

THE GLENN DEFENSE MARINE ASIA PROBLEM : THE ROLE OF ETHICS IN PROCUREMENT REFORM

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ABSTRACT (ENGLISH)

"¹⁸ By 2014, GDMA had been providing husbanding services to the U.S. Navy under contracts and purchase orders for over twenty-five years.¹⁹ While the Inspector General for the Department of Defense (DoD) concluded that GDMA's conspiracy to defraud the Navy stretched back more than twenty years, the earliest charges in the ongoing series of prosecutions relate back to 2006.²⁰ In February of that year, Paul Simpkins, a contract specialist, helped GDMA obtain a \$929,000 contract in exchange for a \$50,000 bribe.²¹ In 2009, GDMA began receiving classified ship schedules from Cmdr. Jose Sanchez, the Seventh Fleet Deputy Logistics Officer.²² Sanchez also warned Francis when the Navy questioned GDMA bills.²³ In 2010, the Deputy Director of Operations for Seventh Fleet Cmdr. Daniel Dusek, after a night in a hotel room with a prostitute at GDMA expense, used his influence to ensure the carrier USS Abraham Lincoln was directed to a GDMA-operated port.²⁴ That same year, Naval Criminal Investigation Service (NCIS) Agent John Beliveau II warned Francis of an ongoing NCIS investigation into GDMA activities and suggested potential answers to questions that investigators might ask.²⁵ In 2011, Cmdr. Sanchez arranged for GDMA to refuel the destroyer, the USS Mustin, at a cost of \$1,000,000; twice as much as an available alternate method.²⁶ In 2012, GDMA overbilled the Navy \$500,000 to service the USS Abraham Lincoln.²⁷ In August of that year, Cmdr. Mike Misiewicz lobbied for the USS Stennis to visit a GDMA-controlled port, which cost \$1.4 million more than it would have cost at other ports.²⁸ On September 16, 2013, Francis finally was arrested in San Diego after arriving to attend what he thought would be a business meeting with senior Navy leaders.²⁹ In January 2015, Francis plead guilty to defrauding the Navy of seven to twenty million dollars through bribes to Navy officials.³⁰ However, the real amount, according to investigators, could have exceeded thirty-five million dollars.³¹ The latest reporting indicates Francis's sentencing hearing is still pending.³² The hearing has been rescheduled four times, probably because of ongoing cooperation between Francis and the U.S. Attorney's Office.³³ Since March 26, 2018, almost five years after Francis's arrest, "550 active-duty and retired military personnel-including about [sixty] admirals-have come under scrutiny for possible violations of military law or ethics rules."³⁴ Like the fiduciary duties of trustees to beneficiaries,³⁵ the ethical obligations of government officials extend well beyond the basic obligation to not use their positions to perpetrate fraud. Because the ethical standards create a punitive buffer zone for conduct that falls short of criminal conduct like accepting bribes-requiring government officials to avoid even the appearance of impropriety-they can serve to prevent grooming by contractors if properly emphasized, monitored, and enforced. [...]Francis was so adept at grooming his targets that one retired Navy officer commented: "The Soviets couldn't have penetrated us better than Leonard Francis. . [...]the Navy imposed adverse administrative action on the seven admirals and two captains that it censured primarily on the basis of improper gift acceptance.³⁶ The GDMA scandal demonstrates how effectively an unscrupulous contractor can influence the procurement process by co-opting individuals outside of official contracting channels with relatively small gifts.

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There's no question in my mind that he tried to influence me.

It's like fishing. He's got the hook. If he got an inch, he'd go for a foot.

If he'd get afoot, he'd go for a yard.¹

I. INTRODUCTION

Three overarching principles form the foundation of the U.S. system of government procurement: integrity, transparency, and competition.² Integrity, arguably, forms the cornerstone because "[b]ribbery, favouritism, or unethical behavior ha[s] no place in a successful procurement system."³ Transparency and competition help ensure integrity by "bringing in the sunlight, which serves as a disinfectant" to corruption.⁴ The contracting techniques utilized by a government agency affect the degree of transparency⁵ and competition in a given contract.⁶ But agencies also employ oversight mechanisms to guard against corruption.

The Federal Acquisition Regulation (FAR) charges government contracting officers (COs) with the responsibility to safeguard "the interests of the United States in its contractual relationships."⁷ COs utilize contracting officer's representatives (CORs) to monitor contracts, including submissions by contractors relating to cost.⁸ The Defense Contract Audit Agency (DCAA) performs audits.⁹ Agencies employ Inspectors General (IGs) to conduct investigations relating to contracts and receive reports regarding "violation[s] of [f]ederal criminal law involving fraud, conflict of interest, bribery, or gratuity violations . . . and violation[s] of the civil False Claims Act."¹⁰ Some agencies, including the Navy, even have personnel authorized to perform law enforcement functions.¹¹ Those personnel can, in effect, provide oversight of agency personnel providing contractor oversight.

Agency contracting personnel, however, are not the only personnel who interact with contractors on a regular basis. They are not the only personnel over whom a contractor can exert influence to obtain advantage. That reality underlies the importance of the ethical principle that requires all executive branch employees to avoid even the appearance of violating the law or ethical standards.¹² One cannot overstate the importance of that principle because, as the Navy's experience with Glenn Defense Marine Asia (GDMA) illustrates, no combination of contracting techniques, contract types, or oversight mechanisms can ensure procurement integrity without reinforcement from a command climate that promotes strict adherence to clearly articulated ethical standards to achieve effective training, monitoring, and enforcement.

Section II of this paper summarizes the significant events involved in the Glenn Defense Marine Asia scandal up to this point. Section III discusses the contracting techniques, types, and oversight mechanisms in place during the relevant period. Section IV discusses the challenges faced by U.S. Pacific Command (USPACOM) and Seventh Fleet with enforcing ethical standards. Section V discusses reforms implemented by the Navy to guard against

corruption in the future and incorporates suggestions for further improvement. The conclusion appears in Section VI. This paper will not focus on the criminal acts or ethical violations of particular individuals, except as necessary to illustrate the importance of organizational changes intended to insulate the procurement system from such crimes and ethical violations.

Over the course of the 20-plus year conspiracy, Francis and GDMA gave Navy officials millions of dollars in gifts.... In exchange, Francis solicited and received classified and confidential U.S. Navy ship schedules and planned ports of call, and obtained preferential treatment for GDMA in contracting for port services}1'

II. THE SCANDAL

Leonard Glenn Francis, also known as "Fat Leonard," was the Group Executive, Chairman, and President of GDMA.¹⁴ Francis, a Malaysian citizen, owned and controlled GDMA, supervising its day-to-day business operations with the assistance of a "core management team."¹⁵ GDMA was "a multi-national corporation with headquarters in Singapore and operating locations in other countries, including . . . Thailand, Malaysia, Korea, India, Hong Kong, Indonesia, Australia, Philippines, Sri Lanka, and the United States."¹⁶ Francis's company, in addition to its commercial contracts, was a government contractor that provided husbanding services, which involves "the coordinating, scheduling, and direct and indirect procurement of items and services required by ships and submarines when they arrive in port."¹⁷ Husbanding services include "tugboats, fenders, port authority/custom fees, security, provisions, fuel, water, trash removal, collection, holding and transfer of liquid waste, transportation and many others."¹⁸ By 2014, GDMA had been providing husbanding services to the U.S. Navy under contracts and purchase orders for over twenty-five years.¹⁹

While the Inspector General for the Department of Defense (DoD) concluded that GDMA's conspiracy to defraud the Navy stretched back more than twenty years, the earliest charges in the ongoing series of prosecutions relate back to 2006.²⁰ In February of that year, Paul Simpkins, a contract specialist, helped GDMA obtain a \$929,000 contract in exchange for a \$50,000 bribe.²¹ In 2009, GDMA began receiving classified ship schedules from Cmdr. Jose Sanchez, the Seventh Fleet Deputy Logistics Officer.²² Sanchez also warned Francis when the Navy questioned GDMA bills.²³

In 2010, the Deputy Director of Operations for Seventh Fleet Cmdr. Daniel Dusek, after a night in a hotel room with a prostitute at GDMA expense, used his influence to ensure the carrier USS Abraham Lincoln was directed to a GDMA-operated port.²⁴ That same year, Naval Criminal Investigation Service (NCIS) Agent John Beliveau II warned Francis of an ongoing NCIS investigation into GDMA activities and suggested potential answers to questions that investigators might ask.²⁵ In 2011, Cmdr. Sanchez arranged for GDMA to refuel the destroyer, the USS Mustin, at a cost of \$1,000,000; twice as much as an available alternate method.²⁶ In 2012, GDMA overbilled the Navy \$500,000 to service the USS Abraham Lincoln.²¹ In August of that year, Cmdr. Mike Misiewicz lobbied for the USS Stennis to visit a GDMA-controlled port, which cost \$1.4 million more than it would have cost at other ports.²⁸ On September 16, 2013, Francis finally was arrested in San Diego after arriving to attend what he thought would be a business meeting with senior Navy leaders.²⁹

In January 2015, Francis plead guilty to defrauding the Navy of seven to twenty million dollars through bribes to Navy officials.³⁰ However, the real amount, according to investigators, could have exceeded thirty-five million dollars.³¹ The latest reporting indicates Francis's sentencing hearing is still pending.³² The hearing has been rescheduled four times, probably because of ongoing cooperation between Francis and the U.S. Attorney's Office.³³

Since March 26, 2018, almost five years after Francis's arrest, "550 active-duty and retired military personnel—including about [sixty] admirals—have come under scrutiny for possible violations of military law or ethics rules."³⁴ The Department of Justice has filed criminal charges against thirty-three individuals.³⁵ In addition to Francis and four of his senior executives, fifteen Navy officials, including an Admiral, three Captains, five Commanders, two Lieutenant Commanders, a Naval Criminal Investigative Service Agent, a contracting official, a contracting supervisor, and a Petty Officer 1st Class have pled guilty in U.S. federal court.³⁶

Thirteen more await trial in federal court, including an Admiral, four Captains, a Marine Colonel, three Commanders,

a Chief Warrant Officer, a Master Chief Petty Officer, a Chief Petty Officer and an unknown Glenn Defense employee.³⁷ In court-martial proceedings, a Captain, a Commander, a Lieutenant, and a Chief Warrant Officer have all pled guilty.³⁸ Another Commander, who served as the Deputy Director for Contracting Operations in Singapore, was found guilty of charges related to his contacts with Francis in early September.³⁹ The Navy has imposed nonjudicial punishment against one admiral⁴⁰ and has taken adverse administrative action against six other admirals and two captains.⁴¹

The fact that only four of the individuals charged so far worked as procurement professionals illustrates how much influence Francis exerted on the procurement process through personnel associated with requiring activities. The Navy's current model for obtaining husbanding services has significant weaknesses in a variety of critical areas... including the funding and scheduling of port visits, the language of contracts, contract surveillance and the invoice review and payment process.⁴

III.A VULNERABLE SYSTEM

The contracting techniques, contract types, and oversight mechanisms used by the Navy failed to prevent GDMA from compromising the integrity of the procurement system. Military Sealift Command (MSC) Far East, based in Singapore, was the geographic area command that supported the Seventh Fleet with "large scale, bulk replenishment of supplies, fuel, munitions, and other required items . . . at sea or at port in locations abroad."⁴³ The Naval Supply Systems Command, Fleet Logistics Center (NAVSUP FLC) in Yokosuka, Japan, was the command "responsible for soliciting, awarding, and overseeing contracts for goods and services, including contracts for ship husbanding."⁴⁴ NAVSUP FLC supported Seventh Fleet's area of operations, including Japan, Hong Kong, Russia, Singapore, Indonesia, the Philippines, Thailand, Cambodia, Vietnam, and Australia.⁴⁵

That contracting organizational support structure, with its great distances between personnel at MSC Far East, NAVSUP FLC, and the Seventh Fleet vessels receiving contracted husbanding services, created seams that GDMA exploited. One of the most basic problems, as Joseph Carilli, former Fleet Judge Advocate for the Seventh Fleet put it, was that "the 7 th Fleet Supply Officer wasn't writing the contracts or responsible for contract enforcement, [so] . . . there was no control over, or, in some cases, sense of ownership of, the funds used for husbanding contracts, and the expenditure of funds to meet requirements."⁴⁶ In addition, Mr. Carilli noted, there was limited substantive communication between the contracting personnel arranging for the husbanding services, and the Seventh Fleet personnel receiving them.⁴⁷ So, "when bills were presented to vessels, vessels validated the bills without verification."⁴⁸

Mr. Elliott Branch, the Deputy Assistant Secretary of the Navy for Acquisition and Procurement, noted that the Navy "services the entire world with a half dozen contracting offices," which have "totally separate contracting authority from operational forces," such as the Seventh Fleet.⁴⁹ Reinforcing the distance between the organizations, figuratively as well as literally, Mr. Branch explained that "the fleets have no ability to set contracting priorities," and, perhaps due to their perceived lack of investment in contracting, "the fleets did not always provide CORs, or enough CORs."⁵⁰

When the right contracting conditions are set, competitors can provide oversight of one another, mitigating a lack of government official oversight. However, as Mr. Branch pointed out, "the way the Navy divided the world into contracting regions drove us to single award [indefinite delivery, indefinite quantity (IDIQ)] contracts in some areas," including ports in the area where GDMA was the predominant contractor for ships' husbanding services.⁵¹ While an agency may select a single awardee for an IDIQ contract following full and open competition, FAR Subpart 6.3 also permits "contracting without providing for full and open competition."⁵² FAR 6.302-1 describes the "one responsible source" exception to the full and open competition requirement, which allows the formation of contracts commonly referred to as "sole source" contracts.⁵³ Sole source contracts cannot always be avoided, particularly in areas where a contractor has little or no real competition. But "[r]eports by the Government Accountability Office, the DoD's inspector general and the commission on wartime contracting have consistently found that noncompeted contracts increase the risk of waste and fraud. . . ."⁵⁴

Without having competitors to keep an eye on one another, oversight by government officials becomes even more

crucial. However, "[a]n audit commissioned by the top brass of the U.S. Navy in response to the ongoing 'Fat Leonard' bribery case concluded the service has 'significant' vulnerabilities overseeing contractors who provide goods and services to ships in foreign ports."⁵⁵ That same audit "noted that three previous audits in 2010 and 2013, before the Francis case broke, identified poor checks and balances and bad internal controls over such contracts."⁵⁶ Those weaknesses made it easier for Francis and GDMA to defraud the Navy.

One must remember, however, that while checks and balances were poor, and internal controls over contracts were weak, checks and balances nonetheless existed. There were internal controls. Illustrating that point, junior officer David Schaus, of the Navy's Ship Support Office in Hong Kong, once confronted Francis with a patently fraudulent invoice GDMA submitted for payment, but was "told by other Navy officials to back off, something that he said invariably happened when he raised questions about Glenn Defense."⁵⁷ The criminal activity allegedly perpetrated by personnel inside the Navy, at the behest of Francis and GDMA corporate officers, likely would have occurred even with more robust checks and balances and internal controls.

GDMA could accomplish the aims of its criminal activities-to perpetrate fraud on such a massive scale-because it ethically compromised key individuals, permitting Francis, in many cases, to bypass procurement checks and balances by influencing the decisions of the requiring activities directly. GDMA was able to compromise those individuals because the Navy did not effectively promote compliance with ethical standards.

The excessive (and increasing) number of [commanding officers] fired for personal misconduct is symptomatic of cultural issues within the Navy and of a confusing ethical context in society, combined with a failure to set effectively and uphold an ethical standard within the service.⁵⁸

IV. ETHICAL CHALLENGES

Promoting ethical standards within U.S. Pacific Command and the Seventh Fleet proved challenging because senior leaders undervalued the role of ethical standards, because the ethics rules can be difficult to apply, and because the emphasis on mission accomplishment in Navy fitness reports creates inherent friction with ethics rules. To successfully promote ethical standards, the leadership within an organization like the Navy must, first and foremost, genuinely appreciate the essential prophylactic role that ethical standards play in preventing fraud.

A. The Role of Government Ethics

The ethical standards of conduct for government officials primarily seek to avoid misuse of official position and conflicts of interest. That is true for procurement professionals, as well as for government officials who do not perform procurement roles. FAR Part 3-preceded only by the description of the acquisition system and definitions-begins with safeguards against improper business practices and personal conflicts of interest.⁵⁹ Because it is necessary "to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships," government personnel must conduct procurement "in a manner above reproach," where "they would have no reluctance to make a full public disclosure of their actions."⁶⁰ Similarly, the core purpose of federal ethics laws, according to the Office of Government Ethics (OGE), is "to prevent financial conflicts of interest and ensure that public servants make impartial decisions based on the interests of the public when performing their job duties."⁶¹ Like the fiduciary duties of trustees to beneficiaries,⁶² the ethical obligations of government officials extend well beyond the basic obligation to not use their positions to perpetrate fraud. Because the ethical standards create a punitive buffer zone for conduct that falls short of criminal conduct like accepting bribes-requiring government officials to avoid even the appearance of impropriety-they can serve to prevent grooming by contractors if properly emphasized, monitored, and enforced.

B. The Navy Undervalued Ethics, Which Facilitated Grooming

Government ethical standards were not intended to impart moral values or merely to warn against the consequences of violating criminal laws.⁶³ Yet, in testimony before the Senate Armed Services Committee regarding the GDMA scandal, then-Secretary of the Navy Ray Mabus stated: "I do want to say, though, is that you can have all the ethics training in the world. If somebody does not know it is wrong to steal, if somebody does not know it is wrong to take a bribe, they missed something at home."⁶⁴ Respectfully, Secretary Mabus's comment misses the point of ethical standards. Sophisticated operators like Leonard Francis do not show up with a suitcase

full of money. They groom. They ingratiate themselves, usually starting with small favors. Then they cultivate a sense of indebtedness, punctuated, when necessary, by reminders of past indiscretions that could be revealed at any time.⁶⁵ Professionals who study the psychology of corruption refer to this process as "incrementalism," a form of socialization that begins by inducing newcomers to commit acts that are only slightly deviant, then gradually progresses as the individual begins to accept the deviant acts as normal.⁶⁶

While Francis may not have been familiar with the term "incrementalism," he certainly knew how to subtly establish and then increase his influence over those he desired to exploit. In fact, Francis was so adept at grooming his targets that one retired Navy officer commented: "The Soviets couldn't have penetrated us better than Leonard Francis. . . . The KGB could not have done what he did."⁶⁷

As Lt. Cmdr. Todd Malaki-currently serving a 40-month prison sentence-stated to a federal judge, "I suspect [Francis] sensed the weakness of my character. He was like a snake charmer, preying on my flaws and manipulating me to serve or advance his interests."⁶⁸ Contrary to the popular image created by media coverage of the scandal, Francis did not lead off with a gold watch, all-expenses-paid travel to Monaco, and a hot tub full of women. When their relationship started, after meeting Francis at a party, Malaki recalled that Francis would drink with him and that "he convinced me into believing that we were friends and he was a mentor."⁶⁹ With a few seemingly innocent drinks and friendly conversation, Francis set the conditions to increase his influence. From there, Francis convinced Malaki to give him classified ship schedules in exchange for cash, hotel stays, and a prostitute.⁷⁰ But Malaki was just one of many.

Francis "befriended a generation of Navy leaders with cigars and liquor whenever they made port calls in Asia," showering them with "gifts, epicurean dinners, prostitutes and, if necessary, cash bribes."⁷¹ In one reported instance, Francis "arrived at the pier bearing gifts: a \$700 cigar lighter, . . . two pewter platters worth about \$500 apiece; a pack of 25 Cuban Cohiba cigars; and a business card for his bespoke tailor."⁷² In individual instances, as with Malaki, "court records show Francis or his executives carefully groomed their targets, befriending them while searching for weak points: money or marital problems, alcohol, loneliness, lust, low self-esteem."⁷³ But the blatantly public gifts served a purpose as well.

Francis's public gifts-like Cuban cigars on the pier and \$30,000 Rolex gold watches donated by GDMA to raise money for the Navy League at a military ball⁷⁴-created the appearance of widespread approval when not rejected by Navy leaders, which fostered a culture that made individual grooming easier. Studies on the psychology of corruption refer to this phenomenon as "social proof."⁷⁵ The term "social proof" describes the tendency to take cues from others in the vicinity where members of a group "assume that others either are responsible for taking action or would do so if they thought it necessary, leading to an unintended diffusion of responsibility within the group and a failure by any group member to take action."⁷⁶

Captain Daniel Dusek-currently serving a 46-month prison sentence-"blamed an 'endemic culture within the Navy in Asia' and charged that Francis 'was able to leverage his way to the top in plain view of generations of senior Naval Officers and Admirals.'"⁷⁷ One cannot easily dismiss Dusek's recrimination of Navy culture when photos of senior Navy leaders, like Admiral Robert Willard, who would become a four-star admiral and commander of all U.S. military forces in the Pacific, appeared in GDMA brochures.⁷⁸ Admiral Willard's photo was taken in uniform, smiling and shaking hands with Francis in front of a Glenn Marine Group of Companies sign.⁷⁹ Had Admiral Willard considered that, even in a general sense, government ethics require officials to act impartially,⁸⁰ he might have realized such a photo would call into question his impartiality with respect to future Navy procurements involving GDMA. However, there was no reason to think about ethics rules in a general way. The Joint Ethics Regulation (JER) states that "[e]ndorsement of a non-Federal entity, event, product, service, or enterprise may be neither stated nor implied by DoD or DoD employees in their official capacities and titles, positions, or organization names may not be used to suggest official endorsement or preferential treatment of any non-Federal entity."⁸¹ Admiral Willard was not the only Navy officer who misunderstood the prohibition against official endorsement. Rear Admiral Michael H. Miller was censured formally after a Navy investigation determined a note he sent to Francis-thanking him for a banquet-amounted to an official endorsement of GDMA.⁸² Admiral Sam Locklear III,

"the highest-ranking officer known to have been investigated" in connection with the scandal, also sent a letter thanking Francis for a dinner party, stating that, "[a]s always, the services provided by Glenn Defense Marine were truly outstanding."⁸³ In fairness, the ethics rules, particularly the exceptions to the default prohibitions, can be very difficult to navigate.

C. The Complexity of Government Ethics Rules

Even had senior Navy leaders better understood the value of ethical standards and themselves set strong examples of avoiding the appearance of impropriety, the complexity of the specific rules can make them difficult to apply. While the core purpose of federal ethics law is simple, the body of federal ethics law is not. At 110 pages long, OGE's most recent Compilation of Federal Ethics Laws spans nine sections, covering Conflicts of Interest, the Ethics in Government Act of 1978, Procurement and Contracting, Gifts and Travel, Employment, Government Property and Information, Taxes in Certain Matters, Political Activities, and Miscellaneous Statutes.⁸⁴ But the Compilation only covers statutes.

In addition to the statutory sources of ethics law, executive branch employees must also follow executive orders issued by the President, ethics regulations issued by OGE, and any supplemental regulations issued by their respective agencies.⁸⁵ All DoD employees and military service members are subject to the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) and the JER.⁸⁶ The rules contained in the Standards of Conduct run on in dense paragraphs for ninety-seven pages.⁸⁷ The JER covers 140 pages of rules. Some rules, though, are more important than others.

The ethics rules most often implicated in the GDMA scandal were not those specifically related to procurement and contracting; they were rules related to gifts and travel. In fact, the Navy imposed adverse administrative action on the seven admirals and two captains that it censured primarily on the basis of improper gift acceptance.⁸⁸ The GDMA scandal demonstrates how effectively an unscrupulous contractor can influence the procurement process by co-opting individuals outside of official contracting channels with relatively small gifts. The danger in accepting a gift-any gift-from a contractor is the expectation of reciprocity. Emails entered into court records show that Francis referred to himself as "the Godfather."⁸⁹ As Don Corleone famously said in The Godfather: "Someday, and that day may never come, I will call upon you to do a service for me. But until that day, consider this justice a gift on my daughter's wedding day."⁹⁰

The Standards of Conduct dedicates twenty-four pages to the rules governing gifts from outside sources, and their exceptions.⁹¹ Francis was known for spending "between \$700 and \$1,000 per person to wine and dine officers."⁹² When a contractor, like Francis, offers something to a military service member, that service member has an obligation to recognize that the rules governing gifts from outside sources have been implicated, and to correctly apply those rules to the situation at hand.⁹³

However, recognizing that an offer from a contractor has implicated the gift rules and then properly applying the gift rules can involve more complexity than one might think. First, the Service member must understand that the gift rules encompass circumstances where one receives a tangible item of value as well as circumstances where one benefits from defrayed costs. In response to allegations that he had accepted meals at two banquets hosted by Francis in violation of the gift rules, Admiral Locklear "said he had obtained 'legal reviews' clearing him to attend both dinners,"⁹⁴ demonstrating that he understood that an item of value, such as a meal, constitutes a gift. But, a letter that Admiral Locklear sent to Francis thanking him "for arranging tee times at the Tanah Merah Country Club"⁹⁵ indicates that he may not have understood that free admission also can constitute a gift.

One might reasonably argue that no confusion should arise over the offer of a \$700 meal. But the gift rules would be implicated if a contractor offered a Service member something as simple as a sandwich. The Standards of Conduct define a gift as "any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value," which "includes services as well as gifts of training, transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred."⁹⁶ A sandwich seems to fit this definition.

But, the definition of gift excludes "[m]odest items of food and nonalcoholic refreshments, such as soft drinks,

coffee and donuts, offered other than as part of a meal.⁹⁷ Whether the sandwich constitutes a gift depends on whether it can be considered a modest item of food not offered as part of a meal. If an item of value does not fit into one of the ten listed grounds for exclusion from the gift rule,⁹⁸ the next step in the analysis determines whether the Service member can accept the gift.

The basic rule on accepting gifts from outside sources states: "Except as provided in this subpart, an employee may not, directly or indirectly, [solicit or] accept a gift from a prohibited source" or solicit or "accept a gift given because of the employee's official position."⁹⁹ The Standards of Conduct definition of prohibited source includes "any person who does business or seeks to do business with the employee's agency."¹⁰⁰ That definition encompasses contractors. Based on that definition, it would seem that a military service member could not accept the gift of a meal from a contractor. However, in response to the question, "May an agency employee ever accept a gift from a contractor," the OGE answered: "Yes. The OGE gift rules have several exceptions that would permit gifts from a prohibited source, including an agency contractor or an employee of an agency contractor."¹⁰¹ Of course, the exceptions that may permit a military service member to accept a gift from a contractor have conditions. The exception under 5 C.F.R. 2635.204(a), commonly referred to as "the twenty-dollar exception," would be the one most likely to apply to the gift of a meal from a contractor to a Service member.¹⁰² Under the twenty-dollar exception, "An employee may accept unsolicited gifts having an aggregate market value of \$20 or less per source per occasion, provided that the aggregate market value of individual gifts received from any one person under the authority of this paragraph (a) does not exceed \$50 in a calendar year."¹⁰³ So, even if a particular sandwich was not a modest food item and must be considered a meal, and therefore a gift, a Service member could still accept the sandwich if it cost less than \$20.

But, if the sandwich cost \$30—not unheard of in a port like Sydney, Australia—the Service member could not render the gift acceptable by paying \$10 out of his own pocket because the exception does not permit one to "buy-down to the \$20 limit" by paying the differential.¹⁰⁴ In that instance, the Service member would have to reject the sandwich or "pay the donor its market value."¹⁰⁵ A Service member may estimate market value, if unknown.¹⁰⁶ However, attempting to estimate market value can be dangerous. Following a banquet hosted by GDMA in Hong Kong on June 10, 2006, three senior Navy officers, including Admiral Michael Miller, "wrote personal checks to reimburse Francis," estimating "the fair market value at between \$50 and \$70 per meal."¹⁰⁷ A Navy investigation later found that "the dinners actually cost more than [ten] times that much: about \$750 per person."¹⁰⁸ The explanation of the basic gift rules above demonstrate how complicated it can be for a military service member to determine whether he can accept something as simple as a sandwich from a contractor. As Captain William Devine said regarding his attendance at a dinner hosted by Francis in Singapore, "I guess in my naiveté I never saw that as going against any rules."¹⁰⁹ The gift rules, though, have many permutations, many of which are far more complex than the one explored above. But, even when Service members understand the ethics rules, they may be reluctant to follow them if they believe doing so will inhibit their ability to compete with their peers for promotion.¹¹⁰

D. Friction Between Mission Accomplishment and Ethical Compliance

The pressure to receive favorable officer evaluation reports can work against an ethical mandate if not properly construed. Evaluation reports govern whether and how quickly military officers attain promotion to the next rank, and determine selection to favorable schools and assignments.¹¹¹ All evaluation reports place some degree of emphasis on accomplishing missions, getting results, meeting suspenses, and solving problems.¹¹² Studies have shown, however, that overemphasizing the importance of getting results, particularly in chaotic situations, creates enormous pressure that often leads individuals to favor results over rules.¹¹³ Like any other individual, military officers "can reach the point of accepting flexibilities in relations, rules or processes with the purpose of meeting certain results or avoid[ing] certain negative consequences."¹¹⁴

When operating in foreign countries, corporate officers face many of the same challenges as military officers when it comes to achieving favorable results for their headquarters. In *Greased Palms, Giant Headaches*, the authors note, "It's hard enough for managers to endure pressure from headquarters when [foreign] government red tape is

slowing growth, but when competitors who play the bribery game are gaining market share, the impulse to make a payoff can become too strong to resist."¹¹⁵ Military officers compete with one another for the most favorable evaluation reports. An officer charged by his commander to ensure vessels receive necessary husbanding services at particular foreign ports has a strong incentive to ensure success. Under those circumstances, the temptation to work with a contractor like Francis-who can circumvent foreign red tape-to obtain a favorable evaluation report exacerbates whatever other temptations the contractor dangles before him.

Cmdr. Mike Misiewicz, currently serving a seventy-eight-month prison sentence for conspiracy and bribery, noted that "[w]hether it's through the NCIS, or the embassy, with the host nation police, with the host nation government, [Francis] was connected and had every in and out on making things happen."¹¹⁶ Misiewicz's experience demonstrates how too much emphasis on mission accomplishment can create tension with the legal and ethical obligations of military officers. Misiewicz's accomplishments, as the Deputy of Fleet Operations, earned him the Legion of Merit medal,¹¹⁷ while the methods that he used to achieve those accomplishments ultimately led to his prosecution.

The Legion of Merit, in order of precedence, is ranked not far below the Silver Star.¹¹⁸ The narrative for Misiewicz's Legion of Merit read: "His efforts allowed United States Navy ships to access previously inaccessible ports and areas of operation, areas with strategic significance."¹¹⁹ As if written in parallel, the stipulation of fact in Francis's guilty plea recited that Misiewicz used "his position and influence with the U.S. Navy to benefit GDMA and [Francis] by influencing the scheduling and movement of U.S. Navy ships to various ports favored by GDMA."¹²⁰ While the Navy may not initially have appreciated the friction between the evaluation system and compliance with ethical standards, it is a learning organization.

While we cannot predict who will commit fraud, and although it is challenging to detect fraud once perpetrated, research in recent years has yielded valuable information about the conditions that might make an organization more susceptible to fraud, as well as the techniques and tools that support both deterrence and detection.²¹

V LEARNING FROM RAST MISTAKES

The changes implemented by the Navy in the wake of the GDMA scandal have focused on procurement practices. However, the Navy apparently recognizes that it must also address ethics. In fairness, changing the ethical culture of large organizations can take time, while changes to contracting organizations and internal procurement practices can occur quickly.

A. Improvements in Procurement Processes

In fact, by March 2015, as Secretary Mabus testified to the Senate Armed Services Committee, the Navy had already "completely overhauled our procurement requirements and regulations in terms of husbanding these services that GDMA provided."¹²² Those changes included adoption of a centralized approval database, modeled on the Defense Travel System, standardizing logistics packages by vessel type, and stripping out unpriced line items.¹²³ Mr. Branch explained what was, arguably, the most important of the changes:

One of the changes we made was to realign the contracting regions to ensure more multiple award IDIQs. Ships husbanding contractors live in ports. They use ports like hubs and spokes, just like airlines use airports. So, using the airline analogy, imagine if you created a contracting region that included Dallas but not Chicago. Within that contracting region, American Airlines would not face much competition. But, include Chicago in the contracting region, and now you have United Airlines competing with American. Where it was practical, we did the same thing with our ships husbanding contractors by redrawing contracting regions to encompass at least two serious competitors in each one.¹²⁴

That will ensure contractors keep an eye on one another. But the Navy also recognizes that Navy personnel must do a better job keeping an eye on contractors, and on each other.

To that end, the Navy has implemented "some of the strongest counterfraud efforts in the government, to include additional measures to assure contracting integrity."¹²⁵ Secretary Mabus also has stated that the Navy is "auditing that on a routine basis."¹²⁶ On a more fundamental level, "the Navy is working to ensure the fleets can provide more CORs."¹²⁷ In particular, the Navy will utilize each vessel's Supply Officer and Chief Engineer to guard

against fraud, waste and abuse since their areas of responsibility involve the two biggest husbanding concerns: "offloading waste and taking on fuel and water."¹²⁸ To truly guard against fraud, waste, and abuse, though, an organization must cultivate a climate that values ethical behavior and adheres to the ethics rules.

B. Improvements in Ethics Compliance

1. Creating an Ethical Climate

To effectively establish an ethical climate, leaders must set the example. Recognizing that their subordinates will do what they do, rather than what they say, leaders must ensure that their own conduct with respect to ethical standards always remains above reproach. The author once witnessed an event where a junior officer gave the Commander of the Army's 1st Armored Division, Major General (MG) Stephen Twitty, a bag of chips as a gag gift. MG Twitty, after laughing along with the group, immediately asked how much the chips cost and then reimbursed the officer the \$2.50 that he had paid for the chips.

MG Twitty understood that the Standards of Conduct generally prohibit officers from receiving gifts from subordinates.¹²⁹ MG Twitty also understood exceptions existed to the general prohibition that may have applied.¹³⁰ More importantly, MG Twitty understood that his attitude toward the ethics rules set the tone for his entire organization. By showing that he took the rules very seriously himself, he communicated his expectation to his subordinates that they take the rules seriously as well.

2. Holding Violators Accountable

After setting the example, leaders must make examples. Next to establishing a climate that encourages respect for the ethical standards through their own conduct, the most important thing leaders can do to ensure compliance is to take appropriate action against those who violate the rules. The Secretary of the Navy made it clear that the Navy "will continue to hold accountable those involved in fraudulent conduct."¹³¹ The tools already exist to hold violators accountable.

The Navy, like the other military services, has a range of options that include letters of reprimand, nonjudicial punishment, involuntary separation, and courts-martial.¹³² However, the tools that exist to enforce the rules have little value unless leaders effectively monitor compliance and discover violations. Leaders must become familiar with the rules before they can recognize violations. Regular training obviously can build familiarity. Recognizing that, the Navy already has started "stepping up ethics training for COs, XOs, people in areas of responsibility."¹³³ The Navy also is creating a "College of Leadership and Ethics at the Naval War College."¹³⁴

But the ethics rules are so complex that even military attorneys, who deal with them on a frequent basis, often struggle with their application. Ultimately, simplicity is the key to effective compliance, just as MG Twitty demonstrated by adhering to the default rule prohibiting the acceptance of gifts from subordinates, rather than attempting to navigate the complex exceptions to the default rule.

3. Strict Adherence-The Key to Effective Compliance

For the ethics rules to accomplish their prophylactic purpose-to function as a first line of defense to prevent fraud-the Navy must promote strict adherence to the rules. "Strict adherence" embodies an approach that tolerates no violations of the rules and, consequently, favors default prohibitions over exceptions and errs on the side of caution whenever necessary, recognizing that the fourteenth principle of ethical conduct states: "Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part."¹³⁵ The strict adherence approach would not negate existing exceptions to default prohibitions in the Standards of Conduct or the JER and would, therefore, require no revision of the existing rules. Rather, Navy personnel, having been encouraged to adhere to default prohibitions, reminded of their obligation to avoid the appearance of impropriety, and warned that rules violations will not be tolerated, would attempt to invoke exceptions only sparingly, when clearly appropriate.¹³⁶

Strictly adhering to the ethics rules can prevent individuals from placing themselves in compromising situations, reducing a contractor's opportunity to groom. Such an approach also can increase the effectiveness of monitoring, reporting and, ultimately, enforcement regimes by making improper interactions between government officials and contractors easier to recognize. The risk that strict adherence to the ethics rules might occasionally cause

unintended offense—from a rejected gift or invitation—is significantly lower than the risks that arise when leaders accept divergence from the rules. But leaders must go beyond setting the example through their own conduct, holding violators accountable, and demanding strict adherence to the basic rules. Leaders must avoid the perception that anything trumps the importance of ethical compliance.

4. Qualifying the Importance of Mission Accomplishment

Expressing an official preference for compliance with ethical standards over mission accomplishment, where the two outcomes cannot coexist, would clarify an expectation that officers might otherwise interpret as a need to achieve results at all costs. That official preference could be placed in the standard language of the fitness report form itself, or could be communicated by each rater to their ratees during professional counseling. Recent statements from the Chief of Naval Operations (CNO), Admiral John Richardson, provide encouraging reason to believe that the Navy recognizes the key role fitness reports play in establishing an ethical organization: "We're in the final stages of a revision to our FITREPS (officer fitness reports) system, our evaluation system," which will reflect the Navy's increased focus on the importance of ethics and "strength of character."¹³⁷ Unfortunately, nothing in the CNO's remarks demonstrated that the Navy specifically recognizes that an unqualified emphasis on mission accomplishment in fitness reports can cut against an ethical mandate.¹³⁸ Subordinates must know their leaders expect them to strictly adhere to the ethics rules, even if doing so makes it more difficult to accomplish the mission, and that taking an ethical stand that results in a negative impact to the mission will not result in a negative evaluation.

We do a good job of getting people to understand the basics, like you can't take bribes from contractors. But, we don't do a good job of sweeping up all the constant low level attempts by outside sources to give things to them and do things for them.¹³⁹

VI. CONCLUSION

No organization can ever completely insulate itself from the kinds of criminal acts perpetrated by Francis and Navy personnel. But any organization can reduce its vulnerabilities to criminal acts. The Navy, having learned important lessons from the GDMA scandal, has taken significant steps to reduce its vulnerabilities to procurement fraud, particularly in regard to ships' husbanding contracts.¹⁴⁰ By realigning contracting regions to enhance competition, standardizing contracting approval processes, and increasing oversight, the Navy has ensured its procurement systems will be harder to compromise. Reducing vulnerabilities within procurement systems is not sufficient, however. To holistically protect the integrity of Navy procurement, the Navy must reduce vulnerabilities to abuses that can occur during requirements generation. As the GDMA scandal showed, an operations officer who can influence what ports an aircraft carrier visits can be just as valuable to an unscrupulous contractor as the contracting officer who will later compete the task order for the support of that carrier. The above recommendations to improve ethical compliance are intended to help the Navy further protect the procurement process by reducing vulnerabilities posed by personnel outside of procurement channels, including those involved with requirements generation.

Footnote

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