

## Recommendation 90: Reorganize Title 10 of the U.S. Code to place all of the acquisition provisions in a single part, and update and move acquisition-related note sections into the reorganized acquisition part of Title 10.

### Problem

Congress, in establishing the Section 809 Panel, directed it to “make any recommendations for the amendment or repeal of such regulations that the panel considers necessary” to streamline defense acquisition. As the panel began its research, it became apparent that restricting its purview to defense acquisition regulations was too narrow. Regulatory implementation is often directed by statutes. Amending, or in some cases repealing, certain defense acquisition statutes is necessary to effectively streamline defense acquisition and provide greater transparency in its processes. Congress acknowledged this situation in subsequent amendments to the Section 809 Panel mandate.

Defense acquisition statutes are codified in Title 10 of the U.S. Code; however, over the years, those statutes have become increasingly disorganized, making it difficult for even the most experienced user to sort through the Code. Acquisition reform has become a perennially popular legislative effort, with Congress enacting no less than 265 acquisition-related provisions in the past three NDAs. Few people know how to sort through the cluttered Code to find those legislative provisions that often end up as notes within the Code.

The acquisition-related statutes that apply to the rest of the federal government were recently organized and codified in Title 41. No similar effort has been made with regard to Title 10, where the organization of the acquisition-related statutes has become problematic. The work of the Section 809 Panel provides an opportunity to bring those defense acquisition statutes into a cohesive organized structure for the long-term benefit of the acquisition community and those companies doing business with DoD or are seeking to enter the DoD marketplace.

### Background

When Title 10 was codified in 1956, the drafters did not anticipate where the growth would take place. Part IV of Subtitle A, Service, Supply, and Procurement, houses most of the acquisition statutes – the house is now full and in disarray. As the Packard Commission noted in 1986:

*... the legal regime for defense acquisition is today impossibly cumbersome. . . . At operating levels within DOD, it is now virtually impossible to assimilate new legislative or regulatory refinements promptly or effectively. For these reasons we recommend that Congress work with the Administration to recodify Federal laws governing procurement into a single consistent and greatly simplified procurement statute.<sup>1</sup>*

The Section 800 Panel (established pursuant to the National Defense Authorization Act for Fiscal Year 1991, Pub. L. 101-510) made a similar finding and recommendation in its January 1993 report to Congress, Streamlining Defense Acquisition Laws. Nothing has changed since those findings and recommendations were made. Lasting positive effects of ongoing reform efforts, like those the Section

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<sup>1</sup> A Quest for Excellence: Final Report by the President’s Commission on Defense Management 55 (June 1986)

809 Panel is recommending throughout its reports, will be limited without a coherent, organized, and transparent structure in which to integrate the resultant legislative changes.

## Discussion

Not since the passage of the Armed Services Procurement Act of 1947 have all the provisions governing DoD acquisition been contained within an organized, logical structure. Over the last 60 years, Congress overloaded Part IV of Subtitle A, adding section after section to the Code. Furthermore, Congress has added myriad *note* sections as it enacted long-term or permanent provisions without amending the Code. A *note* is a provision of law from the annual defense authorization acts or other statutes, which for different reasons are not set forth in the Code as numbered sections. Instead, the editors of the U.S. Code set out the *note* following a Code section.

The number of *note* sections has ballooned over time as Congress authorized short-term pilot programs and reporting requirements that all needed homes somewhere within the Code. Some more permanent provisions of law—enacted through the annual defense authorization acts—have also been buried as *note* sections under existing sections of the law.

A miniscule number of specialized attorneys and policy makers inside and outside of DoD understand what these *notes* mean and where they are located. Few attorneys even recognize that the *notes* are indeed law, just like the section of the Code to which they are appended.

In its *Volume 2 Report*, the Section 809 Panel proposed a rational, statutory structure to replace the confusion and clutter resulting from the Code's buried *note* sections and rambling organization. It also recommended repeal of approximately 100 *note* sections that were either obsolete or expired, as well as three Title 10 provisions. The John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. No. 115–232) adopted a large portion of those repeal recommendations. More significantly, the McCain NDAA recognized the panel's reorganization effort, by creating a new Part V within Subtitle A, *General Military Matters*. To provide room for additional provisions in the new Part V, elements of the Code immediately following the current Part IV will be renumbered.

Redesignation is necessary because there is no more room in Subtitle A, evidenced by the proliferation of *note* sections and the invention of a baroque numbering system (e.g., 2366a, 2371b, 2374a, and even 2410s). As discussed in *Volume 2* of the panel's report, *note* sections that should remain on the books will be codified as new Title 10 sections under a logical and intuitive revised chapter structure. The redesignation will provide additional room for Congress to reorganize or consolidate statutes related to other topics of general military application.

The task of restructuring these statutes requires a substantial effort. Though the intent of this project is not to make any substantive changes to the legislative language, it will include breaking up some long sections of the Code into more manageable sections and making technical updates. Another feature of the restructuring is to work toward a final product that, where practicable, will restore much of the parallelism with Title 41, the acquisition statutes applicable to nondefense agencies that existed before Title 41 was codified.

The Section 809 Panel began the restructuring task, and drafted a number of proposed chapters for inclusion in the newly created Part V in Subtitle A of Title 10. These proposed chapters are being

transmitted periodically to the Senate and House Armed Services Committees as well as to DoD. A table of the completed draft chapters (as of December 31, 2018) is included in the Implementation Details for this section. This table identifies the new proposed section number as well as the original section number for each Title 10 section, and for the note sections, the Title 10 section under which the note originally was located (as well as the public law number). This table is intended to facilitate tracking of the defense acquisition provisions across the old and the new structures. Once the entire project is completed, via enactment in a single or multiple NDAAs, Congress should publish a comprehensive table that identifies the original section numbers and corresponding new section numbers in the new Part V of Title 10. A similar table was published following the reorganization and codification of Title 41 statutes.

In the future, companies that already do business with other federal agencies will encounter a more readable statutory framework when they seek to do business with DoD. More importantly, greater transparency into the laws that govern transacting business with DoD may reduce a barrier into the defense market for innovative small businesses and nontraditional companies.

The mission of the acquisition system is complex, and the stakes are high. DoD must be able to deliver lethality to the warfighter inside the turn of our near peer competitors and nonstate actors. Too often, the practice of defense acquisition and federal procurement is perceived as more complex than its mission, obscured by onerous requirements and shrouded in secrecy. The current lack of organization and structure in the laws governing acquisition seems to confirm this perception.

## **Conclusions**

The tools that support the defense acquisition system need to be simple and effective, not burdensome and confusing. Reorganizing Title 10 would help restore agility and simplicity to defense acquisition. Simplifying the governing body of law is key to creating a system that is more transparent and accessible—and thus better able to meet DoD's mission.

## **Implementation**

### ***Legislative Branch***

- Reorganize all acquisition provisions into a new Part V at the end of Subtitle A of Title 10, U.S. Code.
- Update and move acquisition related *note* sections into the new acquisition structure within Part V of Title 10, U.S. Code.

### ***Executive Branch***

- There are no regulatory changes required for this recommendation.

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

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