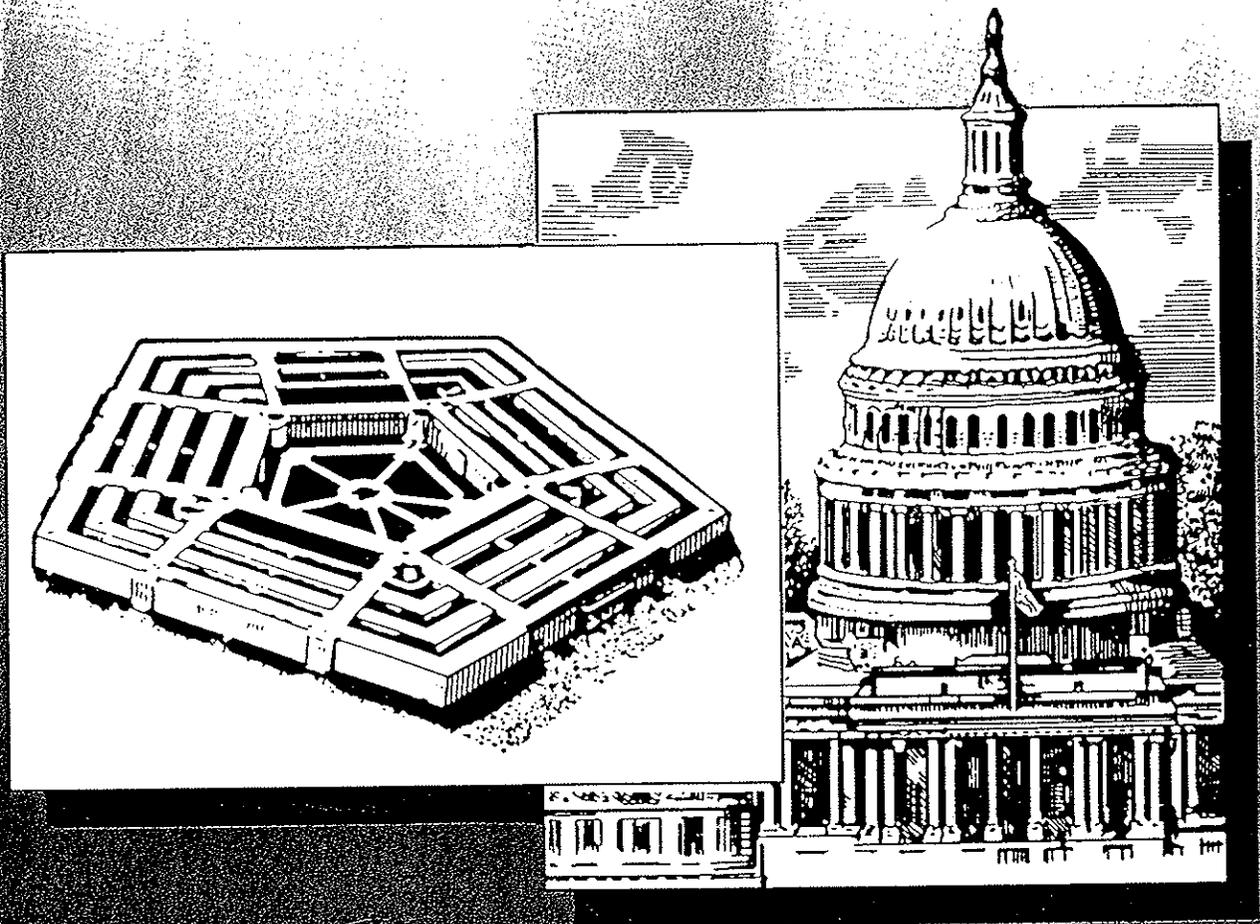




STREAMLINING DEFENSE ACQUISITION LAWS

EXECUTIVE SUMMARY:
REPORT OF THE DOD ACQUISITION LAW ADVISORY PANEL





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This document summarizes the Report of the Department of Defense Acquisition Law Advisory Panel which was transmitted on January 14, 1993, to the congressional defense committees, as directed by § 800, Public Law 101-510. Entitled *Streamlining Defense Acquisition Laws*, the Report consisted of over 1,800 pages, reflecting the results of more than 16 months of intense effort by the Panel to fulfill the requirements of its charter. This monumental study presented the Panel's recommendations on over 600 statutes — each affecting the defense acquisition process in some way — that were selected for review. The Panel members, while proud of the effort which produced this Report, also recognized the need for an additional publication to highlight their principal findings and recommendations for the diverse and often divergent communities who are important stakeholders in defense and other government procurement matters.

This executive summary is intended to meet that need. It reflects the Panel's fundamental goals and objectives, both in conducting the study and in presenting their recommendations for specific and far-reaching changes in the acquisition laws. It also underlines the Panel's consistent concern in addressing defense acquisition as a coherent system. Most importantly, however, the executive summary has been written in a way which highlights the Panel's Report but is in no way intended to replace it. It is important that the reader take advantage of the extensive references to the Report included in the summary, both for the definitive statements of the Panel's recommendations and as the basis for considering actions in response to those recommendations. It is also important to point out that neither the Report nor this summary represent official positions of the U.S. government or the Department of Defense.

Let me emphasize to every reader my personal pride in the extremely dedicated work of our Panel members, as well as the joint military and civilian staff assembled at the Defense Systems Management College, who supported them with great professionalism and dedication. I also want to express on behalf of the Panel our particular thanks to Lieutenant Colonel Kenneth Allard, U.S. Army, for his efforts in preparing and editing this summary. We are also grateful for the assistance provided to those efforts by the task force and DSMC staff members listed on page ix.

While the Panel's recommendations will certainly provoke spirited debate as well as thoughtful consideration, there should be no doubt that all who have been associated with this effort have done their utmost to provide the Congress with their best judgments on these difficult and complex issues. To quote from the Introduction to our Report, we hope that those recommendations will contribute to the development of a more efficient procurement system, "one that is capable of meeting any future challenge to American national security."

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I

INTRODUCTION

Background

Hundreds of individual laws create the underpinnings of the defense acquisition system. Large and small, significant and trivial, new and old, these laws emanate from the fundamental constitutional responsibility of the Congress "To raise and support Armies (and) . . . To provide and maintain a Navy." With the passage of the National Defense Authorization Act for FY 1991, Congress declared that the time had come to start the process of rationalizing, codifying, and streamlining this body of laws. Section 800 of that Act directed the official responsible for administering DOD acquisition law and regulation — the Under Secretary of Defense for Acquisition — to appoint an advisory panel of government and private-sector experts. Under the leadership of the Commandant of the Defense Systems Management College,¹ this panel was to review all laws affecting DOD procurement, "with a view toward streamlining the defense acquisition process," and to issue a report for transmission by the Secretary of Defense to the Congress in January 1993. The report was to be a practical plan of action for moving from present law to an understandable code, and was to contain specific recommendations to Congress to: eliminate any laws "unnecessary for the establishment of buyer and seller relationships in procurement;" ensure the "continuing

financial and ethical integrity" of defense procurement programs; and "protect the best interests of the Department of Defense." Finally, the panel was asked to "prepare a proposed code of relevant acquisition laws."²

Maintaining a fair, efficient, and open system of defense procurement has been a fundamental public policy since the earliest days of the Republic, as well as a specific congressional goal since DOD was created by the National Security Act of 1947. In the decades that followed, six major executive branch commissions separately examined the perennial problem of defense management. One of them, the President's Blue Ribbon Commission on Defense Management headed by David Packard, provided a comprehensive analysis of the major problem areas affecting defense management. It also made a specific recommendation to recodify the federal laws governing procurement:

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

¹ The Defense Systems Management College is a DOD educational institution which has, since 1971, trained program managers and program executives from the uniformed services, defense industry, and other branches of the federal government.

² Pub. L. No. 101-510, § 800, 104 Stat. 1587. See H.R. CONF. REP. NO. 923, 101st Cong., 2d Sess. 107 (1990) to accompany H.R. 4739 (National Defense Authorization Act for FY 1991).

consistent, and greatly simplified procurement statute.³

Although the Packard Commission's recommendations attracted wide public attention, they failed to prompt the sweeping legislative changes that many had thought possible. A 1988 congressional report noted that the Packard Commission's status as the sixth major study of defense acquisition over four decades meant that it was merely the latest to address continuing problem areas in defense procurement. As House Armed Services Committee Chairman Les Aspin stated in his foreword to the report, "Perhaps the next executive commission on acquisition should be created, not to propose the reforms, but to implement them."⁴ In June 1989, Secretary of Defense Dick Cheney set forth just such a plan in his Defense Management Review (DMR), an ambitious effort not only to implement the recommendations of the Packard Commission, but to provide a framework for continuing improvements in Pentagon acquisition practices.⁵ This executive-legislative branch partnership was implicitly recognized by the Senate in approving the legislation which authorized the formation of the "Advisory Panel on Streamlining and Codification of the Acquisition Laws" (hereafter, the Panel).

The Packard Commission and Secretary Cheney's Defense Management Review represent the most recent efforts to promote efficiency in Government procurement practices. The purpose of this Advisory Panel will not be to plow the same ground as previous studies; rather, it will be to take the general principles set forth in these studies and prepare a pragmatic, workable set of recommended changes to the acquisition laws.⁶

Strategic Changes

The authorization of the Panel took place in the midst of fundamental changes in the international security environment, highlighted by the unification of Germany, the transformation of Eastern Europe, and the breakup of the Soviet Union. These strategic changes had profound implications for the American defense establishment. Not only could U.S. military forces be reduced, but some of the money spent on defense could be redirected toward other national priorities. Those changes in turn had equally profound implications for the Panel. The dramatic reductions in defense spending were sufficient by themselves to create a presumption that the acquisition system of the future would demand better management by fewer people of far fewer tax dollars. "Better" in this case was synonymous with the simpler, more flexible, and more responsive procedures needed to match the sweeping personnel reductions and management realignments that had become the order of the day. In its review, therefore, the Panel had a clear obligation to seek out legislative reforms which would enable both government and industry to operate more efficiently with reduced budgets.

Other major influences upon the Panel's deliberations were the changes occurring in the defense industrial base. A study by the Air Force Association noted that the industrial base which supported Operation Desert Storm

. . . no longer exists. Even as the nation watched the war on television, the companies that produced the impressive weapons were releasing workers, closing plants, and searching for nondefense business.⁷

³ *A Quest for Excellence: Final Report by the President's Commission on Defense Management* 55 (June 1986).

⁴ Defense Policy Panel and Acquisition Policy Panel of the H.R. Comm. on Armed Services, 100th Cong., 2d Sess., *Defense Acquisition: Major U.S. Commission Reports (1949-1988)* (Comm. Print 1988), vii.

⁵ U.S. Dep't of Defense, *Defense Management Report to the President by Secretary of Defense Dick Cheney* (1989).

⁶ S. REP. NO. 384, 101st Cong., 2d Sess. 819 (1990) to accompany S. 2884 (National Defense Authorization Act for FY 1991).

⁷ Air Force Ass'n., Arlington, Va., *Lifeline Adrift: The Defense Industrial Base in the 1990's* i (1991).

This exodus from the defense marketplace was not due solely to the downturn in defense spending:

Firms, particularly subcontractors and suppliers of system components, are moving from defense to the commercial market, where the profits are better and where business is conducted in a more stable, less adversarial manner.⁸

Two congressional studies completed in the aftermath of the Gulf War simultaneously praised the performance of U.S. weapons systems but cited the burden of regulatory controls imposed through the DOD acquisition system as an important factor in the decline of the industrial base.⁹

While the Panel's charter called for legislative rather than regulatory reform, there is an important linkage, often missed in public and congressional criticism of DOD contracting methods: many of the regulations which impose the most burdensome controls are specifically mandated by statute.¹⁰ This "missing link" between law and regulation was addressed in a study specially prepared for the Panel by the American Defense Preparedness Association (ADPA). It found that acquisition laws represented the apex of a "cascading pyramid" of restrictive regulations, overly detailed military specifications, and common procurement practices that typically added 30-50 percent to the costs of doing business with the Department of Defense.¹¹

Although these costs have customarily been measured in both time and money, they also impede technological innovation. Ironically, it is technological sophistication which has characterized American weapons development for more than a generation, and is an essential component of our continued military superiority. It is also important to remember that these laws are part of a system that has been successfully applied for almost a half century to procure the weapons and materiel used by American armed forces in actual combat in Korea, Vietnam, and the Persian Gulf, as well as a host of Cold War confrontations. By the early 1990s, however, this record of success could not completely offset a growing concern among lawmakers and procurement experts who worried about the system's ability to respond to future scientific challenges. For one thing, the procurement process typically operated at a far slower pace than the technological developments it sought to capture. Worse yet, it imposed bureaucratic requirements which were so unique and intrusive (e.g., cost accounting standards) that many contractors totally separated their government and commercial production facilities. These barriers not only added to the costs of doing business with the government, but they also "walled off" the rapid advances being made in commercial research and development from easy exploitation and use in military systems.

A particularly vivid example of this barrier occurred during the Gulf War. According to a story cited by Donald A. Hicks, a former Under

⁸ *Id.*

⁹ Office of Technology Assessment, U.S. Congress, *Redesigning Defense: Planning the Transition to the Future U.S. Defense Industrial Base*, OTA-ISC-500, (1991); H. R. Comm. on Armed Services, 102d Cong., 2d Sess., *Future of the Defense Industrial Base, Report of the Structure of U.S. Defense Industrial Base Panel* (Comm. Print 1992).

¹⁰ One notable exception to the usual "missing link" between law and regulation was provided by the report of a 1992 congressional panel studying the industrial base which charged that "Defense Department provisions requiring compliance with Government Cost Accounting Standards and the Truth in Negotiations Act are serious impediments to commercial companies wishing to sell to the department." H.R. Comm. on Armed Services, 102d Cong., 2d Sess., *Future of the Defense Industrial Base, Report of the Structure of U.S. Defense Industrial Base Panel* 13 (Comm. Print 1992).

¹¹ George K. Krikorian, presentation to the Acquisition Law Advisory Panel, Ft. Belvoir, Va. (June 3, 1992). See also Mr. Krikorian's statement before the House Armed Services Committee Subcommittee on Investigations, July 22, 1991, and his article, *DOD's Cost Premium Thirty to Fifty Percent*, *National Defense* (Journal of the American Defense Preparedness Association) 12-13 (Sept. 1992).

Secretary of Defense for Research and Engineering, the U.S. Army placed an emergency order for 6,000 commercial radio receivers, waiving all military requirements and specifications. Because of the urgency of preparations for war — as well as the ever-present threat of second-guessing once that urgency had faded — no responsible procurement official could be found who would waive the requirement for the company to certify that the Army was being offered the lowest available price. Since the radio was widely marketed and any misstatement might constitute a felony, no company official would make this certification. The impasse was resolved only when the Japanese government bought the radios without a price certification, donated them to the U.S. Army, and credited the purchase against Japan's financial contribution to Operation Desert Storm.¹²

The Gulf War demonstrated the devastating tactical effect of sophisticated weaponry of all kinds, particularly when precision munitions were coupled with advanced command and control systems. If these developments truly represent what many observers referred to as a "military technological revolution," then the innovations needed to hone the American combat edge will increasingly depend on developments in the commercial sector. A number of public and private studies have documented the need for more effective integration of commercial and military technology. These analyses have pointed out that this linkage is not only needed to ensure a stable, viable defense industrial base as government spending is reduced, but is equally important to ensure a wartime surge capability as traditional defense plants are eliminated. Recognizing this trend, Congress has given clear guidance in a series of defense authorization

bills that it too is concerned with this objective. Unfortunately, this guidance has not reduced the barriers to commercial access. The impediments to commercial-military integration, therefore, became a topic of continuing interest to the Panel, typifying in many ways the overriding need to streamline the defense procurement laws in a new era of fiscal austerity and great strategic uncertainty.¹³

Goals and Objectives

At their first meeting, the Panel members agreed that their congressional charter (Public Law 101-510, section 800) provided the following goals as the basic framework for their efforts:

- Streamline the defense acquisition process and prepare a proposed code of relevant acquisition laws.
- Eliminate acquisition laws that are unnecessary for the establishment and administration of the buyer and seller relationships in procurement.
- Ensure the continuing financial and ethical integrity of defense procurement programs.
- Protect the best interests of DOD.

During several of its initial meetings, the Panel heard testimony from a wide variety of experts representing government, the military, and industry. General officers from the military services, as well as senior civilian executives representing such key procurement elements as the Defense Logistics Agency, were also invited to testify as the Panel sought to identify the most critical problem areas. Private-sector groups,

¹² Donald A. Hicks, "Requirements for a Viable Defense Industrial Base," Speech to the Economist Conference on Defense Spending Retrenchment, London, UK (Oct. 21, 1991).

¹³ H.R. Comm. on Armed Services, 102d Cong., 2d Sess., *Future of the Defense Industrial Base, Report of the Structure of U.S. Defense Industrial Base Panel 13-16* (Comm. Print 1992). See also two reports by the Center for Strategic and International Studies, *Deterrence in Decay: The Future of the U.S. Industrial Base*, Washington, D.C. (May 1989), and *Integrating Commercial and Military Technologies for National Strength: An Agenda for Change*, Washington, D.C. (March 1991). For a DOD perspective, see Robert B. Costello, *Bolstering Defense Industrial Competitiveness*. Report by the Under Secretary of Defense (Acquisition) to the Secretary of Defense (July 1988).

such as the Council of Defense and Space Industry Associations, the American Bar Association, and the U.S. Chamber of Commerce, were also contacted during this phase of the review. Although individual perspectives varied, there was surprising agreement on the burden placed upon the acquisition community by the increasingly complex web of procurement laws. Many of these viewpoints were summarized in a timely article by Professor William E. Kovacic of George Mason University:

The perceived imperative to embrace immediate statutory cures for apparent (procurement) deficiencies in the 1980s inspired several enactments of sweeping scope and questionable draftsmanship. . . . Once adopted, such enactments typically resist subsequent retrenchment, as any suggested *ex post* weakening of requirements usually is successfully attacked by advocates of the original legislation as an unwarranted dilution of congressional efforts to discourage fraud and otherwise improve procurement performance. There is, in effect, an upward statutory ratchet in procurement regulation that ensures that regulatory commands become ever more restrictive.¹⁴

In the early months of the Panel's activities, its members sought to amplify their original goals and to identify more specific criteria to guide their recommendations for statutory change. The key to this effort was a broadly based pattern of outreach activities, all aimed at ensuring a review process that was open to the widest possible variety of public access and comments. Through these efforts, the Panel was able to establish from its inception a remarkably free-ranging dialogue with both the acquisition community and the general public. One of the first concrete results of that dialogue was the Panel's agreement on the 10 objectives that would help to guide its review:

(1) Acquisition laws should identify the broad policy objectives and the fundamental requirements to be achieved. Detailed implementing

methodology should be reserved to the acquisition regulations.

(2) Acquisition laws should promote financial and ethical integrity in ways that are:
(a) Simple and understandable;
(b) Not unduly burdensome; and
(c) Encourage sound and efficient procurement practices.

(3) Acquisition laws should establish a balance between an efficient process and
(a) Full and open access to the procurement system; and
(b) Socioeconomic policies.

(4) Acquisition laws should, without alteration of commercial accounting or business practices, facilitate:
(a) Government access to commercial technologies; and
(b) Government access to the skills available in the commercial marketplace to develop new technologies.

(5) Acquisition laws should, without requiring contractors to incur additional costs, facilitate the purchase by DOD or its contractors of commercial or modified commercial products and services at or based on commercial market prices.

(6) Acquisition laws should enable companies (contractors or subcontractors) to integrate the production of both commercial and government-unique products in a single business unit without altering their commercial accounting or business practices.

(7) Acquisition laws should promote the development and preservation of an industrial base and commercial access to government-developed technologies.

(8) Acquisition laws should provide the means for expeditious and fair resolution of procurement disputes through uniform interpretation of laws and implementing regulations.

¹⁴ William E. Kovacic, *Regulatory Controls as Barriers to Entry in Government Procurement*, 25 POLICY SCIENCES 31 (1992).

(9) Acquisition laws should encourage the exercise of sound judgment on the part of acquisition personnel.

(10) Acquisition laws should, when generating reporting requirements, permit as much as possible the use of data that already exists and is already collected without imposing additional administrative burdens.

Approaches

Before these goals and objectives could be applied to the task of streamlining, it was necessary to define the universe of laws affecting defense acquisition. From a number of sources, the Panel initially identified over 800 provisions of law that appeared to have some relationship to DOD acquisition, a number that was gradually narrowed through several detailed reviews. Even after this screening, however, the Panel was left with a universe of over 600 DOD-related procurement laws that it was required to review in line with its congressional charter. Those numbers highlighted the importance of approaching defense acquisition as a coherent *system*. To facilitate a systemic approach and to divide the labor of reviewing so many statutes, the Panel established working groups covering six major functional areas: contract formation; contract administration; Service-specific and major systems statutes; socioeconomic requirements, small business, and simplified acquisition; standards of conduct; and intellectual property. In addition, two *ad hoc* working groups addressed commercial procurement and international defense cooperation.

Each functional working group consisted of two Panel members, one from the public sector and one from the private sector. They quickly became the focal points for research and analysis, reviewing the laws assigned to them and preparing recommendations for decision by the

Panel as a whole. In reviewing the major statutes, the working groups typically began the process with a legislative history and a literature search. Building upon the wide public contacts that had already been established, they solicited comments from the acquisition community and other interested parties, often through the use of *Federal Register* notices or questionnaires. Minutes of Panel meetings, legislative abstracts, and various position papers were also distributed through the extensive mailing and telefax lists that were eventually developed by each working group and the Panel as a whole. Specific inputs were also obtained from departmental staffs, trade associations, and governmental agencies with particular expertise, such as the Air Force Contract Law Center. Where appropriate, public meetings on issues being examined by the working groups were also held to ensure that a wide range of opinions was considered. Similarly, when specific issues were scheduled for discussion at Panel meetings, interested groups from both the public and private sectors were routinely invited to speak.¹⁵ This dialogue between the Panel, the acquisition community, and the general public was especially important in framing recommendations. The tentative decisions reached throughout this process were then reviewed *in toto* by the Panel at the conclusion of its deliberations. This "last look" was intended to ensure that the individual decisions made over many months were consistent with one another — and with the Panel's goals and objectives.

An Overview

The Panel's Report was transmitted to the defense committees of the Congress on January 14, 1993, by the Deputy Secretary of Defense. Of more than 600 laws reviewed by the Panel, almost 300 were recommended for repeal, deletion, or amendment. That remarkable total reflected the fact that, throughout its work, the

¹⁵ Examples included: the National Association of Minority Business when the Small Business Act was under discussion; the Management Reviews Division of the General Services Administration during discussion of the Brooks Act; an industry coalition, the Integrated Dual-Use Commercial Companies, during several discussions of commercial products and services; and the General Accounting Office during discussions of protests.

Panel concentrated on changes that would streamline the defense procurement process in the 1990s, when dollars are expected to be fewer, work forces smaller, and superpower security threats less urgent. The Panel's initiatives in three areas are of particular importance:

Streamlining: Addressing the Panel during one of its early meetings, Senator Jeff Bingaman suggested that there had been an unfortunate tendency in recent years for statutes to be enacted without a clear view as to their ultimate effect upon the acquisition system. His challenge to the Panel, echoed by many other observers, prompted a concerted effort to consolidate and simplify statutes in every area of its review. The detailed changes recommended for almost 300 statutes would result in a streamlined system of acquisition laws, more easily understood, administered, and implemented.

Commercial Items: The Panel recommended significant legislative changes in order to improve the Department's access to commercial technologies. Those recommendations are reflected not only in the Panel's analysis of the basic procurement statutes, such as the Truth in Negotiations Act (TINA) and the Competition in Contracting Act, but they are also addressed in an entire chapter of its Report highlighting the extensive reforms needed to enhance the acquisition of commercial items, both as end-items and as components of DOD systems.

Simplified Acquisition: There is a clear need to trim the Department's administrative overhead, not only to reduce costs and cope with change but also to anticipate the effects of current and planned personnel reductions on the acquisition work force. The Panel determined that the creation of a new "simplified acquisition threshold" — initially to be set at \$100,000 — would streamline more than 50 percent of all DOD contract actions over \$25,000, while affecting less than five percent of its contract dollars. Integral to these recommendations is a continued preference for small business, as well as measures needed to sim-

plify contract management for both the Department and its suppliers.

There is no question that the reforms recommended by the Panel would have the greatest effect were they to be passed as a comprehensive package. However, even the enactment of the major recommendations outlined in this summary would make significant progress toward the goal of streamlining and simplifying the defense acquisition system. While the improvement of that system was the primary focus of the Panel, its members fully recognized the importance of seeking government-wide consistency in procurement matters. Therefore, they hope that their recommendations can serve as a baseline for parallel changes in the legislative underpinnings of civilian agency acquisition.

The summary of the Panel's Report contained in the following pages is intended to give the reader an overview of the Panel's approach to key acquisition issues as well as specific information on the most important sources used by the Panel in many of these areas. In this overview, however, those key issues are presented in an order which differs from that used in the Report. To avoid any confusion, the Executive Summary includes references to the Report, usually by both chapter and subchapter, as an aid to the reader in referring to that document for more definitive statements of the issues outlined here.

This summary begins with a section discussing the Panel's findings on commercial items, in many ways the centerpiece of its efforts. Two closely-related areas follow in section III: a new "simplified acquisition threshold" and, because that initiative shaped the Panel's approach to this area, its recommendations on socioeconomic laws. Section IV, Contract Management, summarizes two chapters of the Panel's Report and documents the critical role played by the statutes governing contract formation and administration in all procurement functions. The Panel's findings on statutes pertaining to the defense technology and industrial base are presented in section V. Two critical acquisition issues are grouped under section VI — intellectual prop-

erty and standards of conduct. In section VII, the Panel's findings on several important groups of statutes are presented, including those unique to major systems and testing. The final section presents both the constraints which affected the

Panel's work and its conclusions on the future of the acquisition reform process. Six tables are presented in the appendix, the first of which summarizes the Panel's significant recommendations for statutory amendment or repeal.