SEC. __. ELIMINATION OF GEOGRAPHIC RESTRICTION APPLICABLE TO ACQUISITION AND CROSS-SERVICING AGREEMENTS.

(a) IN GENERAL.—Section 2341 of title 10, United States Code, is amended—

(1) in the section heading, by striking "**deployed outside the United States**";

(2) in the matter preceding paragraph (1), by inserting ", with the concurrence of the Secretary of State," after "the Secretary of Defense";

(3) in paragraph (1), by striking "deployed outside the United States"; and

(4) in paragraph (2), by striking "deployed (or to be deployed) outside the United States".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of subchapter I of chapter 138 of title 10, United States Code, is amended by striking the item relating to item 2341 and inserting the following new item:

"2341. Authority to acquire logistic support, supplies, and services for elements of the armed forces.".

[Please note: The "Changes to Existing Law" section below sets out in red-line format how the legislative text would amend existing law.]

Section-by-Section Analysis

This proposal eliminates a geographic restriction applicable to acquisition and cross-servicing agreements (ACSAs) concluded under the authority of chapter 138 of title 10, United States Code. Such agreements permit the Department of Defense (DoD) to provide logistic support, supplies, and services (LSSS) to, or acquire LSSS from, allies and international organizations on a reimbursable basis. However, section 2341 of title 10, United States Code, restricts the acquisition of LSSS by DoD to situations where the LSSS will be used in support of United States forces "deployed (or to be deployed) outside the United States." Consequently, while ACSAs are generally of worldwide applicability, DoD is nevertheless precluded from acquiring LSSS from allies and international organizations in support of United States forces when those forces are located in the United States. This can adversely impact the conduct of combined exercises, contingency operations, and disaster/humanitarian relief operations in the United States.

The current ACSA authority codified in subchapter II, of chapter 138 of title 10, United States Code, evolved from the North Atlantic Treaty Organization (NATO) Mutual Support Act

of 1979 (Public Law 96-323). That Act addressed the need for DoD to be able to acquire LSSS from allied militaries to support the large numbers of United States forces deployed overseas when such support was not available from organic or commercial sources. The law was subsequently expanded beyond the NATO context, resulting in ACSAs now being the primary—and in many cases the only—means available to DoD of acquiring LSSS from allied and other country militaries and international organizations such as NATO. Regardless of the geographic location, the law has always precluded DoD from acquiring LSSS that is reasonably available from United States commercial sources. This would not change should this proposal be enacted.

Hypothetical examples serve to illustrate the potential impact of the current geographic restriction: (1) NATO deploys AWACs aircraft to the United States after an attack on the United States (as occurred immediately after September 11, 2001) to support air defense operations. But for the geographic restriction, DoD could use the ACSA to pay for the flying hours of the AWACs aircraft. (2) During a Red Flag exercise at Nellis Air Force Base, Nevada, several participants bring air refueling as well as fighter aircraft. But for the geographic restriction, DoD could use the ACSA with each country to exchange air refueling support, thereby enhancing interoperability and the effectiveness of the exercise. (3) In the aftermath of a destructive hurricane impacting the southeast United States, DoD is in dire need of roll-on/roll-off airlift capacity for oversize cargo (a capability domestic air carriers lack). But for the geographic restriction, DoD could use the ACSA to pay for the flying hours of C-17s offered by Canada and the United Kingdom to assist relief operations.

Budget Implications: This proposal has no significant budgetary impact. The resources impacted are reflected in the table below and are included within the Fiscal Year (FY) 2021 President's Budget request.
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Changes to Existing Law: This proposal would amend section 2341 of title 10, United States Code, as follows:

§2341. Authority to acquire logistic support, supplies, and services for elements of the armed forces ~~deployed outside the United States~~

Subject to section 2343 of this title and subject to the availability of appropriations, the Secretary of Defense, with the concurrence of the Secretary of State, may—

(1) acquire from the Governments of North Atlantic Treaty Organization countries, from North Atlantic Treaty Organization subsidiary bodies, and from the United Nations Organization or any regional international organization logistic support, supplies, and services for elements of the armed forces ~~deployed outside the United States~~; and

(2) acquire from any government not a member of the North Atlantic Treaty Organization logistic support, supplies, and services for elements of the armed forces ~~deployed (or to be deployed) outside the United States~~ if that country—

(A) has a defense alliance with the United States;

(B) permits the stationing of members of the armed forces in such country or the homeporting of naval vessels of the United States in such country;

(C) has agreed to preposition materiel of the United States in such country; or

(D) serves as the host country to military exercises which include elements of the armed forces or permits other military operations by the armed forces in such country.

SEC. ___. CLARIFICATION OF APPROVAL REQUIRED FOR CERTAIN ACTIVITIES BY RETIRED AND RESERVE MEMBERS OF THE UNIFORMED SERVICES.

(a) CLARIFICATION.—Section 908(a) of title 37, United States Code, is amended—

(1) in subsection (a)—

(A) in the matter preceding paragraph (1)—

(i) by striking "subsection (b)" and inserting "subsections (b) and (c)"; and

(ii) by inserting ", accepting payment for speeches, travel, meals, lodging, or registration fees, or accepting a non-cash award," after "that employment)"; and

(B) in paragraph (2), by striking "armed forces" and inserting "armed forces, except those members serving on active duty under a call or order to active duty for a period in excess of 30 days";

(2) in the heading of subsection (b), by inserting "FOR EMPLOYMENT AND COMPENSATION" after "APPROVAL REQUIRED";

(3) by redesignating subsection (c) as subsection (d); and

(4) by inserting after subsection (b) the following new subsection:

"(c) APPROVAL REQUIRED FOR CERTAIN PAYMENTS AND AWARDS.—A person described in subsection (a) may accept payment for speeches, travel, meals, lodging, or registration fees described in that subsection, or accept a non-cash award described in that subsection, only if the Secretary concerned approves the payment or award.".

(b) CONFORMING AMENDMENTS.—

(1) SECTION HEADING.—The heading of section 908 of such title is amended to read as follows:

"**§ 908. Reserves and retired members: acceptance of employment, payments, and awards from foreign governments**".

(2) TABLE OF SECTIONS.—The table of sections for chapter 17 of such title is amended by striking the item relating to section 908 and inserting the following new item:

"908. Reserves and retired members: acceptance of employment, payments, and awards from foreign governments.".

[Please note: The "Changes to Existing Law" section below sets out in red-line format how the legislative text would amend existing law.]

Section-by-Section Analysis

This proposal would amend section 908 of title 37, United States Code, to allow retired and reserve members of the uniformed services (including members of the Coast Guard, National Oceanic and Atmospheric Administration, and Public Health Service) to accept, with the approval of the Service Secretary concerned, certain emoluments from foreign governments for which the consent of Congress is required by the last paragraph of section 9 of article I of the Constitution (commonly known as the Emoluments Clause).

Currently, section 908 only addresses compensation. This proposal amends section 908 to address other emoluments, specifically payments for speeches, travel, meals, lodging, and registration fees, and non-cash awards. Consistent with the current structure of section 908, we have added a reference to these emoluments to subsection (a) and introduced a new subsection (c) to address approval of these emoluments. Moreover, we believe that these emoluments could be approved by the respective Service Secretary in the interest of time. Note that we continue to use the existing section (b) for compensation issues that require Secretary of State approval.

Budget Implications: There is no budget impact.

Changes to Existing Law: This proposal would amend section 908 of title 37, United States Code, as follows:

§ 908. ~~Employment of reserves~~ Reserves and retired members: acceptance of employment, payments, and awards from ~~by~~ foreign governments

(a) CONGRESSIONAL CONSENT.—Subject to ~~subsection (b)~~ subsections (b) and (c), Congress consents to the following persons accepting civil employment (and compensation for that employment), accepting payment for speeches, travel, meals, lodging, or registration fees, or accepting a non-cash award, for which the consent of Congress is required by the last paragraph of section 9 of article I of the Constitution, related to acceptance of emoluments, offices, or titles from a foreign government:

(1) Retired members of the uniformed services.

(2) Members of a reserve component of the armed forces, except those members serving on active duty under a call or order to active duty for a period in excess of 30 days.

(3) Members of the Commissioned Reserve Corps of the Public Health Service.

(b) APPROVAL REQUIRED FOR EMPLOYMENT AND COMPENSATION.—A person described in subsection (a) may accept employment or compensation described in that subsection only if the Secretary concerned and the Secretary of State approve the employment.

(c) APPROVAL REQUIRED FOR CERTAIN PAYMENTS AND AWARDS.—A person described in subsection (a) may accept payment for a speeches, travel, meals, lodging, or registration fees described in that subsection, or accept a non-cash award described in that subsection, only if the Secretary concerned approves the payment or award.

~~(c)~~ (d) MILITARY SERVICE IN FOREIGN ARMED FORCES.—For a provision of law providing the consent of Congress to service in the military forces of certain foreign nations, see section 1060 of title 10.

SEC. ___. APPOINTMENT OF RETIRED MEMBERS OF THE ARMED FORCES TO POSITIONS IN THE DEPARTMENT OF DEFENSE.

Section 3326(b) of title 5, United States Code, is amended—

(1) in paragraph (2), by striking "; or" and inserting a semicolon;

(2) in paragraph (3), by striking the period and inserting "; or"; and

(3) by adding at the end the following new paragraph:

"(4)(A) such retired member has achieved full qualification in an information technology or cyberspace military occupational specialty or Air Force specialty code;

"(B) the position relates to information technology or cyberspace; and

"(C) the Secretary of Defense or the Secretary concerned, as the case may be, determines that it is in the national security interests of the United States to appoint such member.".

[Please note: The "Changes to Existing Law" section below sets out in red-line format how the legislative text would amend existing law.]

Section-by-Section Analysis

This proposal amends the statute to allow the appointment of retiring military information technology (IT) and cyberspace professionals to DoD IT and cyberspace positions. Currently, there is a recognized nation-wide shortage of high-end IT and cyberspace professionals. When coupled with hyper-competition with industry to attract and hire personnel from this insufficient talent pool, the Department is at a great disadvantage under the current statute. Retiring veterans may be hired immediately into Federal agencies outside of DoD but may not be hired within DoD for at least 6 months. This amendment allows DoD to capitalize on the investment in training that they've made in military IT and cyber professionals. It also allows the Department to capitalize on the investment in military security clearances and the 20+ years of continual vetting that has occurred over a military career, greatly lowering the "insider threat risk" for hires into critical cyber civilian positions.

Budget Implications: This proposal has no significant budgetary impact. Resources impacted are incidental in nature and amount, and are included within the Fiscal Year (FY) 2021 President's Budget Request. There is a possibility for incidental cost-savings in security clearances by hiring military veterans immediately after retirement, as they will have active security clearances.

Changes to Existing Law: This proposal would make the following changes to section 3326 of title 5, United States Code.

§3326. Appointments of retired members of the armed forces to positions in the Department of Defense

(a) For the purpose of this section, "member" and "Secretary concerned" have the meanings given them by section 101 of title 37.

(b) A retired member of the armed forces may be appointed to a position in the civil service in or under the Department of Defense (including a nonappropriated fund instrumentality under the jurisdiction of the armed forces) during the period of 180 days immediately after his retirement only if—

(1) the proposed appointment is authorized by the Secretary concerned or his designee for the purpose, and, if the position is in the competitive service, after approval by the Office of Personnel Management;

(2) the minimum rate of basic pay for the position has been increased under section 5305 of this title; ~~or~~

(3) a state of national emergency exists~~.~~; or

(4)(A) such retired member has achieved full qualification in an information technology or cyberspace military occupational specialty or Air Force specialty code;

(B) the position relates to information technology or cyberspace; and

(C) the Secretary of Defense or the Secretary concerned, as the case may be, determines that it is in the national security interests of the United States to appoint such member.

(c) A request by appropriate authority for the authorization, or the authorization and approval, as the case may be, required by subsection (b)(1) of this section shall be accompanied by a statement which shows the actions taken to assure that—

(1) full consideration, in accordance with placement and promotion procedures of the department concerned, was given to eligible career employees;

(2) when selection is by other than certification from an established civil service register, the vacancy has been publicized to give interested candidates an opportunity to apply;

(3) qualification requirements for the position have not been written in a manner designed to give advantage to the retired member; and

(4) the position has not been held open pending the retirement of the retired member.

SEC. ___. EXCLUDE PERMANENT MILITARY PROFESSORS FROM CONTROL GRADE STRENGTH LIMITATIONS.

Section 523(b) of title 10, United States Code, is amended—

(1) in paragraph (8) by striking "and professors of the United States Naval Academy who are career military professors (as defined in regulations prescribed by the Secretary of the Navy)"; and

(2) by adding at the end the following new paragraph:

"(10) Permanent military professors of the United States Naval Academy, the Naval War College, and the United States Naval Postgraduate School, but not to exceed a combined total of 85.".

[Please note: The "Changes to Existing Law" section below sets out in red-line format how the legislative text would amend existing law.]

Section-by-Section Analysis

This proposal would amend section 523 of title 10, United States Code, to exclude from computing and determining authorized strengths up to 35 additional Permanent Military Professors (PMPs) serving at the U.S. Naval Academy (USNA), the U.S. Naval Postgraduate School (NPS), and the Naval War College (NWC) for a total of 85 combined across the three flagship educational institutions.

Navy's PMP program was created in 1997 to establish a cadre of proven career naval officers in the grades of captain (O-6) and commander (O-5), with both doctoral degrees and extensive operational experience, to instruct at Navy's flagship educational institutions until statutory retirement. Military professors provide the practitioner experience in context to the fields of study they teach. In terms of professional expertise and credibility, PMPs provide a rare combination of skills that allow them to teach at the graduate level and incorporate relevant warfighting experience. PMPs provide a military core on the faculty that plays a key role in maintaining the learning institutions' focus on supporting warfighting and operational readiness. PMPs also ensure a stable base of military professors on each faculty to offset systemic shortages in control grade officers available to serve as rotational military instructors.

As evidence of Navy's commitment to building a highly skilled cadre of PMPs with career progression and promotion opportunities, the Secretary of the Navy (SECNAV) approved establishment of PMP as a separate competitive category in June 2009. Navy has validated the requirement for PMPs to serve at both NPS and NWC, but the current inventory of 50 PMPs is

authorized only for those assigned to USNA. Navy has taken steps to partially fulfill current requirements by assigning 4 PMPs at NPS and 3 PMPs at NWC, but these personnel count against authorized strengths in other officer communities. Additionally, both the SECNAV and Chief of Naval Operations (CNO) have directed a renewed emphasis and investment in education as a warfighting enabler. USNA has roughly 4500 students with an authorized PMP end strength of 50, which provides a ratio of 90 students per PMP. NPS currently has ~1100 full-time military students, and NWC has ~600. Maintaining the current USNA 90-1 ratio, would require 12 PMPs at NPS and 8 at NWC.

The strategic landscape has changed significantly since Navy forwarded this proposal for Congress' consideration in FY08. Strategic guidance from the Secretary of Defense, Chairman of the Joint Chiefs of Staff, SECNAV and CNO paints a clear picture of great power competition in the context of a profound and rapidly changing character of war and conflict. The same strategic guidance clearly directs the Navy to invest in education as a warfighting enabler, expanding into emerging fields of study such as cyber, engineering and applied sciences, business, international/regional studies as well as operational and information sciences. Increasing the allowable number of PMPs at the Navy's three flagship educational institutions from 50 to 70 would mitigate operational and STEM instructor shortfalls, improve the educational background of military instructors, strengthen military instructor presence and provide viable career opportunities for naval officers with doctoral degrees. A further allocation of 15 PMPs (for a total of 85) would offset impacts to Navy warfare communities while candidates complete educational credentialing requirements to serve as PMPs.

Budget Implications: The resources impacted are reflected in the table below and are included within the Fiscal Year (FY) 2021 President's Budget request. The proposed increase would be phased across the FYDP to allow for recruitment, boarding process, and account for dwell time the officer spends in the education pipeline. The proposed increase of 35 Permanent Military Professors will be phased across the FYDP as depicted in the two tables below.

RESOURCE IMPACT ($MILLIONS)									
Program	**FY 2021**	**FY 2022**	**FY 2023**	**FY 2024**	**FY 2025**	**Appropriation**	**Budget Activity**	**BLI/SAG**	**Program Element**
Navy Permanent Military Professor	1.3	3.5	5.4	7.3	9.0	Military Personnel, Navy	01	NA	NA
Total	1.3	3.5	5.4	7.3	9.0				

PERSONNEL IMPACT (END STRENGTH)					
	FY 2021	**FY 2022**	**FY 2023**	**FY 2024**	**FY 2025**
Navy	10	17	24	30	35
Total	10	17	24	30	35

Changes to Existing Law: This proposal would make the following changes to section 523 of title 10, United States Code:

§523. Authorized strengths: commissioned officers on active duty in grades of major, lieutenant colonel, and colonel and Navy grades of lieutenant commander, commander, and captain

(a)(1) Except as provided in subsection (c), of the total number of commissioned officers serving on active duty in the Army, Air Force, or Marine Corps at the end of any fiscal year (excluding officers in categories specified in subsection (b)), the number of officers who may be serving on active duty in each of the grades of major, lieutenant colonel, and colonel may not, as of the end of such fiscal year, exceed a number determined in accordance with the following table:

* * * * *

(b) Officers in the following categories shall be excluded in computing and determining authorized strengths under this section:

(1) Reserve officers—

(A) on active duty as authorized under section 115(a)(1)(B) or 115(b)(1) of this title, or excluded from counting for active duty end strengths under section 115(i) of this title;

(B) on active duty under section 10211, 10302 through 10305, or 12402 of this title or under section 708 of title 32; or

(C) on full-time National Guard duty.

(2) General and flag officers.

(3) Medical officers.

(4) Dental officers.

(5) Warrant officers.

(6) Retired officers on active duty under a call or order to active duty for 180 days or less.

(7) Retired officers on active duty under section 10(b)(2) of the Military Selective Service Act (50 U.S.C. 3809(b)(2)) for the administration of the Selective Service System.

(8) Permanent professors of the United States Military Academy and the United States Air Force Academy ~~and professors of the United States Naval Academy who are career military professors (as defined in regulations prescribed by the Secretary of the Navy)~~, but not to exceed 50 from any such academy.

(9) Officers who are Senior Military Acquisition Advisors under section 1725 of this title, but not to exceed 15.

(10) Permanent military professors of the United States Naval Academy, the Naval War College, and the United States Naval Postgraduate School, but not to exceed a combined total of 85.

(c) Whenever the number of officers serving in any grade is less than the number authorized for that grade under this section, the difference between the two numbers may be applied to increase the number authorized under this section for any lower grade.

(d) An officer may not be reduced in grade, or have his pay or allowances reduced, because of a reduction in the number of commissioned officers authorized for his grade under this section.

SEC. ___. CONTRACT AUTHORITY FOR ADVANCED DEVELOPMENT OF INITIAL OR ADDITIONAL PROTOTYPE UNITS.

(a) IN GENERAL.—Section 2302e of title 10, United States Code, is amended—

(1) in the heading, by striking "**advanced development**" and inserting "**development and demonstration**";

(2) in subsection (a)(1), by striking "advanced component development, prototype," and inserting "development and demonstration"; and

(3) in subsection (b)(3) by inserting before the period ", and may be from funds made available for research, development, testing, and evaluation".

(b) TABLE OF SECTIONS AMENDMENT.—The table of sections at the beginning of chapter 137 of title 10, United States Code, is amended by striking the item relating to section 2302e and insert the following new item:

"Sec. 2302e. Contract authority for development and demonstration of initial or additional prototype units.".

[Please note: The "Changes to Existing Law" section below sets out in red-line format how the legislative text would amend existing law.]

Section-by-Section Analysis

This proposal would amend section 2302e of title 10, United States Code (U.S.C.), to update and align text in that statute with new Broad Agency Announcement (BAA) authority, and to provide greater funding flexibility by allowing use of research, development, testing, and evaluation (RDT&E) funds up to the total $100,000,000 cap to fund the contract line item or contract option authorized under this authority.

Section 2302e was enacted by section 861 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018. It addresses a contract awarded "from a general solicitation referred to in section 2302(2)(B) of this title" and provides that it "may contain a contract line item or contract option for… the provision of advanced component development, prototype…" Section 221 of the NDAA for FY 2018 amended 10 U.S.C. 2302(2)(B) to allow for expanded application of the general solicitation competitive procedures, BAA, to encompass "science and technology". The Joint Explanatory Statement accompanying the NDAA for FY 2018 (House Report 115-404) included the following with respect to section 221: "The conferees note that the amended language in the final provision is meant to include all activities that comprise budget activities 1 through 4 (i.e. Budget Activities 6.1–6.4)." Budget Activity (BA) 6.4 is also known

as Advanced Component Development and Prototypes (ACD&P). Since an ACD&P funded science and technology (S&T) award is now authorized under the BAA, the use of that same terminology in 10 U.S.C. 2302e (a), as written, is unnecessary and circular. Deletion of this text from 10 U.S.C. 2302e (a) would eliminate confusion and clarify that 10 U.S.C. 2302e is not intended to limit or void the new expanded BAA authority for BA 6.4 funded contract awards. In order to update the statute and to provide authorization for the continued progression of S&T from a BAA contract to an acquisition contract, "development and demonstration" should be inserted instead. Acquisition program review requirements implemented in DOD 5000.2 series remain in place and are not impacted by this additional contracting authority.

Section 2302e(b)(3) specifies that the dollar value of work to be performed under this authority may not exceed $100,0000,000 in fiscal year 2017 contract dollars. To support the contract transition process envisioned under 10 U.S.C. 2302e and increase flexibility, authority to use funds made available for RDT&E within the $100,000,000 cap would help overcome limitations of the funding and budgeting process.

Though section 2302e includes contract authority to enable transition of promising science and technology (S&T) by bridging the gap between the BAA contract award and acquisition contract award without a break to restart the acquisition process, it does not address the underlying funding process which conversely works best when there is a more measured progression of initial S&T to an interim laboratory or testing and evaluation phase (funded largely by BA 6.4 appropriations), and then on to an acquisition phase with eventual fielding and deployment.

Without the traditional lead times needed to align funding with the work to be contracted and performed many years later, the funding available from transition partners to support accelerated S&T contract transition authority varies widely and may be mismatched to the effort described in the statute and authorized for that work. While existing budget reprogramming authorities provide limited flexibility to realign resources, as the demand to speed promising new technology to the warfighters and use of innovative contracting authority increases, neither reprogramming authorities, nor even more cumbersome general transfer authority provide an adequate and timely solution to this challenge. The additional process of reprograming or utilizing general transfer authority is also burdensome for government staff and presents a potential roadblock to use of the authority for the transition of S&T. Greater funding flexibility would support the purpose of the statute and enable proper and expeditious execution.

This proposal is required to implement the National Defense Strategy to reform the Department for greater performance and affordability to deliver performance at the speed of relevance and streamline rapid, iterative approaches, from development to fielding.

Budget Implications: No budget impact.

Changes to Existing Law: This proposal would make the following changes to sections 2302e of title 10, United States Code:

§ 2302e. Contract authority for ~~advanced~~ development and demonstration of initial or additional prototype units

(a) AUTHORITY.—A contract initially awarded from the competitive selection of a proposal resulting from a general solicitation referred to in section 2302(2)(B) of this title may contain a contract line item or contract option for—

(1) the provision of ~~advanced component development, prototype,~~ development and demonstration or initial production of technology developed under the contract; or

(2) the delivery of initial or additional items if the item or a prototype thereof is created as the result of work performed under the contract.

(b) LIMITATIONS.—

(1) MINIMAL AMOUNT.—A contract line item or contract option described in subsection (a)(2) shall require the delivery of the minimal amount of initial or additional items to allow for the timely competitive solicitation and award of a follow-on development or production contract for those items.

(2) TERM.—A contract line item or contract option described in subsection (a) shall be for a term of not more than 2 years.

(3) DOLLAR VALUE OF WORK.—The dollar value of the work to be performed pursuant to a contract line item or contract option described in subsection (a) may not exceed $100,000,000, in fiscal year 2017 constant dollars, and may be from funds made available for research, development, testing, and evaluation.

(4) APPLICABILITY.—The authority provided in subsection (a) applies only to the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force.

SEC. ___. MODIFICATION OF DIRECT HIRE AUTHORITIES FOR THE DEPARTMENT OF DEFENSE.

Section 9905 of title 5, United States Code, is amended—

(1) in subsection (a), by adding at the end the following new paragraphs:

"(11) Any position in support of aircraft operations for which the Secretary determines there is a critical hiring need or shortage of candidates.

"(12) Any position in support of the safety of the public, law enforcement, or first response during emergencies, including natural disasters.

"(13) Any position in support of installation military housing.

"(14) Any position in the competitive service for which the Secretary determines that—

"(A) there is a critical hiring need or shortage of candidates; or

"(B) unique expertise and critical skills are required to support Department of Defense national security missions."; and

(2) in subsection (b)(1), by striking "September 30, 2025" and inserting "September 30, 2026".

Section-by-Section Analysis

This proposal would amend section 9905 of title 5, United States Code (U.S.C.), to enable the Secretary of Defense to utilize new direct hire authorities (DHAs) for: (1) aircraft support operations positions; (2) positions in support of public safety, law enforcement, and first response; and (3) positions in support of installation military housing. The proposal also adds a provision to allow the Secretary of Defense to make determinations for DHA based on critical need, shortage of candidates, or a unique expertise and critical skills in support of national security missions.

The Department of Defense's (DoD) civilian hiring processes is a national security imperative aligned with the Secretary of Defense's initiative to reform its business practices to enhance lethality and maximize taxpayer value. DoD is different from other Federal agencies in its national security mission and the size and scope of its operations. The 1970's era one-size-

fits-all Federal hiring framework is ill-suited for the dynamic national security challenges of the 21st century. Indeed, the Department's lethality and readiness are not enabled just by our service members. DoD's civilian workforce is essential to sustaining the viability and capabilities of the All-Volunteer Force – providing, among other things, the critical equipment maintenance; weapons acquisition and sustainment; base support, logistics, and engineering expertise; family support programs; business operations; and medical care that ensure our Soldiers, Sailors, Airmen, and Marines are ready to deploy, world-wide, and answer the call of our operational Commanders. To that end, the Secretary of Defense specifically called out "hiring practices for the civilian workforce" as a necessary area for review to enhance the readiness and lethality of the Department.

DoD's civilian workforce represents essentially every facet of the American economy. DoD civilians are scientists, engineers, technicians, and analysts. They are welders, mechanics, and electricians. They are doctors, nurses, social workers, teachers, child care providers, police officers, and firefighters who take care of our men and women in uniform and their families and our installations. They run and manage military installations, and take care of the facilities where our Soldiers, Sailors, Airmen, and Marines live and train. They are logistical specialists, truck drivers, and loadmasters, who move warfighting equipment into and out of combat zones to support our warfighters. They are air traffic controllers, store clerks and cashiers, and deans and professors in DoD institutions of higher learning. They are accountants, human resource specialists, and contract specialists who provide the support to all of the foregoing.

The unique mission, size, and complexity of the DoD civilian workforce, and the role they play in supporting the warfighter, necessitates a lean, flexible, responsive, and expeditious hiring framework that will ensure speed of relevance, rather than a prescriptive patchwork of one-size-fits-all Federal hiring regulations. Our near peer competitors and adversaries are working to rapidly narrow our military's competitive advantage across multiple domains to include cyber, space, and electronic warfare. Unlike the United States, the political systems of China and Russia enable them to martial the entire state's economic and human resources to enhance capabilities in these areas. The Department must be able to quickly and efficiently access top talent with the expertise needed to ensure superior capabilities and relevancy in these and other critical areas. The Department is competing for talent in these cutting-edge fields with a private sector that is unconstrained by overlapping, redundant, and bureaucratic hiring regulations. The 21st century security environment is less predictable, more dynamic, and calls for a human capital framework that can be responsive to emerging missions where competition for private sector talent is fierce.

The ability to hire needed talent directly is essential to achieving a new human capital approach, which is in keeping with the 2018 National Defense Strategy (NDS) in which the Secretary of Defense called for the Department to "explore streamlined, non-traditional pathways to bring critical skills into service, expanding access to outside expertise, and devising new public-private partnerships to work with small companies, start-ups, and universities."

The 2018 NDS further states that "A modern, agile, information-advantaged Department also requires a motivated, diverse, and highly skilled civilian workforce, sufficiently sized and appropriately resourced. DoD civilians are an essential enabler of our mission capabilities and

operational readiness." The NDS further directs that the Department undertake a sustained effort to build up its civilian workforce to best serve mission requirements. Lengthy hiring times for civilian personnel not only cost the Department talent, but also lead to sub-optimal Total Force solutions: when decision-makers are unable to bring civilians onboard in a timely manner, they will turn to other, less cost-effective workforce solutions.

In DoD, every dollar spent on unnecessary or unproductive bureaucracy detracts from DoD's ability to sustain our warfighters. DoD needs flexibility to manage human resource systems for results in order to deliver both talent and savings in support of the national defense mission. Data indicates that competing for talent with the private sector or other non-title 5, U.S.C., agencies has significantly increased with the information age.

Section 1109 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020, "Modification of Direct Hire Authorities for the Department of Defense," streamlined and enhanced certain existing DoD DHAs. However, the modified authority does not include certain occupations for which the Department has determined there is a critical need for DHA. This proposal includes new DHA for critical occupations in aircraft operations (e.g., civilian pilots, simulator instructors, air traffic controllers, and aircraft maintenance specialists), safety of the public (e.g., first responders, law enforcement officers, and firefighters), and positions in support of installation military housing where DoD Components are experiencing significant hiring challenges and loss of quality talent to private industry due to cumbersome constraints and lengthy hiring timelines. Section 1109 of the NDAA for FY20 also does not grant the Secretary of Defense authority to establish new DHAs for emerging needs based on certain criteria.

The proposal would also continue to suspend application of certain Department specific DHAs to clarify and simplify the hiring process. In addition, the proposal includes a sunset date of September 30, 2026, so the Department, the Office of Personnel Management, and Congress can evaluate the effectiveness of the modified direct hiring authority.

This proposal is designed to ensure adherence to merit system principles, transparency, and accountability, requiring the Secretary to promulgate regulations to implement use of the authority.

Budget Implications: This proposal has no significant budgetary impact. Resources impacted are incidental in nature and amount and are included within the Fiscal Year (FY) 2021 President's Budget request. In utilizing the authority, the DoD and any DoD Component would be hiring individuals within its pre-existing budget authority for civilian personnel salaries. In other words, the authority would enable DoD to more expeditiously hire individuals it otherwise would have sought to hire under a different legal authority to fill an existing authorized requirement.

Changes to Existing Law: This proposal would amend section 9905 of title 5, United States Code, as follows:

§9905. Direct hire authority for certain personnel of the Department of Defense

(a) IN GENERAL.-The Secretary of Defense may appoint, without regard to the provisions of subchapter I of chapter 33(other than sections 3303 and 3328 of such chapter), qualified candidates to any of the following positions in the competitive service in the Department of Defense:

(1) Any position involved with Department maintenance activities, including depot-level maintenance and repair.

(2) Any cyber workforce position.

(3) Any individual in the acquisition workforce that manages any services contracts necessary to the operation and maintenance of programs of the Department.

(4) Any science, technology, or engineering position, including any such position at the Major Range and Test Facilities Base, in order to allow development of new systems and provide for the maintenance of legacy systems.

(5) Any scientific, technical, engineering, or mathematics position, including technicians, within the defense acquisition workforce, or any category of acquisition positions within the Department designated by the Secretary as a shortage or critical need category.

(6) Any scientific, technical, engineering, or mathematics position, except within any defense Scientific and Technology Reinvention Laboratory, for which a qualified candidate is required to possess a bachelor's degree or an advanced degree, or for which a veteran candidate is being considered.

(7) Any category of medical or health professional positions within the Department designated by the Secretary as a shortage category or critical need occupation.

(8) Any childcare services position for which the Secretary determines there is a critical hiring need or a shortage of childcare providers.

(9) Any financial management, accounting, auditing, actuarial, cost estimation, operational research, or business or business administration position for which a qualified candidate is required to possess a finance, accounting, management, or actuarial science degree, or a related degree or equivalent experience.

(10) Any position for the purpose of assisting and facilitating the efforts of the Department in business transformation and management innovation.

(11) Any position in support of aircraft operations for which the Secretary determines there is a critical hiring need or shortage of candidates.

(12) Any position in support of the safety of the public, law enforcement, or first response during emergencies, including natural disasters.

(13) Any position in support of installation military housing.

(14) Any position in the competitive service for which the Secretary determines that—

(A) there is a critical hiring need or shortage of candidates; or

(B) unique expertise and critical skills are required to support Department of Defense national security missions.

(b) SUNSET—

(1) In general.—Except as provided in paragraph (2), effective on ~~September 30, 2025~~ September 30, 2026, the authority provided under subsection (a) shall expire.

(2) Exception.—Paragraph (1) shall not apply to the authority provided under subsection (a) to make appointments to positions described under paragraph (5) of such subsection.

(c) SUSPENSION OF OTHER HIRING AUTHORITIES.—During the period beginning on the effective date of regulations issued under subsection (b) and ending on the date described in subsection (c)(1), the Secretary may not exercise or otherwise use any hiring authority provided under the following provisions of law:

(1) Sections 1599c(a)(2) and 1705(f) of title 10.

(2) Sections 1112 and 1113 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114–92; 129 Stat. 1033).

(3) Sections 1110 and 1643(a)(3) of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114–328; 130 Stat. 2450 and 2602).

(4) Sections 559 and 1101 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115–91; 131 Stat. 1406 and 1627).

(b) REPORT.—

(1) IN GENERAL.—Not later than February 1, 2021, the Secretary of Defense, in coordination with the Director of the Office of Personnel Management, shall provide for the conduct of an independent review and report to the congressional defense committees and the Committee on Oversight and Reform of the House of Representatives.

(2) CONTENTS.—The report required under paragraph (1) shall—

(A) assess and identify steps that could be taken to improve the competitive hiring process at the Department and ensure that direct hiring is conducted in a manner consistent with ensuring a merit based civil service and a diverse workforce in the Department and the rest of the Federal Government; and

(B) consider the feasibility and desirability of using cohort hiring, or hiring ‘‘talent pools’’, instead of conducting all hiring on a position-by-position basis.

(3) CONSULTATION.—The analysis and recommendations in the report required under paragraph (1) shall be prepared in consultation with all stakeholders, public sector unions, hiring managers, career agency, and Office of Personnel Management personnel specialists, and after a survey of public sector employees and job applicants.

SEC. ___. MODIFICATION OF PREFERENCE ELIGIBILITY FOR GUARDS, OPERATORS, CUSTODIANS, AND MESSENGERS.

(a) REPEAL.—Section 3310 of title 5, United States Code, is repealed.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 33 of such title is amended by striking the item relating to section 3310.

Section-by-Section Analysis

This proposal would repeal section 3310 of title 5, United States Code (U.S.C.). Currently, section 3310 requires that in examinations for positions of guards, elevator operators, messengers, and custodians in the competitive service, competition is restricted to preference eligibles as long as preference eligibles are available. The regulations issued pursuant to section 3310 (subpart D of part 330 of title 5, Code of Federal Regulations) further restrict these positions to available preference eligibles whenever recruitment is conducted through direct hire and noncompetitive appointing authorities. These requirements result in unintended consequences and have caused significant delays in hiring employees to fill these positions. As a result, the ability of the Department of Defense (DoD) to secure its installations and facilities has been compromised.

The DoD has experienced challenges in recruiting for and filling guard vacancies, due in part to the high number of preference eligibles who decline job offers for these positions. Security guards play an important role in accomplishing DoD's mission by securing the Department's installations and facilities. The repeal of section 3310 would grant DoD the flexibility that is needed to reach all of the qualified candidates who are readily available to fill these critical positions.

In 1966, the year in which section 3310 was enacted, there was likely a greater need to restrict positions to preference eligibles. Given advances in equipment and technology, elevator operator positions (0302 occupational series) are obsolete. Within the Department and other agencies, custodian work is generally contracted out. Further, preference eligibles have access to a broader range of positions today based on a combination of veterans' preference and special veterans' employment authorities and programs.

Budget Implications: This proposal has no significant budgetary impact. Resources impacted are incidental in nature and amount and are included within the Fiscal Year (FY) 2021 President's Budget request.

Changes to Existing Law: This proposal would repeal section 3310 of title 5, United States Code, as follows:

~~**§ 3310. Preference eligibles; examinations; guards, elevator operators, messengers, and custodians**~~

~~In examinations for positions of guards, elevator operators, messengers, and custodians in the competitive service, competition is restricted to preference eligibles as long as preference eligibles are available.~~

SEC. ___. PRIVACY ACT EXCLUSION FOR COURTS-MARTIAL TO ALLOW FOR PUBLIC ACCESS TO DOCKETS, FILINGS, AND COURT RECORDS.

Section 940a of title 10, United States Code (article 140a of the Uniform Code of Military Justice), is amended by adding at the end the following new subsection:

"(d) INAPPLICABILITY OF PRIVACY ACT.—Section 552a of title 5 shall not apply to records of trial produced or distributed within the military justice system or docket information, filings, and records made publicly accessible in accordance with the uniform standards and criteria for conduct established by the Secretary under subsection (a).

[Please note: The "Changes to Existing Law" section below sets out in red-line format how the legislative text would amend existing law.]

Section-by-Section Analysis

This proposal would amend section 940a of title 10, United States Code (article 140a of the Uniform Code of Military Justice) to exclude designated court-martial records from the requirements of section 552a of title 5, United States Code (commonly known as the "Privacy Act"). This will ensure that the Military Services—when making dockets, filings, and court records available to the public in the same or similar manner as other Federal and State courts—will not be subject to potential liability under the Privacy Act for an unauthorized disclosure. Although courts-martial are expressly excepted from the definition of "agency" in section 551 of title 5, because the Military Services may maintain court-martial records about individuals in Privacy Act systems of records, the Military Services apply the requirements of the Privacy Act in disclosing such records. These efforts include a thorough review and, where appropriate, application of redactions to privacy-related information before disclosing court-martial records. Excluding such records from the requirements of the Privacy Act will allow the Services to make dockets, filings, and records more readily available to the public without incurring Privacy Act liability for inadvertent failures to redact privacy-protected information. The Military Services will prescribe procedures, taking into account procedures used in the Article III court system, concerning redaction of privacy-related information before records are disclosed to the public.

Budget Implications: This proposal has no significant budget impact. Incidental savings are accounted for within the Fiscal Year (FY) 2021 President's Budget.

Changes to Existing Law: This proposal would make the following changes to sections 940a of title 10, United States Code (article 140a of the Uniform Code of Military Justice):

§940a. Art. 140a. Case management; data collection and accessibility

(a) IN GENERAL.—The Secretary of Defense, in consultation with the Secretary of Homeland Security, shall prescribe uniform standards and criteria for conduct of each of the following functions at all stages of the military justice system (including with respect to the Coast Guard), including pretrial, trial, post-trial, and appellate processes, using, insofar as practicable, the best practices of Federal and State courts:

(1) Collection and analysis of data concerning substantive offenses and procedural matters in a manner that facilitates case management and decision making within the military justice system, and that enhances the quality of periodic reviews under section 946 of this title (article 146).

(2) Case processing and management.

(3) Timely, efficient, and accurate production and distribution of records of trial within the military justice system.

(4) Facilitation of public access to docket information, filings, and records, taking into consideration restrictions appropriate to judicial proceedings and military records.

(b) PROTECTION OF CERTAIN PERSONALLY IDENTIFIABLE INFORMATION.—Records of trial, docket information, filings, and other records made publicly accessible in accordance with the uniform standards and criteria for conduct established by the Secretary under subsection (a) shall restrict access to personally identifiable information of minors and victims of crime (including victims of sexual assault and domestic violence), as practicable to the extent such information is restricted in electronic filing systems of Federal and State courts.

(c) INAPPLICABILITY TO CERTAIN DOCKETS AND RECORDS.—Nothing in this section shall be construed to provide public access to docket information, filings, or records that are classified, subject to a judicial protective order, or ordered sealed.

(d) INAPPLICABILITY OF PRIVACY ACT.—Section 552a of title 5 shall not apply to records of trial produced or distributed within the military justice system or docket information, filings, and records made publicly accessible in accordance with the uniform standards and criteria for conduct established by the Secretary under subsection (a).

SEC. ___. REVISION OF PROOF REQUIRED WHEN USING AN EVALUATION FACTOR FOR DEFENSE CONTRACTORS EMPLOYING OR SUBCONTRACTING WITH MEMBERS OF THE SELECTED RESERVE OF THE RESERVE COMPONENTS OF THE ARMED FORCES.

Section 819 of the National Defense Authorization Act for Fiscal Year 2006 (Public Law 109-163; 119 Stat. 3385; 10 U.S.C. 2305 note) is amended—

(1) by striking subsection (b); and

(2) by redesignating subsection (c) as subsection (b).

[Please note: The "Changes to Existing Law" section below sets out in red-line format how the legislative text would amend existing law.]

Section-by-Section Analysis

This proposal will alleviate an imposed cost and time burden on the public when responding to certain DoD solicitations. Specifically, subsection (a) of section 819 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2006 authorizes DoD to use an evaluation factor that considers whether an offeror intends to carry out a contract using employees or individual subcontractors who are members of the Selected Reserve component of the Armed Forces. Further, subsection (b) of section 819 requires that offerors stating such intent must submit proof of the use of such employees or subcontractors in performance of the contract for consideration by DoD. Finally, subsection (c) of section 819 requires a revision to the Federal Acquisition Regulation as necessary to implement the section.

Selected Reserve members are an important component of the U.S. military. They provide skills and expertise that are essential to wartime missions, commit to regular training and drill schedules, and are subject to deployment when the need arises. As a result, a Selected Reserve member's civilian job schedule can be impacted and require employers to have contingency plans in place to minimize the impact of a member's absence. Subsection (a) of section 819 supports DoD's commitment to support the hiring of military personnel in the civilian workplace. Defense Federal Acquisition Regulation (DFARS) 215.370-2 reinforces this commitment by reminding contracting officers that they may include an evaluation factor in a solicitation to consider whether an offeror intends to perform the contract using employees or subcontractors that are members of the Selected Reserve.

When a contracting officer includes this evaluation factor in a solicitation, subsection (b) of section 819 requires offerors to submit proof to the contracting officer of their intent to use Selected Reserve members in performance of the contract. Further, subsection (c) of section 819 requires incorporation of the statutory language in the acquisition regulations. As a result, a

DoD-wide implementation of subsection (b) is necessary to notify offerors of the requirement for proof and identify what documentation constitutes proof from an offeror.

The statutory requirement for proof implements a greater proposal preparation cost and time burden on offerors who intend to use these employees, when compared to offerors who do not. Additionally, the more Selected Reserve employees an offeror proposes to use, the greater its burden becomes in gathering and submitting proof to the contracting officer.

Striking subsection (b) of section 819 will alleviate the need for a DoD-wide requirement and identification proof, when the use of Selected Reserve personnel is included as an evaluation factor for award. Currently, Federal Acquisition Regulation (FAR) 15.203 requires a solicitation to describe the requisite information to be included in an offeror's proposal, the evaluation factors that will be used to evaluate offers, and the documentation required in an offeror's response. As a result, a contracting officer is empowered to determine what information or documentation is necessary to evaluate offers. Striking subsection (b) will alleviate the need for a DoD-wide interpretation of proof, and permit contracting officers to determine what information is necessary to evaluate such intent, as is appropriate to the circumstances of the requirement and in consideration of the burden to offerors to provide such information.

Finally, this proposal is necessary to implement a recommendation of the DoD Regulatory Reform Task Force, which was established in response to E.O. 13777, Enforcing the Regulatory Reform Agenda, dated February 24, 2017, and supports DoD's focus on business reform. This proposal will relieve the burden for both the Government and the public, but the proposal will not result in a savings greater than $20K. As part of the Regulatory Reform Task Force process, the senior acquisition officials for the Army, Navy, Air Force, DLA, and USTRANSCOM signed off on this repeal, as well as the Deputy General Counsel (Acquisition and Logistics), and the office of DoD Chief Management Officer. The Secretary of Defense then approved this and other Regulatory Reform Task Force recommendations.

Budget Implications: This proposal has no significant budgetary impact. Resources impacted are incidental in nature and amount, and are included within the Fiscal Year (FY) 2021 President's Budget request.

Changes to Existing Law: This proposal would amend section 819 of the National Defense Authorization Act for Fiscal Year 2006 (Public Law 109–163; 119 Stat. 3385; 10 U.S.C. 2305 note) as follows:

SEC. 819. AUTHORIZATION OF EVALUATION FACTOR FOR DEFENSE CONTRACTORS EMPLOYING OR SUBCONTRACTING WITH MEMBERS OF THE SELECTED RESERVE OF THE RESERVE COMPONENTS OF THE ARMED FORCES

(a) Defense Contracts.-In awarding any contract for the procurement of goods or services to an entity, the Secretary of Defense is authorized to use as an evaluation factor whether the entity intends to carry out the contract using employees or individual subcontractors who are members of the Selected Reserve of the reserve components of the Armed Forces.

~~(b) Documentation of Selected Reserve-Related Evaluation Factor.- Any entity claiming intent to carry out a contract using employees or individual subcontractors who are members of the Selected Reserve of the reserve components of the Armed Forces shall submit proof of the use of such employees or subcontractors for the Department of Defense to consider in carrying out subsection (a) with respect to that contract.~~

(~~c~~b) Regulations.-The Federal Acquisition Regulation shall be revised as necessary to implement this section.

SEC. ___. REPEAL OF RQ-4 AIRCRAFT LIMITATION.

Section 136 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91; 131 Stat. 1317) is amended—

(1) in the section heading, by striking "**AND RQ-4**";

(2) in subsection (a)—

(A) in the matter preceding paragraph (1), by striking "fleets of U–2 aircraft or RQ–4 aircraft in their current" and inserting "fleet of U-2 aircraft in its current";

(B) in paragraph (1), by striking "that—" and all that follows through "(B) in the case of the U-2 aircraft," and inserting "that"; and

(C) in paragraph (2), by striking "or RQ-4 aircraft (as the case may be)"; and

(3) in subsection (b), by striking "with respect to U-2 aircraft or RQ–4 aircraft".

[Please note: The "Changes to Existing Law" section below sets out in red-line format how the legislative text would amend existing law.]

Section-by-Section Analysis

The President's Budget Request for Fiscal Year 2021 includes funding levels which anticipate a divestment of twenty-four (24) RQ-4 aircraft. This proposal provides the matching legislative language to support the President's Budget Request: the proposal amends section 136 of the FY18 NDAA (Public Law 115-91) Limitation on Retirement of U-2 and RQ-4 Aircraft to by striking references to the RQ-4 aircraft.

The decision to divest RQ-4 block 20 and block 30 aircraft complies with national-level strategy documents' guidance to take near-term risk and divest legacy, non-survivable platforms in order to create the budgetary tradespace necessary to invest in capabilities which will enable the Air Force to win a high-end fight. Changes to the RQ-4 program, through the divestiture of RQ-4 Block 20s and 30s in FY21, will save over two billion dollars across the FYDP and fund advanced technologies capable of defeating a near-peer adversary in a highly contested environment. This divestiture also gives the Air Force the budget flexibility necessary to manage the intelligence, surveillance, and reconnaissance enterprise and portfolio of capabilities to transform the force for the future fight by aggressively pursuing and implementing its Next

Generation ISR Dominance Flight Plan. The RQ-4 block 20/30 redeployment timeline will be closely coordinated with the Joint Staff, combatant commands, and major commands, and RQ-4 block 40 fleet modernization efforts include continued maturation of the Ground Segment Modernization Program.

Budget Implications: The resources impacted are reflected in the table below and are included within the Fiscal Year (FY) 2021 President's Budget request.

RESOURCE IMPACT ($MILLIONS)									
Program	**FY 2021**	**FY 2022**	**FY 2023**	**FY 2024**	**FY 2025**	**Appropriation**	**Budget Activity**	**BLI/SAG**	**Program Element (for all RDT&E programs)**
RQ-4	-$93.2	-$81.0	-$40.1	-$154.4	-$3.7	3010	05	HAWK00	
RQ-4	-$93.1	-$104.2	-$295.5	-$261.6	-$315.7	3400	01	011W	
RQ-4	-$82.9	-$208,0	-$145.9	-$26.4	-$43.3	3600	07		0305220F
RQ-4	-$0.1	-$0.2	-$0.2	-$0.2	-$0.2	3740	01	011A	
Total	-$269.3	-$393.4	-$481.7	-$442.6	-$362.9				

Changes to Existing Law: The proposal would amend section 136 of the National Defense Authorization Act for Fiscal year 2018 (Public Law 115-91; 131 Stat. 1317) as follows:

SEC. 136. LIMITATION ON RETIREMENT OF U–2 ~~AND RQ–4~~ AIRCRAFT.

(a) LIMITATION.—The Secretary of the Air Force may take no action that would prevent the Air Force from maintaining the ~~fleets of U–2 aircraft or RQ–4 aircraft in their current~~ fleet of U-2 aircraft in its current, or improved, configurations and capabilities until—

(1) the Under Secretary of Defense for Acquisition and Sustainment certifies in writing to the appropriate committees of Congress that—

~~(A) in the case of the RQ–4 aircraft, the validated operating and sustainment costs of the capability developed to replace the RQ–4 aircraft are less than the validated operating and sustainment costs for the RQ–4 aircraft on a comparable flight-hour cost basis; or~~

~~(B) in the case of the U–2 aircraft,~~ the validated operating and sustainment costs of the capability developed to replace the U–2 aircraft are less than the validated operating and sustainment costs for the U–2 aircraft on a comparable flight-hour cost basis; and

(2) the Chairman of the Joint Requirements Oversight Council certifies in writing to the appropriate committees of Congress that the capability to be fielded at the same time or before the retirement of the U–2 aircraft ~~or RQ-4 aircraft (as the case may be)~~ would result in equal or greater capability available to the commanders of the combatant commands and would not result in less capacity available to the commanders of the combatant commands.

(b) WAIVER.—The Secretary of Defense may waive the certification requirement under subsection (a)(1) ~~with respect to U–2 aircraft or RQ–4 aircraft~~ if the Secretary—

(1) determines, after analyzing sufficient and relevant data, that a greater capability is worth increased operating and sustainment costs; and

(2) provides to the appropriate committees of Congress a certification of such determination and supporting analysis.

(c) APPROPRIATE COMMITTEES OF CONGRESS DEFINED.—In this section, the term ‘‘appropriate committees of Congress’’ means— (1) the Committee on Armed Services, the Committee on Appropriations, and the Select Committee on Intelligence of the Senate; and (2) the Committee on Armed Services, the Committee on Appropriations, and the Permanent Select Committee on Intelligence of the House of Representatives.

(d) REPEAL.—Section 133 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112– 81; 125 Stat. 1321) is repealed.

SEC. ___. TEMPORARY AUTHORITY RELATING TO B-1 BOMBER AIRCRAFT.

(a) TEMPORARY AUTHORITY TO RETIRE AIRCRAFT.—Notwithstanding section 9062(h)(1) of title 10, United States Code, during the period beginning on the date of the enactment of this Act and ending on January 1, 2023, the Secretary of the Air Force may retire 17 B-1 aircraft.

(b) COMBAT CODED AIRCRAFT.—Section 9062(h)(2) of such title is amended by striking "36" and inserting "24".

[Please note: The "Changes to Existing Law" section below sets out in red-line format how the legislative text would amend existing law.]

Section-by-Section Analysis

The President's Budget Request for FY21 includes funding levels which anticipate a divestment of seventeen (17) B-1B aircraft. This proposal provides the matching legislative language to support the President's Budget Request: 1) subsection (a) would provide temporary authority to retire seventeen B-1 aircraft; and 2) subsection (b) would amend 10 U.S.C. § 9062(h)(2) to reduce the number of combat-coded B-1 aircraft the Air Force is required to maintain from 36 to 24.

The B-1B Lancer is a critical component of America's long-range strike capability, and will remain so as we transition to the two-bomber force of the future. While multiple wartime employments, high operations tempo, and harsh environmental exposure have proven the aircraft's combat effectiveness, they have also caused significant degradation to aircraft availability. Retiring 17 B-1s in FY21 while retaining all of the associated maintenance manpower will allow our Airmen to focus on maintaining the remaining 45 B-1Bs as never before, and we believe availability rates will improve as a result of this fleet-shaping measure.

The reduction will not close any squadrons, and we have no plans to retire any more B-1Bs for at least the next five years. Additionally, this shaping frees over one billion dollars across the FYDP to invest in the Air Force we need, including the sustainment and modernization of the remaining B-1B fleet, the continued development of the B-21 Raider, and other capabilities critical to further aligning the service with the National Defense Strategy.

Budget Implications: The resources impacted are reflected in the table below and are included within the Fiscal Year (FY) 2021 President's Budget request.

RESOURCE IMPACT ($MILLIONS)									
Program	**FY 2021**	**FY 2022**	**FY 2023**	**FY 2024**	**FY 2025**	**Appropriation**	**Budget Activity**	**BLI/SAG**	**Program Element (for all RDT&E programs)**
B-1	-$1.9	-$22.9	-$60.2	-$64.8	-	3010	05	B01B00	
B-1	-$15.4	-$17.2	-$17.7	-$18.2	-$18.7	3500	01, 02, 04		
B-1	-$37.1	-$100.4	-$257.2	-$291.4	-$313.7	3400	01	011M	
B-1	-$27.3	-$14.2	-$8.1	-	-$6.0	3600	07		0101126F
Total	-$81.7	-$154.7	-$343.2	-$374.4	-$338.4				

Changes to Existing Law: The proposal would amend section 9062 of title 10, United States Code, as follows:

§9062. Policy; composition; aircraft authorization

1

(a) It is the intent of Congress to provide an Air Force that is capable, in conjunction with the other armed forces, of-

(1) preserving the peace and security, and providing for the defense, of the United States, the Commonwealths and possessions, and any areas occupied by the United States;

(2) supporting the national policies;

(3) implementing the national objectives; and

(4) overcoming any nations responsible for aggressive acts that imperil the peace and security of the United States.

(b) There is a United States Air Force within the Department of the Air Force.

(c) In general, the Air Force includes aviation forces both combat and service not otherwise assigned. It shall be organized, trained, and equipped primarily for prompt and sustained offensive and defensive air operations. It is responsible for the preparation of the air forces necessary for the effective prosecution of war except as otherwise assigned and, in accordance with integrated joint mobilization plans, for the expansion of the peacetime components of the Air Force to meet the needs of war.

(d) The Air Force consists of-

(1) the Regular Air Force, the Air National Guard of the United States, the Air National Guard while in the service of the United States, and the Air Force Reserve;

(2) all persons appointed or enlisted in, or conscripted into, the Air Force without component; and

(3) all Air Force units and other Air Force organizations, with their installations and supporting and auxiliary combat, training, administrative, and logistic elements; and all members of the Air Force, including those not assigned to units; necessary to form the basis for a complete and immediate mobilization for the national defense in the event of a national emergency.

(e) Subject to subsection (f) of this section, chapter 911 of this title, and the strength authorized by law pursuant to section 115 of this title, the authorized strength of the Air Force is 70 Regular Air Force groups and such separate Regular Air Force squadrons, reserve groups, and supporting and auxiliary regular and reserve units as required.

(f) There are authorized for the Air Force 24,000 serviceable aircraft or 225,000 airframe tons of serviceable aircraft, whichever the Secretary of the Air Force considers appropriate to carry out this section. This subsection does not apply to guided missiles.

(g)(1) Effective October 1, 2011, the Secretary of the Air Force shall maintain a total aircraft inventory of strategic airlift aircraft of not less than 301 aircraft. Effective on the date that is 45 days after the date on which the report under section 141(c)(3) of the National Defense Authorization Act for Fiscal Year 2013 is submitted to the congressional defense committees, the Secretary shall maintain a total aircraft inventory of strategic airlift aircraft of not less than 275 aircraft.

(2) In this subsection:

(A) The term "strategic airlift aircraft" means an aircraft-

(i) that has a cargo capacity of at least 150,000 pounds; and

(ii) that is capable of transporting outsized cargo an unrefueled range of at least 2,400 nautical miles.

(B) The term "outsized cargo" means any single item of equipment that exceeds 1,090 inches in length, 117 inches in width, or 105 inches in height.

(h)(1) Beginning October 1, 2011, the Secretary of the Air Force may not retire more than six B–1 aircraft.

(2) The Secretary shall maintain in a common capability configuration not less than ~~36~~ 24 B–1 aircraft as combat-coded aircraft.

(3) In this subsection, the term "combat-coded aircraft" means aircraft assigned to meet the primary aircraft authorization to a unit for the performance of its wartime mission.

(i)(1) During the period beginning on October 1, 2017, and ending on October 1, 2022, the Secretary of the Air Force shall maintain a total aircraft inventory of fighter aircraft of not less than 1,970 aircraft, and a total primary mission aircraft inventory (combat-coded) of not less than 1,145 fighter aircraft.

(2) In this subsection:

(A) The term "fighter aircraft" means an aircraft that-

(i) is designated by a mission design series prefix of F– or A–;

(ii) is manned by one or two crewmembers; and

(iii) executes single-role or multi-role missions, including air-to-air combat, air-to-ground attack, air interdiction, suppression or destruction of enemy air defenses, close air support, strike control and reconnaissance, combat search and rescue support, or airborne forward air control.

(B) The term "primary mission aircraft inventory" means aircraft assigned to meet the primary aircraft authorization to a unit for the performance of its wartime mission.

(j)(1) Except as provided in paragraph (2), effective October 1, 2019, the Secretary of the Air Force shall maintain a total aircraft inventory of air refueling tanker aircraft of not less than 479 aircraft.

(2) The Secretary of the Air Force may reduce the number of air refueling tanker aircraft in the total aircraft inventory of the Air Force below 479 only if-

(A) the Secretary certifies to the congressional defense committees that such reduction is justified by the results of the mobility capability and requirements study conducted under section 144(b) of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115–91); and

(B) a period of 30 days has elapsed following the date on which the certification is made to the congressional defense committees under subparagraph (A).

(3) In this subsection:

(A) The term "air refueling tanker aircraft" means an aircraft that has as its primary mission the refueling of other aircraft.

(B) The term "total aircraft inventory" means aircraft authorized to a flying unit for operations or training.

SEC. ___. MODIFICATION TO TEST RESOURCE MANAGEMENT CENTER STRATEGIC PLAN REPORTING CYCLE AND CONTENTS

(a) QUADRENNIAL STRATEGIC PLAN—Section 196 of title 10, United States Code, is amended—

(1) in subsections (c)(1)(C) and (e)(2)(B), by inserting "quadrennial" before "strategic plan"; and

(2) in subsection (d)—

(A) in the heading, by inserting "QUADRENNIAL" before "STRATEGIC PLAN"; and

(B) by inserting "quadrennial" before "strategic plan" each place it occurs.

(b) TIMING AND COVERAGE OF PLAN.—Section 196(d)(1) of such title is amended—

(1) by striking "two fiscal years" and inserting "four fiscal years, and within one year after release of the National Defense Strategy," ; and

(2) by striking "thirty fiscal years" and inserting "15 fiscal years".

(c) AMENDMENT TO CONTENTS OF PLAN.—Section 196(d)(2) of such title is amended—

(1) by striking subparagraph (B); and

(2) by redesignating subparagraph (C) as subparagraph (B) and in that subparagraph by striking "based on current" and all that follows through the end of the subparagraph and inserting "for test and evaluation of the Department of Defense major weapon systems based on current and emerging threats.".

(d) ANNUAL UPDATE TO PLAN.—Section 196(d) of such title is further amended by adding at the end the following new paragraph:

"(5) In addition to the quadrennial strategic plan completed under paragraph (1), the Director, Test Resource Management Center, shall also complete an annual update to the plan. The annual update shall include a summary of changes to the assessment provided in the most recent plan, comments and recommendations the Director considers appropriate, test and evaluation challenges raised since the most recent plan, and actions taken or planned to address such challenges.".

(e) TECHNICAL AMENDMENT.—Section 196(d)(1) of such title is further amended by striking "Test Resources" and inserting "Test Resource".

[Please note: The "Changes to Existing Law" section below sets out in red-line format how the legislative text would amend existing law.]

Section-by-Section Analysis

This proposal would modify the TRMC strategic plan reporting cycle and period to be covered. It is currently a 30-year strategic plan, re-baselined every two years. This proposal will make the strategic plan cover a 15- year period and will be re-baselined at least every four fiscal years, with an annual update. To be responsive to political leadership changes, the new strategic plan would be due not later than one year after the release of the Secretary's National Defense Strategy (NDS).

The current strategic plan required by 10 USC 196 is not as useful to Congress or the Department as it could be due to being cumbersome in covering a 30-year period. It is a substantial document and requires extensive coordination to complete. By the time the strategic plan is fully coordinated and prepared for public release, the next fiscal year may well be underway and a new strategic plan must be initiated. The Department believes a more helpful strategic plan would be on a four-year cycle, with yearly updates to relay any changes, analysis, or high visibility items determined worthy of reporting by the Director of the Test Resource Management Center.

Budget Implications: This proposal has no significant budgetary impact. Resources impacted are incidental in nature and amount, and are included within the Fiscal Year (FY) 2021 President's Budget request.

Changes to Existing Law: This proposal would amend section 196 of title 10, United States Code, as follows:

§196. Department of Defense Test Resource Management Center

(a) Establishment as Department of Defense Field Activity.-The Secretary of Defense shall establish within the Department of Defense under section 191 of this title a Department of Defense Test Resource Management Center (hereinafter in this section referred to as the "Center"). The Secretary shall designate the Center as a Department of Defense Field Activity.

(b) Director and Deputy Director.

(1) At the head of the Center shall be a Director, selected by the Secretary from among individuals who have substantial experience in the field of test and evaluation.

(2) There shall be a Deputy Director of the Center, selected by the Secretary from among individuals who have substantial experience in the field of test and evaluation. The Deputy Director shall act for, and exercise the powers of, the Director when the Director is disabled or the position of Director is vacant.

(c) Duties of Director.-

(1) The Director shall have the following duties:

(A) To review and provide oversight of proposed Department of Defense budgets and expenditures for-

(i) the test and evaluation facilities and resources of the Major Range and Test Facility Base of the Department of Defense; and

(ii) all other test and evaluation facilities and resources within and outside of the Department of Defense, other than budgets and expenditures for activities described in section 139(j) of this title.

(B) To review proposed significant changes to the test and evaluation facilities and resources of the Major Range and Test Facility Base, including with respect to the expansion, divestment, consolidation, or curtailment of activities, before they are implemented by the Secretaries of the military departments or the heads of the Defense Agencies with test and evaluation responsibilities and advise the Secretary of Defense and the Under Secretary of Defense for Research and Engineering of the impact of such changes on the adequacy of such test and evaluation facilities and resources to meet the test and evaluation requirements of the Department.

(C) To complete and maintain the quadrennial strategic plan required by subsection (d).

(D) To review proposed budgets under subsection (e) and submit reports and certifications required by such subsection.

(E) To administer the Central Test and Evaluation Investment Program and the program of the Department of Defense for test and evaluation science and technology.

(2) The Director shall have access to such records and data of the Department of Defense (including the appropriate records and data of each military department and Defense Agency) that are necessary in order to carry out the duties of the Director under this section.

(d) Quadrennial Strategic Plan for Department of Defense Test and Evaluation Resources.--(1) Not less often than once every ~~two~~ four fiscal years, and within one year after release of the National Defense Strategy, the Under Secretary of Defense for Research and Engineering, in coordination with the Director of the Department of Defense Test Resource~~s~~ Management Center, the Director of Operational Test and Evaluation, the Director of the Defense Intelligence Agency, the Secretaries of the military departments, and the heads of Defense Agencies with test and evaluation responsibilities, shall complete a quadrennial strategic plan reflecting the future needs of the Department of Defense with respect to test and evaluation facilities and resources. Each quadrennial strategic plan shall cover the period of ~~thirty~~ 15 fiscal years beginning with the fiscal year in which the plan is submitted under paragraph (3). The quadrennial

strategic plan shall be based on a comprehensive review of both funded and unfunded test and evaluation requirements of the Department, future threats to national security, and the adequacy of the test and evaluation facilities and resources of the Department to meet those future requirements and threats.

(2) The quadrennial strategic plan shall include the following:

(A) An assessment of the test and evaluation requirements of the Department for the period covered by the plan.

~~(B) An identification of performance measures associated with the successful achievement of test and evaluation objectives for the period covered by the plan.~~

(~~C~~B) An assessment of the test and evaluation facilities and resources that will be needed to meet current and future requirements for test and evaluation of the Department of Defense major weapons systems based on current and emerging threats~~and satisfy such performance measures~~.

(D) An assessment of the current state of the test and evaluation facilities and resources of the Department.

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(E) An assessment of plans and business case analyses supporting any significant modification of the test and evaluation facilities and resources of the Department projected, proposed, or recommended by the Secretary of a military department or the head of a Defense Agency for such period, including with respect to the expansion, divestment, consolidation, or curtailment of activities.

(F) An itemization of acquisitions, upgrades, and improvements necessary to ensure that the test and evaluation facilities and resources of the Department are adequate to meet such requirements and satisfy such performance measures.

(G) An assessment of the budgetary resources necessary to implement such acquisitions, upgrades, and improvements.

(3) Upon completing a quadrennial strategic plan under paragraph (1), the Director shall submit to the Secretary of Defense a report on that plan. The report shall include the plan and a description of the review on which the plan is based.

(4) Not later than 60 days after the date on which the report is submitted under paragraph (3), the Secretary of Defense shall transmit to the Committee on Armed Services and Committee on Appropriations of the Senate and the Committee on Armed Services and Committee on Appropriations of the House of Representatives the report, together with any comments with respect to the report that the Secretary considers appropriate.

(5) In addition to the quadrennial strategic plan completed under paragraph (1), the Director, Test Resource Management Center, shall also complete an annual update to the plan. The annual update shall include a summary of changes to the assessment provided in the most recent plan, comments and recommendations the Director considers appropriate, test and evaluation challenges raised since the most recent plan, and actions taken or planned to address such challenges.

(e) Certification of Budgets.-(1) The Secretary of Defense, acting through the Under Secretary of Defense (Comptroller), shall require that the Secretary of each military department and the head of each Defense Agency with test and evaluation responsibilities transmit such Secretary's or Defense Agency head's proposed budget for test and evaluation activities, including modeling and simulation activities, for a fiscal year and for the period covered by the future-years defense program submitted to Congress under section 221 of this title for that fiscal year to the Director of the Center for review under paragraph (2) before submitting such proposed budget to the Under Secretary of Defense (Comptroller).

(2)(A) The Director of the Center shall review each proposed budget transmitted under paragraph (1) and shall, not later than January 31 of the year preceding the fiscal year for which such budgets are proposed, submit to the Secretary of Defense a report containing the comments of the Director with

respect to all such proposed budgets, together with the certification of the Director as to whether such proposed budgets are adequate.

(B) The Director shall also submit, together with such report and such certification, an additional certification as to whether such proposed budgets provide balanced support for such strategic plan.

(3) The Secretary of Defense shall, not later than March 31 of the year preceding the fiscal year for which such budgets are proposed, submit to Congress a report on those proposed budgets which the Director has not certified under paragraph (2)(A) to be adequate. The report shall include the following matters:

(A) A discussion of the actions that the Secretary proposes to take, together with any recommended legislation that the Secretary considers appropriate, to address the inadequacy of the proposed budgets.

(B) Any additional comments that the Secretary considers appropriate regarding the inadequacy of the proposed budgets.

(f) Approval of Certain Modifications.-(1) The Secretary of a military department or the head of a Defense Agency with test and evaluation responsibilities may not implement a projected, proposed, or recommended significant modification of the test and evaluation facilities and resources of the Department, including with respect to the expansion, divestment, consolidation, or curtailment of activities, until-

(A) the Secretary or the head, as the case may be, submits to the Director a business case analysis for such modification; and

(B) the Director reviews such analysis and approves such modification.

(2) The Director shall submit to the Secretary of Defense an annual report containing the comments of the Director with respect to each business case analysis reviewed under paragraph (1)(B) during the year covered by the report.

(g) Supervision of Director by Under Secretary.-The Director of the Center shall be subject to the supervision of the Under Secretary of Defense for Research and Engineering. The Director shall report directly to the Under Secretary, without the interposition of any other supervising official.

(h) Administrative Support of Center.-The Secretary of Defense shall provide the Director with administrative support adequate for carrying out the Director's responsibilities under this section. The Secretary shall provide the support out of the headquarters activities of the Department or any other activities that the Secretary considers appropriate.

(i) Definition.-In this section, the term "Major Range and Test Facility Base" means the test and evaluation facilities and resources that are designated by the Secretary of Defense as facilities and resources comprising the Major Range and Test Facility Base.

SEC. ___. TIMELINESS RULES FOR FILING BID PROTESTS AT THE UNITED STATES COURT OF FEDERAL CLAIMS.

(a) JURISDICTION.—Paragraph (1) of section 1491(b) of title 28, United States Code, is amended—

(1) in the first sentence, by striking "Both the" and all that follows through "shall have" and inserting "The United States Court of Federal Claims shall have"; and

(2) in the second sentence—

(A) by striking "Both the" and all that follows through "shall have" and inserting "The United States Court of Federal Claims shall have"; and

(B) by striking "is awarded." and inserting "is awarded, but such jurisdiction is subject to time limits as follows:

"(A) A protest based upon alleged improprieties in a solicitation that are apparent before bid opening or the time set for receipt of initial proposals shall be filed before bid opening or the time set for receipt of initial proposals. In the case of a procurement where proposals are requested, alleged improprieties that do not exist in the initial solicitation but that are subsequently incorporated into the solicitation shall be protested not later than the next closing time for receipt of proposals following the incorporation. A protest that meets these time limitations that was previously filed with the Comptroller General may not be reviewed.

"(B) A protest other than one covered by subparagraph (A) shall be filed not later than 10 calendar days after the basis of the protest is known or should have been known (whichever is earlier), with the exception of a protest challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested

and, when requested, is required. In such a case, with respect to any protest the basis of which is known or should have been known either before or as a result of the debriefing, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 calendar days after the date on which the debriefing is held.

"(C) If a timely agency-level protest was previously filed, any subsequent protest to the United States Court of Federal Claims that is filed within 10 calendar days of actual or constructive knowledge of initial adverse agency action shall be considered, if the agency-level protest was filed in accordance with subparagraphs (A) and (B), unless the contracting agency imposes a more stringent time for filing the protest, in which case the agency's time for filing shall control. In a case where an alleged impropriety in a solicitation is timely protested to a contracting agency, any subsequent protest to the United States Court of Federal Claims shall be considered timely if filed within the 10-day period provided by this subparagraph, even if filed after bid opening or the closing time for receipt of proposals.

"(D) Under no circumstances may the United States Court of Federal Claims consider a protest that is untimely because it was first filed with the Comptroller General.".

(b) AVAILABLE RELIEF.—Paragraph (2) of such section is amended by inserting "monetary relief shall not be available if injunctive relief is or has been granted, and" after "except that".

(c) AGENCY DECISIONS OVERRIDING STAY OF CONTRACT AWARD OR PERFORMANCE.—Such section is further amended—

(1) by redesignating paragraphs (5) and (6) as paragraphs (6) and (7), respectively; and

(2) by inserting after paragraph (4) the following new paragraph (5):

"(5) The United States Court of Federal Claims shall have jurisdiction to render judgment on an action by an interested party challenging an agency's decision to override a stay of contract award or contract performance that would otherwise be required by section 3553 of title 31. Such an action shall be filed within 10 calendar days of actual or constructive notification of the agency's written determination to proceed with the award or performance of the contract.".

(d) CONFORMING AMENDMENTS.—

(1) IN GENERAL.—Section 3556 of title 31, United States Code, is amended—

(A) by inserting "instead of with the Comptroller General" before the period at the end of the first sentence; and

(B) by striking the second sentence.

(2) SECTION HEADING AMENDMENT.—The heading of such section is amended by striking "**; matter included in agency record**".

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to any cause of action filed 180 days or more after the date of the enactment of this Act.

[Please note: The "Changes to Existing Law" section below sets out in red-line format how the legislative text would amend existing law.]

Section-by-Section Analysis

This proposal would amend section 1491 of title 28, United States Code, to impose timeliness rules at the U.S. Court of Federal Claims (COFC) that will mirror those for bid protests filed with the Government Accountability Office (GAO), thereby reducing the time to decide bid protests by avoiding unnecessarily repetitive protests.

Section 3552 of title 31, United States Code, provides statutory authority for bid protests to be decided by the Government Accountability Office (GAO) (P. L. 98–369, div. B, title VII, §2741(a), July 18, 1984, 98 Stat. 1199 as amended). Section 1491(b)(1) of title 28, United States Code, provided temporary concurrent federal jurisdiction between the COFC and the United States District Courts to hear pre-award or post-award bid protest matters. Section 12(d) of the Administrative Disputes Resolution Act of 1996 (P. L. 104-320; 110 Stat. 3870; 5 U.S.C. 571 note) (ADRA), contained a sunset provision that terminated District Court jurisdiction to hear such bid protests under section 1491 as of January 1, 2001, leaving all ADRA bid protest cases under the jurisdiction of the COFC. The jurisdiction of the COFC and the GAO are concurrent. As a result, a protestor may file a protest with the GAO and, if the protest is denied, file suit at the COFC.

The Federal bid protest system is fashioned around the two goals of ensuring accountability through visibility in the procurement process while expeditiously resolving bid protests. Expeditious resolution of protests is an express requirement of COFC and GAO jurisdiction. Section 3554(a)(1) of title 31, United States Code, states, "the Comptroller General shall provide for the inexpensive and expeditious resolution of protests." Section 1491(b)(3) of title 28, United States Code, states that "[i]n exercising jurisdiction . . . [the COFC] shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action."

The expeditious resolution of protests is greatly hindered by the ability of a protestor to seek redress at GAO and, faced with a negative outcome, then seek another review of the agency's actions by filing a protest with the COFC. In Axiom Resource Management, Inc. v. United States, 80 Fed. Cl. 530, 539 (2008), rev 564 F.3d 1374 (Fed. Cir. 2009), Axiom challenged an award to Lockheed Martin Federal Healthcare, Inc. ("Lockheed") to perform program management services for the Tricare Management Agency. Axiom alleged the award to Lockheed was improper because Lockheed suffered from a variety of organizational conflicts of interest ("OCIs").

These same allegations had previously been challenged at the GAO. Id. at 1377. In response to two GAO protests, the agency took corrective action to analyze the OCI allegations raised by Axiom. After performing a detailed analysis, the Contracting Officer concluded the alleged OCIs could be avoided or mitigated. The award to Lockheed stood, and Axiom filed a third GAO protest which was denied. Axiom subsequently filed suit at the COFC where, ultimately, the award to Lockheed was set aside. Axiom Res. Mgmt., Inc. v. United States, 80 Fed. Cl. 530, 539 (2008). The COFC decision was ultimately reversed by the Federal Circuit. Axiom Resource Management, Inc v. United States, 564 F.3d 1374 (Fed. Cir. 2009). This protest litigation took nearly two years. A similar procedural history occurred in MASAI Technologies Corp. v. United States, 79 Fed. Cl. 433 (2007). In MASAI, the allegations considered by the COFC had been raised previously at the GAO resulting in corrective action by the agency two times. Id. at 436-40. Ultimately, the Contracting Officer determined the initial award was correct and GAO denied MASAI's protest. In MASAI, however, the COFC agreed with GAO's denial. The MASAI litigation took approximately fourteen months. See also Labatt Food Serv., Inc. v. United States, 577 F.3d 1375 (Fed. Cir. 2009) (one year to resolve) and Ala. Aircraft Indus., Inc.--Birmingham v. United States, 586 F.3d 1372 (Fed. Cir. 2009) (over one

year to resolve). At the conclusion of the litigation, the parties in each of these cases found themselves in the same position they held when the GAO issued its decision on the merits of the protests; the agency's actions were ultimately upheld.

By establishment of parallel timelines at GAO and COFC, the statutory requirement for expeditious resolution of protests is maintained, without sacrificing accountability. Regarding pre-award protests, GAO has clearly established timeliness rules.

Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals. In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation.(4 C.F.R. § 21.2(a)(1)).

Neither the Tucker Act nor the ADRA established a unique statute of limitations for COFC bid protests. The COFC can entertain protests "without regard to whether suit is instituted before or after the contract is awarded." 28 U.S.C. 1491(b)(1) (2006). Under section 2501 of title 28, United States Code, the statute of limitations at the COFC is six years. Several COFC decisions have considered whether or not protests based upon alleged improprieties in a solicitation are barred when filed after the solicitation closing date, with varying outcomes. See TransAtlantic Lines LLC v. United States, 68 Fed. Cl. 48, 52-53 (2005) (GAO rule that limits its advisory role cannot limit the exercise of jurisdiction of the COFC); Software Testing Solutions, Inc. v. United States, 58 Fed. Cl. 533, 535 (2003) (delay in bringing a protest may be considered in the analysis of whether injunctive relief is warranted but not basis for rejecting request); ABF Freight Sys., Inc. v. United States, 55 Fed. Cl. 392, 399-400 (2003) (quoting N.C. Div. of Servs. for the Blind v. United States, 53 Fed. Cl. 147, 165 (2002)) (GAO timeliness rule applied); Aerolease Long Beach v. United States, 31 Fed. Cl. 342, 358 (1994) (citing Logicon, Inc. v. United States, 22 Cl. Ct. 776, 789 (1991) (declining to accept the GAO bid protest timeliness regulations as always controlling).

In 2007, however, the Court of Appeals for the Federal Circuit resolved this issue when it issued its decision in Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308 (Fed. Cir. 2007). In that decision the Federal Circuit held that ". . . a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims." Id. at 1313. Accordingly, with respect to protests based upon solicitation improprieties, the Federal Circuit has, in essence, adopted the GAO bid protest timeliness regulation.

The same cannot be said for post-award bid protests. As discussed, the COFC will consider protests filed after consideration by GAO and months after contract award. In PlanetSpace Inc. v. United States, 92 Fed. Cl. 520 (2010), the United States sought to bar the protestor's claim under the doctrine of laches since the protestor filed at the COFC three months after losing its GAO protest and seven months after contract award. The COFC held,

Even if the court . . . were to conclude that there was no reason for the delay in filing, defendant's laches argument would still fail. "When a limitation on the period for bringing suit has been set by statute, laches will generally not be invoked to shorten the statutory period." Adv. Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc., 988 F.2d 1157, 1161 (Fed. Cir. 1993) (citing Cornetta v. United States, 851 F.2d 1372, 1377-78 (Fed. Cir. 1988) (en banc)). This bid protest is properly before the court pursuant to 28 U.S.C. § 1491(b) and thus is governed by the Tucker Act's six-year statute of limitations set forth at 28 U.S.C. § 2501. Absent "extraordinary circumstances," this court will not invoke laches to bar an otherwise timely protest. CW Gov't Travel, Inc., 61 Fed. Cl. 559, 569 (2004) ("Had Congress wanted to set a statute of limitations on bid protest actions, it would have done so. Because Congress did not so limit the jurisdiction of this court to hear such actions, we would be reluctant to invoke laches except under extraordinary circumstances that are not present in this case."). To be sure, defendant has not cited, and the court is not aware of, a single instance in which the court invoked laches to bar a bid protest that was filed a mere three months after a failed GAO protest or a mere seven months after contract award. Id. at 531. The Court noted that should the protestor succeed on the merits of the case, the requested injunctive relief is not automatic. Thus, similar to the pre-award decision in Software Testing Solutions, supra, the delay in filing is properly considered in determining whether injunctive relief is appropriate, but does not preclude review of the underlying protest.

Despite the COFC's willingness to consider a delay in filing in fashioning its remedy, the disruption to the procurement process and associated costs and uncertainties stemming with serial protests and the lack of a reasonable statute of limitations for COFC protests outweigh any perceived benefit. For these reasons, 28 U.S.C. 1491 should be amended to impose jurisdictional limitations that parallel those imposed at GAO.

Specifically, subsection (a) of the proposal strikes any reference to the United States district courts and makes clear that only the COFC has jurisdiction to provide judicial review of bid protests. By eliminating references to the district courts, section 1491(b) is reconciled with the sunset provisions of the ADRA that ended district court bid protest jurisdiction in 2001, and with section 861 of the FY 2012 National Defense Authorization Act (P. L. 112-81) that ended district court jurisdiction over bid protests pertaining to the award of maritime contracts.

Subparagraph (a)(2)(B) of the proposal lays out the timeliness rules for bid protests by adding four new subparagraphs to section 1491(b)(1).

It would add a new subparagraph (A) which will impose time limits for bringing a pre-award bid protest before the COFC. A pre-award protest is a challenge to a solicitation before award is made. This provision requires that such protests be brought before the receipt of proposals. If an objectionable provision is introduced by an amendment to the original solicitation, any protest must be brought before the revised date for submittal of proposals as set forth in the amendment to the solicitation. This provision makes these time limits jurisdictional. The Federal Circuit's decision in Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308 (Fed. Cir. 2007) began the process of aligning COFC practice with that of the GAO in the area of pre-award timeliness. There, the Federal Circuit effectively applied the pre-award timeliness rules of the GAO to bid protests filed at the COFC by ruling that a party that failed to challenge the terms

of a solicitation prior to the close of the bidding process waived its ability to do so after award. Subsequent COFC decisions emphasized that this time bar is based upon the doctrine of waiver, and is not jurisdictional. In at least one decision the COFC therefore considered untimely pre-award protest allegations in determining whether a protester possessed sufficient standing to bring a COFC protest. The above language fully aligns GAO practice with COFC practice by mirroring precisely the GAO timeliness rules at 4 C.F.R. § 21.2(a)(2), and making the bar to untimely COFC pre-award protests jurisdictional.

It would add a new subparagraph (B) to impose a time limit for bringing a post-award protest before the COFC, which is almost invariably a challenge to a contract award decision. This language is closely modeled on the GAO timeliness rules at 4 C.F.R. § 21.2(a)(2). This section imposes a 10-day time limit on bringing bid protests from when the basis of the protest was known or should have been known. It tolls that 10-day period for required debriefings in order to encourage debriefings, which are designed to avoid protests by providing information to disappointed offerors.

It would add a new subparagraph (C) to section 1491(b)(1) to ensure COFC bid protests are handled in much the same manner as GAO protests are handled. Specifically, the Federal Acquisition Regulation encourages the resolution of protests at the agency level, if possible. The GAO rules further this policy because the GAO will consider a bid protest that is filed outside the 10-day period if the protester first brings a timely protest to the agency (referred to as an "agency-level protest"). See 4 C.F.R. § 21.2(a)(3). The new subparagraph (C) will apply the same concept to COFC bid protests. Also, COFC case law has held that an offeror that fails to submit a proposal before the date set for receipt of proposals is not an interested party to protest. This provision allows a protester to pursue a pre-award, agency-level protest and still bring its protest to the COFC even if it does not submit a proposal and even if the date set for receipt of proposals elapses.

Finally it would add a new subparagraph (D) to section 1491(b)(1) that eliminates any argument that the filing of a bid protest with the GAO tolls the jurisdictional time limit for filing with the COFC.

Subsection (b) of the proposal ensures that a protestor may not receive both injunctive relief and monetary relief as they can under the current section 1491(b). As the Department of Justice has noted, a protester that receives injunctive relief is made whole relative to its competitors. If it receives monetary relief in addition, it receives a windfall. Therefore, a protester should be entitled to injunctive relief or monetary relief, but not both.

Subsection (c) of the proposal clarifies that none of the proposed changes to 1491(b) are intended to infringe on the COFC's jurisdiction to review agency overrides of CICA stays, and to enjoin such overrides when appropriate. The 10-day new rule is iterated to clarify that the jurisdictional time limit applies to overrides.

Subsection (d) of the proposal amends section 3556 of title 31, United States Code to conform with the proposed change.

Subsection (e) provides a delayed effective date for this provision. A 180-day effective date is appropriate due to the impact on the existing rights of interested parties resulting from shortening the statute of limitations from six years to ten days. It could be prejudicial to interested parties seeking to take full advantage of their current statutory rights by providing for an effective date which cuts off those rights with a shorter notice period. Currently, interested parties have the ability to file a protest with GAO with the expectation that they can also file a protest with the COFC if unsuccessful at GAO. If a protester files its protest at the ten day limit, and GAO uses the entire 100-day statutory period to issue its protest decision, the GAO process will have taken nearly four months. An effective date of 180 days provides interested parties with a reasonable time to file with the COFC prior to the statutory change taking effect.

By harmonizing the timeliness rules between the COFC and the GAO, a protester would be forced to make a choice of forum in deciding where to bring its protest. The improvements to the protest system would be as follows: (1) the amount of time that could be consumed by protests would be reduced, (2) scarce agency procurement resources would be conserved by ensuring that two separate trial-level forums do not adjudicate the same bid protest, and (3) protesters would be assured of accountability and transparency no matter which forum they elected. This reform would largely eliminate an unintended "forum shopping" practice that has arisen under the existing bid protest system, and would materially contribute to the expeditious yet fair resolution of bid protests.

Budget Implications: This proposal has no significant budgetary impact. Resources impacted are incidental in nature and amount, and are included within the Fiscal Year (FY) 2021 President's Budget Request.

Changes to Existing Law: This proposal would amend section 1491(b) of title 28, United States Code, and section 3556 of title 31, United States Code, as follows:

TITLE 28, UNITED STATES CODE

*** * * * * * ***

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and

correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 7104(b)(1) of title 41, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

(b)(1) ~~Both the Unites States Court of Federal Claims and the district courts of the United States~~ The United States Court of Federal Claims shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. ~~Both the United States Court of Federal Claims and the district courts of the United States~~ The United States Court of Federal Claims shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded, but such jurisdiction is subject to the time limits as follows.

(A) A protest based upon alleged improprieties in a solicitation that are apparent before bid opening or the time set for receipt of initial proposals shall be filed before bid opening or the time set for receipt of initial proposals. In the case of a procurement where proposals are requested, alleged improprieties that do not exist in the initial solicitation but that are subsequently incorporated into the solicitation shall be protested not later than the next closing time for receipt of proposals following the incorporation. A protest that meets these time limitations that was previously filed with the Comptroller General may not be reviewed.

(B) A protest other than one covered by subparagraph (A) shall be filed not later than 10 calendar days after the basis of the protest is known or should have been known (whichever is earlier), with the exception of a protest challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required. In such a case, with respect to any protest the basis of which is known or should have been known either before or as a result of the debriefing, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 calendar days after the date on which the debriefing is held.

(C) If a timely agency-level protest was previously filed, any subsequent protest to the United States Court of Federal Claims that is filed within 10 calendar days of actual or constructive knowledge of initial adverse agency action shall be considered, if the agency-level protest was filed in accordance with subparagraphs (A) and (B), unless the contracting agency imposes a more stringent time for filing the protest, in which case the agency's time for filing shall control. In a case where an alleged impropriety in a solicitation is timely protested to a contracting agency, any subsequent protest to the United States Court of Federal Claims shall be considered timely if filed within the 10-day period provided by this subparagraph, even if filed after bid opening or the closing time for receipt of proposals.

(D) Under no circumstances may the United States Court of Federal Claims consider a protest that is untimely because it was first filed with the Comptroller General.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief, except that monetary relief shall not be available if injunctive relief is or has been granted, and any monetary relief shall be limited to bid preparation and proposal costs.

(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(5) The United States Court of Federal Claims shall have jurisdiction to render judgment on an action by an interested party challenging an agency's decision to override a stay of contract award or contract performance that would otherwise be required by section 3553 of title 31. Such an action shall be filed within 10 calendar days of actual or constructive notification of the agency's written determination to proceed with the award or performance of the contract.

~~(5)~~ (6) If an interested party who is a member of the private sector commences an action described in paragraph (1) with respect to a public-private competition conducted under Office of Management and Budget Circular A–76 regarding the performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A–76, then an interested party described in section 3551(2)(B) of title 31 shall be entitled to intervene in that action.

~~(6)~~ (7) Jurisdiction over any action described in paragraph (1) arising out of a maritime contract, or a solicitation for a proposed maritime contract, shall be governed by this section and shall not be subject to the jurisdiction of the district courts of the United States under the Suits in Admiralty Act (chapter 309 of title 46) or the Public Vessels Act (chapter 311 of title 46).

(c) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

TITLE 31, UNITED STATES CODE

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§3556. Nonexclusivity of remedies~~; matters included in agency record~~

This subchapter does not give the Comptroller General exclusive jurisdiction over protests, and nothing contained in this subchapter shall affect the right of any interested party to file a protest with the contracting agency or to file an action in the United States Court of Federal Claims instead of with the Comptroller General. ~~In any such action based on a procurement or~~

~~proposed procurement with respect to which a protest has been filed under this subchapter, the reports required by sections 3553(b)(2) and 3554(e)(1) of this title with respect to such procurement or proposed procurement and any decision or recommendation of the Comptroller General under this subchapter with respect to such procurement or proposed procurement shall be considered to be part of the agency record subject to review.~~