GOVERNMENT CONTRACTS LAW AS AN INSTRUMENT OF NATIONAL POWER: A PERSPECTIVE FROM THE DEPARTMENT OF THE AIR FORCE

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ABSTRACT

Just as the law is increasingly recognized as an important instrument of national power, this article argues that government contracts law should also be recognized as such an instrument. Broadly construed, acquisition law encompasses a host of subjects that bear on national security. This discussion is divided into inward- and outward-facing components. Its inward-facing components are *instrumental* in nature because they serve as handmaidens to the military and other instruments of national power. Its outward-facing components are *intrinsic* in nature because various foreign policy tools, including foreign military sales (FMS), are governed by procurement law, making this component an instrument of national power in its own right. This article uses an example from Latin America to illustrate how U.S. laws that authorize, manage, and enforce the FMS program are used to give practical effect to standards of international law and thus to achieve national strategic objectives. It concludes by suggesting that the judge advocates in the Department of the Air Force who specialize in procurement law are perhaps undervalued.

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"*[A]cquisition reform . . . is a national security issue, and the failure to innovate inside the Pentagon will have real life-and-death national security implications.*"

Bret Boyd[1]

I. INTRODUCTION

Instruments of national power are the means by which the government conducts foreign policy.[2] Historically, in both the literature[3] and national security doctrine,[4] scholars and practitioners have recognized four such instruments known as "DIME": diplomacy, information, economics, and military. Consistent with Joint Doctrine Note 1-18,[5] this article assumes that there is a fifth instrument of national power—the law—that can operate either independently or in concert with the other instruments.[6] Scholars and practitioners have coined a new acronym in light of this recognition: "MIDFIELD."[7]

1. Bret Boyd, *Defense Acquisition Reform Is a National Security Issue*, Grayline, https://graylinegroup.com/defense-acquisition-reform-is-a-national-security-issue (last visited May 24, 2022).

2. *See generally* U.S. Dep't of Def., Joint Chiefs of Staff, Joint Doctrine Note 1-18, II-1, II-5, II-8 (Apr. 25, 2018), https://fas.org/irp/doddir/dod/jdn1_18.pdf [https://perma.cc/3GZ7-AS3H] [hereinafter Joint Doctrine Note].

3. *See*, *e.g.*, George T. Raach & Ilana Kass, *National Power and the Interagency Process*, Joint Forces Q., June 1995, at 8–13.

4. *See*, *e.g.*, Joint Chiefs of Staff, Joint Publication 1: Doctrine for the Armed Forces of the United States, I-12 to I-15 (as amended through Mar. 25, 2013, incorporating changes through July 12, 2017), https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp1_ch1.pdf [https://perma.cc/4JDX-KUNR] [Joint Publication I].

5. Joint Doctrine Note, *supra* note 2, at II-8 (citing Peter C. Phillips & Charles S. Corcoran, *Harnessing America's Power: A U.S. National Security Structure for the 21st Century*, 63 Joint Forces Q. 38, 40 (2011)).

6. This article was written in response to the U.S. Air Force Judge Advocate General's School's 2020 National Security Writing competition, entitled "Law as Instrument of National Power." Submissions were to consider how law could "be used as an instrument of national power, either alone or in combination with other instruments."

7. *See also* Jeremy S. Weber, *Playing the MIDFIELD: It's High Time to Recognize Law as an Instrument of National Power*, JAG Rep. (Nov. 4, 2019), https://reporter.dodlive.mil/2019/11/playing-the-midfield [https://perma.cc/7BAH-C8VX].

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Those in the military and national affairs increasingly recognize the law as an instrument of national power. Since then-Colonel Charles Dunlap's seminal essay on the subject two decades ago, which popularized the term "lawfare,"[8] the nexus between foreign affairs, military operations, and the law has become an academic subject unto itself.[9] Few would dispute that, in a world that is ever more legalistic and globalized,[10] the law affects matters both public and private at home and abroad like never before.[11] This article takes this proposition a step further, making a more controversial claim.

In 2018, the Air Force[12] Judge Advocate Generals (JAG) Corps leadership released an updated "Flight Plan," which included a graphic depicting how the Corps's mission fits within national security doctrine.[13] The accompanying

8. Col. Charles J. Dunlap, Jr., Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts 1 (Nov. 29, 2001), https://people.duke.edu/~pfeaver/dunlap.pdf [https://perma.cc/5MK2-FBLG] (unpublished paper presented at Harvard University, Carr Center, Humanitarian Challenges in Military Intervention Conference); *see also* Charles J. Dunlap, Jr., *Lawfare: A Decisive Element of 21st Century Conflicts?*, Joint Force Q. 34, 34 (2009) (refining his definition of the term "lawfare" in light of developments in the previous decade).

9. *See*, *e.g.*, Bernard Koteen, *National Security Law: A Career Guide* 3, Office of Public Interest Advising, Harv. L. Sch. (2014), https://hls.harvard.edu/content/uploads/2015/07/NATIONAL-SECURITY-LAW-2014.pdf [https://perma.cc/LZ9Q-FRM5] (stating that that national security law courses started to appear in law school curricula in the late 1980s, truly came of age following 9/11, and that this legal discipline covers myriad practice areas); Georgetown Law Libr., *National Security Law Research Guide*, Geo. L. Sch. (Mar. 11, 2022), https://guides.ll.georgetown.edu/national_security (explaining that the national security law field encompasses military justice, border security, emergency and war powers, intelligence law, and the PATRIOT and Homeland Security Acts).

10. Weber, *supra* note 7, at 3 (observing that, given the law's omnipresence, "[i]t stands to reason that [it] would be a natural candidate for the title of instrument of national power").

11. *See*, *e.g.*, E. Norman Veasey & Christine T. Di Guglielmo, Indispensable Counsel: The Chief Legal Officer in the New Reality 30–33 (2012) (describing the prominence of the in-house counsel role given the "new reality" wherein firms face complex legal risks associated with new regulations such as Sarbanes-Oxley); Weber, *supra* note 7, at 1 ("Law plays a central role in national power, and pretty much every other area of life."). Weber continues:

> Law is pervasive: it impacts nearly every aspect of society. Law touches everyone every day in ways seen and unseen. It regulates the air we breathe, the food we eat, the clothes we wear, the roads we drive on, and the jobs we perform. It regulates our social, political, and economic relationships. It permits certain acts, and criminalizes others. It affects us from before the cradle to after the grave. This is true of domestic American law, but it is also true of international law.

Id. at 2–3 (citing Margaret E. McGuinness, *Old W(h)ine, Old Bottles: A Reply to Professor Paulsen*, 119 Yale L.J. Online 31 (2009), https://www.yalelawjournal.org/forum/old-whine-old-bottles-a-reply-to-professor-paulsen [https://perma.cc/Y7CJ-JX7U]).

12. The generic term "Air Force" has been used for what is more properly called "the Department of the Air Force," which encompasses both the Air Force and the Space Force. Judge advocates in the Department of the Air Force serve both forces, often alternating between them in the course of their careers. For simplicity, this article will continue to use "Air Force" to mean the entire Department of the Air Force, including both Air and Space Forces.

13. *Compare JAG Corps Flight Plan: Bridging the Strategic to the Tactical and Back*, U.S. Dept. of Def. (Dec. 28, 2018) (on file with the author), *with* Donald J. Trump, *National Security Strategy of the United States of America*, White House (Dec. 2017), https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf [https://perma.cc/KW67-R85W] (providing that pursuing an America-first strategy entails protecting the homeland,

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explanatory text defines the Corps's legal domains: military justice, operations and international law, and civil law.[14] The first two are instruments of national power in a straightforward way. As former Secretary of Defense James Mattis once observed, military justice is essential to good order and discipline.[15] It is a force multiplier and increases the lethality of the military.[16] Operations and international law are even more clearly instruments because they provide commanders with the left and right boundaries when executing the mission.[17] Less obvious is civil law's function as an instrument of national power. This article argues, perhaps more controversially, that one area of civil law is particularly important: acquisition law. It maintains that the lawyers who specialize therein are an essential instrument of national power, no less than in the other domains in which judge advocates work.[18]

This article analyzes the inward- and outward-facing aspects of procurement law to illustrate how expertise in this field may enable other instruments of national power and serve as an instrument in and of itself. Acquistion law is an important tool across the armed forces, but, in the Air Force's technology-centric modes of warfare, it is truly indispensable. Enabling airmen and guardians to bring the fight to air, space, and cyberspace depends

promoting American prosperity, preserving peace through strength, and advancing American influence), *and* James Mattis, *Summary of the National Defense Strategy of the United States of America: Sharpening the American Military's Competitive Edge*, U.S. Dept. of Def. 5 (2018), https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf [https://perma.cc/6GBZ-YYNY] (setting priorities to build a more lethal force, strengthen alliances and attract new partners, and reform the DoD for greater performance and affordability), *and* Secretary of the Air Force Public Affairs, *Air Force Senior Leaders Unveil New Priorities*, U.S. Air Force (Aug. 2, 2017), https://www.af.mil/News/Article-Display/Article/1264852/air-force-senior-leaders-unveil-new-priorities [https://perma.cc/47JF-EAAV] (announcing that the Air Force's priorities would be to restore readiness, to cost-effectively modernize, to drive innovation, to develop exceptional leaders, and to strengthen our Alliances), *and* Gen. David L. Goldfein, *CSAF Letter to Airmen*, Air Force (Mar. 10, 2017), https://www.af.mil/News/Article-Display/Article/1108931/csaf-letter-to-airmen [https://perma.cc/ME92-A5Q4] (proclaiming the Chief of Staff's priorities to revitalize squadrons, to strengthen joint leaders and teams, and to enhance multi-domain command and control).

14. A.F. Judge Advoc. Gen.'s Corps, ABA Rep. (2018), https://www.afjag.af.mil/Portals/77/documents/2018_ABA_Report.pdf?ver=2018-10-15-085732-503 [https://perma.cc/6553-HX47].

15. Memorandum from James Mattis, Sec'y of Def., to the Sec'ys of the Military Dep'ts, Discipline and Lethality 1 (Aug. 13, 2018), https://partner-mco-archive.s3.amazonaws.com/client_files/1534283120.pdf [https://perma.cc/3JSN-5CGD] (noting that "enhanced lethality . . . requires having a more disciplined force").

16. Lt. Gen. Richard C. Harding, *A Revival in Military Justice: An Introduction by The Judge Advocate General*, 37(2) JAG Rep. 4, 5 (2010), https://www.afjag.af.mil/Portals/77/documents/AFD-101105-056.pdf [https://perma.cc/R7Y3-FRB9] (paraphrasing George Washington, stating that "[d]iscipline is a force multiplier").

17. *See* John J. Martinez, Jr., *The JAG Corps Flight Plan—Our Foundation . . . Our Future*, 44 Reporter 24, 40 (2017).

18. Perhaps this proposition is not too controversial a claim considering that the aforementioned article for the *JAG Reporter* framing the writing competition for which this article was submitted mentions that, in 2001, a contract was used as a "legal weapon" to prevent commercial satellite imagery from falling into enemy hands preceding the invasion of Afghanistan. Weber, *supra* note 7, at 4 (citing Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, Yale J. Int'l Affs. 146, 147 (Winter 2008)).

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on sophisticated machines of war whose purchase is facilitated by lawyers.[19] Stripped of those machines, the Air Force would bring little to the fight: hence the centrality of acquisition law. The penultimate section suggests that the cultivation of this expertise is perhaps underemphasized.

Procurement law is both an instrumental and intrinsic instrument of U.S. power. It is instrumental in that it is a force enabler.[20] Acquisitions counsel help their clients navigate the procurement system; to avoid, manage, and prepare for litigation; to fully embrace competition; and, when necessary, to pursue the necessary exceptions to policy, class deviations, or reforms.[21] Thus, the practice of procurement law helps to ensure that warfighters have what they need while at the same time reducing the burden on taxpayers.[22] It thereby enables and safeguards the military and economic instruments of national power, among others.[23]

In addition to procurement law being an inward-facing instrument enabling other instruments, its outward-facing side is also an instrument of national power in its own right. Broadly defined, procurement law affects myriad aspects of international relations and commerce including export controls,[24] national security restrictions on foreign imports,[25] and the delivery of non-military foreign aid,[26] among other subjects.[27] Spending half of a trillion dollars every

19. *See generally* Barton C. Hacker, *The Machines of War: Western Military Technology 1850–2000*, 21 Hist. & Tech. 255 (2005) (describing the interaction of science, technology, and military weaponry beginning in the nineteenth century).

20. Weber, *supra* note 7, at 3 (claiming that "the United States unquestionably uses domestic law to achieve strategic effects within her shores").

21. *See Contracts Specialists*, Today's Mil., https://www.todaysmilitary.com/careers-benefits/careers/contracts-specialists [https://perma.cc/3PEL-5CFD] (last accessed Apr. 22, 2022).

22. Joint Doctrine Note, *supra* note 2, at II-17 (Apr. 25, 2018).

23. Joint Publication 1, *supra* note 4, at I-12 to I-15 (spelling out the "DIME" acronym, which includes military and economic instruments of power).

24. *See generally* Joelle Laszlo & Marques O. Peterson, *Overview of US Export Control and Sanctions Laws and Regulations*, *in* The Contractor's Guide to International Procurement 61–85 (Erin Felix & Marques O. Peterson eds., 2018) [hereinafter The Contractor's Guide].

25. *See* Allen B. Green, International Government Contract Law 70–71, 87–89, 106 (2011) (explaining that the U.S. defense industry is one of the most protected industries, partly for national security reasons, and discussing negotiations for defense free trade agreements and various other exceptions to the laws and regulations otherwise limiting foreign competition).

26. *See id.*, at 149–207 (reviewing the procurement law issues associated with development programs administered by the U.S. Agency for International Development).

27. Not least among such procurement-related subjects bearing on national security is the extent to which the DoD may buy from non-U.S. suppliers when legitimate concerns about either security of supply or security of information exist. Such policy concerns are not uniquely American, but are well recognized in the defense procurement literature abroad. *See*, *e.g.*, Luke R.A. Butler, Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market 204–43 (2017); Martin Trybus, Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context 41–44 (2014); Peter Trepte, Regulating Procurement: Understanding the Ends and Mean of Public Procurement Regulation 232–33 (2007). "Procurement law" broadly defined also covers various other subjects, including defense offsets, *see*, *e.g.*, Green, *supra* note 25, at 275–91; bribery and corruption, *see*, *e.g.*, Marques O. Peterson & Lorriene Romero, *Anti-Bribery and the Foreign Corrupt Practices Act*, *in* The Contractor's Guide, *supra* note 24, at 86–105; U.S. anti-boycott policies; *see, e.g.*, Melissa Proctor & Kim Strosnider, *Compliance with US Anti-Boycott Laws and Regulations*, *in* The Contractor's Guide, *supra* note 24, at 106–28; human trafficking,

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year, the U.S. federal government is the world's single largest buyer.[28] Despite domestic criticism,[29] our procurement system is admired abroad and has been emulated in various ways.[30] "Exporting" our legal system in this fashion is one of the ways that procurement law functions as an outward facing instrument of national power.[31] Though there are many other examples,[32] this article uses the role of procurement law in foreign military sales (FMS) to demonstrate this proposition. Rather than merely enabling, FMS exemplifies one way in which government contracts law functions as an intrinsic instrument of national power. Therefore, procurement law itself is such an instrument, not merely a handmaiden to other instruments.

Together, these inward- and outward-facing elements make procurement law an important instrument of national power. This distinction between inward- and outward-facing elements is drawn to underscore how acquisition

see, *e.g.*, James J. McCullough et al., *Anti-Human Trafficking Requirements for Federal Contractors*, *in* The Contractor's Guide, *supra* note 24, at 128–47; collaborative procurements among NATO partners, *see*, *e.g.*, Steven Hill et al., *NATO Procurements*, *in* The Contractor's Guide, *supra* note 24, at 178–206; and international aid administered by the World Bank, *see*, *e.g.*, Alison Micheli, *World Bank Procurement*, *in* The Contractor's Guide, *supra* note 24, at 207–32.

28. Erika Lunder et al., Cong. Rsch. Serv., Rep. No. R42826, The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions 2 (2015).

29. *See*, *e.g.*, Vernon Edwards, *This Is What Is Wrong with Government Contracting*, Wifcon (Sept. 3, 2016), http://www.wifcon.com/discussion/index.php?/topic/3712-this-is-what-is-wrong-with-governmentcontracting/&tab=comments#comment-33249 [https://perma.cc/58XW-A3FX].

30. For example, the U.S. system of monitoring the award process by allowing disappointed offerors to bring protests against the government has been borrowed by the World Trade Organization Agreement on Government Procurement. Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), 1867 U.N.T.S. 154, art. XX; Revised Agreement on Government Procurement to the Protocol Amending the Agreement on Government Procurement, Mar. 30, 2012, GPA/113, art. XVIII; European Union, Directive 2007/66/EC (Classic Directive), art. 2; 2009 O.J. (L216/76), arts. 55–64; *see also* Dietrich Knauth, *4 Tips for Navigating Bid Protests Outside the US*, Law360 (Sept. 27, 2013), https://www.law360.com/articles/469016/print?section=aerospace [https://perma.cc/KY8M-9SZQ] (claiming that other nations have emulated the U.S. bid protest system).

31. *See* Weber, *supra* note 7, at 5 (describing DoD "rule of law missions" and the efforts to export our legal system).

32. FMS is not the only example of procurement law's pervasive influence as an instrument of national power. For example, the National Defense Authorization Act of 2019 prohibited the purchase of Chinese telecommunications products for national security reasons. Pub. L. No. 115-232, 132 Stat. 1636, § 889(a), (f)(3)(A) (2018); *see also* Grace Sullivan, *The Kaspersky, ZTE, and Huawei Sagas: Why the United States Is in Desperate Need of a Standardized Method for Banning Foreign Federal Contractors*, 49 Pub. Cont. L.J. 323, 323 (2020). Next, consider the role of creative procurement lawyers in expediting the invention of mRNA vaccines that would help end the pandemic. *See* David Adler, *Inside Operation Warp Speed: A Model for Industrial Policy*, 5:2 Am. Affairs 3, 9, 16, 21 (2021) (describing the use of other transaction authorities to expedite research, development, and eventually production). Further, the Air Force was given lead agency responsibility under the Defense Production Act, and in 2021 the Department of the Air Force Acquisition COVID Taskforce executed twenty-nine contracts and spent $1.33 billion on behalf of the Department of Health and Human Services, by which U.S. companies received support for expanding domestic manufacturing capacity for personal protective equipment, pharmaceuticals, and Covid-19 testing capabilities. Steve Warns, *AFICC Oversees COVID-19 Relief Efforts as Part of DAF ACT, Awards Contract for Critical Test Kit Materials*, U.S. Air Force (Jan. 25, 2022), https://www.af.mil/News/Article-Display/Article/2911757/aficc-oversees-covid-19-relief-efforts-as-part-of-daf-act-awards-contract-for-c [https://perma.cc/D9PF-XBJL].

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law may operate either independently or in concert with other instruments of national power.[33] Inward-facing elements emphasize that this legal instrument of power supports and sustains the military instrument of national power. The outward-facing example of the FMS program not only shows that this area of law may operate as an instrument of power independently but also how acquisition law may operate in concert with other instruments. Clearly, when the U.S. government facilitates the sale of arms, it also implicates the diplomatic and economic instruments of power. Acquisition law, then, is an instrument of national power and as such is routinely interactive and collaborative with other instruments.[34]

II. INWARD-FACING GOVERNMENT PROCUREMENT LAW

For a military branch that depends on technology like no other, the Air Force must navigate the acquisition process to buy, build, and innovate to accomplish its mission: to fly, fight, and win.[35] The Air Force exemplifies how the United States employs the law "to achieve strategic effects within her shores,"[36] specifically to build and maintain the fleet. To this end, specialized attorneys are essential in four respects. First, they help the Air Force prepare for litigation and, when necessary, to defend its interests. Second, they help the wider acquisition workforce to navigate the procurement system. Third, they are an important bulwark to ensure that the system functions as it was meant to: competitively. Fourth, they help to reform the system when necessary.

A. Navigating the Procurement System

The Air Force Federal Acquisition Regulation Supplement (AFFARS) mandates a legal review at every stage of the procurement process.[37] Under some circumstances, a review is required only above a threshold value.[38] In others, a review is required regardless of the contract value.[39] In practice, this mandate

33. Joint Publication 1, *supra* note 4, at xiii, I-1, I-4, I-12, I-17 (stating that the instruments of national power must be used in concert with one another and in a coordinated fashion under the direction of the National Security Council).

34. *Id.* at I-14 ("The routine interaction of the instruments of national power is fundamental to US activities in the strategic security environment.").

35. *Mission*, U.S. Air Force, https://www.airforce.com/mission [https://perma.cc/SR4E-Z4GA] (last visited May 24, 2022).

36. Weber, *supra* note 7, at 3.

37. AFFARS 5301.602-2(c)(i)(A) (providing that "[c]ontracting officers must obtain legal advice during all phases of acquisitions").

38. *Id.* 5301.602-2(c)(i)(C) (mandating legal review for operational contracts above $500,000 and for AFMC and Space and Missile Command contracts above $1 million).

39. *Id.* 5301.602-2(c)(i)(A)(1)–(19) (mandating review when there is doubt about the interpretation of statutes, directives, and regulations; when using unusual contract provisions; when actions are likely to be subject to public scrutiny or receive higher-level agency attention; when a protest or claim is likely; when contemplating the use of alternative dispute resolution; when using liquidated damages provisions in contracts for other than construction; for source selection decisions and supporting documentation for actions accomplished under the requirements of MP5315.3;

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means that the majority of actions require a legal review. Without the assistance of specialized legal counsel, the procurement system would not function as it should.[40]

Even when a legal review is not required by the AFFARS, the help of specialized counsel is still advisable for several reasons. First, because procurement is highly legalistic,[41] opportunities for missteps abound.[42] Without the benefit of counsel, officials risk making mistakes that may result in suboptimal purchases, unnecessary delays, or costly litigation. Second, because public contracts diverge from private contracts in several important ways, even *lawyers* without specialized contracts training risk making serious mistakes.[43] Third, apart from avoiding mistakes, program counsel can help officials cut through the red tape. Otherwise, overemphasis on compliance may come at the expense of sensible business decisions.[44] Perhaps the greatest service

when dealing with licensing, technical data rights, or patents; for all bid mistakes; for all bid protests and disputes; for all ratifications; for all terminations or suspension actions; and for all individual or class deviations).

40. *See* Jason Miller, *Air Force's Next Hack of the Federal Procurement System: One-Year Funding*, Fed. News Network: Rep.'s Notebook (Dec. 8, 2020, 10:38 AM), https://federalnewsnetwork.com/reporters-notebook-jason-miller/2020/12/air-forces-next-hack-of-the-federal-procurement-system-one-year-funding [https://perma.cc/9X5F-TN5E].

41. *See, e.g.*, John W. Whelan & Robert S. Pasely, Cases and Materials on Federal Government Contracts 1 (1975) (claiming that the federal procurement system is characterized by "extensive legalism"); Harold Leventhal, *Public Contracts and Administrative Law*, 52 Am. Bar Assoc. J. 35, 40 (1966) (observing that the federal procurement system was already "overjudicialized" six decades ago).

42. *See, e.g.*, Charles Tiefer & William A Shook, Government Contract Law in the Twenty-First Century 3 (2012) (noting a "large role" for a lawyers in federal procurement); John Cibinic, Jr., Ralph C. Nash & Christopher R. Yukins, Formation of Government Contracts 2 (2011) (writing that the general rules of federal procurement law are most often found in the case law); Joshua Schwartz, *Etats-Unis/United States of America*, *in* Droit Comparé des Contrats Publics/Comparative Law on Public Contracts 613, 629 (Rozen Noguellou & Hanna Schröder eds., 2010) (reporting that a "complex and highly-articulated body of law governs the formation of federal procurement contracts"); Robert C. Marshall, Michael J. Meurer & Jean-François Richard, *The Private Attorney General Meets Public Contract Law: Procurement Oversight by Protest*, 20 Hofstra L. Rev. 1, 34 (1991) (explaining that the federal "procurement process is hedged in by a dense thicket of statutes and regulations").

43. American lawyers study private contracts in law school; however, this training can be misleading because public and private contracts are different. *See, e.g.*, Tiefer & Shook, *supra* note 42, at 3 (observing that the government "binds itself, and its contractors, by much more elaborate law than the comparatively simple law governing how private parties contract with each other"); U.S. Comm'n on Gov't Procurement, 4 Report of the Commission on Government Procurement, pt. G, 35 (1972) (reporting that federal government contracts differ from private contracts in one important respect in that they are "formed according to an extensive and complex set of formal rules" for which there is no counterpart in private contract law); Colin C. Turpin et al., The London Transcript: A Comparative Look at Public Contracting in the United States and the United Kingdom I-11 (1971) (concluding that "government contract law is notably different in many respects from the ordinary law" and suggesting that "no presumption of sameness ought to be indulged without careful consideration and consultation"). For an exhaustive analysis of the divergence between public and private contracts, see generally Joshua I. Schwartz, *Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law*, 64 Geo. Wash. L. Rev. 633 (1995).

44. *See generally infra* Section II.B.

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counsel can render is to help clients to understand and to make full use of the flexibility contained in the FAR.[45] Such familiarity with the FAR does not, of course, require a law degree.[46] Yet legal training no doubt helps in this highly formal and legalistic field.

B. Avoiding, Preparing for, and Litigating Bid Protests and Contract Disputes

Because legal reviews are required at all phases of acquisitions,[47] local acquisition counsel are ideally positioned to help officials avoid, prepare for, and litigate protests and disputes. Local counsel also assist with preparing the agency report for bid protests and often do the heavy lifting for protests before the Government Accountability Office (GAO)[48] and the Court of Federal Claims (COFC).[49] And local counsel will likewise help in the preparation of dispute litigation before the Armed Services Board of Contract Appeals (ASBCA) and COFC.[50] Because the federal procurement system is adversarial by design,[51] where "private attorneys-general" are supposed to further the public interest by protesting questionable awards,[52] lawyers are indispensable subject-matter experts for such litigation.[53]

Avoiding litigation is certainly important. However, there is a tendency to fear litigation to an unhealthy degree.[54] Such anxiety may lead acquisition

45. *See, e.g.*, FAR 1.102(d) (providing that officials are to exercise "initiative and sound business judgment" and that they "may assume that if a specific strategy, practice, policy, or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), executive order, or other regulation, that the strategy, practice, policy, or procedure is a permissible exercise of authority").

46. Non-lawyers in the field have also identified such authorities. *See, e.g.*, Dan Ward, *Simplicity & Federal Acquisition Regulations*, LinkedIn (May 26, 2016).

47. AFFARS 5301.602-2(c)(i)(A).

48. AFFARS 5333.104 (establishing that the Air Commercial Litigation Field Support Center, or AF/JACQ, serves as agency counsel before the GAO).

49. AFFARS 5333.105 (stating that AF/JACQ serves as agency counsel to the Department of Justice (DOJ) for protests at COFC and assists the DOJ in defending the Air Force's interests).

50. AFFARS 5333.291(a) (establishing that AF/JACQ represents the Air Force in appeals before the ASBCA); AFFARS 5333.292(a) (saying that the DOJ represents the Air Force in appeals before COFC and that AF/JACQ serves as the Air Force counsel).

51. The Law and Economics of Framework Agreements: Designing Flexible Solutions for Public Procurement 32 (Gian Luigi Albano & Caroline Nicholas eds., 2016).

52. *See* Associated Industries of New York State, Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943). This is consistent with a broader policy of "regulation by private litigation" common in various fields. *See* Ralf Michaels, *American Law (United States)*, Encyclopedia of Comparative Law 76 (Jan M. Smits ed., 2d ed. 2014). These include antitrust, securities, environmental, civil rights, and products safety regulation. *See* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543, 661–62 (2000); Marshall, Meurer & Richard, *supra* note 42, at 21.

53. *See* John W. Whelan, *Reflections on Government Contracts and Government Policy on the Occasion of the Twenty-Fifth Anniversary of the Public Contract Law Section*, 20 Pub. Cont. L.J. 1, 19–20 (1990) (observing that because the federal procurement system has become so adversarial, lawyers are "indispensable").

54. *See* Vernon J. Edwards, *Postscript: Pathologies of the Protest System*, 27 Nash & Cibinic Rep. ¶ 38 (Aug. 2013) (observing that contracting officers "are supposed to be afraid of protests") (citing Marshall, Meurer & Richard, *supra* note 42, at 1).

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personnel to resist change or innovation,[55] discourage the use of practices not specifically sanctioned,[56] or other manifestations of overdeterrence.[57] Often, the best advice counsel can give is to stop worrying about protests and to focus on exercising good business judgment.[58] Lower-value procurements are rarely protested and thus should not worry the contracting officer. Higher-value contracts in excess of $100 million will be protested no matter what, and thus there is no use in worrying about creating a "protest proof" procurement.[59] In either case, officials would do best to concentrate on making sound procurement decisions rather than on avoiding protests.[60]

C. Securing for the Government the Benefits That Arise from Competition

In a landmark opinion decided eight decades ago, the Tenth Circuit held that the purpose of federal procurement statutes was "to prevent unjust favoritism, or collusion or fraud . . . and thus *secure for the Government the benefits which arise from competition*."[61] Competition has long been a hallmark of the federal procurement system.[62] Yet this purpose can be thwarted if government officials become too single-minded about the avoidance of litigation or of winning protests or disputes at any cost.[63] With a better understanding of the rationale for so much litigation in the federal procurement system, program counsel may serve an important role: they can be the watchmen of competition.

Acquisition attorneys are litigation specialists whose training helps procurement officials when protests and disputes arise, with the goal of avoiding them in the first place. Relative to the nonlawyers working on a source selection, the lawyers are the litigation experts. They are, however, more than that. Such counsel also help officials to develop a proper perspective on the value

55. Ralph C. Nash & John Cibinic, Jr., *Foreword*, 7 Nash & Cibinic Rep. 12, 12 (1993) (noting that the anxieties stemming from a desire to curb abuse has caused the U.S. government to create a "bloated" system of rules and regulations, which in the end, is inefficient); *see also* Edwards, *supra* note 54, at ¶ 38 (reporting that, although top-notch procurement officials are unafraid of protests, the average official is terrified and thus "dubious about or even afraid of new ideas").

56. Steven Kelman, *Remaking Federal Procurement*, 31 Pub. Cont. L.J. 581, 595 (1998) (noting that "the fear of being subjected to a traumatic lawsuit . . . inhibited government officials from trying procurement practices not specifically sanctioned by other procurement rules, even if the rules did not forbid the practice, because this was perceived to increase one's risk of being sued").

57. Robert C. Marshall et al., *Curbing Agency Problems in the Procurement Process by Protest Oversight*, 25 Rand J. Econ. 297, 311–14 (1994) (reporting that officials may respond to the threat of a protest by choosing a contract vehicle ill-suited to the procurement only to avoid the protest, which wasted the government's time and money).

58. *See* Daniel I. Gordon, *Feature Comment: Avoiding Bid Protests: Some Advice to Agency Counsel*, 56(28) Government Contractor ¶ 244 (July 30, 2014).

59. *Id.*

60. *Id.*

61. United States v. Brookridge Farms, Inc., 111 F.2d 461, 463 (10th Cir. 1940) (emphasis added).

62. Agencies are required to use "full and open competition through the use of competitive procedures." 41 U.S.C. § 3301(a); 10 U.S.C. § 2304(a); *see also* Lani A. Perlman, *Guarding the Government's Coffers: The Need for Competition Requirements to Safeguard Federal Government Procurement*, 75 Fordham L. Rev. 3187, 3214–15 (2007) (describing competition in contracting as the cornerstone of U.S. government contracting).

63. *See generally* Gordon, *supra* note 58.

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of litigation as a guarantor of competition.[64] In this manner, the acquisition lawyer seeks to further not only the Air Force's immediate procurement needs but also to underwrite the integrity of the procurement system as a whole.[65] This goal is not simply a matter of interest to the regulator, the taxpayer, or the morally punctilious; it is also critically important because a competitive system is one that suppliers can trust.[66] If public business cannot be done on the basis of trust and voluntary exchanges, the alternative is coercion,[67] which should be avoided.[68]

Buying next-generation innovation in the fields that the Air Force and Department of Defense (DoD) are pursuing will require not only maintaining relationships with existing contractors in the defense industry, but also expanding the industrial base to new businesses.[69] Further, in what the Obama administration called the third-offset strategy,[70] the Pentagon seeks to acquire the next generation of military technology in fields where civilian, non-defense firms currently dominate.[71] According to the National Defense

64. *See* Lani A. Perlman, *Guarding the Government's Coffers: The Need for Competition Requirements to Safeguard Federal Government Procurement*, 75 Fordham L. Rev. 3187, 3214–15 (2007) (arguing that bid protest litigation ensures that competition functions as it should); Patricia H. Wittie, *Origins and History of Competition Requirements in Federal Government Contracting: There's Nothing New Under the Sun*, Reed Smith 29–30 https://www.reedsmith.com/-/media/files/perspectives/2003/02/origins-and-history-of-competition-requirements-in/files/origins-and-history-of-competition-requirements-in/fileattachment/wittiepaper.pdf [https://perma.cc/BG89-MGUY] (last visited Apr. 11, 2022) (recounting the legislative history indicating that Congress specifically included bid protests in the Competition in Contracting Act of 1984 to establish a "strong enforcement mechanism" that would ensure competition).

65. *See, e.g.*, Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627, 709–10 (2001) (averring that when disappointed contractors protest in pursuit of their own interests, they also inadvertently support institutional integrity).

66. *Id.* at 693 (claiming that third-party monitoring via bid protests promotes the appearance of a level playing field and thereby encourages more competition from potential offerors).

67. Linell A. Letendre, *Google . . . It Ain't Ford: Why the United States Needs a Better Approach to Leveraging the Robotics Industry*, 77 A.F. L. Rev. 51, 58–59, 61–62 (2017) (advocating amending statutory authority to assert greater control over the robotics industry and to mobilize its technology for defense purposes).

68. Daniel E. Schoeni, *Three Competing Options for Acquiring Innovation*, Air & Space Power J., Dec. 2018, at 85, 86–87 (criticizing Letendre's proposal to expand the President's already formidable authority to compel the private sector's cooperation and arguing this is a poor long-term strategy for cultivating relationships with potential suppliers).

69. *See National Security Strategy*, *supra* note 13, at 29 ("We must harness innovative technologies that are being developed outside of the defense industrial base."); Gary Roughead & Kori Schake, The Hamilton Project, National Defense in a Time of Change, Discussion Paper No. 2013-01, at 16 (2013) (urging that we expand the industrial base and diversify not only to drive down costs but to engender innovation).

70. *See* Chuck Hagel, Sec'y of Def., Keynote Address at Defense Innovation Days Before the Southeastern New England Defense Industry Alliance (Sept. 3, 2014), http://www.defense.gov/News/Speeches/Speech-View/Article/605602 [https://perma.cc/JGK2-Z8EM]. The Trump administration did not settle on a name, but continued with essentially the same strategy for acquiring defense innovation; *see* Jon Harper, *New National Defense Strategy Prioritizes High-Tech Equipment, Acquisition Reforms*, Nat'l Def, (Jan. 19, 2018), https://www.nationaldefensemagazine.org/articles/2018/1/19/new-national-defense-strategy-prioritizes-high-tech-equipment-acquisition-reforms [https://perma.cc/XR8S-MF3G].

71. *See, e.g.*, William Greenwalt, Leverage the National Technology Industrial Base to Address Great-Power Competition: The Imperative to Integrate Industrial Capabilities

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Strategy, these technologies include "advanced computing, 'big data' analytics, artificial intelligence, autonomy, robotics, directed energy, hypersonics, and biotechnology."[72] If the Air Force is to attract such firms, it must be counted as a reliable partner that awards contracts fairly, deals justly when disputes arise, and does not act solely on the basis of litigation avoidance. Otherwise, the spritely firms mostly likely to develop innovative solutions will take their business elsewhere.[73] If the perception is that the costs of doing business with the Air Force outweigh the benefits, the rational operator will choose another business partner. Protests entail unwanted delays, but the importance of underwriting competition is no small matter. Acquisition counsel may thereby encourage their clients to take an enterprise-level perspective—however painful the litigation may seem to those on the front lines.

D. Reforming the System

Opinions vary considerably as to whether or to what extent reform is necessary. Some consider it an urgent necessity.[74] Others maintain that the system as presently constituted reflects an ideal alignment not only with constitutional doctrine but also with our political and cultural priorities.[75] Still others hold that the problem lies not with the arrangement of the acquisition system but in procurement officials' ignorance of what the regulations actually say.[76]

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of Close Allies 8–9 (2019), https://www.atlanticcouncil.org/wp-content/uploads/2019/04/Leveraging_the_National_Technology_Industrial_Base_to_Address_Great-Power_Competition.pdf [https://perma.cc/MQ2B-A455] (explaining that commercial technology outstrips the military in areas that the *National Defense Strategy* has identified as key to future defense applications, including artificial intelligence and machine learning, software development, data analytics, autonomy and robotics, and biotechnology).

72. *See National Defense Strategy*, *supra* note 13, at 3.

73. Kelley M. Sayler, Cong. Rsch. Serv., R46458, Emerging Military Technologies: Background and Issues for Congress 31 (2022).

74. The U.S. federal procurement system has been called "a national bureaucratic enterprise that has gone completely haywire." Vernon Edwards, *This Is What Is Wrong with Government Contracting*, Wifcon (Sept. 3, 2016), http://www.wifcon.com/discussion/index.php?/topic/3712-this-is-what-is-wrong-with-governmentcontracting/&tab=comments#commen t-33249 [https://perma.cc/2CVF-2HPB]; *see also* Greenwalt, *supra* note 71, at 8–9 (2019) (saying that our defense procurement system is sclerotic, that fielding weapons takes decades, and that our adversaries are thus leapfrogging); Robert D. Kaplan, The Return of Marco Polo's World: War, Strategy, and American Interest in the Twenty-First Century 68 (Random House New York 2018) (describing defense procurement as ossified and arguing that partly because of this system our Navy will soon have only 150 ships since the Pentagon cannot build more than five ships per year); Roughead & Schake, *supra* note 69, at 15 (describing our current defense procurement system as one "with far too little real accountability and far too much middling oversight that drives up the cost of systems that cannot pace the rate of technological development").

75. *See* Mark Cancian, *Acquisition Reform: It's Not as Easy as It Seems*, Acquisition Rev. Q., Summer 1995, at 189–90 (arguing that "the current system is not broken" but instead "is well designed to accomplish the goals that the nation values"); Jerry L. Mashaw, *The Fear of Discretion in Government Procurement*, 8 Yale J. on Reg. 511, 515 (1991) (suggesting that "the procurement system that we have is not some silly aberration" but is "responsive both to our constitutional heritage and to the day-to-day politics of a system structured to produce continuous oversight").

76. *See* Ward, *supra* note 46 (observing that complaints about the FAR usually arise from ignorance and that "the FAR does not merely permit federal agencies to reduce administrative burden and embrace simplicity, thrift, speed, flexibility, agility, and innovation," but that it "insists

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Whatever the truth may be, though, program counsel would surely have a key role in any such reform efforts.

Perhaps no other group is better situated to identify problems with federal procurement law than the DoD acquisition lawyers whose struggles with the FAR are up-close, personal, and daily. Program counsel, therefore, have a crucial role to play in discussions about reforms. Sometimes this assistance will entail helping clients reach their goal without amending the regulations. Other times, legal counsel may entail advocating for reforms to make the system work better while still preserving transparency, integrity, and fairness. Either way, specialized counsel's role is crucial to ensuring that the procurement system continues working properly.

III. OUTWARD-FACING GOVERNMENT PROCUREMENT LAW

The FMS program is an illustrative example of the outward-facing side of U.S. federal procurement law. The Air Force has an outsized role as one of the two largest purveyors of FMS contracts.[77]

A. Foreign Military Sales

The FMS program is a form of security assistance whereby the United States sells defense goods and services to friendly countries, with the U.S. government acting as intermediary.[78] Its origin lay in the Second World War when the United States supported Britain with the Lend-Lease program.[79] Then, for the first three decades of the Cold War, the United States supported allies

on it"); *see also* MITRE AiDA, *Speeding with the FAR*, https://aida.mitre.org/blog/2019/03/25/speeding-with-the-far [https://perma.cc/C28Y-98Y2] (last accessed Apr. 4, 2020) ("Ignorance of the [FAR] is a greater barrier to government innovation than the FAR itself.").

77. Over the last three years, new FMS sales have averaged $47 billion per year. Def. Sec. Coop. Agency, Fast Facts Fiscal Year 2021, at 1–2 (2021), https://www.dsca.mil/sites/default/files/DSCA_Fast_Facts_FY21.pdf [https://perma.cc/6HRT-HR5F]. Though there are fourteen agencies and DoD components that manage FMS cases, only three departments process ninety-five percent of these: the Army, Navy, and Air Force; U.S. Gov't Accountability Off., GAO-17-703, Foreign Military Sales: DOD Needs to Improve Its Use of Performance Information to Manage the Program 29 (2017). Of that, the Navy averages about twenty percent, and the Army and Air Force each constitute about forty percent. *See id.* at 36–37. U.S. manufacturers have long enjoyed a competitive advantage for fighters and bombers. *See* Ian Anthony, *United States: Arms Exports and Implications for Arms Production*, *in* Arms Industry Limited 66, 78–79 (Herbert Wulf ed., 1993). So much do buyers favor purchasing U.S.-built aircraft via FMS that the Air Force's management of its FMS cases actually skews reports about its use of competitive procedures, by as much as fifteen percent according to one source. U.S. Gov't Accountability Office, GAO-13-325, Defense Contracting: Actions Needed to Increase Competition 15–16 (2014) (finding that the competition rate improved from 34.8% to 49.8% when FMS contracts were discounted). In recent years, the Air Force's share of FMS sales has increased. It reached nearly 50% of the total in 2020, and last year's numbers were on track to surpass 2020 levels. *See* John A. Tirpak, *USAF-Related Foreign Military Saes to Surpass Last Year Despite Pandemic*, Air Force Mag., Aug. 6., 2021, https://www.airforcemag.com/usaf-related-foreign-military-sales-surpass-2020-pandemic [https://perma.cc/DE9N-HL49].

78. *See* Green, *supra* note 25, at 110.

79. *See id.*

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with precursors to what is now called FMS.[80] Congress formalized these arrangements and established the modern FMS program in the 1970s.[81] Since then, FMS has become a key policy tool for advancing U.S. security interests abroad and is critical to our allies' strategic planning and self-defense capabilities.[82]

One could quibble about whether FMS would be more accurately characterized as an activity that fits under the military rather than the legal instrument of national power.[83] However, even if FMS is primarily a military function, it is authorized,[84] managed,[85] and enforced by law.[86] Lawyers—not only from the DoD, but also the State and Commerce Departments—are intimately involved throughout the process.[87] FMS is not a purely legal instrument, but it is unquestionably performed under the aegis of legal authority and is sanctioned by and executed based on the advice of the security cooperation legal experts.[88] What follows is not so much a description of the process, which can be had elsewhere,[89] so much as it is an explanation of why FMS is aptly characterized as an instrument of national power.

The U.S. government is the world's leading arms exporter.[90] Apart from the fact that some weapons are only available through FMS,[91] purchasing U.S. arms through FMS is favored for at least three reasons. First, America builds

80. *See id.* at 110–11.

81. *See id.* at 111–12; Anthony J. Perfilio, Foreign Military Sales Handbook 6 (2021).

82. *See* Tina Kaidanow, *Advancing US Security Through Foreign Military Sales*, Def. News (Aug. 30, 2016), https://www.defensenews.com/opinion/commentary/2016/08/30/advancing-us-security-through-foreign-military-sales [https://perma.cc/8R2C-484V] (arguing that FMS "is a central element in our foreign policy toolkit").

83. *See* Weber, *supra* note 7, at 6 (explaining that instruments of national power work in concert with one another to achieve strategic effects).

84. Arms Export Control Act, 22 U.S.C. 2751 *et seq*.

85. Security Assistance Management Manual, Def. Sec. Coop. Agency, https://www.samm.dsca.mil [https://perma.cc/HD4C-NYQB] (last accessed Apr. 13, 2020) [hereinafter SAMM].

86. Eligibility for FMS can be suspended for various reasons. *See* 22 U.S.C. § 2775(a) (diversion of economic aid); *id.* (discrimination based on race, religion, national origin, or sex or pattern of harassment or intimidation against persons in the United States); 22 U.S.C. § 2377 (aiding or abetting terrorists); 22 U.S.C. § 2370(e) (expropriation of U.S. property); 22 U.S.C. § 2291j (inadequate effort to prevent the sale of illegal drugs to U.S. government personnel); 22 U.S.C. § 2753(c) (use of equipment in violation of its agreement with the United States).

87. *See* Green, *supra* note 25, at 114–15 (listing the major actors in the FMS program, which include State, Commerce, and various agencies within the DoD such as the Defense Security Cooperation Agency and the Security Cooperation Organizations located in country).

88. *See, e.g.*, Def. Inst. of Sec. Assistance Mgmt., The Management of Security Assistance 5–16 (2021) (explaining that "FMS has a language of its own and that learning and communicating with the numerous acronyms, special terms, and organizational symbols is very often half of the battle").

89. *See generally* Perfilio, *supra* note 81.

90. SIPRI Yearbook 2019: Armaments, Disarmament and International Security Summary, SIPRI 9 (2019), https://sipri.org/sites/default/files/2019-08/yb19_summary_eng_1.pdf [https://perma.cc/Z9ZL-U6RU] (last accessed Apr. 13, 2020) (reporting that the United States leads the world in arms exports with 36% of the market share, followed by Russia with 21%, and with the rest of the top ten exporters having less than 10% each).

91. Green, *supra* note 25, at 113.

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the world's premiere weapons.[92] Buyers prefer the dependability, prestige, and deterrence that come with buying the best.[93] Second, foreign buyers want to "entangle" themselves with the United States.[94] Such entanglements may yield collateral benefits apart from buying the best arms at the best price, including deeper and longer-term relationship with a powerful ally.[95] The third reason is that the FMS program itself is an incentive to buy American arms: ninety percent of U.S. arms exports are concluded through FMS.[96] One key reason is that FMS also reduces compliance costs.[97] FMS also allows buyers to avoid the uncertainties and transaction costs[98] often associated with this market.[99] Additionally, buying through FMS means operating within the United States' reliable procurement system[100] that is highly regarded abroad.[101] In some cases, buyers not only like U.S. arms, they admire the U.S. procurement system and

92. *See*, *e.g.*, Sebastien Roblin, *Meet the F-16 Fighting Falcon: The Old Fighter Jet That Keeps on Killing*, Nat'l Interest (Sept. 19, 2019), https://nationalinterest.org/blog/buzz/meet-f-16-fighting-falcon-old-fighter-jet-keeps-killing-73676 [https://perma.cc/HCC4-YWTC] (reporting that General Dynamics' fourth-generation F-16 has an astounding 76-2 combat record and the best "bang-for-the-buck" of any fighter jet on the market).

93. *Id.*

94. *See*, *e.g.*, Kaidanow, *supra* note 82 (arguing that foreign partners "see the benefit of being able to 'buy into' the US defense infrastructure"); Sophie de Vaucorbeil, *Reforming the Transatlantic Defence Market*, The Estonian Foreign Policy Yearbook 2008 115, 128 (2008) (explaining that armaments cooperation is a way to entangle allies into an alliance) (citing Ethan B. Kapstein, *Allies and Armaments*, Survival, Summer 2002, at 141, 143–47).

95. Such entanglements are mutually beneficial and consistent with U.S. foreign policy. *See* Weber, *supra* note 7, at 4 (describing the United States' efforts "to *enmesh* countries in a U.S.-led, rules-based international order that benefits all participants and makes major conflicts less likely") (emphasis added).

96. Perfilio, *supra* note 81, at 3.

97. Jade C. Totman & Brian C. Baldrate, *International Defense Sales*, *in* The Contractor's Guide, *supra* note 24, at 9, 19. *See also* Green, *supra* note 25, at 113 (explaining FMS alleviates administrative and compliance-related burdens imposed upon U.S. defense contractors); Perfilio, *supra* note 81, at 94–95 (citing FAR § 6.302-4; 10 U.S.C. § 2304(c)(4)) (noting that FMS waives the requirement to acquire export licenses).

98. Totman & Baldrate, *supra* note 97, at 19 (noting that states participating in FMS avoid uncertainties and additional costs that would otherwise be present in Direct Commercial Sales, such as, performance and price risks associated with non-FAR and DFARS-governed contracts; costs associated with contract administration and management; costs associated with ensuring compliance with various regulatory frameworks, trade agreements, etc.).

99. For examples of economics research on the problems of information asymmetries prevalent in the defense market, see William P. Rogerson, *Incentive Models of the Defense Procurement Process*, 1 Handbook of Defense Economics 309–46 (Keith Hartley & Todd Sandler eds., 1995); David P. Baron & David Besanko, *Monitoring, Moral Hazard, Asymmetric Information, and Risk Sharing in Procurement Contracting*, 18(4) RAND J. of Econ. 509–32 (1987).

100. *See* SAMM § C4.5.13 (providing that "[w]hen procuring for a foreign government, the Department of Defense shall apply the same contract clauses" required by the FAR and DFARS "as it would use in procuring for itself"); *see also* Totman & Baldrate, *supra* note 97, at 19 (explaining that one of the charms of FMS is that buyers can depend on the predictability of a procurement under the FAR and DFARS); Perfilio, *supra* note 81, at 61 (reporting that under FMS the U.S. government uses the same laws, regulations, and procedures as when buying for its own use).

101. *See* Politicizing Procurement: Will President Obama's Proposal Curb Free Speech and Hurt Small Business?: Joint Hearing Before the H. Comm. on Small Bus. and H. Comm. on Oversight and Gov't Reform, 112th Cong. 100 (2011) (statement of Daniel I. Gordon, Administrator, Office of Federal Procurement Policy, Office of Management and Budget).

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its legal system more broadly.[102] Buying from the United States thus entails the added benefit of using a trusted and efficient system. Procurement law is therefore a key ingredient to what may otherwise seem like a purely military instrument of national power.[103]

B. A Latin American Example: Enforcing the Aerial Interdiction Law Ban

For many countries, the importance of continued U.S. security cooperation is existential. Being their provider of choice affords the United States significant diplomatic leverage. Considerable space could be devoted to discussing examples from Saudi Arabia, Taiwan, or Israel,[104] and how defense industry business relationships through FMS affect diplomatic relationships with these nations. Instead, an illustration from Latin America is used. Many countries in the region are stuck in protracted struggles with narcotraffickers. But for their interest in continued U.S. security cooperation support, and FMS in particular, these countries would adopt policies on the interdiction of civilian aircraft that would violate the Chicago Convention, as noted below, or at least transgress America's views on the meaning of that treaty.[105]

Signatories of the International Convention on Civil Aviation, or Chicago Convention, have since 1944 prohibited armed attacks on civilian aircraft.[106] With two notable exceptions,[107] this prohibition has generally been observed.[108] Some countries that usually follow the prohibition also hold that civilian aircraft may be forced down for purposes of law enforcement; many of these are countries in Latin America that are struggling with drug trafficking.[109] The United States long supported such law enforcement activities.[110] However,

102. *See* Totman & Baldrate, *supra* note 97, at 19 (noting that foreign governments find the assurances and predictability of the U.S. procurement regime, as governed by the FAR and DFARS, desirable and a reason to make purchases through the FMS program rather than buying via direct commercial sales); Green, *supra* note 25, at 113.

103. *See* Weber, *supra* note 7, at 6.

104. *See, e.g.*, Ariel Bachar, *JCPOA: Implications and Effects on Our Foreign Military Sales Program*, 46 Pub. Cont. L. J. 873, 875 (2017) (describing how maintaining eligibility for FMS constrains Israel's military options against Iran).

105. Darren C. Huskisson, *The Air Bridge Denial Program and the Shootdown of Civil Aircraft*, 56 A.F. L. Rev. 109, 110 (2005).

106. *See* Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295, art. 3.

107. *See* Brian E. Foont, *Shooting Down Civilian Aircraft: Is There an International Law?*, 72 J. Air L. & Com. 695, 707–13, 716 (2007) (recounting the several Soviet and Cuban shootdowns and concluding that, although both nations were signatories of the Chicago Convention, they did not condemn the use of force against civilian aircraft).

108. *See* Huskisson, *supra* note 105, at 110 (concluding that the international community "generally abhors the shootdown of civil aircraft").

109. *See* Foont, *supra* note 107, at 717. Colombia, Peru, and Brazil assert that the right to shoot down civilian aircraft derives from their sovereignty under Article 1 of the Chicago Convention. Yet a better basis for such authority lies not in the Chicago Convention but in the U.N. Charter, art. 51, which recognizes states' inherent right to self-defense; *see* Huskisson, *supra* note 105, at 142–47.

110. *See* Huskisson, *supra* note 105, at 109 (explaining that the United States long supported the shootdown of suspected drug aircraft by partners such as Colombia and Peru with

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U.S. policy changed in 2001 after Peru's tragic interdiction of American missionaries mistakenly thought to be drug traffickers.[111] U.S. support for shootdown policies was suspended, and ultimately the law was changed to require an annual presidential determination of eligibility for countries with shootdown policies in order to receive continued assistance from the U.S. government. Such a determination was eventually made for Colombia, but several other regional partners still await U.S. approval of their aerial interdiction policies.[112] This has had second-order effects for FMS, which requires strict compliance with the contract terms, which may include seemingly unrelated U.S. policy.[113] Since the United States now requires a presidential determination for partners to have laws authorizing the shoot-down of civilian aircraft, failure to comply entails suspension from related FMS contracts, including purchasing spare parts. Some countries in Latin America have fallen in line, while others vociferously object that *ni un tornillo* can be bought without presidential approval of their aerial interdiction programs.[114] Were it not for FMS acting as a sword of Damocles hanging over their heads, Latin American partners would be less interested in the niceties of the United States' views on the Chicago Convention.[115] Procurement law lies at the heart of disputes with several key partners in the region and could affect the shape of those relationships in the future, especially with near-peer competitors vying for influence.[116] This illustrates the importance of procurement law as an instrument of national power and how it can be used to greater effect in combination with other instruments.

airborne tracking and intelligence). This has been a bipartisan policy; the Clinton administration introduced the ground radar stations and aerial platforms that enabled shootdowns, which has extended down to the present. *Id.* at 113–14; *see also* Resumption of U.S. Drug Interdiction Assistance to the Government of Peru, Pres. Det. No. 95-9 of Dec. 8, 1994, 59 Fed. Reg. 65,231 (Dec. 19, 1994) (holding that the "interdiction of aircraft reasonably suspected to be primarily engaged in illicit drug trafficking in [Peru's] airspace is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country").

111. *See generally* State Dep't, Peru Investigation Report: The April 20, 2001 Peruvian Shootdown Accident (Aug. 2, 2001), https://fas.org/irp/news/2001/08/peru_shootdown.html [https://perma.cc/QTM2-PFDV]; Central Intelligence Agency, Inspector-General, Report of Investigation, Procedures Used in Narcotics Airbridge Denial Program in Peru, 1995–2001 (Aug. 25, 2008), *available at* http://www.fas.org/irp/cia/product/ig-airbridge.pdf [https://perma.cc/9KG4-CM66].

112. *See* Huskisson, *supra* note 105, at 118–19.

113. 22 U.S.C. § 2753(c) (establishing that FMS contracts can be terminated or suspended if a country that is otherwise eligible uses the equipment or service provided in substantial violation of its agreement with the United States).

114. This expression is common in blog posts complaining about the FMS program's tight controls over sales of equipment and requirement for strict compliance with U.S. rules and regulations: "Not even a screw!"

115. Weber, *supra* note 7, at 4–5 (explaining that international law establishes norms, though it sometimes may lack the capacity to enforce those norms).

116. *See* Karina Osgood, *Taking to the Skies*, JAG Rep. (Dec. 10, 2021), https://www.jagreporter.af.mil/Post/Article-View-Post/Article/2865942/taking-to-the-skies [https://perma.cc/WGD8-FAS3] (arguing that current U.S. policies on shootdowns could strain relationships with important regional partners and lead them to ally with Chinese or Russian instead).

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IV. GOVERNMENT PROCUREMENT LAW: AN UNDERAPPRECIATED LEGAL SPECIALTY

This section does not attempt a comprehensive review of all the military branches. It concentrates instead on the active-duty judge advocates who serve the airmen and guardians of the Department of the Air Force. Further, this section addresses only judge advocates, not the many skilled (and often far more experienced) civilian attorneys who constitute the majority of the procurement law support, working either for the Air Force JAG Corps or the Office of General Counsel. This composition of the workforce (some active duty, some civilian) begs the question—if acquisition law is so important, why not civilianize it entirely (as the Navy has)?[117] This would, so the thinking goes, ensure better subject-matter expertise and continuity.[118]

This article does not attempt to settle what the right mix of civilian and military attorneys may be, but it does posit that having attorneys with active-duty experience is valuable to the Air Force. Not always, but often, Air Force civilian attorneys started their careers in the JAG Corps and first gained exposure to government contracts while on active duty.[119] Many would not have discovered government contracts but for this experience. Active-duty experience not only affords a broader understanding of the mission, but also greater credibility with clients. Thus, a key ingredient to a seasoned and experienced civilian corps of contracts experts is their military service, most often in the JAG Corps.[120] Further, for the same reasons that members of the armed forces prefer a justice system administered by uniformed judges, prosecutors, and defenders, having uniformed procurement lawyers in the mix also serves an important function. Last, necessity sometimes dictates that lawyers be stationed closer to the warfighter.[121] Civilians may serve in such roles, but they do so purely on a volunteer basis.[122] This consideration alone makes active-duty procurement experts, who can be ordered into hostile combat zones, indispensable.[123]

Yet as a specialty for judge advocates, procurement law is sometimes given short shrift. The Air Force leaders, civilian and military alike, have long recognized that procurement is mission critical; but the JAG Corps, it seems, has

117. *See Why Civilian*, U.S. Navy Judge Advoc. Gen.'s Corps., https://www.jag.navy.mil/careers_Civ/careers/whyciv.html [https://perma.cc/CTD7-ZTPZ] (last visited Apr. 24, 2022).

118. *Id.*

119. *See generally* The U.S. Army Judge Advoc. Gen.'s Corps, https://www.law.edu/_media/ocpd-probono-forms/JAG-Corps-Brochure.pdf [https://perma.cc/3TFH-WZ7V].

120. *See Contracts Specialists*, Today's Mil., https://www.todaysmilitary.com/careers-benefits/careers/contracts-specialists [https://perma.cc/8WDU-ZLT2] (last accessed Apr. 22, 2022).

121. *See* Rod Powers, *AFSC 6C0X1 - Contracting Airmen*, The Balance Careers (Nov. 26, 2018), https://www.thebalancecareers.com/air-force-enlisted-job-descriptions-3344373 [https://perma.cc/X63R-RY4K].

122. *See*, *e.g.*, Roughead & Schake, *supra* note 69, at 14.

123. *Id.* ("Civilians have become ever-more important for their expertise in areas such as acquisition, but it is more difficult to use them as flexibly as their military counterparts.").

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until recently considered it a tertiary priority.[124] The Air Force Judge Advocate General's School teaches new entrants at the Judge Advocate Staff Officer Course, its introductory course, that military justice takes priority.[125] "Military justice is job one," is the refrain.[126] This lesson is reinforced throughout one's career progression.[127] The best lawyers are assigned to litigation billets.[128] Talented justice practitioners are rewarded.[129] It would seem the opposite is true for those specializing in government contracts law. Few would think that developing this expertise would be a fast track for career advancement.[130] Shrewd mentors often forewarn promising young judge advocates who are wandering down this career cul-de-sac unawares.[131]

Despite insufficient emphasis on the value of program counsel from the JAG Corps, the larger Air Force and the market recognize the value of legal

124. *Compare* Air Force Acquisition, https://ww3.safaq.hq.af.mil (last visited Apr. 16, 2022), *with* 2018 ABA Report, The Air Force Judge Advocate General's Corps, https://www.afjag.af.mil/Portals/77/documents/2018_ABA_Report.pdf?ver=2018-10-15-085732-503 [https://perma.cc/4T8Q-JXPD] (last visited Apr. 16, 2022) 1-28 ("JAG Corps professionals are ready to support them at every step.").

125. *Compare* Air Force Acquisition, https://ww3.safaq.hq.af.mil (last visited Apr. 16, 2022), *with* 2018 ABA Report, The Air Force Judge Advocate General's Corps, https://www.afjag.af.mil/Portals/77/documents/2018_ABA_Report.pdf?ver=2018-10-15-085732-503 [https://perma.cc/4T8Q-JXPD] (last visited Apr. 16, 2022) 1-28 ("JAG Corps professionals are ready to support them at every step.").

126. Lt. Gen. (ret.) Richard C. Harding, *The Year in Review*, 37 JAG Rep. 10 (2010), http://www.afjag.af.mil/Portals/77/documents/AFD-111018-032.pdf [https://perma.cc/62GZ-E93W].

127. *Id.*

128. JAG Instruction 1150.2E from the Off. of the Judge Advoc. Gen., Dep't of the Navy 1-28 (Jan. 26, 2022) establishes that:

> MJLQ officers fill litigation-intensive billets, ensure the effectiveness and efficiency of the courts-martial process, and are available for emergent assignments that require expertise in military justice and criminal litigation. MJLQ officers embrace and embody the governing principles of the JAG Corps: embody a warfighting spirit; lead with character and integrity; stand for diversity, equity, and inclusion; embrace accountability; promote a culture of learning; and encourage innovation.

129. The Navy JAG Corps's instruction explains:

> The purpose of the MJLCT is to provide excellence in courts-martial litigation and in other accountability actions, to enable good order and discipline, and to ensure that courts-martial results at trial and on appeal are just and reliable. The JAG Corps is committed to providing MJLQ officers education, training, and courtroom experience to develop and maintain the critical skill sets needed to litigate and preside over complex criminal cases, including cases involving sexual assault charges.

Id. at 1–2.

130. To my knowledge, the Air Force has not formally studied the relationship between the specialization of procurement law and increased promotion rates. However, specializing in subjects besides military justice and operational and international law likely decreases one's chances of promotion.

131. What exacerbates the Corps's mild neglect is the opportunity cost. To a greater extent than military justice litigators, government contracts experts who choose to stay on active duty forgo more generous compensation in the private sector. To many, that makes the perceived neglect all the more irksome. Col. Clyde M. Thomas, *Executive, Office of the Judge Advocate General*, 15 JAG L. Rev. 16 (1973).

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expertise in government contracts. Consider the following example. The Office of the Assistant Secretary of the Air Force for Acquisition, Technology and Logistics (SAF/AQ) has for many years funded the full-time studies of judge advocates earning Master of Laws (L.L.M.) degrees in government procurement law.[132] This investment is considerable and is a testimony to the interest that acquisition specialists have in cultivating acquisition law expertise. Consider also that it is not uncommon in Air Force Materiel Command for program offices to fund additional procurement attorney billets to ensure that ample capacity is available for legal support.[133] A review of Air Force leadership's priorities proves that acquisition is front and center.[134] This leadership does not ask for the development of a better system for justice or discipline; nor do they seek improved guidance on the law of armed conflict.[135] Instead, their emphasis is on upgrading the fleet, which is an acquisition function.

Regarding the value the market places on procurement lawyers, one need only observe how judge advocates with such training vote with their feet. They have more opportunities than most of their peers, whether elsewhere in government or in private practice.[136] Such alternatives can be alluring. Many of our best procurement lawyers separate or else immediately retire once they are eligible.[137] The value of this expertise is not lost on the market.

This is an unfortunate state of affairs. Although America's procurement workforce is among the best in the word, commentators have nonetheless complained about the U.S. acquisition workforce's inadequate training.[138] And, often, training is also a problem for the lawyers advising them; no sooner are they trained than they move on.[139] If the Air Force JAG Corps were serious

132. *Id.*

133. For example, when I was stationed at Hanscom AFB, Massachusetts from 2014 to 2017, several of the program counsel billets were funded by the Lifecycle Management Center.

134. *See generally National Defense Strategy*, *supra* note 13, at 10–11.

135. One of my peer reviewers of an earlier version of this article, Judge Jeri Somers, objected that major military justice reforms are underway and noted that assessment would seem to contradict my argument. I note that those reforms are driven by congressional and public concerns. Air Force leadership, both uniformed and civilian, by contrast, seems more focused on developing warfighting capabilities to prepare for war with near-peer adversaries. These are primarily acquisition issues.

136. *See* Drew Lautemann, *Benefits and Considerations About Becoming a Military Attorney*, For the Rec. (Sept. 2017), https://www.sdcba.org/?pg=FTR-Sep-2017-3.

137. *See* Andre R. Allen, *1 May 1955: A Career Field Is Born*, 32 Reporter 37, 38 (2005).

138. *See*, *e.g.*, Daniel I. Gordon, *Feature Comment: Reflections on the Federal Procurement Landscape*, 54 Gov't Cont. ¶ 51, Feb. 22, 2012, at 1 ("Virtually everyone paying attention to the U.S. procurement system since the 1990s has decried the decline of the acquisition workforce."); Christopher Yukins, *A Pedagogical Perspective on Training the Acquisition Workforce*, 47 Gov't Contractor ¶ 204, May 4, 2005, at 7–8 (assessing and suggesting reforms to training of the acquisition workforce at Defense Acquisition University); Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 Stan. L. & Pol'y Rev 549, 557 (2005) (attributing the abuses at Abu Ghraib, in part, to poor oversight of contractors resulting from insufficient investment in training and development of acquisition professionals).

139. *See*, *e.g.*, F. Trowbridge vom Baur, *History of Century and a Half of Legal System of Defence Procurement Traced*, 27 Hennepin Law. 17, 24 (Nov. 1958) (lamenting that too often the talented acquisition professional moves on "just as he becomes most knowledgeable and useful").

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about retaining talent, it would use one or more of the familiar retention tools: special or incentive pay could be offered;[140] a separate promotion track could be created, just as the Navy JAG Corps has done for its litigators; and contract specialists could be allowed to homestead rather than being reassigned every two to three years.[141] Considering that the Air Force's combined budget of $174 billion,[142] investing in efforts to recruit, train, and retain top-tier legal talent would cost little when compared with potential savings to the taxpayer. The status quo is pennywise but pound foolish.[143]

Several reasons that the Corps is more interested in military justice than in procurement law come to mind. To begin, whereas the former is a legal function staffed mainly by lawyers,[144] in procurement, lawyers are but one part of a larger team. The JAG Corps does not "own" procurement in the same sense that it "owns" military justice. Perhaps the Corps's emphasis on military justice arises not from our clients' wishes but in part from what we as lawyers find most interesting; few went to law school to become procurement lawyers. Likewise, there is something flashier about military justice litigation. No filmmaker will ever cast Tom Cruise in the procurement-law version of *A Few Good Men*.[145] A common quip in the Corps is that if an attorney's work

140. *Id.* (recommending higher salaries that would compare favorably with civilian employers).

141. This article's emphasis is on uniformed lawyers, but the preponderance of the talent in acquisition law lies in the cadre of highly skilled government civilian lawyers at the program level, AF/JACQ, and Air Force Office of General Counsel. This discussion would apply with even greater force to the civilian attorney workforce because their expertise makes them a valuable commodity to civilian law firms, defense contractors, and other federal agencies alike. Perhaps similar retention incentives should be considered to retain these experienced attorneys. Relying on their patriotism alone seems like a questionable strategy.

142. The Air Force's budget is $156.3 billion and Space Force's $17.4 billion for fiscal year 2022. *Air Force President's Budget FY21*, U.S. Dept. of the Air Force (2021), https://www.saffm.hq.af.mil/FM-Resources/Budget/Air-Force-Presidents-Budget-FY21 [https://perma.cc/E2BQ-TRDA] (last visited Mar. 26, 2022).

143. vom Baur, who was then the General Counsel of the Navy, concluded his article with the following observations:

> Sometimes in a few minutes a high degree of knowledge, skill and talent can be expressed in an exercise of judgment which will save the Government thousands or hundreds of thousands of dollars, and which is simply not possible with a less skilled person. It would cost the Government little more to increase the salaries of the middle and upper grades of the Government servant.
>
> The moderate amount so expended, in my opinion, would be returned many, many times by the economy which would result in the administration of the million dollar and multimillion dollar programs of today, including the procurement and administration of Government contracts.

vom Baur, *supra* note 139, at 24.

144. Of course, other players participate in the military justice system. But if military justice is failing, the commander will want an explanation from her staff judge advocate. By contrast, if the procurement function is failing, more stakeholders are involved, and legal is not generally held accountable in the same way. *See* A.F Judge Advoc. Gen.'s Corps, *supra* note 14.

145. Two films that may be well known to the government contracts community deserve honorable mention, even though I believe the point still holds: *The Pentagon Wars* (1998) and *War Dogs* (2016). Yet neither of these films won nearly the commercial success of *A Few Good Men*, which, adjusted for inflation brought in $312 million domestically and another $210 million

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is outside of the courtroom then she is not truly practicing law.[146] This misplaced preference for litigation over transactional work is not unique to the military, but it is a common criticism of pedagogy in law schools.[147] These comments serve not to denigrate the proven value of military justice litigation or of military justice generally, only to encourage the recognition of acquisition law as a domain of comparable value to the mission.[148]

Similar observations could be made about the third domain under the *JAG Corps Flight Plan*, operations and international law.[149] Just as some law students are drawn to the profession of arms by the prospect of immediate criminal litigation experience, others are attracted by the prospect of close contact with the mission as operational law advisors. Contracts law lacks a corresponding immediacy or proximity to the mission: no Hollywood mogul would finance an *Eye in the Sky* spinoff whose focus is government procurement. Thorny contracts issues do not set the heart racing, much less turn a profit at the box office.[150]

Another reason that the JAG Corps may not favor focusing on procurement is that it seeks to train generalists who can one day serve as well-rounded leaders and will train the next generation of judges advocates and paralegals. This undeniably serves an important purpose. Yet perhaps these goals are not so antagonistic as supposed. Arguably, the career path for developing a

internationally. *See* Donald Liebenson, *Kevin Pollak Can Handle the Truth About A Few Good Men*, Vanity Fair (Dec. 4, 2017), https://www.vanityfair.com/hollywood/2017/12/a-few-good-men-anniversary-25-years-kevin-pollak-tom-cruise [https://perma.cc/JC66-RYJS].

146. Of course, not all Air Force acquisition counsel are purely transactional attorneys. For example, the AF/JACQ litigates protests before the GAO and disputes before the ASBCA. *See* AFFARS MP 5333.104 (2021). Each year one Air Force judge advocate is seconded to the National Courts Section of Department of Justice's Civil Division (DOJ) to litigate at COFC. *The Air Force Judge Advocate General's Corps*, U.S.A.F. (2018), https://www.afjag.af.mil/Library/AFJAGS-Library. Further, local counsel are personally involved in preparing cases for protest and dispute litigation before the GAO, ASBCA, or COFC by litigation attorneys from AF/JACQ or the DOJ, for example, drafting the agency report and assisting with other filings for bid protests before the GAO. *See* A.F Judge Advoc. Gen.'s Corps, *supra* note 14; *see also* 4 C.F.R. § 21.3(c) (2021).

147. *See, e.g.*, Lynnise Pantin, *Deals or No Deals: Integrating Transactional Skills in the First Year Curriculum*, 41 Ohio N.U.L. Rev. 61, 88 (2014) (warning that law schools should avoid marginalizing transactional-oriented students and perpetuating the myth that only "litigators are real lawyers"); Lisa Penland, *The Hypothetical Lawyer: Warrior, Wiseman, or Hybrid?*, 6 Appalachian J. L. 73, 73–74 (2006) (lamenting that law schools teach students primarily to be litigator-warriors and recommending instead that the curriculum teach them to be hybrid litigator "wisemen"); Melissa L. Nelken, *The Myth of the Gladiator and Law Students' Negotiation Styles*, 7 Cardozo J. Conflict Resol. 1, 1 (2005) (arguing that law school teaching and the portrayal of lawyers in popular media feed a stereotype that lawyers are above all else cut-throat litigators); Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 Harv. Negot. L. Rev. 143, 167 (2002) (reporting that, whereas law students were led to believe that an aggressive approach to litigation was more effective, her study indicates that a less adversarial, problem-solving approach often wins the day).

148. My complaints about military justice litigation taking priority may also apply to other transactional civil law specialties in the Air Force such as labor, utilities, medical, or environmental. But these other specialties are not front and center in the Air Force's strategic objectives in the same way that acquisition law is.

149. *JAG Corps Flight Plan*, *supra* note 13, at 1.

150. *But see supra* note 145 (discussing two films about defense procurement).

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program counsel to advise Program Executive Officers (PEOs) is no less rigorous than that required for skillfully advising commanders on military justice matters or other base-level type issues; advising PEOs requires a similar level of competence, savvy, and officership. Program counsel will not fail to develop the necessary leadership skills. Perhaps the Corps could build a cadre of acquisition specialists who at the same time become the leaders who will train the next generation. The two are not mutually exclusive.[151]

There is, perhaps, a glimmer of hope. Although the *Flight Plan* does not separately list acquisition alongside military justice and international and operational law, if one reads the material defining the civil law domain, it seems to be talking mostly about acquisition law.[152] "Civil law disciplines," it states, "are interwoven with the *acquisition*, operation, protection, and preservation of the force and its people, *funds*, *weapon systems*, *materiel*, and *installations*."[153] Civil law is in one sense being used here as a catchall for domains that are not encompassed by the other two. Yet the definition given also suggests that "civil law" is primarily about fiscal and acquisition law. This document seems to betoken a new understanding about the primacy of acquisitions and, thus, to correct the Corps's longstanding neglect of this field in favor of fields of practice that active duty attorneys may find more compelling. Our clients recognize the primacy of acquisitions *and* the necessity of legal expertise therein. Perhaps a rebalancing of the Corps's priorities is therefore overdue.

V. CONCLUSION

Apart from a few career fields whose direct contribution to front-line combat operations is recognized,[154] other branches of the military sometimes view the Air Force as a less legitimate part of the military. Such criticism is unfair. But amidst the mockery, there is a kernel of truth. Just as sailors without ships would not a Navy make, no other service depends on its machines of war so much as the Department of the Air Force. The Air Force's machines are prerequisites for the domains it fights in, and that fact should be recognized

151. I am indebted to Peter Camp for the insights in this paragraph, though I alone am responsible if his thoughts are poorly conveyed. Correspondence on file with author.

152. A.F. Judge Advoc. Gen.'s Corps, *supra* note 14.

153. *Judge Advocate*, Team McChord, https://www.mcchord.af.mil/Units/Judge-Advocate [https://perma.cc/7237-JJZ] (last visited May 7, 2022) (emphasis added).

154. For example, Kaplan movingly describes the respect that infantrymen and special operators have for A-10 pilots:

> The A-10 is essentially a flying Gatling gun. Its pilots hover low to the ground and loiter over the battlefield at great risk. Even as they disdain the rest of the Air Force, *Marines and Green Berets consider A-10 pilots true warriors*. A-10 pilots feels the same bond toward combat infantry. It is the trait of professional warriors that they feel closer to those in other armed services who take similar risks than toward the men and women in their own service who don't. Being in the military isn't enough for these men: To earn their respect, you had to have joined in order to fight—not to better your career, or your station in life.

Kaplan, *supra* note 74, at 99–100 (emphasis added).

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and embraced. It has ramifications for how the Air Force does business,[155] and, specifically to this article, for where the most valuable billable hours are for judge advocates and the types of expertise that ought to be cultivated. In short, the Corps could better tailor the legal services that it offers to the Air Force's unique mission, which, arguably, has more in common with a technology company than with infantry warriors.[156]

Law is indeed an instrument of national power, and the Air Force JAG Corps embodies one part of that instrument in the larger foreign policy apparatus. But the JAG Corps could perhaps better align with our client's greatest need. It has long provided sound advice, counsel, and litigation support for military justice and international and operational law, and these are surely critical endeavors. Yet perhaps the JAG Corps could do better at cultivating and retaining expertise in government contracts—especially given that the Air Force's overwhelming emphasis on high-tech acquisitions is our central distinction from our sister services.[157] The apparent realignment in the *JAG Corps Flight Plan* is encouraging,[158] but the Corps's orientation could still do more to better sync with our service's distinctive mission.

While government contracts law will never be as alluring as military justice, that does not make it less important. Procurement law is not at the tip of the spear, but without this enabling instrument of national power there would be no spear in the first place. Likewise, on its outward-facing side, procurement law is a key foreign policy tool and an instrument of national power in its own right, which is of particular interest given that Air Force oversees an FMS portfolio of $640 billion.[159] Procurement is part of the Department of the Air Force's DNA; it would behoove the Corps to better leverage the *legal* aspect of this instrument of national power.

155. *See*, *e.g.*, Loren Thompson, *Five Reasons the Air Force's Digital Century Series Is Doomed to Failure*, Forbes (Sept. 24, 2019), https://www.forbes.com/sites/lorenthompson/2019/09/24/five-reasons-the-air-forces-digital-century-series-is-doomed-to-failure/#4bb934591bd2 [https://perma.cc/Z9TT-A3XB] (citing Dr. Will Roper, Assistant Secretary of the Air Force for Acquisition, Technology, and Logistics, who argued that "the Air Force needs to think of itself more like a *technology company*, investing in game-changing innovations that disrupt the military marketplace and disorient potential adversaries") (emphasis added).

156. *Id.*

157. *Id.*

158. *JAG Corps Flight Plan*, *supra* note 13.

159. Fast Facts, *supra* note 77, at 2.

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