarifications."[51]

Clarifications are defined at FAR 15.306(a)(1) as "limited exchanges, between the Government and offerors, that may occur when award without discussions is contemplated."[52] The distinction between clarifications under FAR 15.306(a) and discussions under FAR 15.306(d) is fact specific and difficult to determine. However, the purpose of the inquiry helps the practitioner determine if the exchanges are clarifications or discussions. Discussions, which can only occur under the procedures at FAR 15.306(d), will be discussed in detail in Section VI of this article.[53]

The GAO and courts have looked at the purpose of the communication to determine whether the exchange constitutes clarification or discussion and have recognized that "if an offeror is given an opportunity to revise its proposal, the agency has engaged in discussions."[54] If the purpose of the exchange is to allow an offeror to clarify or confirm information in its original offer, without affording it the opportunity to revise its offer, that exchange would be a clarification.[55] Generally speaking "discussions, on the other hand, occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror with the opportunity to revise or modify its proposal in some material respect."[56] It should also be noted that the GAO has consistently held "offerors have no automatic right to clarifications regarding proposals."[57]

Referring to the hypothetical discussed earlier, you arrive at your office early Monday morning immediately after physical training, with the hope of reviewing the guard contract file without any distractions. That hope is short-lived as your phone rings as soon as you turn your office light on. It is the contracting officer for the guard contract who asks you, "Have you read my email yet?" You then open your email and find the following:

> Offeror A's proposed price for contract line item (CLIN) 0005 is obviously wrong. Offeror A just misplaced a comma. It should read $16,000.00 and not $1,600.000. The overall price of the contract confirms this error. Can I contact them to confirm the error? We do not have time to enter into discussions, and I only want them to confirm the error and its intended price. I think I can but am reaching out in an abundance of caution.

You remember a GAO case which discussed a similar issue and remember that the government has to explicitly let offerors know whether it intends to award without discussions.[58] Fortunately, you tabbed the clause in your copy of the FAR and look at standard provision 52.215-1. You then confirm that the solicitation contained the clause before going any further.[59] Federal Acquisition Regulation 52.215-1 states the government's intention to award the contract without discussions.[60] This clause is typically found in section L of the solicitation.[61] You next look at the more difficult issue of whether the contracting officer's proposed course of action constitutes clarifications or discussions.

You respond by writing the following email:

> FAR 15.306(a) allows offerors the opportunity to resolve minor clerical errors. Here, you are just confirming that a decimal point is in the wrong position, and that CLIN 0005 should read $16,000.00. You are not giving Offeror A an opportunity to modify or revise its proposal. If

[48] FAR 15.306(a)(1) (2002).

[49] Wolverine Services LLC, B-409906.3; B-409906.5 (Comp. Gen. Oct. 14, 2014), http://www.gao.gov/assets/ 670/666771.pdf.

[50] FAR 15.306(a)(2) (2002). *See also* Environmental Quality Management, Inc., B-402247.2, (Comp. Gen. Mar. 9, 2010), http://www.gao.gov/assets/390/388389.pdf .

[51] FAR 15.306(a)(1) (2002).

[52] *Id.*

[53] Environmental Quality Management, Inc., *supra* note 50, at 5.

[54] Michelle E. Litteken & Luke Levasseur, *When Does an Agency Cross the Line from Clarifications to Discussions?*, MAYER BROWN (Aug. 19, 2014), http://www.meaningfuldiscussions.com/when-does-an-agency-cross-the-line-from-clarifications-to-discussions/.

[55] Environmental Quality Management, Inc., *supra* note 50, at 5.

[56] Pinnacle Solutions, Inc., B-406998, B-406998.2 (Comp. Gen. Oct. 16, 2012), http://www.gao.gov/assets/ 660/650507.pdf. The Government Accountability Office (GAO) and Court of Federal Claims (CFC) have differing standards regarding the classification of exchanges, which go to technical acceptability, which are looked at further in Part VI.

[57] PN&A, Inc., B-406368 (Comp. Gen. Apr. 23, 2012), http://www.gao.gov/assets/600/590355.pdf.

[58] Kiewit Louisiana Company, *supra* note 43.

[59] All contract attorneys should sign up for GAO's email notification system to receive Comptroller General decisions. *See E-mail Updates*, GAO.GOV, http://www.gao.gov/subscribe/index.php, (last visited Jan. 11, 2016).

[60] It is important to also look at all the amendments to the solicitation to confirm no changes were made regarding the Government's intention to award without discussions.

[61] See FAR 15.406-1 (2002), Tab 15-1, setting forth section "L" of the Uniform Contract Format.

> Offeror A tries to change its overall price in any way, we would have a problem. I recommend including language similar to the following in your evaluation notice (EN)[62]: "No other changes to your proposal are allowed, and no such changes will be accepted."

At the end of your e-mail, you say, "As you know, discussions are highly recommended in negotiated procurements. We still have twenty days before the current contract expires, which gives us time to enter into discussions, if you determine them to be necessary."[63] Satisfied you answered the contracting officer's question regarding clarifications, you then turn your attention to FAR 15.306(b) and communications.

IV. Communications With Offerors Before Establishment of the Competitive Range

Federal Acquisition Regulation 15.306(b) allows agencies to hold communications with offerors after the receipt of proposals in order to determine whether or not an offeror should be included in the competitive range.[64] There are two types of offerors with whom the government can enter into communications. The first is the offeror whose "past performance information is the determining factor preventing their proposal from being placed in the competitive range."[65] In this case, the agency is required to hold communications with the offeror.[66] The second is the offeror "whose exclusion from, or inclusion in, the competitive range is uncertain."[67] In this situation, the government is not obligated to enter into communications but may choose to do so.[68] The FAR also allows agencies to enter into communications so as "to enhance the agency's understanding of proposals, allow reasonable interpretation of the proposal, or facilitate the evaluation process."[69] As mentioned above, communications, like clarifications, do not provide an offeror the opportunity to revise its proposal.[70]

It is now Tuesday morning and the contracting officer on the guard contract is waiting outside your office. Before you can even unlock your office door he says,

> Although I was hoping to avoid discussions, it looks like we will have to enter into them because all of the offerors' prices are higher than the independent government cost estimate (IGCE).[71] I wanted to get your thoughts on possibly limiting the competitive range to three offerors. I want to exclude Offerors B and C because I found negative past performance information on the Contractor Performance Assessment Reporting System (CPARS).[72]

You immediately begin to think of what authority may allow the contracting officer to do so, and ask, "Are you trying to exclude them from the competitive range solely because of their negative past performance information? If that is your intent, FAR 15.306 prohibits you from doing so."[73] You also note that after he establishes the competitive range of the most

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[62] Evaluation Notices (ENs) are the contracting officer's "written notification to the offeror for purposes of clarifications, communications, or in support of discussions." SOURCE SELECTION PROCEDURES, *supra* note 36, at 30.

[63] You should always confirm or have the contracting officer confirm the availability of the source selection evaluation board (SSEB) members to review any final proposal revisions (FPRs). While not required, it is best practice to have the same SSEB members review any and all FPRs received after entering discussions.

[64] *See* Firearms Training Sys. v. United States, 41 Fed. Cl. 743 (1998).

[65] FAR 15.306(b)(1)(i) (2002). *See also* Presidio Networked Solutions, Inc., B-408128.33, B-408128.35, B-408128.36, B-408128.50 (Comp. Gen. Oct. 31, 2014), http://www.gao.gov/assets/670/666752.pdf.

[66] *See* Presidio Networked Solutions, Inc., *supra* note 65, at 10.

[67] FAR 15.306(b)(1)(ii) (2002).

[68] *Id. See also* Professional Performance Development Group, Inc., B-408925 (Comp. Gen. Dec. 31, 2013), http://www.gao.gov/assets/670/661730.pdf.

[69] Presidio Networked Solutions, Inc., *supra* note 65, at 10.

[70] FAR 15.306(b)(3) (2002). *See also* Presidio Networked Solutions, Inc., *supra* note 65, at 10 (holding that offerors cannot use communications to "cure proposal deficiencies or material omissions, alter the technical or cost elements of the proposal, and/or otherwise revise the proposal").

[71] *See Department of Defense COR Handbook*, DEFENSE ACQUISITION UNIVERSITY, https://acc.dau.mil/CommunityBrowser.aspx?id=526706 (last visited Jan. 11, 2016).

> The IGCE is the Government's estimate of the resources and projected cost of the resources a contractor will incur in the performance of a contract. These costs include direct costs such as labor, products, equipment, travel, and transportation; indirect costs such as labor overhead, material overhead, and general and administrative (G&A) expenses; and profit or fee (amount above costs incurred to remunerate the contractor for the risks involved in undertaking the contract).

Id.

[72] *Contract Performance Assessment Reporting System (CPARS)*, OFFICE OF THE UNDERSECRETARY OF DEFENSE, http://www.acq.osd.mil/dpap/pdi/eb/cpars.html (last visited Jan. 11, 2016).

> CPARS is a web-enabled application that collects and manages the library of automated Contractor Performance Assessment Reports (CPARs). A CPAR assesses a contractor's performance and provides a record, both positive and negative, on a given contractor during a specific period of time. Each assessment is based on objective facts and supported by program and contract management data, such as cost performance reports, customer comments, quality reviews, technical interchange meetings, financial solvency assessments, construction/production management reviews, contractor operations reviews, functional performance evaluations, and earned contract incentives.

Id.

[73] FAR 15.306(b)(1)(i) (2002).

highly rated offerors, he may be able to further reduce its numbers for reasons of efficiency.[74] The contracting officer agrees with you, saying, "I thought so, but wanted to confirm because we have no room for error here. I will send over the draft ENs, which will afford Offerors B and C the opportunity to address the negative past performance information for your review later today. Thanks." As he turns toward the door you also remind him that FAR 15.306(a)(3) requires him to document his decision to enter into discussions in the contract file.[75]

V. Competitive Range

Federal Acquisition Regulation 15.306(c) requires the procuring contracting officer to establish a competitive range composed of the most highly-rated proposals before entering into discussions with offerors.[76] Simply stated, the "competitive range is the group of offerors with whom the contracting officer will conduct discussions and from whom the agency will seek revised proposals."[77] The contracting officer's decision of which offerors are the most highly rated must be based on all of the evaluation factors contained in the solicitation.[78]

The current "most highly rated" standard articulated in FAR 15.306(c)(1) is considerably different than the pre-rewrite standard of "reasonable chance of being selected for award."[79] Before the rewrite, if there was any doubt as to whether an offeror had a chance of being selected for award, that offer was included in the competitive range.[80] This is no longer the case. The GAO rejected the old presumption of inclusion and held that it does "not read the revised language to require agencies to retain in the competitive range a proposal that the agency reasonably concludes has no realistic prospect of award."[81] The contracting officer even has the ability to further limit the number of offerors in the competitive range for efficiency's sake.

After having evaluated all proposals in accordance with the request for proposals, the contracting officer may "limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals."[82] However, in order to limit the number of highly-rated proposals, the government has to give offerors notice of its right to limit the competitive range. Inclusion of standard provision 52.215-1 satisfies this notice requirement.[83]

The contracting officer has to document this decision to further restrict the competitive range and must consider "the expected dollar value of the award, the complexity of the acquisition and solutions proposed, and the extent of available resources"[84] before making a determination to limit the number of offerors in the competitive range. If the contracting officer is not the source selection authority (SSA) for the procurement, the contracting officer should obtain the SSA's approval of the competitive range.[85] After obtaining the SSA's approval, the contracting officer must clearly articulate his rationale in the competitive range determination and advise offerors of their exclusion where necessary.

Federal Acquisition Regulation 15.503(a)(1) requires the contracting officer to provide written notice to an offeror excluded from the competitive range.[86] Federal Acquisition Regulation 15.503(a)(1) states, "The contracting officer shall notify offerors promptly in writing when their proposals are excluded from the competitive range or otherwise eliminated from the competition. The notice shall state the basis for the determination and that a proposal revision will not be considered."[87] The contracting officer can also eliminate an offeror from the competitive range after discussions. If a contracting officer decides to do so, he must provide written notice to the unsuccessful offerors in accordance with FAR 15.503.[88] The offerors "excluded or otherwise eliminated from the competitive range may request a debriefing (see 15.505 and 15.506)."[89]

Looking back at the hypothetical, your contracting officer calls you and states, "Offeror D's proposal needs a lot of work. In fact, if I include it in the competitive range, it would basically have to submit a whole new proposal in order to be rated acceptable. I think I will exclude them from the competitive range. Thoughts?" You respond by telling the contracting officer that legally he must include only the most highly-rated proposals in the competitive range, and that GAO ordinarily gives great deference to the agency's decision on whether to exclude an offeror from the competitive range. There is judicial precedent to supporting

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[74] JOHN CIBINIC & RALPH C. NASH, FORMATION OF GOVERNMENT CONTRACTS 871 (George Washington University, 3d ed. 1998).

[75] FAR 15.306(a)(3) (2002). *See also* FAR 52.215-1 (2002).

[76] FAR 15.306(c) (2002). *See also* AS3, *supra* note 15, at 27.

[77] CONTRACT ATTORNEYS DESKBOOK, *supra* note 7, at 8-51.

[78] *Id.*

[79] WALTER STARK ET AL., 1-4 FEDERAL CONTRACT MANAGEMENT ¶ 4.06 (Matthew Bender & Co., Inc., 2013).

[80] *Id.*

[81] *Id.*

[82] AS3, *supra* note 15, at 28.

[83] FAR 52.215-1(f)(4) (2002).

[84] AS3, *supra* note 15, at 28.

[85] *Id.*

[86] FAR 15.503(a)(1) (2002).

[87] FAR 15.503(a) (2002).

[88] *Id.* at (c)(3).

[89] *Id.* at (c)(4).

his position to exclude.[90] You remind him to document your decision to exclude.

The contracting officer agrees with your recommendation and includes the four most highly-rated offerors within the competitive range. You reviewed his competitive range determination and are standing by to review the new discussion ENs. While waiting for the ENs, you read the last ten GAO decisions pertaining to the Department of Defense and discussions under FAR 15.306(d).[91]

VI. Exchanges With Offerors After Establishment of the Competitive Range

Federal Acquisition Regulation 15.306(d) controls the exchange of information between the government and all offerors within the competitive range.[92] As briefly discussed in Part II, it is often difficult to determine whether the government's exchange with an offeror constitutes clarifications or discussions. This section will further explore and clarify the distinction between clarifications and discussions.

Contract attorneys must know when clarifications cross over into discussions. When the government enters into discussions with one offeror, it must enter into discussions with all offerors within the competitive range.[93] Failure to conduct meaningful discussion with all offerors within the competitive range leaves the government vulnerable to protest.[94] The results of holding discussions with only one offeror can be devastating. For example, the GAO recently recommended the government cancel an award and reopen the procurement to "afford all of the competitors an opportunity to revise their quotations."[95] The first step to avoid such a situation is to determine whether or not the exchange constitutes discussions.

The GAO and the Court of Federal Claims (CFC) have long held that discussions occur when the government affords an offeror the opportunity to revise or modify its proposal.[96] This rule is often referred to as the "acid test."[97] The "acid test for deciding whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise its proposal."[98] However, there are situations that are not as clear cut. For example, in situations "when either (i)[sic] questions (often called 'clarifications' by the agency) seek information that is necessary to determine technical acceptability, or (2) the agency seeks a substantial amount of 'clarify[ing]' information and an offeror's response approaches (or crosses) the line of changing the proposal" the GAO and CFC disagree on whether the exchanges constitute discussions.[99]

A. When Exchanges Constitute Discussions

It may not always be obvious when an exchange constitutes a discussion. "Decisions from the GAO and CFC reveal that the two protest forums apply the FAR provisions differently, with the CFC appearing to embrace a more substantial exchange of information that can still be characterized as clarifications."[100] This is highlighted in how the GAO and CFC view exchanges between the government and an offeror in which the government seeks information to determine the technical acceptability of an offeror's proposal.

> [The] GAO has ruled that, when an agency uses information from an offeror after submission of a proposal to determine the technical acceptability of a proposal "discussions" occurred.[101] In contrast, CFC decisions generally find that discussions occur only when an offeror is given the opportunity to revise its proposal, and the court is less likely to characterize the provision of information related to a technical acceptability determination as discussions.[102]

Contract attorneys must know this distinction and advise their contracting officers accordingly because many contracting officers think gathering information of technical acceptability always constitute discussions. This belief is most likely based on the fact that contracting officers are generally more versed in GAO decisions than CFC decisions. In addition to the different standard GAO and CFC employ regarding technical acceptability exchanges, they also

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[90] CONTRACT ATTORNEYS DESKBOOK, *supra* note 7, at 8-52.

[91] Search of Last Ten GAO Decisions for Department of Defense and FAR 15.306(d), GAO.GOV, http://gao.gov (follow "Legal Decisions & Bid Protests" hyperlink; then follow "Search" hyperlink; then enter "15.306(d)" in the search bar and filter results by clicking "Department of Defense" under "Agency").

[92] FAR 15.306(d) (2002).

[93] *Id.* at (d)(1).

[94] Presidio Networked Solutions, Inc., *supra* note 65, at 8.

[95] Standard Communications, Inc., B-406021 (Comp. Gen. Jan. 24, 2014), http://www.gao.gov/assets/ 590/588569.pdf.

[96] Litteken & Levasseur, *supra* note 54.

[97] Evergreen Helicopters of Alaska, Inc., B-409327.3 (Comp. Gen. Apr. 14, 2014), http://www.gao.gov/assets/ 670/662588.pdf.

[98] *Id. See also* Companion Data Services, LLC, B410022, B-410022.2 (Comp. Gen. Oct. 9, 2014), http://www.gao.gov/assets/670/666661.pdf; Litteken & Levasseur, *supra* note 54.

[99] Litteken & Levasseur, *supra* note 54.

[100] *Id.*

[101] *Id.*

[102] *Id.*

disagree on the deference which should be given to the government's classification of the exchange.[103]

B. Classification of the Exchange

The CFC gives greater deference to the government's characterization of an exchange than GAO.[104] The GAO looks to the actions of the parties as opposed to the government's characterization of the exchange to determine if discussions occurred.[105] "In determining whether exchanges between the government and offerors are clarifications or discussions, the agency's characterization of the exchange is not controlling, as it is the actions of the parties that determine whether discussions have been held."[106] The CFC generally gives the agency's characterization of the exchange greater deference, holding "in close cases, it is well-established that the government's classification of a particular communication as a clarification or discussion 'is entitled to deference from the court,' as long as that classification is permissible and reasonable."[107]

Looking back at our hypothetical, you receive an email from the contracting officer with a draft EN, labeled "clarifications." The EN reads in pertinent part, "Offeror E, please provide the resumes for your four proposed shift supervisors as required by section L of the solicitation." You remember this requirement from your review of the solicitation. You call the contracting officer and ask him, "Does the purpose of these resumes go to the technical acceptability of Offeror E? If so, the GAO would most likely determine this exchange to be discussions. Therefore, I recommend you establish the competitive range and conduct meaningful discussions with all offerors within the competitive range." The contracting officer sends you an email stating, "Great catch. My contract specialist typed the EN and I did not review it before sending over for legal review. It should have been labeled 'discussions.' I will hold off and send you each offeror's ENs in one email."

Although the GAO and CFC take differing approaches as to what constitute discussions and how much deference should be given to an agency's classification of an exchange, both agree on the government's responsibility when it enters into discussions as set forth in FAR 15.306(d)(3).[108] Federal Acquisition Regulation 15.306(d)(3) provides the minimum requirements the government must satisfy when it enters into discussions with offerors in the competitive range.[109] Therefore, "it is a fundamental precept of negotiated procurements that discussions, when conducted, must be meaningful; that is, discussions must identify deficiencies and significant weaknesses in each offeror's proposal that could reasonably be addressed to materially enhance the offeror's potential for receiving award."[110] For this reason, the government must tailor the ENs to each offeror's proposal.[111] However, the government need not identify each and every deficiency in an offeror's proposal.[112]

All that is required of the government when it enters into discussions with an offeror is to "lead the contractor into areas requiring improvement."[113] Contract attorneys should encourage their contracting officers to exceed this standard[114] so as to achieve the purpose of discussions; namely, "maximize the Government's ability to obtain best value, based on the requirement and the evaluation factors set forth in the solicitation."[115] In order to accomplish this, the contracting attorney must be familiar with the evaluation board's findings and with each offeror's proposal to help the contracting officer shape the ENs. Having knowledge of the evaluation board's findings and each offeror's proposal also helps the contract attorney ensure that the government does not engage in the activities prohibited in FAR 15.306(e), limit of exchanges. Federal Acquisition Regulation 15.306(e) is designed to ensure the government does not favor one offeror over another. Simply stated, the government should treat all offerors fairly.

VII. Limits On Exchanges

"Fair treatment of offerors is a cornerstone of effective competition. Thus, ensuring that all offerors are treated fairly

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[103] The EN will always spell out under which authority the contracting officer is sending the EN to the offeror.

[104] Litteken & Levasseur, *supra* note 54.

[105] *Id.*

[106] Evergreen Helicopters of Alaska, Inc., *supra* note 97 (quoting Kardex Remstar, LLC, B-409030 (Comp. Gen. Jan. 17, 2014), http://www.gao.gov/assets/670/660392.pdf).

[107] Litteken & Levasseur, *supra* note 54.

[108] FAR 15.306(d)(3) (2002).

[109] *Id.*

[110] Theodore Watson, *Meaningful Discussions and GAO Protest Decisions*, WATSON & ASSOCIATES, LLC (Jan. 24, 2014), http://blog.theodorewatson.com/meaningful-discussions-gao-bid-protest/. *See also* FAR 15.001 (2002) ("Deficiency" is "a material failure of a proposal to meet a Government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level," and "weakness" as a "flaw in the proposal that increases the risk of unsuccessful contract performance. A "significant weakness" in the proposal is a flaw that appreciably increases the risk of unsuccessful contract performance.).

[111] FAR 15.306(d)(1) (2002).

[112] CONTRACT ATTORNEYS DESKBOOK, *supra* note 7, at 8-56.

[113] *Id.*

[114] It is important for you to ensure that the offeror is able to understand its deficiencies and significant weaknesses. If you are having trouble understanding, it is likely the offeror will too.

[115] FAR 15.306(d)(2). *See also* CONTRACT ATTORNEYS DESKBOOK, *supra* note 7, at 8-56.

is a major concern when conducting negotiations."[116] Federal Acquisition Regulation 15.306(e) seeks to ensure fair treatment of offerors by limiting the conduct of government personnel involved in the acquisition.[117] Contract attorneys must know these limitations so that they may identify them and take corrective action when necessary.[118]

Referring to the hypothetical, you receive a phone call from the contracting officer at 1630 on Friday afternoon. He tells you that he is finishing the ENs for all the offerors in the competitive range. During your review, you notice one EN contains the following language: "Offeror C, the government has determined your overall price to be too high. It is 23% greater than the IGCE and 15% higher than the next lowest offeror." Fortunately, the contracting officer is also in his office so you call him and tell him, "This language appears to be in violation of FAR 15.306(e) because we do not address the IGCE with any of the other offerors and because we appear to have revealed another officer's price. While FAR 15.306(e) allows us to disclose our IGCE, we must disclose it to all offerors."[119] The contracting officer makes your recommended changes and sends them back for one last legal review. After reading through the ENs, you are confident the government's exchanges with the offerors are meaningful and fair and approve the ENs for release. The ENs set 1300 on November 24, 2014, as the date and time for the offerors to submit their final proposal revisions.[120]

VIII. Conclusion[121]

High-dollar, negotiated procurements are always ripe for protest.[122] Knowing the distinction between the different forms of exchanges authorized under FAR 15.306 and being able to advise your contracting officers on these distinctions will reduce the likelihood of sustainable protest issues while achieving best value for the government.[123] This is the end-result all contract professionals should strive for and the area where contract attorneys really can be value added to the procurement process.

Clarifications under FAR 15.306(a) are the most limited of the three types of exchanges between the government and an offeror when the government intends to award without discussions.[124] They are designed to allow offerors the opportunity to clarify certain aspects of their proposals or to resolve minor clerical errors.[125] Examples of clarifications include the relevance of an offeror's past performance, adverse past performance information, and the resolution of minor clerical errors.[126] Clarifications are similar to communications in that they do not afford the offeror the opportunity to revise its proposal.[127]

Communications occur when the government contemplates award after discussions.[128] Communications lead to the establishment of the competitive range which is made up of the most highly-rated proposals and must be established before the government can enter discussions with the offerors in the competitive range.[129] Communications do not allow the offerors to revise their proposals.[130] In contrast, discussions are the only form of exchange between the government and offerors after receipt of proposals where offerors are allowed to revise their proposals.[131]

Discussions occur after the establishment of the competitive range and are the most detailed of the exchanges allowed under FAR Part 15 because they allow an offeror to revise its proposal.[132] Discussions "allow the offeror an opportunity to revise its proposal so that the government obtains the best value, based on the requirement and applicable evaluation factors."[133] It is important to remember that the government has the responsibility to enter into meaningful discussions with all those within the competitive range.[134] As such, the government must craft ENs "tailored to each offeror's proposal"[135] while being careful not to engage in the activities prohibited in FAR 15.306(f).

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[116] CIBINIC & NASH, *supra* note 74, at 899.

[117] FAR 15.306(e) (2002).

[118] The procedures for remedying a violation of FAR 15.306(e) are beyond the scope of this article. *But see* CIBINIC & NASH, *supra* note 74, at 904-06.

[119] FAR 15.306(e) (2002).

[120] When setting a date and time for which final proposal revisions must be submitted, it is always a good practice point to make it a time certain (e.g. "1300 Eastern Standard Time"). It is best to avoid times which can confuse an offeror (e.g. "1200") because it is unclear as to whether we are referring to noon or midnight.

[121] AS3, *supra* note 15, at 26 (containing a useful chart explaining the distinctions between clarifications, communications, and discussions, which is attached); *see infra* Appendix C.

[122] Myth-Busting, *supra* note 6, at 7.

[123] *Id.*

[124] AS3, *supra* note 15, at 26.

[125] FAR 15.306(a). *See also* AS3, *supra* note 15, at 26.

[126] AS3, *supra* note 15, at 26.

[127] *Id.*

[128] *Id.*

[129] FAR 15.306(b) (2002). *See also* AS3, *supra* note 15, at 26.

[130] AS3, *supra* note 15, at 26.

[131] FAR 15.306(d) (2002).

[132] *Id.*

[133] AS3, *supra* note 15, at 26.

[134] *Id.*

[135] FAR 15.306(d)(1) (2002).

Regarding the hypothetical discussed throughout this article, it is now November 28th, and the contracting officer briefs the commander that (1) all four offerors in the competitive range submitted timely final proposal revisions, (2) the SSEB met and reviewed all the final proposal revisions and recommended award to Offeror A, (3) he concurs with their recommendation, and (4) he plans to award the guard contract to Offeror A today.

Your brigade commander turns to you and asks, "Are we going to get any protests from this award?" You tell your boss,

> Sir, procurements like this one are always subject to protest, due to their dollar value. However, the contracting officer and his team did a great job. Their willingness to enter into discussions certainly helped reduce the chances of a sustainable protest, and helped the government receive best value, as demonstrated by the revised prices, which are in line with our IGCE. I am confident we can win any protest."[136]

Satisfied with your answer, the commander turns to the contracting officer and says, "Great work, now go award the contract."

[136] Myth-Busting, *supra* note 6, at 7.

Appendix A. FAR 15.306 (2002) — Exchanges With Offerors After Receipt of Proposals.

(a) *Clarifications and award without discussions.*

(1) Clarifications are limited exchanges, between the Government and offerors, that may occur when award without discussions is contemplated.

(2) If award will be made without conducting discussions, offerors may be given the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor or clerical errors.

(3) Award may be made without discussions if the solicitation states that the Government intends to evaluate proposals and make award without discussions. If the solicitation contains such a notice and the Government determines it is necessary to conduct discussions, the rationale for doing so shall be documented in the contract file (see the provision at 52.215-1) (10 U.S.C. 2305(b)(4)(A)(ii) and 41 U.S.C. 3703(a)(2)).

(b) *Communications with offerors before establishment of the competitive range.* Communications are exchanges, between the Government and offerors, after receipt of proposals, leading to establishment of the competitive range. If a competitive range is to be established, these communications—

(1) Shall be limited to the offerors described in paragraphs (b)(1)(i) and (b)(1)(ii) of this section and—

(i) Shall be held with offerors whose past performance information is the determining factor preventing them from being placed within the competitive range. Such communications shall address adverse past performance information to which an offeror has not had a prior opportunity to respond; and

(ii) May only be held with those offerors (other than offerors under paragraph (b)(1)(i) of this section) whose exclusion from, or inclusion in, the competitive range is uncertain;

(2) May be conducted to enhance Government understanding of proposals; allow reasonable interpretation of the proposal; or facilitate the Government's evaluation process. Such communications shall not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal. Such communications may be considered in rating proposals for the purpose of establishing the competitive range;

(3) Are for the purpose of addressing issues that must be explored to determine whether a proposal should be placed in the competitive range. Such communications shall not provide an opportunity for the offeror to revise its proposal, but may address—

(i) Ambiguities in the proposal or other concerns (e.g., perceived deficiencies, weaknesses, errors, omissions, or mistakes (see 14.407)); and

(ii) Information relating to relevant past performance; and

(4) Shall address adverse past performance information to which the offeror has not previously had an opportunity to comment.

(c) *Competitive range.*

(1) Agencies shall evaluate all proposals in accordance with 15.305(a), and, if discussions are to be conducted, establish the competitive range. Based on the ratings of each proposal against all evaluation criteria, the contracting officer shall establish a competitive range comprised of all of the most highly rated proposals, unless the range is further reduced for purposes of efficiency pursuant to paragraph (c)(2) of this section.

(2) After evaluating all proposals in accordance with 15.305(a) and paragraph (c)(1) of this section, the contracting officer may determine that the number of most highly rated proposals that might otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted. Provided the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency (see 52.215-1(f)(4)), the contracting officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals (10 U.S.C. 2305(b)(4) and 41 U.S.C. 3703).

(3) If the contracting officer, after complying with paragraph (d)(3) of this section, decides that an offeror's proposal should no longer be included in the competitive range, the proposal shall be eliminated from consideration for award. Written notice of this decision shall be provided to unsuccessful offerors in accordance with 15.503.

(4) Offerors excluded or otherwise eliminated from the competitive range may request a debriefing (see 15.505 and 15.506).

(d) *Exchanges with offerors after establishment of the competitive range.* Negotiations are exchanges, in either a competitive or sole source environment, between the Government and offerors, that are undertaken with the intent of allowing the offeror to revise its proposal. These negotiations may include bargaining. Bargaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract. When negotiations are conducted in a competitive acquisition, they take place after establishment of the competitive range and are called discussions.

(1) Discussions are tailored to each offeror's proposal, and must be conducted by the contracting officer with each offeror within the competitive range.

(2) The primary objective of discussions is to maximize the Government's ability to obtain best value, based on the requirement and the evaluation factors set forth in the solicitation.

(3) At a minimum, the contracting officer must, subject to paragraphs (d)(5) and (e) of this section and 15.307(a), indicate to, or discuss with, each offeror still being considered for award, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond. The contracting officer also is encouraged to discuss other aspects of the offeror's proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award. However, the contracting officer is not required to discuss every area where the proposal could be improved. The scope and extent of discussions are a matter of contracting office judgment.

(4) In discussing other aspects of the proposal, the Government may, in situations where the solicitation stated that evaluation credit would be given for technical solutions exceeding any mandatory minimums, negotiate with offerors for increased performance beyond any mandatory minimums, and the Government may suggest to offerors that have exceeded any mandatory minimums (in ways that are not integral to the design), that their proposals would be more competitive if the excesses were removed and the offered price decreased.

(5) If, after discussions have begun, an offeror originally in the competitive range is no longer considered to be among the most highly rated offerors being considered for award, that offeror may be eliminated from the competitive range whether or not all material aspects of the proposal have been discussed, or whether or not the offeror has been afforded an opportunity to submit a proposal revision (see 15.307(a) and 15.503(a)(1)).

(e) *Limits on exchanges.* Government personnel involved in the acquisition shall not engage in conduct that—

(1) Favors one offeror over another;

(2) Reveals an offeror's technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror's intellectual property to another offeror;

(3) Reveals an offeror's price without that offeror's permission. However, the contracting officer may inform an offeror that its price is considered by the Government to be too high, or too low, and reveal the results of the analysis supporting that conclusion. It is also permissible, at the Government's discretion, to indicate to all offerors the cost or price that the Government's price analysis, market research, and other reviews have identified as reasonable (41 U.S.C.2102 and 2107);

(4) Reveals the names of individuals providing reference information about an offeror's past performance; or

(5) Knowingly furnishes source selection information in violation of 3.104 and 41 U.S.C. 2102 and 2107.

Appendix B. FAR 52.215-1 — Instructions to Offerors—Competitive Acquisition (Jan 2004)

(a) *Definitions.* As used in this provision—

"Discussions" are negotiations that occur after establishment of the competitive range that may, at the Contracting Officer's discretion, result in the offeror being allowed to revise its proposal.

"In writing," "writing," or "written" means any worded or numbered expression which can be read, reproduced, and later communicated, and includes electronically transmitted and stored information.

"Proposal modification" is a change made to a proposal before the solicitation's closing date and time, or made in response to an amendment, or made to correct a mistake at any time before award.

"Proposal revision" is a change to a proposal made after the solicitation closing date, at the request of or as allowed by a Contracting Officer as the result of negotiations.

"Time," if stated as a number of days, is calculated using calendar days, unless otherwise specified, and will include Saturdays, Sundays, and legal holidays. However, if the last day falls on a Saturday, Sunday, or legal holiday, then the period shall include the next working day.

(b) *Amendments to solicitations.* If this solicitation is amended, all terms and conditions that are not amended remain unchanged. Offerors shall acknowledge receipt of any amendment to this solicitation by the date and time specified in the amendment(s).

(c) *Submission, modification, revision, and withdrawal of proposals.*

(1) Unless other methods (e.g., electronic commerce or facsimile) are permitted in the solicitation, proposals and modifications to proposals shall be submitted in paper media in sealed envelopes or package (i) addressed to the office specified in the solicitation, and (ii) showing the time and date specified for receipt, the solicitation number, and the name and address of the offeror. Offerors using commercial carriers should ensure that the proposal is marked on the outermost wrapper with the information in paragraphs (c)(1)(i) and (c)(1)(ii) of this provision.

(2) The first page of the proposal must show—

(i) The solicitation number;

(ii) The name, address, and telephone and facsimile numbers of the offeror (and electronic address if available);

(iii) A statement specifying the extent of agreement with all terms, conditions, and provisions included in the solicitation and agreement to furnish any or all items upon which prices are offered at the price set opposite each item;

(iv) Names, titles, and telephone and facsimile numbers (and electronic addresses if available) of persons authorized to negotiate on the offeror's behalf with the Government in connection with this solicitation; and

(v) Name, title, and signature of person authorized to sign the proposal. Proposals signed by an agent shall be accompanied by evidence of that agent's authority, unless that evidence has been previously furnished to the issuing office.

(3) *Submission, modification, revision, and withdrawal of proposals.*

(i) Offerors are responsible for submitting proposals, and any modification, or revisions, so as to reach the Government office designated in the solicitation by the time specified in the solicitation. If no time is specified in the solicitation, the time for receipt is 4:30 p.m., local time, for the designated Government office on the date that proposal or revision is due.

(ii)(A) Any proposal, modification, or revision received at the Government office designated in the solicitation after the exact time specified for receipt of offers is "late" and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late offer would not unduly delay the acquisition; and —

(1) If it was transmitted through an electronic commerce method authorized by the solicitation, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals; or

(2) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of offers and was under the Government's control prior to the time set for receipt of offers; or

(3) It is the only proposal received.

(B) However, a late modification of an otherwise successful proposal that makes its terms more favorable to the Government, will be considered at any time it is received and may be accepted.

(iii) Acceptable evidence to establish the time of receipt at the Government installation includes the time/date stamp of that installation on the proposal wrapper, other documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel.

(iv) If an emergency or unanticipated event interrupts normal Government processes so that proposals cannot be received at the office designated for receipt of proposals by the exact time specified in the solicitation, and urgent Government requirements preclude amendment of the solicitation, the time specified for receipt of proposals will be deemed to be extended to the same time of day specified in the solicitation on the first work day on which normal Government processes resume.

(v) Proposals may be withdrawn by written notice received at any time before award. Oral proposals in response to oral solicitations may be withdrawn orally. If the solicitation authorizes facsimile proposals, proposals may be withdrawn via facsimile received at any time before award, subject to the conditions specified in the provision at 52.215-5, Facsimile Proposals. Proposals may be withdrawn in person by an offeror or an authorized representative, if the identity of the person requesting withdrawal is established and the person signs a receipt for the proposal before award.

(4) Unless otherwise specified in the solicitation, the offeror may propose to provide any item or combination of items.

(5) Offerors shall submit proposals in response to this solicitation in English, unless otherwise permitted by the solicitation, and in U.S. dollars, unless the provision at FAR 52.225-17, Evaluation of Foreign Currency Offers, is included in the solicitation.

(6) Offerors may submit modifications to their proposals at any time before the solicitation closing date and time, and may submit modifications in response to an amendment, or to correct a mistake at any time before award.

(7) Offerors may submit revised proposals only if requested or allowed by the Contracting Officer.

(8) Proposals may be withdrawn at any time before award. Withdrawals are effective upon receipt of notice by the Contracting Officer.

(d) *Offer expiration date.* Proposals in response to this solicitation will be valid for the number of days specified on the solicitation cover sheet (unless a different period is proposed by the offeror).

(e) *Restriction on disclosure and use of data.* Offerors that include in their proposals data that they do not want disclosed to the public for any purpose, or used by the Government except for evaluation purposes, shall —

(1) Mark the title page with the following legend:

This proposal includes data that shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed — in whole or in part — for any purpose other than to evaluate this proposal. If, however, a contract is awarded to this offeror as a result of — or in connection with — the submission of this data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the resulting contract. This restriction does not limit the Government's right to use information contained in this data if it is obtained from another source without restriction. The data subject to this restriction are contained in sheets [insert numbers or other identification of sheets]; and

(2) Mark each sheet of data it wishes to restrict with the following legend:

Use or disclosure of data contained on this sheet is subject to the restriction on the title page of this proposal.

(f) *Contract award.*

(1) The Government intends to award a contract or contracts resulting from this solicitation to the responsible offeror(s) whose proposal(s) represents the best value after evaluation in accordance with the factors and subfactors in the solicitation.

(2) The Government may reject any or all proposals if such action is in the Government's interest.

(3) The Government may waive informalities and minor irregularities in proposals received.

(4) The Government intends to evaluate proposals and award a contract without discussions with offerors (except clarifications as described in FAR 15.306(a)). Therefore, the offeror's initial proposal should contain the offeror's best terms from a cost or price and technical standpoint. The Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary. If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals.

(5) The Government reserves the right to make an award on any item for a quantity less than the quantity offered, at the unit cost or prices offered, unless the offeror specifies otherwise in the proposal.

(6) The Government reserves the right to make multiple awards if, after considering the additional administrative costs, it is in the Government's best interest to do so.

(7) Exchanges with offerors after receipt of a proposal do not constitute a rejection or counteroffer by the Government.

(8) The Government may determine that a proposal is unacceptable if the prices proposed are materially unbalanced between line items or subline items. Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more contract line items is significantly overstated or understated as indicated by the application of cost or price analysis techniques. A proposal may be rejected if the Contracting Officer determines that the lack of balance poses an unacceptable risk to the Government.

(9) If a cost realism analysis is performed, cost realism may be considered by the source selection authority in evaluating performance or schedule risk.

(10) A written award or acceptance of proposal mailed or otherwise furnished to the successful offeror within the time specified in the proposal shall result in a binding contract without further action by either party.

(11) If a post-award debriefing is given to requesting offerors, the Government shall disclose the following information, if applicable:

(i) The agency's evaluation of the significant weak or deficient factors in the debriefed offeror's offer.

(ii) The overall evaluated cost or price and technical rating of the successful and the debriefed offeror and past performance information on the debriefed offeror.

(iii) The overall ranking of all offerors, when any ranking was developed by the agency during source selection.

(iv) A summary of the rationale for award.

(v) For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror.

(vi) Reasonable responses to relevant questions posed by the debriefed offeror as to whether source-selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the agency.

(End of Provision)

Alternate I (Oct 1997). As prescribed in 15.209(a)(1), substitute the following paragraph (f)(4) for paragraph (f)(4) of the basic provision:

(f)(4) The Government intends to evaluate proposals and award a contract after conducting discussions with offerors whose proposals have been determined to be within the competitive range. If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. Therefore, the offeror's initial proposal should contain the offeror's best terms from a price and technical standpoint.

Alternate II (Oct 1997). As prescribed in 15.209(a)(2), add a paragraph (c)(9) substantially the same as the following to the basic clause:

(c)(9) Offerors may submit proposals that depart from stated requirements. Such proposals shall clearly identify why the acceptance of the proposal would be advantageous to the Government. Any deviations from the terms and conditions of the solicitation, as well as the comparative advantage to the Government, shall be clearly identified and explicitly defined. The Government reserves the right to amend the solicitation to allow all offerors an opportunity to submit revised proposals based on the revised requirements.

- ***Types of Exchanges***

After receipt of proposals, there are three types of exchanges that may occur between the Government and offerors -- clarifications, communications and negotiations or discussions. They differ on when they occur, their purpose and scope, and whether offerors are allowed to revise their proposals as a result of the exchanges. All SSEB exchanges must be accomplished through the use of evaluation notices (ENs). Figure 3-5 provides a side-by-side comparison of the three types of exchanges.

Figure 3-5
Comparison of Types of Exchanges (After Receipt of Proposals)

	Clarifications	Communications	Negotiations/Discussions
When They Occur	Limited exchanges, between the Government and offerors when award WITHOUT discussions is contemplated	When award WITH discussions is contemplated -- prior to establishing the competitive range May only be held with those offerors (other than offerors under FAR 15.306 (b)(1)(i)) whose exclusion from the competitive range is uncertain.	After establishing the competitive range **Note**: The term "negotiations" applies to both competitive and non-competitive acquisitions. In competitive acquisitions, negotiations are also called discussions.
Scope of the Exchanges	Most limited of the three types of exchanges	Limited; similar to fact finding	Most detailed and extensive
Purpose	To clarify certain aspects of proposals	To enhance the Government's understanding of the proposal by addressing issues that must be explored to allow a reasonable interpretation of the offeror's proposal to determine whether a proposal should be placed in the competitive range	To allow the offeror an opportunity to revise its proposal so that the Government obtains the best value, based on the requirement and applicable evaluation factors
Examples of Topics of Exchanges	• Relevance of an offeror's past performance • Adverse past performance information • Resolution of minor or clerical errors.	• Ambiguities or other concerns (e.g., perceived deficiencies, weaknesses, errors, omissions, or mistakes) • Relevance of an offeror's past performance • Adverse past performance information	Examples of potential discussion topics include the identification of all evaluated deficiencies, significant weaknesses, weaknesses, and any adverse past performance information to which the offeror has not yet had an opportunity to respond.
Are Resultant Proposal Revisions Allowed?	No	No	Yes

ARMY SOURCE SELECTION SUPPLEMENT (December 21, 2012) 26

September Grasshoppers:
Why Federal Agencies Spend so Much at the End of the Fiscal Year

Captain Charles Reiter[*]

In a field one summer's day a Grasshopper was hopping about, chirping and singing to its heart's content. An Ant passed by, bearing along with great toil an ear of corn he was taking to the nest. "Why bother about winter?" said the Grasshopper; "[W]e have got plenty of food at present." But the Ant went on its way and continued its toil. When the winter came, the Grasshopper had no food, and found itself dying of hunger, while it saw the ants distributing every day corn and grain from the stores they had collected in the summer. Then the Grasshopper knew: "It is best to prepare for the days of necessity."[1]

I. Introduction

Aesop's fable of the ant and the grasshopper illustrates how safeguarding surplus resources, as the ant did, leads to increased security in times of future need. Although this may be prudent behavior for most economic decisions, the federal budget process does not reward ant-like behavior.[2] In fact, this behavior is disincentivized.[3]

For federal agencies that operate on annually expiring budgets, the month of September signals the end of the current fiscal year and the approach of a new budget. If an agency does not spend all of its funds by the end of September, Congress may reduce its future baseline budget.[4] The potential reduction of future budget baselines acts as a disincentive for agency budget surpluses.[5] Because of this disincentive, Aesop's intended lesson does not offer much guidance for federal agencies. Predictably every September, federal agencies act like grasshoppers and spend whatever may be left of their budgets.[6]

This article argues that disincentives for budget surpluses, in conjunction with the policy of expiring funds, promotes inefficient spending by federal agencies each September. Though Aesop's fable emerges from a world distinct from the world of federal spending, understanding the causes of both ant-like and grasshopper-like economic behaviors gives perspective to the problem of wasteful year-end spending by federal agencies. The discussion examines the current budget process through the lens of economic psychology, highlighting parallels between the fraud triangle theory[7] and inefficient federal spending. Finally, the article shifts to suggest several possible ways to address the issue while evaluating the merits of each. While there are different types of fraud, waste, and abuse that can occur in federal spending, the scope of the following discussion is limited to one particular type: wasteful expenditures that would not have occurred but for the pressures put on otherwise responsible federal employees by the policy of expiring federal funds.

II. Background

At the start of each calendar year, the executive branch collects from each federal agency a budget proposal for the next fiscal year. The President uses the budget proposals from each agency to create a single federal budget proposal for the

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[1] AESOP RETOLD BY JOSEPH JACOBS, THE HARVARD CLASSICS, vol. 17, part 1, at 36 (Charles W. Eliot ed., New York: P.F. Collier & Son, 1909–14) (c. 6th century B.C.E.).

[2] *See, e.g.*, D. ANDREW AUSTIN, CONG. RESEARCH SERV., RL34424, THE BUDGET CONTROL ACT AND TRENDS IN DISCRETIONARY SPENDING 2 (2014); Jeffrey B. Liebman & Neale Mahoney, *Do Expiring Budgets Lead to Wasteful Year-End Spending? Evidence from Federal Procurement* (Nat'l Bureau of Econ. Research, Working Paper No. 1948, 2013); Charles J. Whalen, *Should the US Government Adopt a Biennial Budget?* 2 (The Levy Inst., Working Paper No. 128, 1994), http://www.levyinstitute.org/pubs/wp128.pdf (discussing wasteful spending in federal government).

[3] *See generally* Michael F. McPherson, An Analysis of Year-End Spending and the Feasibility of a Carryover Incentive for Federal Agencies (Dec. 2007) (MBA Professional Report, Naval Postgraduate Sch.), http://www.dtic.mil/dtic/tr/fulltext/u2/a475973.pdf (supporting the idea that the federal budget process creates disincentives for saving and incentives for spending).

[4] Memorandum from Office of the Sec'y of Def. to Sec'ys of the Military Dep'ts, et. al., subject: U.S. Department of Defense Management of Unobligated Funds; Obligation Rate Tenets 1 (10 Sep. 2012), http://www.scribd.com/doc/152945898/Defense-Department-memo-on-management-of-unobligated-funds [hereinafter DoD Unobligated Funds Memo].

[5] *See* McPherson, *supra* note 3.

[6] *See, e.g.*, David Fahrenthold, *As Congress Fights over the Budget, Agencies Go on Their 'Use It or Lose It' Shopping Spree*, WASHINGTON POST (Sept. 28, 2013), http://wpo.st/uWu80; Matthew Sabas, *'Use It or Lose It' Shows There's More Room to Cut Spending*, HERITAGE FOUNDATION (Nov. 14, 2013), http://blog.heritage.org/2013/11/14/use-lose-shows-theres-room-cut-spending/.

[7] *See discussion infra* Part III.A (discussing Donald Cressy development of the fraud triangle theory to explain why employees commit financial crimes in the workplace).

entire executive branch, and submits the proposal to Congress for review and adjustment before it can become law.[8] Not long after the President sends the overall budget proposal to Congress, agencies submit justifications of their individual budget requests to Congress and must provide detailed accounts of past spending—including records of unobligated funds and budget surpluses.[9] Many agencies share the view expressed by the former Under Secretary of Defense (Comptroller), Robert F. Hale, and Under Secretary of Defense for Acquisition, Technology and Logistics, Frank Kendall, that "Congress has used unobligated balances as a means to reduce our budgets."[10]

Federal spending in 2014 was approximately $3.5 trillion, which can be roughly separated into interest payments of about $230 billion, mandatory spending of $2.11 trillion, and discretionary spending of $1.17 trillion.[11] The Federal discretionary spending "covers the costs of the routine activities commonly associated with such federal government functions as running executive branch agencies, congressional offices and agencies, and international operations of the government."[12] With limited statutory exceptions, almost "all spending on federal wages and salaries is discretionary."[13] Federal grants, equipment and other asset purchases, and contractor service support are also funded with discretionary spending.[14]

The fiscal rules of purpose, time, and amount restrict how agency officials can spend discretionary funds. The purpose statute requires agencies to apply appropriations only to the objects for which the appropriations were made, except as otherwise provided by law.[15] Agencies have a limited time to obligate funds and "must incur a legal obligation to pay money within an appropriation's period of availability. If an agency fails to obligate funds before they expire, they are no longer available for new obligations."[16] The Antideficiency Act prohibits any government officer or employee from "obligating, expending, or authorizing an obligation or expenditure of funds in excess of the amount available in an appropriation, an apportionment, or a formal subdivision of

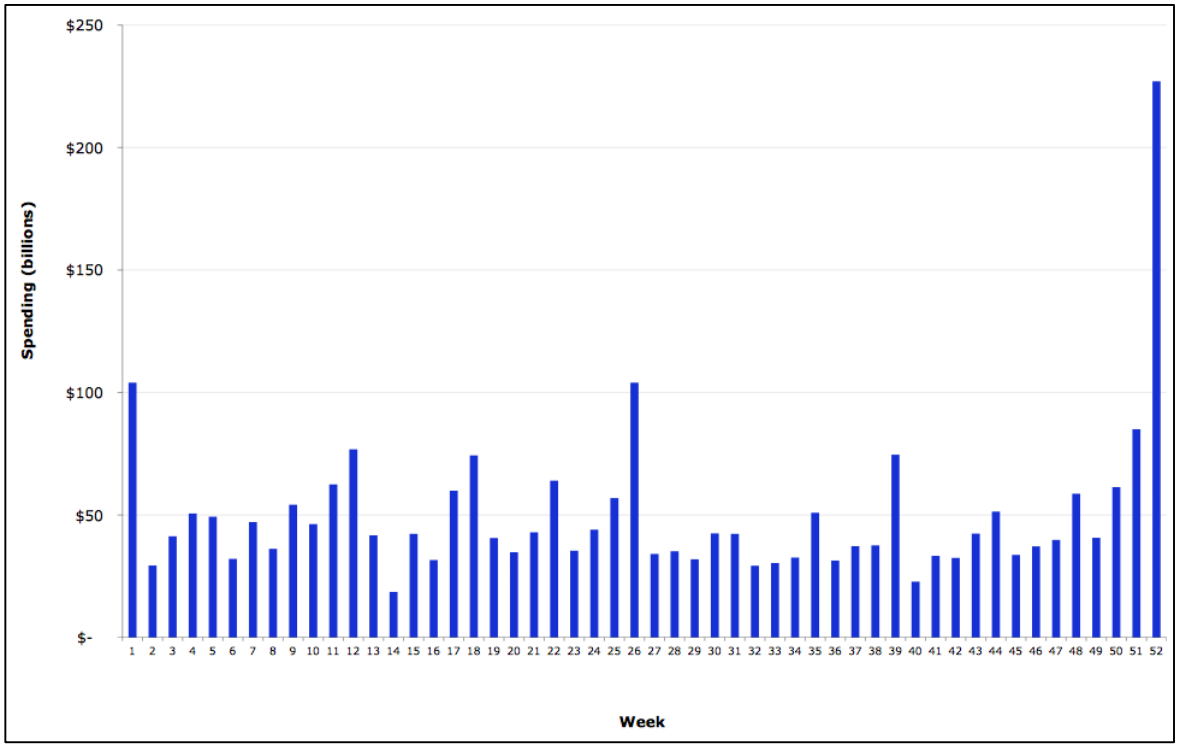

Figure 1 Dollars spent on Federal Contracts by Week

[8] MICHELLE D. CHRISTENSEN, CONG. RESEARCH SERV., RS20152, THE EXECUTIVE BUDGET PROCESS TIMETABLE (2012).

[9] MICHELLE D. CHRISTENSEN, CONG. RESEARCH SERV., RS20268, AGENCY JUSTIFICATION OF THE PRESIDENT'S BUDGET (2008).

[10] DoD Unobligated Funds Memo, *supra* note 4, at 1.

[11] AUSTIN, *supra* note 2, at 2.

[12] *Id.* at 1.

[13] *Id.*

[14] *Id.*

[15] *See* 31 U.S.C. § 1301 (2006); *see also* U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 14, ch. 2, para. 020202.B (Jan. 2009) [hereinafter DOD FMR].

[16] *See* 31 U.S.C. § 1301 (2006); *see also* DOD FMR, *supra* note 15, para. 020202.B.

funds."[17] In addition, agencies may only obligate funds for bona fide needs. The Defense Acquisition University explains the bona fide need rule as a law that "requires appropriated funds be used only for goods and services for which a need arises during the period of that appropriation's availability for obligation."[18]

There is ample anecdotal evidence that this budgeting system leads to increased spending at the end of the fiscal year.[19] The National Bureau of Economic Research published a study authored by Jeffrey Liebman and Neale Mahoney that examined federal procurement contracts. They analyzed five years' worth of federal procurement data and found that 8.7% of spending occurs in the last week of September alone, which is 4.9 times greater than the rest-of-year average, and well above the 1.9% of spending that would occur if spending were uniformly distributed throughout the fiscal year.[20]

As Figure 1 shows,[21] the end-of-year spike in spending is apparent when measured by dollars. When measured by number of contracts instead of dollars spent, 5.6% of contracts are executed in the last week of September.[22] Additionally, Liebman's research confirms that contracts awarded during the end-of-year spending rush are 2.2 to 5.6 times more likely to be lower in quality.[23] This drastic increase in spending—and on contracts of lower quality—mimics the wasteful grasshopper.

III. Discussion

In a commercial market, the ant-like inclination to save, or "spend less now so we can spend in the future"[24] is rewarded.[25] However, Liebman's research gives empirical support to the notion that things work differently in the world of federal appropriations.[26] This section uses Cressey's fraud triangle to help explain how the policy of expiring discretionary funds and the fear of budget reduction make September grasshoppers of federal agencies.

A. Fraud Triangle

Donald R. Cressey developed the fraud triangle theory in an attempt to explain why employees embezzle funds, or commit like crimes.[27] According to Cressey, "there are three factors that must be present at the same time in order for an ordinary person to commit financial fraud: pressure, opportunity, and rationalization."[28] Cressey's theory explains how ordinary employees—as opposed to career criminals—might come to embezzle money under the right circumstances.[29]

Inefficient spending for unselfish reasons might be easier to rationalize for the ordinary person than outright embezzlement. While wasteful year-end spending is not embezzlement, still, the pressure and rationalization factors of the fraud triangle are all systemically created with a federal use-it-or-lose-it policy. It is unsurprising that the federal budget process leads to wasteful spending, even from employees with the best of intentions. Cressey explains:

> Trusted persons become trust violators when they conceive of themselves as having a financial problem which is non-shareable, are aware this problem can be secretly resolved by violation of the position of financial trust, and are able to apply to their own conduct in that situation verbalizations which enable them to adjust their conceptions of themselves as trusted persons with their conceptions of themselves as users of the entrusted funds or property.[30]

The current use-it-or-lose-it federal budgetary policy for expiring one-year appropriations creates both pressure and rationalization on federal employees that are charged with purchasing goods and services. There is pressure to spend the appropriated funds by a relatively arbitrary artificial deadline: the end of the fiscal year. If the money is not spent in time, then it will be taken back.[31] To add to this pressure and also create convincing rationale for wasteful spending, there is a belief that unspent funds are used as justification for reducing

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[17] 31 U.S.C. § 1341(a)(1)(A); *see also* DoD FMR, *supra* note 15, para. 020202.D.

[18] *Bona Fide Need Definition*, DEF. ACQUISITION UNIV. (Apr. 7, 2015), https://dap.dau.mil/acquipedia/Pages/ArticleDetails.aspx?aid=b2f52b87-8cc1-4639-87af-b8941f72d965.

[19] *See* sources cited *supra* note 6.

[20] Liebman & Mahoney, *supra* note 2, at 2.

[21] *Id.* at 38.

[22] *Id.* at 10.

[23] *Id.* at 3. ("Projects that originate in the last week of the fiscal year have 2.2 to 5.6 times higher odds of having a lower quality score.").

[24] Paul Webley & Ellen K. Nyhus, *Inter-temporal Choice and Self-control: Saving and Borrowing*, *in* THE CAMBRIDGE HANDBOOK OF PSYCHOLOGY AND ECONOMIC BEHAVIOUR, 105, 105-31 (Alan Lewis ed., 2008).

[25] Sonia M. Livingstone & Peter K. Lunt, Psychological, Social and Economic Determinants of Saving: Comparing Recurrent and Total Savings, 12 J. ECON. PSYCHOLOGY 621, 621-41 (1991).

[26] Liebman & Mahoney, *supra* note 2, at 1.

[27] *The Fraud Triangle*, ASS'N OF CERTIFIED FRAUD EXAM'RS, http://www.acfe.com/fraud-triangle.aspx (last visited Jan. 11, 2016).

[28] *Id.*

[29] DONALD R. CRESSEY, OTHER PEOPLE'S MONEY (1973).

[30] *Id.* at 30.

[31] *See* Robin Mordfin, *A Simple Way to Reduce Wasteful Government Spending*, CAPITAL IDEAS MAG. (Nov. 18, 2013), http://www.chicagobooth.edu/capideas/magazine/winter-2013/a-simple-way-to-reduce-wasteful-government-spending.

the allotted funds in the next fiscal year.[32] In order to avoid budget reductions in the future, otherwise honest federal employees are incentivized to spend all that has been allotted to them whether there is a bona fide need or not.[33]

The use-it-or-lose-it budget policies provide pressure on federal agencies as well as put them in a position where inefficient and wasteful spending can be rationalized. On the other hand, the budget policies do reduce the opportunity for any fiscal wrongdoing by putting extra restrictions in place.[34] But, in so doing, the pressure and rationalization legs of Cressey's fraud theory remain, just waiting for the opportunity to complete the triangle.

There is some warranted criticism of the theory's simplicity and its inability to explain all types of fraud (for example, crimes committed by financial predators).[35] In spite of its limitations, Cressey's theory rings true for explaining the ordinary employee spending behaviors that may range from questionable to criminal. For this reason, the fraud triangle offers insight into why federal employees—who are honest in all other transactions in their personal and professional lives—may be intentionally wasteful.

B. Pressure from the Policy of Expiring Funds

The policy of expiring funds creates an artificial environment of external pressures.[36] These artificial pressures discourage even those with a strong internal propensity to save resources from doing so. An article in *The Fiscal Times* describes how "the system [of expiring funds] typically creates panic for federal workers scrambling to spend millions of dollars before they run out of time."[37] Moreover, the current policy rewards the spending behavior by creating counter-intuitive incentives and disincentives.[38] The reward for spending all that has been allocated is justification for equal or larger budgets in subsequent years.[39]

In 1980, the Comptroller General of the United States described a problem with federal budgeting policy in a restricted report to the Honorable Stewart B. McKinney:

> Unfortunately the existing budget system has certain characteristics that, while not intended to do so, serve as incentives to spend all unobligated funds before year-end. For those funds that lapse at year-end, the manager sees no benefit in saving since the Congress may or may not return tax dollars saved in the following fiscal year. For example, we recently reported that managers with large unobligated balances near the end of a fiscal year may use them on low priority projects, unplanned projects or services, or shortcut the procurement process rather than lose the funds.[40]

People—including federal employees—make choices every day about expending resources and saving resources.[41] Some people are more likely than others to act based on internal values and external factors and exhibit resource-saving behavior.[42] But Cressey's fraud theory shows that the combination of pressure, opportunity, and rationalization created by the policy of expiring funds will make September grasshoppers of anyone responsible for spending money—even people who are naturally inclined to save.

C. Fear of Future Budget Reduction

Federal agencies fear that surpluses will be held against them when Congress considers future budget baselines. In fact, an official Department of Defense (DoD) memo offered sympathy to spending authorities, noting that "the threat that funding will be taken away or future budgets . . . reduced unless funds are obligated on schedule is a strong and perverse motivator."[43] The memo also offers encouragement to "rethink how we approach managing mid-year and year-end obligations and to change to types of behavior we reward or punish."[44] The encouragement of the memo, however, is

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[32] *See id.*; *see also* discussion *infra* Part III.C (noting fear that budget surpluses will cause future budget reductions).

[33] McPherson, *supra* note 3, at 7.

[34] *Id.*

[35] *The Fraud Triangle*, *supra* note 27.

[36] McPherson, *supra* note 3, at 6 ("This annual deadline entrains a huge effort on federal agencies that plan months in advance to execute as much authority as possible—or lose it.").

[37] Brianna Ehley, *Reckless Federal Shopping Spree Could Squander $50 Billion*, THE FISCAL TIMES (Sept. 30, 2014), http://www.thefiscaltimes.com/Articles/2014/09/30/Reckless-Federal-Shopping-Spree-Could-Squander-50-Billion.

[38] Jason J. Fichtner & Robert Greene, *Curbing the Surge in Year-End Federal Government Spending: Reforming "Use It or Lose It" Rules*, MERCATUS CTR. AT GEORGE MASON UNIV. (September 2014), http://mercatus.org/sites/default/files/Fichtner-Year-End-Spending_1.pdf.

[39] *See* DoD Unobligated Funds Memo, *supra* note 4, at 2 (finding "Managers who release unobligated funds to higher priorities will not automatically be penalized in their next year's budget with a lower allocation and may be candidates for additional funding to offset prior year reductions").

[40] U.S. GOV'T ACCOUNTABILITY OFFICE, PAD-81-18, FEDERAL YEAR-END SPENDING: SYMPTOM OF A LARGER PROBLEM 4-5 (1980) [hereinafter GAO YEAR-END SPENDING].

[41] *See* Webley & Nyhus, *supra* note 24, at 105-31.

[42] Joan Finegan, *The Impact of Personal Values on Judgments of Ethical Behavior in the Workplace*, 13 J. BUS. ETHICS 747, 747-55 (1994).

[43] DoD Unobligated Funds Memo, *supra* note 4, at 1.

[44] *Id.*

dampened by an acknowledgement that the fear of future budget reductions is real.[45]

This mixed message is also found in a 1965 address from President Lyndon B. Johnson:

> When an agency speeds up spending in the last few weeks of the fiscal year, in the absence of clear and compelling reasons, the practice looks like an attempt to use up funds which otherwise would lapse. We cannot expect our employees to believe that cost reduction efforts are serious if they see evidence of opportunistic spending in the last days of the fiscal year.[46]

Despite encouragement to dismiss the fear of budget cuts and return unspent funds, the Government Accountability Office (GAO) notes that "even for funds that do not lapse there appears to be little incentive to save. Under current practices, agencies run the risk of having future appropriation requests reduced if large fund balances remain unobligated at the end of a prior fiscal year."[47] And the signaling effect is magnified "when current spending is explicitly used as the baseline in setting budgets for the following year."[48]

So, whether or not the fear correlates with anything written into policy, the same DoD memo that offered encouragement admits that the fear is justified by recent history: "for the past several years, Congress has used unobligated balances as a means to reduce our budgets."[49] An article from *The Fiscal Times* captures the way this fear leads to a rationalization to spend, saying that "since agencies cannot carry over unspent funds, the idea is use-it-or-lose-it. If they do not spend the money, Congress may not allocate as much the following year."[50]

Though "fear of economic uncertainty" and "pessimism about the economy" in a commercial market would likely cause reduction in spending, the market of federal appropriations causes some backwards reactions. In the case of use-it-or-lose-it funds, federal employees are less likely to save any funds past the fiscal year. They fear that any savings will mean that their agency will have to make do with less next fiscal year.[51]

The rationalization to spend is simple. It can be looked at as the better of two bad choices. An employee can easily justify some waste at the end of the year on some questionable expenses if it means that the organization avoids a reduction in the next budget. McPherson describes the incentive as an "incentive to spend as much as possible for survival's sake."[52] A *Washington Post* article quotes Senator Coburn as he expresses agreement with this bleak view: "The way we budget [money] sets it up, because instead of being praised for not spending all your money, you get cut for not spending all your money. And so we've got a perverse incentive in there."[53]

IV. Addressing the Problem–Perspective on Surpluses

Several proposed solutions could help reduce the incentive for end of fiscal year wasteful expenditures due to our current expiring funds policy.[54] These can be placed into two categories. One type of solution focuses on reducing existing disincentives for agency budget surpluses, which reduces the pressure and rationalization legs of the fraud triangle.[55] The second type of solution focuses on creating incentives for agency budget surpluses. While these incentives may indirectly serve to curb certain elements of the fraud triangle, the intent behind each proposal is to create positive incentives to save rather than eliminating incentives to waste.

Each of the following proposed partial solutions assumes that budget surpluses can benefit the federal government and ultimately the nation and that wasteful government spending has a detrimental effect in the long run. Each proposed solution is also intended to do at least one of three things: reduce existing disincentives for agency budget surpluses, increase agency incentives to have budget surpluses, and decrease the pressure-filled spending deadlines.

A. Reduce Existing Disincentives for Agency Budget Surpluses

1. Prohibit the Use of Surpluses as Justification for Future Budget Reductions

Currently agencies have a valid concern that if they do not spend all they are allocated in a fiscal year, it may be used

[45] *Id.*

[46] Memorandum from President Lyndon B. Johnson on "June Buying" by Federal Departments and Agencies to Cabinet and Heads of Agencies, THE AMERICAN PRESIDENCY PROJECT AT UC SANTA BARBARA (May 20, 1965), http://www.presidency.ucsb.edu/ws/?pid=26982 [hereinafter June Buying Memo].

[47] GAO YEAR-END SPENDING, *supra* note 40, at 4-5.

[48] Liebman & Mahoney, *supra* note 2, at 1.

[49] DoD Unobligated Funds Memo, *supra* note 4, at 1.

[50] Ehley, *supra* note 37.

[51] *See* Liebman & Mahoney, *supra* note 2.

[52] McPherson, *supra* note 3, at 6.

[53] Fahrenthold, *supra* note 6.

[54] *See generally* Liebman & Mahoney, *supra* note 2; McPherson, *supra* note 3 (proposing and analyzing several solutions).

[55] *See* CRESSEY, *supra* note 29.

as justification to reduce their future budget.[56] This concern creates a powerful disincentive to have any real budget surplus. Significant budget surpluses can be regarded as budgeting failures under this system; however, "exhaustive spending may be regarded not only as the hallmark of a successful year, but a key criterion by which executives and financial managers are judged effective."[57]

The current rationale for budget reduction based on past surpluses is that an agency that only obligates part of its allocated budget has been allocated too much; therefore, it will be reduced accordingly in the future.[58] This rationale only makes sense when cost fluctuation is not considered. Operational costs may fluctuate significantly from year-to-year. These fluctuations may occur for many reasons.[59] Market price changes, personnel shifts, and unforeseen maintenance and repair costs may cause fluctuations to agency operational costs. When agency operational costs are lower than predicted, budget surpluses are possible. Budget surpluses can then be used to reduce future costs.[60]

Reduction in future budget allocations is a negative repercussion and agencies might spend less if this negative repercussion did not exist.[61] If showing a budget surplus at the end of the fiscal year did not carry with it any negative repercussions for the agency, there would be less incentive to participate in the traditional mad-dash spending that often occurs in September.

Even though the concept is simple, it still requires a fundamental shift in budgeting rationale. Surpluses are a good thing and should not be assumed to be a result of improper budgeting. When an agency does not spend all of the money it has been given, it is a positive and should not suffer negative repercussions. Instead, the default assumption should be that agencies with budget surpluses are good stewards of taxpayer dollars. Agencies that end up spending less than they were allocated should gain credibility. These agencies should not have their budgets slashed in the future. They have demonstrated that they do not spend for the sake of spending and are more likely to return any surplus.

If congress looks at surpluses as a positive, then an agency provides evidence of good stewardship if it obligates the needed portion of its budget and returns the surplus. These agencies that demonstrate good stewardship should not be punished with reduced budgets because that encourages wasteful spending. If agencies do not spend wastefully and return excess funds, over-allocation should be less of a concern.[62] In his 1965 address, President Johnson talks about returning money as a good thing:

> I see nothing at all wrong in returning unused appropriation balances to the Treasury. Last year, we turned back $805 million when the Fiscal Year ended and I hope that this practice may be the rule, rather than the exception. I do not want "June Buying"[63] to become a way of circumventing our cost reduction efforts. "June Buying" may be an ancient practice—but that does not justify it or excuse it.[64]

A congressional self-imposed prohibition of the use of surpluses to justify future budget reductions is consistent with current spending regulations that agencies must already follow. The Federal Acquisition Regulation (FAR) prohibits cost-plus-a-percentage-of-cost contracts. Under a cost-plus-a-percentage-of-cost contract, the federal contractor is rewarded with profits that increase proportionally as the total project costs increase. Thus, the contractor has an incentive to drive costs up so they are rewarded with more profits. Federal agencies are prohibited from entering into cost-plus-a-percentage-of-cost contracts because they incentivize contractors to spend more than is necessary.[65]

Similar to cost-plus-a-percentage-of-cost contracts, disincentives for agency budget surpluses also incentivize more spending. Thus, a prohibition against using surpluses as budget reduction justification is a rational and necessary step towards addressing inefficient September spending.[66] While

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[56] *See supra* Part III.C (noting fear that budget surpluses will cause future budget reductions).

[57] McPherson, *supra* note 3, at 6 (noting fear that budget surpluses will cause future budget reductions).

[58] *Id.* at 5-6; *see supra* Part III.C.

[59] *See* McPherson, *supra* note 3, at 28 ("Under the current system, these exigencies constantly throw budgets off, making a real baseline nearly impossible to determine.").

[60] *Id.* at 33 (summarizing the success of the Oklahoma carryover plan in which most agencies "now have a buffer to pay for one-time expenses they would previously have used current-year appropriations for").

[61] *See id.* at 36-37 (discussing reports that agencies participating in the Washington State Savings Incentive Plan felt an increased incentive to reduce "expenditures, particularly those at the end of the fiscal year" in order to build up their "revolving account for one-time expenditures").

[62] *See id.* at 5-12.

[63] In 1965, the fiscal year ended in June as opposed to September, hence the term "June Buying." *See* 31 U.S.C. § 1102 (2006) (establishing the current fiscal year beginning October 1 and ending September 30); Fiscal Year Transition Act, Pub. L. 94–274, 90 Stat. 383 (providing for an orderly transition to the new fiscal year for particular acts by specifying how the period of July 1, 1976, through September 30, 1976, was to be treated for fiscal year purposes).

[64] June Buying Memo, *supra* note 46.

[65] *See* FAR 16.102-c (2015) ("The cost-plus-a-percentage-of-cost system of contracting shall not be used (see 10 U.S.C. 2306(a) and 41 U.S.C. 254(b)). Prime contracts (including letter contracts) other than firm-fixed-price contracts shall, by an appropriate clause, prohibit cost-plus-a-percentage-of-cost subcontracts.").

[66] *See* McPherson, *supra* note 3, at 40-43 (discussing interview results that suggest the fear of budget reductions could prevent other solutions from working).

seventy-five percent of the interviewees that McPherson questioned about year-end spending favored incentives that have been successfully implemented at the state-level, "much skepticism was expressed regarding the feasibility of actually enacting such a program, especially given the track record of budget-and-execution rule changes."[67] In other words, the fear of future budget reductions will prevent change despite solutions that are proven to be effective.

2. *Extend Availability of Expiring Funds*

a. *Carryover*

Congress could grant agencies more authority to obligate allocated funds after the end of the fiscal year.[68] Extending the deadline would reduce the existing pressure to spend that agencies feel during the last weeks of a fiscal year, where there is a drastic spike in agency spending and a decrease in the quality of contracts executed.[69] Leibman's comparison of typical federal agencies to the Department of Justice—where a portion of the budget may be carried over to the next year—shows that a simple extension past the current spending deadline of September 30 may reduce the traditional end of year spending spike and increase the quality of contracts executed during that same time period.[70]

Allowing agencies to carry over unused funds also makes sense because budget legislation is often not passed on schedule. Funding gaps can cost taxpayers billions of dollars.[71] If agencies were able to spend money past the end of September every year, it would be easier for them to prepare for "the days of necessity"[72] if the federal budget is not passed on time.[73] When the federal budget is passed on time this would result in a funding overlap; both current year funds as well as previous year funds would be available for obligation.[74] When the budget is not passed on time, potential funding gaps could be reduced.[75] This reduction of funding gaps means increased efficiency.[76]

b. *Multi-Year Budget*

Wasteful expenditures could be decreased by creating budgets lasting longer than one year.[77] Spending deadlines assist Congress in controlling how money is spent but they also create pressure. A negative side effect of this pressure is the drastic increase in spending and decrease in contract quality as the deadline approaches.[78] Simply reducing the amount of these deadlines could reduce the frequency of spending increases and lower quality contracts.[79] If budgets were created every two years instead of annually, there would be at worst half the deadlines—and hence—half the rush periods typical of increased wasteful spending. *The Levy Institute* published a working paper authored by Charles Whalen about biennial budgeting. Whalen and other "supporters argue that a two-year budget and appropriations cycle would streamline the budget process by eliminating much procedural repetition."[80] There are indications that a two-year budget would eliminate the spending rush. The former Assistant Secretary for Budget, Technology and Finance at the Department of Health and Human Services, Charles E. Johnson, stated that "he never saw it happen with two-year money, but he did see a 'rush to obligate' with one-year money."[81]

The idea of a two-year budget is not foreign to this country and roots of it can even be seen as far back as our Constitution.[82] In 2011, Senator Jeff Sessions proposed that we shift to a two-year budgeting cycle.[83] He described the

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[67] *Id.* at 42.

[68] *See id.* at 27-43 (reviewing results of budget carryover programs in both Oklahoma's and Washington's state governments).

[69] Liebman & Mahoney, *supra* note 2, at 3.

[70] *Id.* at 28-30.

[71] *See generally* Phillip G. Joyce, *The Costs of Budget Uncertainty: Analyzing the Impact of Late Appropriations*, UNIVERSITY OF MARYLAND (2012), http://faculty.publicpolicy.umd.edu/sites/default /files/joyce/files/the_costs_of_budget_uncertainty.pdf (2012).

[72] AESOP, *supra* note 1, at 36.

[73] *See generally* Joyce, *supra* note 71.

[74] *See* McPherson, *supra* note 3, at 27.

> The two-year period in question should not be confused with biennial budgeting. Unlike biennial budgeting, the Jones plan would still mandate annual budgeting according to an incremental budgetary system. The difference would be that agencies would have twenty-four months to obligate. Additionally, by commanding two years in which to obligate funds, organizations would have two fiscal-year budgets for their needs.

Id.

[75] *See generally* Lawrence R. Jones, *Out-Year Budgetary Consequences of Agency Cost Savings*, 6 INT'L PUB. MGMT. REV., 139-68 (2005).

[76] *See generally* Joyce, *supra* note 71.

[77] *See, e.g.*, Greg McDonald, *Sessions Calls for a Two-Year Budget Plan*, NEWSMAX.COM (Oct. 4, 2011, 2:04 PM), http://www.newsmax.com/TheWire/Sessions-two-year-budget-plan/2011/10/04/id/413235/; Laura Meckler, *Giving Government Incentives To Save*, WALL STREET JOURNAL (Jun. 7, 2010); Whalen, *supra* note 2.

[78] Liebman & Mahoney, *supra* note 2, at 10.

[79] *See id.* at 32-35 (discussing the positive results of rollover budget simulation).

[80] Whalen, *supra* note 2, at 11.

[81] McPherson, *supra* note 3, at 23.

[82] Liebman & Mahoney, *supra* note 2, at 25.

[83] McDonald, *supra* note 77.

advantages of shifting to a two-year cycle in his testimony during a Senate Budget Committee hearing, stating,

> For two consecutive years, the Senate has simply refused to adopt a budget resolution. It's been 888 days. We're not passing appropriations bills—we're funding the government with stopgap measures, or cramming all our spending bills into one big omnibus . . . . [W]e can't—and we shouldn't—operate our nation's finances in this way . . . especially not during a time of financial crisis . . . . Under the current system . . . an executive agency has to begin working on its budget for the next fiscal year before the current budget has been adopted or approved . . . . Additionally, by switching to a two-year plan, it will be easier for agencies to reduce waste and conduct long-term planning.[84]

Some argue that the idea of extending the availability of expiring funds is simply a way to lengthen the budgeting period.[85] But Whalen predicts that a two-year budget would actually mean "a reduced budget workload" for federal workers over the two-year period.[86] Other critics argue against change because "the system appears to work well enough."[87] But Whalen believes that "the combination of a longer budget period with this chance to devote additional attention to oversight and other non-budget matters is one that provides new opportunities for making policies more effective, promoting economic stability and perhaps even for reducing the federal deficit."[88]

B. Create Incentives for Agency Surpluses

1. Agency Incentive–Keep Funds for Future Use

Like the two-year budget, the idea of allowing agencies to keep a portion of unspent funds for future use is not a new concept.[89] In 2010, President Obama proposed that Congress grant "new authority that could help to discourage unnecessary spending by federal agencies, a move that comes amid rising public concern about the federal deficit. The proposed change would let agencies that save money redirect half the savings to other initiatives, with the rest going toward deficit reduction."[90] Laura Meckler, in her 2010 *Wall Street Journal* article *Giving Government Incentives To Save*, agrees.

> Under current law, agencies are typically forced to return any unspent part of their budgets, giving them an incentive to use every last dollar even if the money isn't needed. The new policy would alter those incentives. The dollars aren't huge; at most, about $25 billion would be subject to redirection. But officials said the goal was partly to change the mentality at the agencies.[91]

2. Individual Incentive–Evaluate on Efficiency

Creating individual incentives as well as agency incentives is an opportunity to addresses the issue from different angles. Agencies can do a better job of evaluating the efficiency of those employees that make spending decisions.[92] Going even further, efficiency could be something every federal employee is evaluated on—but not trump leadership, mission accomplishment, or other important criteria. If efficiency becomes part of every employee's evaluation, those who contributed to greater efficiency could be positively identified for future positions of greater responsibility. While a small change, evaluating federal employees on efficiency would give people incentive to be good stewards of public money.[93]

Arguments against this proposition may cite the fact that many federal employees serve in positions where they are unlikely to have a significant effect on agency spending or that "even if a federal agency wanted to adopt business-style efficiencies, the output of much government work is hard to measure, which would make it difficult to set performance goals for managers and workers."[94] Both of these arguments, although valid, do not outweigh the importance of attempting to raise the universal value of efficiency within the federal workplace.

Out of all the proposed partial solutions, the addition of efficiency to employee evaluation criteria is perhaps easiest to first enact. While other proposed policy changes would require Congressional approval, modifying performance evaluation criteria for federal employees does not. Even if progress is slow, the costs and risks of such a change is low

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[84] *Id.*

[85] *See* McPherson, *supra* note 3, at 49.

[86] Whalen, *supra* note 2, at 2.

[87] McPherson, *supra* note 3, at 49 (citing Aaron B. Wildavsky, *A Budget for all seasons? Why the traditional Budget Lasts*, 38 PUB. ADMIN. REV., 501-09 (1978)).

[88] Whalen, *supra* note 2, at 2.

[89] *See* 28 U.S.C. § 527 (2006) (establishing a working capital fund "without fiscal year limitation" for the Department of Justice).

[90] *What is "Spend It or Lose It"?*, BANKRUPTING AMERICA (Jul. 17, 2013), http://www.bankruptingamerica.org/fact-sheet/what-is-spend-it-or-lose-it; Meckler, *supra* note 77.

[91] *Id.*

[92] U.S. DEP'T OF DEF., INSTR. 5000.02, OPERATION OF THE DEFENSE ACQUISITION SYSTEM (7 Jan. 2015) [hereinafter DoDI 5000.02].

[93] *See generally* Finegan, *supra* note 42 (discussing ambition and how ambition can affect workplace motivation).

[94] Chris Edwards, *Reducing Wasteful Federal Spending*, CATO INST. (Jan. 14, 2014), http://www.cato.org/publications/testimony/reducing-wasteful-federal-spending.

so the measure is worth trying. Still, cultivating a culture of efficiency will only result in long term success if there were also Congressional buy-in concerning changes to the policies around one-year expiring funds.

C. Combined Approach is Best

Eliminating the disincentive for agency surpluses is the most important component of any plan that will successfully address the inefficient spending in September.[95] The fear of future budget reductions is a powerful motivator that could counteract any positive agency-level incentives for surpluses or individual incentives for greater efficiency.[96] Hence, the elimination of surplus disincentives is the logical first step towards a successful solution to the issue.

However, a more drastic reduction of inefficient spending might be seen with a combined approach or a plan that aimed to both reduce surplus disincentives as well as create positive surplus and efficiency incentives. As long as disincentives were restricted, a combined approach that adds incentives for agency surpluses could accelerate a shift toward more efficient September spending.

A combined approach should first eliminate the surplus disincentive with a prohibition of the use of budget surpluses as justification for future budget reductions. Next, agency incentives for surpluses should be used to magnify the effects of the prohibition. Following these organizational changes, a combined approach could institute individual evaluations based on efficiency or other such tools that would incentivize efficiency for individual federal employees.

However, a full and effective solution to the problem of wasteful year-end spending must attack the issue from both sides. Without the policy changes that would mitigate the perspective of a budget surplus as something that will be punished by means of budget reduction in the coming year, it will not matter whether or not employees begin to be evaluated on efficiency. Alone, adding efficiency to employee evaluation criteria will not be enough to change the habit of wasteful spending. The potential decrease in next year's budget will be a stronger motivator. Likewise, without emphasizing the importance of efficiency when evaluating an individual employee's performance, any latitude given to agencies as a result of policy changes may only delay existing opportunities for wasteful spending—if not create new ones.[97]

V. Conclusion

The work of Liebman and McPherson helped identify the unintended consequences that expiring funds and surplus disincentives have on federal agencies.[98] Liebman's research in particular helped quantify the difference in spending when federal agencies are not subject to these policies such as in the case of the Department of Justice.[99] Cressey's fraud triangle and Livingstone's study on the causes of saving facilitated an understanding of spending behaviors from an individual economic psychology perspective.[100]

This discussion has focused on budgetary policy, how it inevitably leads to wasteful spending, and how wasteful spending is an inefficient use of federal resources. The proposed partial solutions seek to minimize the current inefficiencies. The hurdle to overcome is that budgetary policy is not primarily about promoting efficiency but rather more about controlling how federal funds are spent. Most of the proposed solutions would require Congress to relinquish some of its control to the agencies in order to allow them to budget more efficiently.

If Congress stopped using agency budget surpluses as justification for reduction of future budgets, the existing disincentive to have a budget surplus would decrease, and with it, the pressure to spend at the end of the fiscal year would decrease as well. Similarly, if Congress expanded agencies' ability to allocate funds past the end of the fiscal year, it would decrease the pressure to spend at the end of the fiscal year and incentivize having a budget surplus in September. Allowing agencies to keep a portion of unspent funds would incentivize budget surpluses. Enacting biennial budgets would reduce the total number of deadlines that cause spending pressures. Evaluating federal employees on efficient use of resources could increase individual agency employees' incentive to save money, leading to budget surpluses.

The current mindset of federal agencies is that they must spend all they are allocated or they risk their future budgets being reduced. Although changing that mindset will be difficult—and take a long time—it is worth trying because the

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[95] *See* McPherson, *supra* note 3, at 40-43 (discussing interview results that suggest the fear of budget reductions could prevent other solutions from working).

[96] *Id.*

[97] *See* Edwards, *supra* note 94.

> Federal managers face no profit incentive, giving them little reason to proactively reduce waste and cut costs. Indeed, without profits to worry about, federal managers often favor budget increases without any idea about whether expansion will add net value to society above the taxpayer costs . . . . Without the profit motive, there is little incentive for government workers and managers to innovate. There is less motivation than in the private sector to try and produce better services of higher quality.

Id.

[98] *See generally* Liebman & Mahoney, *supra* note 2; McPherson, *supra* note 3.

[99] *See* Liebman & Mahoney, *supra* note 2, at 28-30.

[100] *See generally* CRESSEY, *supra* note 29; Livingstone, *supra* note 25.

current policies have inadvertently caused inefficiencies, wasted taxpayer dollars, and show no signs of slowing either of these down.

Contract and Fiscal Law

Recent Developments in the Availability of Appropriated Funds for Disposable Cups, Plates, and Cutlery

In December 2014, the Government Accountability Office (GAO) opined that agencies could not use appropriated funds to buy disposable cups, plates, and cutlery for use by its employees.[1] In August 2015, the GAO revisited that opinion but declined to reverse its decision.[2]

The original decision arose from a labor dispute between employees of the National Weather Service (NWS) and the Department of Commerce (DoC).[3] In September 2009, Commerce and the National Weather Service Employees Union (NWSEO) signed a Memorandum of Understanding (MOU) whereby the DoC agreed to provide each NWS work station or cubicle with, among other things, disinfectant spray, tissues, paper towels, disposable cups, plates, and plastic utensils. For the next three and a half years, the NWS used appropriated funds to provide these items to its employees. However, in March 2013, the DoC's Office of General Counsel declared that disposable cups, plates, and cutlery were personal items and its subordinate agencies could no longer purchase them with appropriated funds.[4]

The NWSEO objected to the DoC's decision and sued for arbitration. The arbitrator ruled in the NWSEO's favor, finding that disposable items like cutlery and plates contributed to a healthy workplace which benefited the agency.[5] The Department of Commerce appealed this decision to the Federal Labor Relations Authority (FLRA), requesting a stay of proceedings and an opinion from the GAO.[6]

The GAO's long-standing rule is that appropriated funds are not available to purchase personal items for government employees.[7] The exception to this rule, in the absence of specific statutory authority, is when the purchase of a personal expense directly advances a government agency's statutory mission[8] and any ancillary benefit to the employee is outweighed by the benefit to the agency.[9] What advances an agency's mission or where and how a benefit accrues is not always clear. What conveniences an employee while simultaneously contributing to an agency's mission may be difficult to measure or quantify. Therefore, the GAO resolves these issues on a case-specific basis.[10]

There have been instances in the past where the GAO permitted agencies to use appropriated funds to make similar purchases.[11] However, in those cases, the GAO found that the agencies sufficiently demonstrated that those purchases advanced the agencies' statutory mission or were supported by an existing regulatory scheme.[12] In this case, the DoC did not provide the GAO with any authority justifying the purchase of disposable cups, plates, and cutlery because the agency concluded none existed and there was no argument to be made despite the MOU.

In this case, the GAO noted that the arbitrator's decision did not rely on any empirical evidence to support its finding that disposable cups, plates, and cutlery created a healthier workplace thereby benefitting the agency.[13] Consequently, the GAO concluded there was no legal authority for the agency to purchase these items with appropriated funds and provide them to its employees free of charge, regardless of what the NWS agreed to in the MOU.[14]

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[1] Dep't of Com., Disposable Cups, Plates, and Cutlery, B-326021, 2014 WL 7331168 (Comp. Gen. Dec. 23, 2014).

[2] *Id*.

[3] The National Weather Service is a subordinate agency of the National Oceanic and Atmospheric Administration, which is a branch of the Department of Commerce. *National Oceanic and Atmospheric Administration (NOAA)*, COMMERCE.GOV, https://www.commerce.gov/national-oceanic-and-atmospheric-administration (last visited Jan. 10, 2016).

[4] Dep't of Com., *supra* note 1.

[5] *Id*.

[6] *Id*. at 3.

[7] *Id*.

[8] U.S. Fish and Wildlife Serv., Steller's and Spectacled Eiders Conservation Plan, B-318386, 2009 WL 2580314 (Comp. Gen. Aug. 12, 2009).

[9] Dep't of the Navy, Lunch for Volunteer Focus Group, B-318499, 2009 WL 5184704 (Comp. Gen. Nov. 19, 2009).

[10] Dep't of Com., *supra* note 1, at 4.

[11] *See* Matter of: Expenditures by the Department of Veterans Affairs Medical Center, Oklahoma City, Oklahoma (II), B-247563, 1996 WL 713064 (Comp. Gen. Dec. 11, 1996); Matter of: Purchase of Paper Napkins with Imprest Funds, B-204214, 1982 WL 28632 (Jan. 8, 1982).

[12] Dep't of Com., *supra* note 1, at 5.

[13] *Id*.

[14] *Id*. at 6.

This would ordinarily have concluded the matter, but evidently, the NWSEO felt strongly enough about free sporks that it petitioned the GAO for reconsideration.[15]

In its petition, the NWSEO argued that the Federal Service Management Relations Statute[16] prohibited the GAO from considering the DoC's request for an advanced appropriations decision, despite the specific authorization found in 31 U.S.C. § 3529.[17]

In denying the NWSEO's request for reconsideration, the GAO cited a relatively recent decision by the U.S. Court of Appeals for the District of Columbia Circuit that is exactly on point. In *U.S. Department of the Navy v. Federal Labor Relations Authority*,[18] the court vacated an FLRA decision requiring the Navy to bargain with its employees over the free provision of bottled water. The court held that "[f]ederal collective bargaining is not exempt from the rule that funds from the Treasury may not be expended except pursuant to congressional appropriations."[19] In other words, a collective bargaining proposal is void *ab initio* if it requires an agency to expend appropriated funds for an unauthorized purpose. In concluding that the purchase of bottled water was not for an authorized purpose, the court cited a "line of Comptroller General decisions . . . dating back to at least 1923" that required tap water to either be unavailable or unpotable for an agency to purchase bottled water for its employees with appropriated funds.[20]

There are two important takeaways for the practitioner. First, the GAO has reinforced the principle that agencies cannot circumvent, nor be required to circumvent, 31 U.S.C. §1301(a)[21] (often called the Purpose Statute) in the absence of some other Congressional authorization. Second, in ruling that appropriated funds were not available to purchase disposable cups, plates, and cutlery, the GAO did not say that an agency may *never* purchase these items with appropriated funds. An agency could presumably reason that the primary benefit of tax payer-funded disposable cutlery accrued to the agency while advancing its statutory mission.

When analyzing a proposed expenditure as to purpose, the practitioner would do well to remember that the GAO does not substitute its own discretion or judgment for that of the agency counsel. Rather, the GAO questions "whether the expenditure falls within the agency's legitimate range of discretion."[22] Therefore, the practicing judge advocate or attorney-advisor must be able to articulate, with empirical evidence if necessary, that a proposed expense that is personal in nature "directly advances the agency's statutory mission and the benefit accruing to the agency clearly outweighs the ancillary benefit to the employee."[23] The attorney's ability to clearly articulate the rationale behind a proposed expenditure will protect a command from the consequences of any questionable expense of appropriated funds.

—MAJ Dale McFeatters

[15] *Id.* at 1.

[16] 5 U.S.C. § 7101 (2015).

[17] 31 U.S.C. § 3529 (2015) (allowing a disbursing or certifying official or the head of an agency to request an advanced decision from the Comptroller General on questions regarding the payment of appropriated funds).

[18] U.S. Dep't of the Navy v. Fed. Labor Rels. Auth., 665 F.3d 1339 (D.C. Cir. 2012).

[19] *Id.* at 1347.

[20] *Id.* at 1350.

[21] "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a) (2015).

[22] Matter of: Implementation of Army Safety Program, B-223608, 1988 WL 228374 (Comp. Gen. Dec. 12, 1988).

[23] Dep't of Com., *supra* note 1, at 1.

The Curious Court-Martial of Daniel Boone

Major Jonathan E. Fields[*]

Colonel Richard Calleway brought up a Complaint against Captain Daniel Boon. Their [sic] was a court Marshal [sic] called to try him. I was present at his Tryal [sic].[1]

I. Introduction

Frontier icon and militia officer, Captain (CPT) Daniel Boone, was court-martialed following the 1778 siege of Boonesborough[2] in a small log fort in modern-day Kentucky. Shrouded in mystery for over 200 years, historians and scholars present varied accounts of this controversial proceeding that tarnished the exemplary military career of a legendary woodsman and frontier hero. In the history of famous (or infamous) courts-martial that weave their way through the fabric of the Judge Advocate General's (JAG) Corps, the eighteenth century case against CPT Boone has been largely stricken from the record.

Daniel Boone was born in the upper Schuylkill River valley of Pennsylvania on October 22, 1734, to Squire and Sarah Boone.[3] From an early age, Boone exhibited a particular tenacity that would serve him well as he sought to master an untamed wilderness.[4] As a man, Boone stood five feet, eight inches tall with a stocky build, dark hair, and blue-gray eyes.[5] Between early forays into the lands west of the Appalachian Mountains searching for game and unencumbered land, Boone worked as a surveyor and trader—learning to read and write at an early age.[6] His journeys into that vast and uncharted territory would introduce him to the Native American tribes who called this area home.[7] He would also hone his skills as a scout and make him an indispensable asset for the United States' war against Great Britain on the western front.

Boone's military career would span decades, but began in the French and Indian War with enlisted service under British General Edward Braddock during the failed attack on Fort Duquesne in April 1755 near Pittsburgh.[8] During the obscure episode known as Lord Dunmore's War between the colony of Virginia[9] and the Shawnee and Mingo tribes in the Clinch River Valley in 1774, Boone would earn a commission

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[1] DANIEL TRABUE, WESTWARD INTO KENTUCKY 63 (Chester Young ed., 2004) (1981). Daniel Trabue was born in 1760 and died at the age of 80. Trabue served in the Revolutionary War with significant service in Kentucky. *Id.* at 1. Unique among his fellow frontiersmen (which included Daniel Boone), Trabue actually recorded contemporary events in a journal, of which 148 pages have survived. *Id.* Chester Young, professor and chair of the Department of History and Political Science at Cumberland College notes, "Trabue's account remains the principal evidence for the court-martial of Boone. His recalling, forty-nine years after the event, of the specific charges against the captain is remarkable in view of the fact that he witnessed this trial as an eighteen-year-old lad." *Id.* at 172.

[2] *See* JOHN M. FARAGHER, DANIEL BOONE: THE LIFE AND LEGEND OF AN AMERICAN PIONEER 199-202 (Henry Holt and Company, LLC 1992) (1993).

[3] *Id.* at 10.

[4] *Id.* at 15-30. The origins of Boone's tenacity and renowned tolerance for physical pain can be found in his strict Quaker upbringing. Relatives note that Squire Boone would beat his children until they asked for forgiveness, then cease dolling out the blows. *Id.* One descendent wrote, "[T]he father [Squire], wishing to gain his point in government, would appeal to Daniel, 'Canst thou not beg?' But [Daniel] could not beg, leaving his anxious parent to close the matter at his pleasure." *Id.* at 13.

[5] *Id.* at 30.

[6] *Id.* at 16-17. Daniel Boone's ability to read and write on the eighteenth century frontier coupled with his experience and prowess on the frontier contributed to him attaining an officer's commission in the militia. *See generally id.*

[7] *Id.* at 23. "But during that youth he also grew in his knowledge and ways of the American woods and of the culture of the Indians." *Id.*

[8] *Id.* at 36-37.

[9] Daniel Boone, though born in Pennsylvania and elevated to national prominence in Kentucky, has deep connections in Virginia as well. *Id* at 2. Boone's travels led him to Charlottesville, Virginia, and the areas surrounding the present-day regimental home of the Army's Judge Advocate General's Corps (JAGC). *The Judge Advocate General's Legal Center and School*, JAGCNET, https://www.jagcnet.army.mil/Sites/tjaglcs.nsf/homeContent.xsp?open&documentId=CBE94495746A8AF585257A98006F314C (last visited Jan. 20, 2016). During the Revolutionary War, Lieutenant Colonel Banastre Tarleton led a raid on Charlottesville in an effort to capture members of Virginia's legislature and then-governor, Thomas Jefferson. Though Tarelton's main objective failed, he did manage to capture Daniel Boone in the process. JOHN C. FREDRIKSEN, REVOLUTIONARY WAR ALMANAC 209 (2006).

as a captain of frontier militia.[10] Boone cherished this commission, and never ceased to carry it on his person.[11] Boone held the rank of captain into the Revolutionary War and was promoted to major—though under very unusual circumstances.[12] It was during his time as a commissioned officer that Daniel Boone found himself the subject of a ramshackle court-martial brought on by one officious commander's attempt to maintain order on the western front.

This article frames Daniel Boone's court-martial in the anthology of American military justice cases. It provides the historical context of the charges and places the reader into the thick log walls of the makeshift courtroom in Logan's Fort during the autumn of 1778. First, the article describes Daniel Boone's employment with the Transylvania Company—a strange endeavor by attorney Richard Henderson to create the fourteenth American colony. Second, the article details the spread of the American Revolution west of the Blue Ridge Mountains, along with Great Britain's alliance with the Shawnee nation to attack American settlements along the frontier. Third, Boone's surrender of an ill-fated expedition to make salt for the starving frontier settlements will be presented, along with his questionable tactical decisions during the eventual siege of Fort Boonesborough by the Shawnee. Finally, the article explains the charges, proceedings, and aftermath of CPT Boone's court-martial, and undergirds the importance of an established trial judiciary for the American military during the infancy of the Republic. Judge advocates can glean valuable and contemporary lessons from the trial of a wildly popular senior military leader, which occurred in the midst of a war that would ultimately decide the fate of the Nation.[13]

II. Transylvania

In 1767, Boone made his initial venture into Kentucky—a land known as the Dark and Bloody Ground.[14] Enamored with the boundless beauty and game of that region, Boone began a harrowing effort to settle this land, which culminated in the founding of Boonesborough in 1775.[15] The journey to establish the frontier settlement that would ultimately bear his own name began with Boone's bizarre employment to Richard Henderson. An attorney and entrepreneur, Henderson effectuated a treaty between a large company of his own creation and the Cherokee tribe to purchase an immense swath of land in 1775 that would compose nearly half of modern-day Kentucky.[16] His end state was to establish a new colony west of the Appalachian Mountains to be called Transylvania.[17] Once the treaty was executed, Henderson needed a pioneer to blaze a trail through the Cumberland Gap and establish a foothold in his fledgling colony to draw settlers and businesses to the region[18]; Daniel Boone was just the man for the job. However, war with England would drastically change the plans of both Boone and Henderson.[19]

The establishment of Boonesborough[20] would not come without a fight. Though the Cherokee tribe had signed the Treaty of Sycamore Shoals in which John Henderson had secured his purchase for Transylvania, not all the tribes in the region gave credence to the document or the Cherokee's authority to unilaterally agree to the forfeiture of the land at issue.[21] Perhaps even more striking is the fact that Henderson was establishing treaties and attempting to create a colony as a private citizen, and not clothed in the authority of the fledgling United States.[22] A leading voice of violent dissent

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[10] *See id*. at 102-06.

[11] FARAGHER, *supra* note 2, at 105-06. The pride and value in which Boone would place in his commission is demonstrative of the personal disdain and disgust in which Boone would view his court-martial in the years following the trial. *See infra* note 33. Interestingly, Boone's family submitted the document to the federal government seeking remuneration in 1840 for Boone's service; the commission was lost by the government. *Id*.

[12] *See* TRABUE, *supra* note 1, at 63-64.

[13] *See* FARAGHER, *supra* note 2, at 1. The American Revolutionary War was fought between 1775 and 1783. Tangentially, warfare between the Colonial settlers of the Ohio River Valley and the Native American tribes of the Shawnee, Delaware, Mingo, and Miami raged on the frontier until 1795 and the Treaty of Greenville. *The Treaty of Greenville 1795*, THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/greenvil.asp (last visited Jan. 20, 2016). Daniel Boone, as an officer of a colonial militia, served extensively in these conflicts. FARAGHER, *supra* note 2, at 2.

[14] JOHN FILSON, THE DISCOVERY, SETTLEMENT AND PRESENT STATE OF KENTUCKE 7 (1784). John Filson wrote an extraordinary account of the land and history that compose the state of Kentucky. He relied heavily upon Daniel Boone's personal accounts and exploits in the region to publish the book. *Id*.

[15] FARAGHER, *supra* note 2, at 106. "Americans established a number of permanent settlements in Kentucky in 1775, Boonesborough was among them." *Id*. Boonesborough exists to this day, and is located in the Fort Boonesborough State Park, Kentucky, south of Winchester, Kentucky.

[16] ROBERT MORGAN, BOONE: A BIOGRAPHY 171-75 (Algonquin Books 2008) (2007).

[17] *Id*.

[18] FARAGHER, *supra* note 2, at 109.

[19] *Id*.

[20] *Id*. at 125. So happy was Henderson with Boone's effort, that his company voted to bestow upon him a gift of 2,000 acres of land in Transylvania; the gift died along with Henderson's attempt to create a new American colony. *Id*. "The Transylvania Company had voted 'that a present of two thousand acres of land be made to Col. Daniel Boone, with thanks of the Proprietors, for the signal services he has rendered,' but with the failure of their claims to Kentucky, Boone's grant was forgotten and he never received any compensation." *Id*.

[21] *Id*. at 125-31. In addition to opposition from the Native Americans, the Second Continental Congress also spoke on the issue after Henderson brought his colony request to the fledging government. *Id*. at 125. "Thomas Jefferson argued that 'quit-rents is a mark of vassalage'"; John Adams noted that the Transylvania claim lay "within the limits of Virginia and North Carolina by their charters." *Id*. Even the British weighed in by calling Henderson and his business venture "an infamous Company of land Pyrates." *Id*.

[22] *Id*. at 106. "Henderson had no authority to enter into such an agreement; the laws of both North Carolina and Virginia, as well as the British Proclamation of 1763, specifically enjoined private citizens from treating with Indian nations, especially concerning the purchase of land." *Id*.

arose from Chief Blackfish of the Shawnee tribe.[23] Blackfish viewed the rising tide of settlers as trespassers on land that rightfully belonged to the Shawnee.[24] Fueled by the defense of his homeland, Blackfish would find an unlikely ally in the British Army, and would lead a protracted series of engagements against many of the frontier settlements, including Boonesborough.[25]

The Revolutionary War slowly spread west across the continent after the first shots were fired in Massachusetts in 1775,[26] though a copy of the Declaration of Independence would not arrive at Boonesborough until August 1776, when it was read aloud to the residents.[27] Hoping to draw the finite combat power of General George Washington's Colonial Army away from the decisive action on the eastern seaboard, the British eventually opened a second front to the war against the colonies by aiding and encouraging the Native American tribes of the region to attack the settlers on the Western frontier.[28] Monetary rewards were given by British Lieutenant Governor Henry Hamilton in Detroit for American prisoners, or American scalps.[29] Hamilton would order scores of raiding parties to attack the Kentucky settlements.[30] A cry arose on the frontier as colonial families were viscously attacked and murdered by the British and the Native American tribes.[31] The cry reached Virginia and the frontier militias commanded by George Rogers Clark, brother of the famous explorer from the Lewis and Clark Expedition.[32] As the American government struggled to aid American families on the frontier and counter enemy forces on the western front, CPT Boone[33] began orchestrating a defense of the settlements surrounding and including Boonesborough.[34]

III. Making Salt

The incessant attacks by the British and Shawnee on the western settlements made scratching out a life on the frontier even more difficult for the inhabitants of Boonesborough and the surrounding settlements. Hunting and farming became nearly impossible, with settlers spending their days within the fortified walls of their outposts.[35] In critically low supply, salt was needed to preserve the meat of what cattle remained to nourish the settlers to spring.[36] As a result, Boone led a party of approximately thirty men outside the protection of the garrison at Boonesborough to a salt spring on the Licking River on New Year's Day 1778 to undertake the arduous task of boiling down the salty spring water to produce salt and distribute it among the surrounding settlements.[37] This was a dangerous mission that would be critical for the survival of the frontiersmen and their families. This ill-fated operation would set the stage for Boone's subsequent court-martial.

According to John Filson's 1784 personal interview with Boone regarding this episode, Boone left the salt-makers on February 7, 1778, to procure game for the men as they worked.[38] Alone on the hunt, he was surprised and captured by Chief Blackfish and approximately 120 Shawnee warriors en route to destroy Boonesborough in a very unusual winter

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[23] *Id*. at 128.

[24] *Id*.

[25] *See id*. at 98-125.

[26] *See generally id*. at 125-31.

[27] *Id*. at 141. A bonfire was lit in celebration by the residents. *Id*.

[28] *Id*. at 151.

[29] *Id*. Hamilton became known as the "hair buyer." *Id*. Allan Eckert attributes the following to Hamilton: "You will continue to honor our obligations, paying fifty dollars for each white scalp and one hundred dollars for each living prisoner." ALLAN W. ECKERT, THE FRONTIERSMEN 180 (1967). Eckert's citation and research is meticulous, though he adds dialogue to improve readability. "*The Frontiersman* . . . is the result of a close study of a multitude of documents written in the period 1700-1900 . . . . [C]ertain techniques normally associated with the novel form have been utilized, but in no case has this been at the expense of historical accuracy." *Id*. at xi; *see also infra* note 89 (discussing Eckert's research methods and the genre of historical fiction).

[30] FARAGHER, *supra* note 2, at 146-51.

[31] ECKERT, *supra* note 29, at 387-88. Eckert records the vicious execution of one frontiersman at the hands of the Shawnee tribe as follows:

> From a pole stuck in the center of the trail, Alex McIntyre's scalp-less head stared sightlessly at them. On another pole close by, his still dripping heart was impaled. His arm and legs had been hacked off and his body cut in two just under the rib cage and these six grotesque pieces were hung with rawhide strips from limbs overhanging the trail.

Id.

[32] FARAGHER, *supra* note 2, at 145. "So preoccupied was [Virginia's] government with preparations for war along the seaboard that it was unable to do little more than legitimize the existing military organization in the West, appointing George Rogers Clark [major] in command of the Kentucky militia, with John Todd, James Herrod, Benjamin Logan, and Daniel Boone captains at the American strongholds south of Harrodsburg, Logan's Station, and Boonesborough." *Id*. This was, perhaps, Boone's second commission as an officer though this commission was from the newly-created state of Virginia. *See generally id*.

[33] *Id*. at 101-05. In 1774, Boone would be promoted to the rank of captain by Colonel (COL) William Preston in 1774. "Boone may have come from lowly origins, but he seemed officer material nonetheless." *Id*.

[34] *Id*. at 145. "Even as Shawnees decided to launch a sustained campaign in Kentucky, the Americans, their supplies of ammunition nearly depleted, were abandoning the last remaining stations north of the Kentucky River and pulling back to fortified positions." *Id*.

[35] *Id*. at 154. The settlers were "almost destitute of the necessary article of salt." *Id*.

[36] *See id*.

[37] *Id*.

[38] FILSON, *supra* note 14, at 48.

offensive.[39] The war party had spotted the salt makers before capturing Boone.[40]

> The Shawnees outnumbered the salt makers by more than four to one, and Boone worried that the appearance of an Indian army at Boonesborough would come as a complete surprise and that there would be a bloody rout. Quickly he devised a stratagem that would forever be the subject of controversy.[41]

Understanding the odds and learning of the war party's mission to attack the under-defended Boonesborough, Boone led the war party to the salt makers and away from the settlement. As he approached the salt camp, he ordered the men to lay down their arms and surrender to the Shawnee.[42] This decision would haunt him for the rest of his life.[43] The Shawnee marched their prisoners toward Chillicothe (the largest Shawnee village in the area), forcing them to also carry the large kettles and salt already produced by the work party, adding insult to the injury of defeat and capture.[44] Along the way, Boone was stripped to a breach clout and leggings and forced to run a gauntlet consisting of two lines of Shawnee warriors with sticks and clubs who viscously beat him as he sprinted past each man.[45]

Already a legend on the frontier—even gaining recognition and respect among the Native American tribes of the region for his tenacity and prowess as a woodsman—Boone was a conspicuous prisoner for the Shawnee.[46] After arriving at Chillicothe, Boone and ten of the men from the ill-fated salt party were marched onward to Detroit, where he was presented to General Hamilton.[47] In a move common among fellow officers at the time, Hamilton offered the militia officer parole.[48] The Shawnees refused to surrender such a prize to the British, but rather adopted Boone into their tribe, a custom that was prevalent among the Native Americans of the eastern United States.[49]

By all accounts, Boone lived comfortably among the British and Indians, a fact that would also later trouble him at trial.[50] Boone maintained that his friendly relationship with the enemy was a ruse to ultimately aide in his escape.[51] An uncanny hunter, Boone was eventually given leave to hunt without guards.[52] In June of 1778, after spending nearly six months in captivity, Boone began to hear rumors of a large-scale summer offensive being mounted against the settlements in Kentucky.[53] Recognizing the critical nature of this intelligence, Boone slipped his captors.[54] According to Boone, "On the sixteenth [of June], before sun-rise [sic], [Boone] departed in the most secret manner, and arrived at Boonesborough on the twentieth, after a journey of one hundred and sixty miles; during which, [he] had but one meal."[55]

The reaction to Boone's homecoming was varied.[56] His family and close allies were ecstatic to see the return of their patriarch and military leader.[57] Morale in Boonesborough was low, and the living conditions had deteriorated to squalor in the six months following the capture of the salt party.[58]

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[39] FARAGHER, *supra* note 2, at 156-57. Frontiersman captured and executed Shawnee Chief Cornstalk at Point Pleasant, Ohio, in November 1777. *Id*. The Shawnee warriors were on a punitive expedition to avenge the death. *Id*.

[40] *Id*. at 156. "They [the Shawnee war party] were camped on Hinkston Creek and these four scouts were returning from the Licking, where they had already spied Boone's men at work." *Id*.

[41] *Id*. at 157.

[42] *Id*. at 158.

[43] *Id*. at 201. Boone's decision, though highly criticized at the time, was arguably prudent given the force ratio of the parties, and the decision likely saved the lives of the men of his salt-party and the beleaguered settlers at Boonesborough. *See generally id.*

[44] *Id*. at 161.

[45] Boone was given the choice to run a gauntlet formed of the Shawnee war party on the way to Chillicothe or to wait and run at Chillicothe. *Id*. at 160. Boone chose the former, asserting that the women and children of the Shawnee inflicted worse and more humiliating torture to captured prisoners than the Shawnee warriors. *Id*.

[46] FILSON, *supra* note 14, at 49.

[47] *Id*.

[48] *Id*. "[A]lthough the Governor (General Hamilton) offered [the Shawnee] one hundred pounds Sterling for me, on purpose to give me [Boone] a parole to go home." *Id*. The concept of granting parole for military prisoners was common among European armies of the day as long as the parolee would give his word not to take up arms against the paroling army until hostilities had ceased. *See* Major Gary D. Brown, *Prisoners of War Parole: Ancient Concept, Modern Utility*, 156 MIL. L. REV. 200 (1998).

[49] Ten of the salt makers would eventually be adopted by the Shawnees. FARAGHER, *supra* note 2, at 164. The Shawnees commonly adopted enemy prisoners to replace their own sons lost in battle. *Id*. "During the eighteenth century hundreds of Europeans and Americans were captured and adopted into Indian tribes." *Id*.

[50] FILSON, *supra* note 14, at 49. "Several English gentlemen there, being sensible of my adverse fortune, and touched with human sympathy, generously offered a friendly supply for my wants, which I refused . . . ." *Id*.

[51] *See* TRABUE, *supra* note 1, at 63-64.

[52] FILSON, *supra* note 14, at 51.

[53] *Id*.

[54] *Id*.

[55] *Id*.

[56] FARAGHER, *supra* note 2, at 175. "Boone found them sullen and suspicious." *Id*.

[57] *See id*. at 175.

[58] *See id*. at 177. Sections of the stockade had actually rotted away in Boone's absence. *Id*.

Boone's return rekindled a spark of hope among the inhabitants.[59] On the other hand, rumors of Boone's surrender and preferential treatment by the enemy had circulated among the residents, and many were suspicious of Boone's return.[60] Pushing aside these distractions, Boone rallied the inhabitants of Boonesborough to ready the fort for battle.[61]

IV. The Siege of Boonesborough

Indians [are] coming against us to the number of near 400 which I expect here in 12 days . . . we shall lay up provisions for a siege.[62]

Captain Daniel Boone orchestrated a protracted defense of the Boonesborough settlement in the late summer of 1778.[63] Employing settlers of all ages, Boone equipped about sixty rifleman for war.[64] He consolidated and pre-positioned his meager supplies, cleared surrounding vegetation to increase his fields of fire around the fort, and sent an urgent message to his chain of command in Virginia for reinforcements.[65]

Among Boonesborough's residents was Colonel (COL) Richard Callaway.[66] Callaway was the son of a wealthy, landowning family in the Shenandoah Valley of Virginia.[67] He was Boone's superior in age, rank, and time in service, but Boone was in command at Boonesborough.[68] Callaway was described as "officious, bad tempered, and a bit of a blue blood."[69] He most definitely resented Boone's infectious leadership and his operational command of Fort Boonesborough.[70] Their adversarial relationship would come to a head during the siege of Boonesborough as Callaway would vehemently challenge Boone's tactical judgments at every turn.[71]

The Shawnee gathered a force of roughly 400 men to attack Boonesborough.[72] On September 7, 1778, the siege of Boonesborough began and would last for eleven days.[73] Two decisions during the siege would result in additional court-martial charges for Boone at trial.[74]

The first decision came to be known as the Paint Creek Raid.[75] In late August, rumors were swirling around Boonesborough as the settlers waited for the Shawnee's assault.[76] Boone decided to undergo a preemptive attack on a nearby Shawnee village on the Paint Creek in late August 1778.[77] He reasoned that a raid using thirty soldiers would be successful against the weakly-defended village and yield plunder that would bolster the meager supplies of Boonesborough in anticipation of a siege.[78] Colonel Callaway vigorously opposed this course of action, reasoning that it would reduce the defenders at Boonesborough by half.[79] Regardless, the charismatic junior officer formed his raiding party and attacked the Paint Creek village without losing a soldier, but gaining only a modest amount of supplies.[80] Worse, the main body of the Shawnee attack had maneuvered closer to Boonesborough during the raid, and was now located between Boone's raiding party and the fort.[81] Boone and his men were forced to take a long and indirect route back to Boonesborough.[82] They arrived on September 6, 1778, to the news that the Shawnee's assault would begin the following day.[83]

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[59] FARAGHER, *supra* note 2, at 175. "'Bless your soul,' pronounced one of the men as Boone came up." *Id*.

[60] *Id*. at 169-70. Andy Johnson was a member of the salt party and had escaped prior to Boone. *Id*. He reported that "Boone was a Tory, and had surrendered [all the salt party] up to the British, and taken the oath of allegiance to the British at Detroit." *Id*.

[61] *Id*. at 177.

[62] *Id*. at 180. Boone pens these words on July 18, 1778, in a message to the Virginia legislature requesting reinforcements. *Id*.

[63] *Id*. at 177-78.

[64] *Id*. at 178. "Black and white, young and old, Boonesborough could count a total of sixty men at arms, defending perhaps another dozen adult women and twenty children." *Id*.

[65] *Id*. at 177-78.

[66] *Id*. at 181.

[67] *Id*. at 113.

[68] *Id*.

[69] *Id*.

[70] See TRABUE, *supra* note 1, at 57-61.

[71] *Id*. Trabue notes COL Callaway's opposition and confrontation to Boone's decisions regarding the failed peace treaty and the Paint Creek Raid. *Id*.

[72] FARAGHER, *supra* note 2 at 180.

[73] *Id*. at 198.

[74] LOFARO, *infra* note 106, at 105.

[75] *See* FARAGHER, *supra* note 2, at 181-82.

[76] *Id*. at 181.

[77] *Id*.

[78] *Id*. at 182. The venture would yield only a very modest amount of supplies. *Id*. This likely stoked the ire of Callaway against Boone by risking so great for so very little. *See generally id*.

[79] *Id*.

[80] *Id*. at 182. "The Paint Creek raid had yielded little plunder." *Id*.

[81] *Id*. at 182.

[82] *Id*.

[83] Trabue notes, "[The Paint Creek Raid party] only got [back] to the fort a few hours before the Indean [sic] army got their [sic]." TRABUE, *supra* note 1, at 63.

The second decision found CPT Boone the victim of a well-played act of perfidy[84] by Chief Blackfish, the leader of the enemy siege force.[85] On September 9, 1778, early into the siege, Chief Blackfish entreated the settlers for peace under a flag of truce.[86] After a meal prepared by the women of the fort, Boone led ten of his principal leaders outside the walls to negotiate with the Shawnee.[87] Articles of peace were agreed to, recorded, and even signed by the parties.[88] However, as Boone and the men stood to shake their adversaries' hands, "[e]ach American was surrounded by at least two Shawnees."[89] Colonel Callaway was the first to react to the trap and violently "jirked [sic] away from them"[90] as gunfire erupted from the fort.[91] A melee ensued as the frontiersman scrambled back to the garrison.[92] Only Squire Boone Jr., Boone's brother, was injured, getting shot in the shoulder.[93] However, he was quickly back on his feet and fled to the safety of Boonesborough's embattled log walls.[94] Captain Boone narrowly escaped recapture by the Shawnee, along with ten of his top leaders.[95] The crack of rifle fire and the acrid clouds of black powder smoke would persist at Boonesborough for nine more days as the Americans repelled persistent assaults by the Shawnee warriors who laid siege to the frontier fort.[96]

The Shawnee pressed their final attack on September 17, 1778, and were repelled.[97] The Americans killed more Shawnee during this attack than during the previous days combined.[98] The siege was over, and the Shawnee warriors melted back into the wilderness.[99] In the end, no American lives were lost, but "several" Shawnee were killed.[100] The absence of American casualties is astonishing given the fact that 125 pounds of lead were removed from the walls of the fort following the battle.[101] Captain Boone defeated a numerically superior force without receiving reinforcements from Virginia.[102] Aside from preserving the settlement and the lives of his friends and families, CPT Boone had secured a significant victory on the western front of the American Revolution by defeating the Shawnee attack orchestrated and funded by General Hamilton.[103] However, Boone's celebration would be short-lived, as an angry COL Callaway immediately sought to convene a court-martial against the frontier hero.[104]

V. The Trial

After the attack on Fort Boonesborough was quelled, COL Callaway and CPT Ben Logan[105] insisted that Boone be tried at a court-martial for a variety of charges involving Boone's conduct prior to and during the defense of Fort

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[84] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, U.N. Doc. A/32/144 [hereinafter Protocol I]. Literally speaking, perfidy means the breaking of faith, and the problem of bad faith may present itself in time of peace or in time of armed conflict with regard to the whole field of international relations whether at a political level—implicating only those participating in the decision-making process—or at the level of the application of the rules. *Id*.

[85] FARAGHER, *supra* note 2, at 188-92.

[86] *Id*. at 183.

[87] *Id*.

[88] *Id*. It is striking that the ruse by the Shawnee included recording the cessation of hostilities with pen and paper; perhaps this was an attempt to "sell" the Americans on the sincerity of the plan. *Id*. Regardless, it illustrates the responsibilities of a militia officer on the frontier. *See generally id*.

[89] *Id*.

[90] TRABUE, *supra* note 1, at 58.

[91] FARAGHER, *supra* note 2, at 188-92.

[92] *Id*. at 191,

[93] *Id*. at 192.

[94] *Id*.

[95] *Id*. "[B]ut our men all got to the fort safe." *Id*.

[96] *See id*. at 192-98.

[97] *Id*. at 198.

[98] *Id*.

[99] *Id*.

[100] *Id*.

[101] *Id*. Lead being a precious commodity on the frontier, its malleable and durable form most assuredly led to its subsequent recovery and recasting into new bullets. *See generally id*.

[102] *Id*. at 190. "A few days later the reinforcements arrived from Virginia." *Id*.

[103] "On the eighth [of September, 1778], the Indian army arrived, being four hundred and forty-four in number[,] . . . marched within view of our fort, with British and French colours [sic] flying; and having sent a summons to me [Boone] in his Britannick [sic] Majesty's name, to surrender the fort . . . ." FILSON, *supra* note 14, at 52. In addition to the capture of Fort Sackville the following year by George Rogers Clark, Boone's defense of Boonesborough against a multinational force represents one of the preeminent victories on the western front of the Revolution for the young United States. Robert C. Alberts, *George Rogers Clark and the Winning of the Old Northwest*, NAT'L PARK SERV. (1975).

[104] FARAGHER, *supra* note 2, at 199.

[105] In 1776, Virginia created Kentucky County in response to the rising threats on the western front of the American Revolution. *Id*. at 145. In addition to creating the government framework of this enormous county on their western flank, the Virginia legislature also appointed "George Rogers Clark [as] major in command of the Kentucky Militia, with John Todd, James Herrod, Benjamin Logan, and Daniel Boone as captains at the American strongholds south of Harrodsburg, Logan's Station, and Boonesborough." *Id*. It is unclear why Logan was so insistent that Boone be tried. However, Trabue notes that Logan's Station, a settlement near Boonesborough, was also affected by the warring Shawnee of the Boonesborough siege and that Captain (CPT) Logan (badly injured in the fighting) had only fifteen men assigned to defend his settlement. *See generally* TRABUE, *supra* note 1, at 60-62. These factors likely contributed to Logan's frustration with Boone following the action. *Id.*

Boonesborough[106] Interestingly, the very same officers demanding a court-martial of Boone also had nephews who were part of the doomed salt making party, and both soldiers had yet to be released or escape the Shawnees' grasp.[107]

Author and historian Michael A. Lofaro, a professor of American and Cultural Studies and American Literature at the University of Tennessee, is a celebrated authority on Boone and frontier history.[108] In his book, *Daniel Boone: An American Life*, he notes the following:

> The court-martial of Daniel Boone convened at Logan's Fort, with charges as follows:
>
> i. That Boone had taken out twenty six men to make salt at the Blue Licks, and the Indians had caught him trapping for beaver ten miles below on [the] Licking [River], and [that Boone] voluntarily surrendered his men at the Licks to the enemy.
>
> ii. That when a prisoner, he engaged with Gov. Hamilton to surrender the people of Boonesborough, to be removed to Detroit, and lived under British protection and jurisdiction.
>
> iii. That returning from captivity, he encouraged a party of men to accompany him to the Paint Lick Town, weakening the garrison at a time when the arrival of an Indian army was daily expected to attack the fort.
>
> iv. That preceding the attack on Boonesborough, he was willing to take officers of the fort, on [the] pretense of making peace, to the Indian camp, beyond the protection of the guns of the garrison.[109]

The charges set forth by Callaway might not withstand the scrutiny of the modern Rules for Court-Martial; however, there are conceivable analogs to the charges under the current Uniform Code of Military Justice by which a zealous trial counsel might develop a case. A contemporary charge sheet[110] against CPT Daniel Boone may include violations of the following punitive articles (considered in the order presented above): Article 86, Absence Without Leave (AWOL),[111] in that Boone was accused of absenting himself from the duty of making salt for the inhabitants of Boonesborough and was captured allegedly trapping beavers[112] ten miles away from the work party; Article 99, Misbehavior Before the Enemy,[113] including specifications for shamefully abandoning, surrendering, and delivering up command of his Soldiers[114] in a cowardly conduct;[115] Article 104, Aiding the Enemy,[116] including specifications for improper communications with the British and Shawnee enemy at Detroit; and possibly Article 134, Reckless Endangerment,[117] for executing the Paint Creek Raid and agreeing to a false peace treaty conference outside the protection of Fort Boonesborough.

It is doubtful that a written copy of the sixty-nine Articles of War, passed by the Second Continental Congress on June 30, 1775,[118] was maintained at Logan's Fort, on the very fringe of American expansion into the continent, a mere three years following its passage. Similarly, the available historical documents suggest that neither a judge advocate nor military judge was present to oversee the conduct of the trial.[119] Allan Eckert, a notable historian whose awards include the Pulitzer Prize, suggests that Boone's command even struggled with whether to follow the long-established and familiar British

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[106] MICHAEL A. LOFARO, DANIEL BOONE: AN AMERICAN LIFE 105 (2010).

[107] *Id.*

[108] Editorial reviews of *Daniel Boone: An American Life*, KENTUCKY PRESS, http://www.kentuckypress.com/live/title_detail.php?titleid =1872#.VpQZSKOhrIU (last visited Jan. 20, 2016).

[109] LOFARO, *supra* note 106, at 105.

[110] U.S. Dep't. of Def., DD Form 458, Charge Sheet (May 2000).

[111] UCMJ art. 86 (2012).

[112] "[A]nd that the Indians caught said Boon [sic] 10 Mile below these men [the salt-making party] on Licking [a river near Boonesborough], where he was a ketching [sic] Beaver." TRABUE, *supra* note 1, at 63. Trabue's account makes this charge even more spurious in that it insinuates that Boone was away from his men pursuing personal business ventures (trapping beaver for fur), rather than procuring meat for his men as noted by Faragher.

[112] FARAGHER, *supra* note 2, at 154.

[113] UCMJ art. 99 (2012).

[114] UCMJ art. 99(2) (2012) ("[s]hamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend").

[115] UCMJ art. 99(5) (2012) ("is guilty of cowardly conduct").

[116] UCMJ art. 104 (2012).

[117] UCMJ art. 134 (2012).

[118] 28 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789 (June 30, 1775), http://memory.loc.gov/cgibin/query/r?ammem/hlaw:@field (DOCID+@lit(jc00249)) (last visited Jan. 20, 2016). Callaway's charge was synonymous with Article XXXI, which carried the following harsh penalty:

> If any commander of any post, intrenchment [sic], or fortress, shall be compelled, by the officers or soldiers under his command, to give it up to the enemy, or to abandon it, the commissioned officer, non-commissioned officers, or soldiers, who shall be convicted of having so offended, shall suffer death, or such other punishment as may be inflicted upon them by the sentence of a general court martial.

Id.

[119] ALLAN W. ECKERT, THE COURT-MARTIAL OF DANIEL BOONE v (A Bantam Domain Book 1993) (1973).

rules and regulations for court-martial or those of the newly-established Republic.[120]

The trial was ultimately heard on September 28, 1778, only eleven days following the end of the siege, by a panel of officers from the Kentucky militia at Logan's Fort.[121] The court-martial was open to the public and many local settlers attended the proceedings.[122] Those facts aside, many of the specific details of the court-martial are less clear. Biographer John Mack Faragher suggests that "the official records of the proceeding disappeared, perhaps destroyed by a well-meaning friend who found them embarrassing."[123]

The combined narratives of biographers Trabue, Filson, and Faragher imply that COL Callaway served as the de facto trial counsel, orchestrating the government's case against Boone.[124] Trabue summarized Callaway's theme at trial by writing, "[Colonel] Callaway insisted [Boone] was in favour [sic] of the bretesh [sic] and he ought to be broak [sic] of his commission."[125] Daniel Trabue, who was present at the trial, notes that Boone's pro se defense to the first charge regarding the salt making party was simple: "[Boone] had surrendered his men to keep the Indians from going to Boonesborough, where 'the fort was in bad order and the Indeans [sic] would take it easy.'"[126] To the second charge of Boone's collusion with the enemy at Detroit, Trabue records that Boone employed a "strategem" [sic] and that he "had told the Shawnees and the British 'tails to fool them.'"[127] Boone's defense to the charges associated with the Paint Creek Raid and the false treaty incident were less reasoned. Boone declared to the panel that "the outcome of the [successful] siege ought to speak for itself."[128] The witness list included COL Callaway and two members of the captured salt party who had escaped, Andrew Johnson and William Hancock.[129] Captain Boone also testified in his own defense.[130]

According to Faragher's account, the officers of the panel retired to deliberate, but came back quickly with a verdict: not guilty on all charges.[131] Trabue records that "the court Marshal [sic] deseded [sic] in Boone's favour [sic.]"[132] In a surprising turn of events, the panel had reached another decision; they promoted Boone to the rank of major for his conduct during the siege.[133] The results were a complete vindication[134] for Boone by his fellow militia officers and simultaneously "heap[ed] scorn" upon Callaway and Logan.[135] "[Colonel] Calleway [sic] and Capt. Ben Logan was [sic] not pleased about it."[136] Callaway's disappointment would be short-lived. Eighteen months after the trial, he was killed by Indians as he worked with his slaves near Boonesborough.[137] "His body was scalped, mutilated, and rolled in a mud hole, leaving him, in the words of John Gass, 'the worst barbequed man I ever saw.'"[138]

Long after the trial, the charges levied against Boone by Callaway continued to trouble Boone.[139] John Filson, a contemporary of Boone, was a historian and author. He wrote *The Discovery, Settlement and Present State of Kentucke* [sic] in 1784.[140] He cited Boone's experiences extensively throughout his work.[141] The scars of the charges against Boone were fresh, as Filson presents a biographical and chronological description of Boone's exploits in Kentucky during the late eighteenth century.[142] In accounting for the period of time in Kentucky immediately after the siege of Boonesborough and the iniquitous court-martial, Filson records Boone's sentiments as follows: "Soon after [the siege of Boonesborough], I went into settlement, and nothing worthy of a place in this account passed in my affairs for some

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[120] *Id.* at 13. "Does this court-martial proceed under long-established British Crown regulations which set forth the limits under which it must be governed, or does it attempt to regulate itself under a new set of standards not really established by a developing independent Republic? In other words, is Captain Boone to be court-martialed under British or American rule?" *Id.* Allen Eckert's novel on the court-martial of Daniel Boone can be placed into the genre of historical fiction; however, Eckert was a meticulous and acclaimed historian who used source-documents for most of his work, including for his use of conversations and narrative throughout. *See generally id.* at v-1. Eckert notes, "What we do know of the court-martial of Daniel Boone has been painstakingly gleaned from numerous scattered sources and brief references to it which were made at the time in letters and diaries or in personal reminiscences which still exist today." *Id.* at v.

[121] FARAGHER, *supra* note 2, at 199.

[122] *Id.*

[123] *Id.*

[124] TRABUE, *supra* note 1, at 64.

[125] *Id.* at 64.

[126] FARAGHER, *supra* note 11, at 200.

[127] TRABUE, *supra* note 1, at 63-64.

[128] FARAGHER, *supra* note 11, at 200.

[129] *Id.*

[130] *Id.* at 63.

[131] *Id.* "After taking testimony from Callaway, the escaped captives Andrew Johnson and William Hancock, and Boone himself, the officers retired to deliberate and were quickly back with their verdict." *Id.*

[132] TRABUE, *supra* note 1, at 64.

[133] *Id.* "[A]nd [the panel] at that time advanced Boon [sic] to a Major." *Id.*

[134] FARAGHER, *supra* note 2, at 200.

[135] *Id.*

[136] TRABUE, *supra* note 1, at 64.

[137] FARAGHER, *supra* note 2, at 201.

[138] *Id.*

[139] *Id.* at 199.

[140] *See* LOFARO, *supra* note 106.

[141] FARAGHER, *supra* note 2, at 2-7.

[142] *Id.*

time."[143] It is telling that Boone omits such a significant event in his life—his court-martial—while simultaneously dismissing the court-martial as an event unworthy of record in his life. Faragher notes at the conclusion of the trial, "[F]or Boone, it was painful having these matters[144] aired at all, and he did his best to avoid any discussion of the whole affair for the rest of his life."[145]

By the 1850s, Boone's youngest son Nathan would claim to know nothing of the trial.[146] Aside from Daniel Boone's consternation regarding this chapter of his life, the soldiers under his command would often affirm the decision of the panel years following the court-martial.

> A whispered debate, of which [Boone] was painfully aware, continued for years over his conduct. After they returned, the former captives were asked scores of times for their opinion. For the most part, they exonerated Boone of any blame for their ordeal. "It was Boons [sic] management that saved our lives at the Blue Licks [site of capture]," Richard Wade told his inquiring son. "It was conceded by all conversant with the circumstances that the course [Boone] pursued was the only wise, safe, and prudent course."[147]

VI. Conclusion

The court-martial of Daniel Boone is an insightful glance into how commanders attempted to maintain good order on the western front of the American Revolution—far different from the more established command structures of the Continental Army and the founding judge advocates of the JAG Corps. His ramshackle court-martial illustrates the need for judge advocates, military judges, and court reporters to marshal the court-martial process toward a just result that can be recorded for stare decisis and posterity. Daniel Boone died peacefully in his Missouri home on September 26, 1820, at the age of 85, with his family at his side.[148] Ironically, it was an early Federal Judge, John Coburn, whose eulogy at Boone's funeral perhaps best captures the legendary woodsman's gravitas: "Few men have excelled Col. Boone, for he has been the instrument of opening the road to millions of the human family from the pressure of sterility and want, to a Land flowing with milk and honey."[149]

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[143] *Id.* at 54.

[144] Lofaro notes that "after a full investigation, Boone's defense of his actions and loyalty [to the American cause] was upheld and he was honorably acquitted on every charge." LOFARO, *supra* note 106, at 106. COL Callaway's attempts to cast aspersions on Boone's character as an officer failed. *Id.*

[145] FARAGHER, *supra* note 2, at 201.

[146] *Id.* at 199.

[147] *Id.* at 200-01.

[148] *Id.* at 318-19.

[149] *Id.* at 322.

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