

## **Recommendation 34: Repeal certain Title 10 sections and note sections, create a new Part V under Subtitle A of Title 10, and redesignate sections in Subtitles B-D to make room for Part V to support a more logical organization and greater ease of use.**

### **Problem**

With passage of the Armed Services Procurement Act of 1947 all of the laws governing DoD acquisition were contained within an organized, logical structure. In the 60 years since Title 10 was enacted, the acquisition-related part of the Code (Part IV, Service, Supply, and Procurement, of Subtitle A, General Military Law), has dramatically expanded, with the addition of new sections. Further disrupting the once organized structure are the myriad *note* sections for numerous provisions, including permanent or temporary requirements as well as specific reporting requirements. This statutory language is included within the Code but are set forth in note sections under existing sections of law. For example, the FY 2018 NDAA included 35 new defense acquisition-related provisions that became note sections. In the last three NDAs alone, Congress enacted 265 new acquisition-related provisions, with many being included as *notes* or assigned statutory designations such as; 10 U.S.C. § 2313b. The abundant note sections have rendered Title 10 difficult to navigate even for experienced acquisition personnel.

### **Background**

Title 10, enacted into positive law August 10, 1956, details the specific laws governing the Military Services and provides organizational structure for DoD. The title was originally divided into five subtitles, A through E, with defense acquisition statutes primarily found in Subtitle A, General Military Law under Part IV, Service, Supply, and Procurement. In the 1956 codification, the acquisition-related statutes were mainly codified in three chapters: Chapter 137, Procurement Generally (derived from the Armed Services Procurement Act of 1947); Chapter 139, Research and Development; and Chapter 141, Miscellaneous Procurement Provisions. A Subtitle E was added in 1994.

In the past 60 years, the original three chapters have grown dramatically, with Chapter 141 growing from six to 36 sections. Congress created several new chapters, including Chapter 140, Procurement of Commercial Items; Chapter 142, Procurement Technical Assistance Cooperative Agreement Program; Chapter 144, Major Defense Acquisition Programs; Chapter 146, Contracting for Performance of Civilian Commercial or Industrial Type Functions; Chapter 149, Defense Acquisition System; and Chapter 144B, Weapon Systems Development and Related Matters. Title 10, Subtitle A, Part IV now includes 34 chapters. These chapters have generally been inserted where there is room within the existing structure of Part IV of Subtitle A, rather than where they might fit logically or thematically.

Designating new chapters within Part IV of Subtitle A is increasingly problematic. It is now almost always necessary for the section number of a new section to be in the form of a number-and-letter combination (e.g., 2410q or 2466a) rather than the traditional numeric designation. This designation form, though legally sufficient, hinders usability and may lead to confusion of similar citations (e.g., 2304(a) versus 2304a).

There are 20 iterations of Section 2410 (2410, 2410a, 2410b . . . 2410s). In addition to the organization problems created by the growth of the number of actual sections, is the accumulation of almost

350 *notes*. Section 2304, for example, concerns Competition Requirements; however, that section includes 55 *notes* with titles ranging from Matters Relating to Reverse Auctions to Competition for Procurement of Small Arms Supplied to Iraq and Afghanistan. The FY 2018 NDAA resulted in addition of 35 new defense acquisition *notes*.

These provisions cover a wide variety of subjects and are increasingly organized primarily in sequence of enactment rather than by similarity of subject matter. Many defense provisions of law that apply to defense acquisition are not found in Title 10 itself, but are provisions of the annual defense authorization acts or other statutes, which are set forth in the Code as confusing “note” sections. These provisions, especially when they are permanent, are not as useful as they would be if they were provisions of the Code itself.

## Discussion

Despite the trend toward electronic research, the current cumbersome statutory structure for acquisition-related statutes hinders the acquisition community, both inside and outside DoD, from easily identifying related sections and appropriate definitions, and prevents understanding of the statutes in their proper context. As indicated above, the structure originally provided for defense acquisition-related statutes has been overwhelmed by the volume of amendments. The Office of the Law Revision Counsel noted “[o]ver time, some areas of law outgrow their original boundaries due to the enactment of new laws and amendments. . . . As a result, the Code becomes less organized, harder to navigate, and less reflective of the underlying structure of the statutes.”<sup>1</sup> In the overview to the Discussion Draft of the Accelerating the Pace of Acquisition Reform Act of 2018, introduced by Representative Mac Thornberry, (R-TX), Chairman of the House Armed Services Committee (HASC), the committee described the acquisition-related statutes in Title 10 as “cumbersome and incoherent.”<sup>2</sup> The committee further stated that “[a] focused effort is needed to rationalize the body of acquisition law provided to DoD.”<sup>3</sup> Indeed, the task is not so much to *reorganize* the defense acquisition laws as to *organize* them.

Congress, in the conference report to the FY 2018 NDAA, encouraged such a comprehensive reorganization by noting, in regard to the conference report’s recommended repeal of an obsolete provision: “this first, relatively narrow repeal of an outdated program in title 10 . . . should encourage a future, wider effort to reorganize and optimize the entirety of acquisition law.”<sup>4</sup> This statement encourages a once-in-a-generation opportunity for reorganization, or organization, of Title 10.

As a starting point, the Section 809 Panel undertook a review of all the *note* sections for possible codification of such notes or their potential repeal. As a result the panel recommended the potential repeal of 100 note sections and three Title 10 sections.

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<sup>1</sup> “Editorial Reclassification,” U.S. House of Representatives, Office of Law Revision Counsel, accessed June 2, 2018, <http://uscode.house.gov/editorialreclassification/reclassification.html>.

<sup>2</sup> House Armed Services Committee, *Accelerating the Pace of Acquisition Reform Act of 2018: Discussion Draft Overview*, 1, accessed June 2, 2018, [https://armedservices.house.gov/sites/republicans.armedservices.house.gov/files/wysiwyg\\_uploaded/FY19%20Reform%20Bill%20Summary%20Memo\\_FINAL%5B1%5D.pdf](https://armedservices.house.gov/sites/republicans.armedservices.house.gov/files/wysiwyg_uploaded/FY19%20Reform%20Bill%20Summary%20Memo_FINAL%5B1%5D.pdf).

<sup>3</sup> *Ibid.*

<sup>4</sup> FY 2018 NDAA, Conference Report to Accompany H.R. 2810, H. Rept. 115-404, 889.

The provisions recommended for repeal (a) required the Department to issue regulations (or directives or guidance, etc.) or (b) have now expired, or (c) are otherwise obsolete. The purpose of repealing these provisions would be to remove provisions from Title 10 that may unnecessarily constrain the Secretary of Defense's authority, and to reduce the volume of statutory provisions with which those working with defense acquisition statutes must contend. The panel shared its list with DoD to ensure repealing these provisions would do no harm. DoD agreed with the majority, though not all, of the panel's recommendations. As with the recommendations to repeal various statutory offices included in *Volume 1* of the panel's *Final Report*, repealing a requirement neither invalidates the policy nor discourages its continuation. Though the repeal allows the Secretary of Defense greater opportunity to make revisions as circumstances warrant, or for other interested parties to revisit and recommend possible changes as well, a risk exists that repeal of a select number of note sections with ongoing policy implications may lead some to mistakenly believe those policies are no longer operative. Consequently, in situations for which DoD has already implemented, or is about to implement, policies consistent with the NDAA sections identified in the notes proposed here for repeal, DoD should, to the maximum extent practicable, issue an affirmative statement or guidance to the organizations affected indicating the policies remain in place.

To align with the legislative cycle for consideration of the annual defense authorization bill, the Section 809 Panel submitted its recommendations for potential repeals in transmissions to Congress in February and March. The majority of recommendations were initially incorporated in the legislative discussion draft of the Accelerating the Pace of Acquisition Reform Act of 2018. The FY 2019 NDAA, as approved by HASC, includes most, but not all, of the Section 809 Panel's recommended statutory repeals.<sup>5</sup>

As a next step, the Section 809 Panel is developing a comprehensive restructuring of the Title 10 acquisition-related provisions that would be accomplished through creation of a new Part V, Acquisition within Subtitle A, General Military Matters.<sup>6</sup> Such a reorganization would require redesignating many existing provisions of law, which would create a short-term inconvenience; similar efforts have proven worthwhile.<sup>7</sup> In the context of reclassifying certain provisions codified in Title 50, the Office of the Law Revision Counsel noted, "The short-term inconvenience of adjusting to new Code citations is greatly outweighed by the benefit of making much needed long-term improvements in the organizational structure."<sup>8</sup> Enactment of Title 41, Public Contracts, into *positive law* by Pub. L. No. 111-350 is a recent example that is particularly relevant for the acquisition community.

Adding a new Part V at the end of Subtitle A will offer substantial advantages in terms of organizing acquisition statutes and making them proximate to other relevant provisions of Subtitle A. Because there is currently no room for a new Part V between the end of Part IV and the beginning of Subtitle B, the panel's proposal would, entail redesignation of the chapters and sections of subtitles B, C, and D, relating to the three Military Services, so as to make room for the new part V. This proposal presumes

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<sup>5</sup> See FY 2019 NDAA, H.R. 5515, Sec. 812.

<sup>6</sup> The framework for this reorganization is also included in the HASC approved FY 2019 NDAA. Ibid at Sec. 801.

<sup>7</sup> See Ibid at Secs. 806, 807, and 808.

<sup>8</sup> "Editorial Reclassification, Title 50, United States Code, Brief Summary of Changes," U.S. House of Representatives, Office of Law Revision Counsel, accessed June 2, 2018, <http://uscode.house.gov/editorialreclassification/t50/index.html>.

that future growth in Title 10 will generally be in subtitle A and that there will be relatively little growth in the military department subtitles. This proposal presents an opportunity to create room for not only a new Part V of Subtitle A on defense acquisition but also for additional growth in subtitle A, as well as for possible reorganization of other subjects within Subtitle A. As a technical matter, the redesignation of chapters and sections of Subtitles B, C, and D could be accomplished in a transparent manner that ensures there are no substantive changes and uses drafting techniques that minimize the number of complex amendatory provisions.

The task of restructuring these statutes would require substantial effort, rather than simply moving each existing section of law into the newly created structure. This effort includes breaking up some long sections of code into more manageable sections and making technical updates. The proposed reorganization and technical updates would restore much of the parallelism between the acquisition-related provisions of Title 10 with the corresponding provisions of Title 41, standardizing the governments *face to industry* for contractors doing business with both DoD and other federal agencies. This effort would achieve what the Packard Commission called for almost 40 year ago: “Congress should work with the Administration to recodify all Federal statutes involving procurement...[s]uch codification should aim not only at consolidation, but more importantly, at simplification and consistency.”<sup>9</sup>

## Conclusions

Organizing the defense acquisition statutes into a restructured, rationalized form would reduce the overcrowding, reflect more clearly the underlying structure of these statutes, and provide substantial benefits in terms of a structure that is more intuitive and easier to navigate. This effort would be especially beneficial for the thousands of attorneys across DoD who advise commanders, program managers, and contracting officers on acquisition authorities. Confusing notes and cumbersome statutory structure can create a barrier to entry for innovative firms unfamiliar with the federal acquisition process, firms DoD seeks to leverage to ensure technological dominance and enhanced lethality across the joint force inside the curve of near-peer competitors and nonstate actors.

This logical restructuring would be achieved by adding a new Part V at the end of Subtitle A and placing all of the defense-acquisition related statutes into that new part. An initial step, aimed at decluttering the code, was a review of all relevant note sections for possible repeal or codification. Subsequently, the Section 809 Panel recommended repealing sections and notes that either required DoD to issue regulations, had expired by their own terms, or were otherwise obsolete. With these recommendations, the Section 809 Panel is not expressing a view on the merits of the policies promoted by these provisions. Rather, in recommending the repeal of the statutory requirement for a regulation, the Section 809 Panel is recommending that the Secretary of Defense be allowed to revise the regulation as circumstances warrant

The Section 809 Panel’s primary recommendation is to create a rational statutory structure. HASC Chairman Mac Thornberry describes this project in the summary to his proposed FY 2019 NDAA as

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<sup>9</sup> President’s Blue Ribbon Commission on Defense Management, *A Quest for Excellence: Final Report to the President*, June 1986, xxv, accessed June 2, 2018, <https://assets.documentcloud.org/documents/2695411/Packard-Commission.pdf>.

“a historic clarification of the acquisition process.”<sup>10</sup> Future recommendations by the Section 809 Panel will fully address the chapter structure within this new Part V, and restructure some sections to restore the parallelism with current Title 41 provision. This effort is not intended to make substantive changes to the existing acquisition statutes, but would provide a more logical framework within which comprehensive statutory recommendations could be nested. This project ultimately will involve substantial effort on the part of Congress and DoD.

## **Implementation**

### ***Legislative Branch***

- Repeal certain Title 10 sections and *notes* as described in the Section 809 Panel’s recommendations (submitted on February 26, 2018, and March 23, 2018) and codify the remaining *notes* in the new Part V.
- Create a new Part V under Subtitle A of Title 10, and redesignate sections in Subtitles B-D to make room for Part V.

### ***Executive Branch***

- There are no Executive Branch changes required for this recommendation.

### ***Implications for Other Agencies***

- There are no cross-agency implications for this recommendation.

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<sup>10</sup> House Armed Services Committee, *National Defense Authorization Act for FY 2019, Chairman’s Mark Summary*, 9, accessed June 2, 2018, [https://armedservices.house.gov/sites/republicans.armedservices.house.gov/files/wysiwyg\\_uploaded/Chairman%27s%20Mark%20Summary%20FY19%20NDAA.pdf](https://armedservices.house.gov/sites/republicans.armedservices.house.gov/files/wysiwyg_uploaded/Chairman%27s%20Mark%20Summary%20FY19%20NDAA.pdf).

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