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## ‘Every War Causes Us to Adjust’: Defense Contract Maneuvers

How national security lawyers meet the challenges of the Ukrainian conflict and military supply chain disruption.

BY BRUCE LOVE

In late September, the Pentagon was in up in arms. An engine part in the U.S. Air Force’s F-35 fighter jet was found to have been sourced from China. The revelation came barely weeks after the Department of Defense had halted delivery of the fighter from Lockheed Martin after finding another Chinese component had also found its way into the F-35.

Foreign components finding their way into military equipment is increasingly seen as a potential threat to national security—especially if those components originate in China or Russia. As a result, the sourcing of defense-related assets has been under a harsh spotlight for the past few years, and will continue to be so for the foreseeable future.

“We as a nation—and all our allies and partners—are looking at supply chains,” Air Force chief of staff, General Charles Brown told reporters at the time, underlining a government policy that has led to a sharp uptick in work for Washington lawyers whose practices touch on defense and government contracting.

For the past few years, the federal government has increasingly viewed sourcing from foreign countries through the lens of national security. And that policy focus has led to a shift in the legal services clients now need from their lawyers in Washington.

“It all feeds through in terms of understanding supply chain security, knowing your suppliers and



the sourcing of components, whenever you are contracting with the government,” said Benjamin Powell—co-chair of Wilmer Cutler Pickering Hale and Dorr’s cybersecurity and privacy practice—of the recent F-35 example. “You have an increasingly active DoD and Department of Justice looking at government contracting issues. And every time the U.S. imposes new regulations, you have a compliance and investigatory piece to the work for law firms in this space.”

Government contracting supply chains are just one of several areas that will drive defense-related business for law firms in the year to come.

The war in Ukraine also weighs heavy on law and policymakers’ minds inside the Beltway, as

they both look to support an important ally, and budget for defense spending in 2023. The FY23 National Defense Authorization Act has been fiercely debated in both the House and the Senate, and is expected to pass in the post-election, lame duck session. NDAA 2023 is expected to be one of the largest Defense spends in the history of the United States. With that will come a frantic workload and a significant amount of business for a wide range of practice areas at Washington law firms—national security, defense, government contracting, aerospace and technology to name but a few.

In cybersecurity, Powell's particular practice area, clients are dealing with both renewed investment in the cybersecurity workforce, as well as a desire for more tools to protect U.S. systems and networks, both public and private.

Powell notes that increasingly rigorous cybersecurity requirements and mandatory reporting obligations for government networks and private contractors has filtered throughout the entire supply chain, leading to an increased need for legal services.

Powell sees this as a stark change from the legal services of clients during past conflicts like Iraq and Afghanistan.

"In previous conflicts, it was about literally putting people on the ground. There was a huge amount of contract, support and maintenance work involving a lot of complexity around U.S. government contract compliance and issues regarding where contractors are deployed in areas of active hostilities," Powell said, adding that such situations raise "a whole host" of local jurisdictional issues as well as DoD compliance.

As the U.S. faces threats and theaters substantially different in nature, so too the legal service needs of government contractors have evolved.

"Every one of these wars causes us to adjust," said Powell, citing a vast range of new and developing situations, from Iranian drones being used by Russia in Ukraine, to the developing China/Taiwan situation, and the repercussions for governments, citizens and businesses alike.



Photo: George Frey/Bloomberg

**A Lockheed Martin Corp. F-35A jet flies during a training mission in Hill Air Force Base, Utah, U.S., on Friday, Oct. 21, 2016. Lockheed Martin Corp.'s accelerating revenue growth outlook is boosted by its recent portfolio moves, which are enabling the world's largest defense contractor to better capitalize on higher foreign demand. Rising F-35 production is a key driver, as deliveries are to double by 2019 vs. current levels.**

Powell said there have been huge debates both inside the Beltway and in the corporate world about what is the appropriate investment to make in each of these situations. As a result, Wilmer is always following policy and regulations trends "very closely" to continue keeping up to speed and advise clients as defense policy evolves, he said.

Powell's colleague Stephen Preston is chair of Wilmer's defense, national security and government contracts practice. When the practice was set up more than 20 years ago, Preston said the concept was to take Wilmer's regulatory expertise and combine it with senior level government experience to provide a strategic response and problem-solving methodology to clients in the defense, aerospace, government services sectors, and commercial enterprises when such clients faced national security-related issues.

"From the beginning, we've taken a broad conception of national security as being not only national defense and intelligence, but also foreign and economic security," said Preston, a former GC of both the CIA and the DoD, whose colleagues in the practice area include former high-ranking

members of the State, Treasury and Commerce departments.

That premise, he said, has served the firm well as the defense landscape has changed over the past two decades.

“Conventional defense and aerospace clients dealing with the DoD as the customer presents a perfectly complex set of problems. But these issues are now felt by companies across multiple economic sectors,” said Preston, raising America’s evolving policies toward China as a pertinent example. “China has essentially weaponized cross-border transactions—both corporate combinations and commercial transactions—with the purpose of eroding our technological advantage on the battlefield. That itself is giving rise to stronger regulatory enforcement interest and more complex compliance challenges for companies across the economic spectrum.”

As a result, matters of US export controls, economic sanctions, and foreign direct investment have all become areas with defense implications, Preston said.

Andrew Tabler, a government affairs analyst at K&L Gates, said the Pentagon is balancing the need for R&D and innovation with the risks involved in sending equipment to Ukraine that could fall into Russian, Iranian or Chinese hands.

“At the moment, it’s not about sending new things. It’s mostly depleting our stocks and replenishing them in a smart way,” Tabler said.

As a result, the supply chain is a big issue for his clients, he said.

“Whenever clients talk to the government, either Congress or a federal agency like the DoD, we advise them to say up front that they are an American company with American citizens or green card holders, because we know that supply chain security is a really big issue,” Tabler said.

“We advise them to lock down supply chain risk as much as possible—but that doesn’t necessarily always mean Made in America,” said Tabler. “One of the things we’re trying to do for our clients is strategize how our allies and partners can work together in the future. Ukraine has really changed the paradigm.”

Current conflicts such as Ukraine have laid bare that the United States and its allies need to have a better strategy regarding broader supply chain issues, said Tabler’s colleague Matthew Manning—an associate at K&L Gates.

“We can empty our warehouses to send certain provisions to Ukraine, but there are impacts that the global community has not really had to deal with for the past 30-40 years,” said Manning. “It’s kind of an awakening to the international community that we’re all interconnected.”

An environment where much of the DoD’s focus has been on reshoring manufacturing to de-risk the supply chain while also requiring innovation, has led to a delicate balance for clients, said Tabler and Manning.

Both the Trump and Biden administrations have focused on leveraging commercial technology to drive innovation.

“There are a lot of new technologies that the DoD wants to harness for our defense industry, and the innovation for these is coming very much from the private sector,” said Tabler, raising as an example quantum computing, artificial intelligence, machine learning and autonomy.

Within his practice, Tabler said he often receives requests from clients outside the traditional areas of defense—companies such as energy and alternative energy vehicles, to see if there is scope for them to become defense contractors.

“There are emerging industries that realize they are now part of national security,” adds Manning, providing as examples food supply and logistics and medical supplies.

Such companies need representation in Washington and are coming to K&L Gates in droves, said Tabler—whether it is because they realize they need representation for current business lines, or they have identified defense as a strategic growth area.

Washington, D.C.-based Hogan Lovells partner Michael Scheimer is a government contracts lawyer with a particular focus on national security, cybersecurity and IT contracting. Among other gov-con services, Scheimer helps clients obtain and maintain government security

clearances and comply with industrial security requirements.

Scheimer said, while the historical view of security clearance was Cold War contractor types, such as original equipment manufacturers like Lockheed Martin Corp., who handle top secret information, the need for security clearance has moved considerably in the past few years.

From West Coast cloud computing services to space companies to medical and life sciences companies are needing to obtain security clearances.

“The U.S. government has rightfully zeroed in on what’s the next thing going to be around the corner, the way DARPA (the Defense Advanced Research Projects Agency) used to do when it was first created in the 1950s,” said Scheimer. “Many emerging tech companies are potentially getting government work, and may need security clearance.”

At Hogan Lovells—a firm structured by industry and sector practice groups, which markets itself as global—Scheimer said he increasingly works with a broad number of other practice areas, such as Hogan’s Committee on Foreign Investment in the United States (CFIUS) team, its regulatory lawyers, IP attorneys and even its M&A and transactions folk.

“All the regulatory teams may get involved. There may be a tax implication, or environmental considerations if the client is building factory, for instance,” Scheimer said.

Lawyer, economist and former diplomat Nazak Nikakhtar has been providing clients with counsel that goes beyond her comprehensive understanding of national security and international trade law and policy.

Nikakhtar, Wiley Rein’s national security chair, has been analyzing legislation and from an economic and statistical perspective to provide clients with more valuable insight.

For instance, the CHIPS Act of 2022—designed to boost America’s competitiveness and national security—provides incentives to produce key technology like semiconductors onshore. Nikakhtar

has examined the legislation “at the node level” to help clients see where it impacts their supply chain.

“Understanding the industry and its products, enables us to provide even more targeted analysis, so that our clients can stay ahead of whatever’s coming,” said Nikakhtar. “We’re able to do this because we understand the rules at a deeper level.”

Nikakhtar sees the service as a good example of how Wiley approaches the market. The Am Law 200 firm indigenous to the Beltway markets itself as having deep benches across the regulatory spectrum.

As defense appropriation policies become increasingly complex, Nikakhtar said she has been increasingly called upon by clients to help obtain or maintain defense contractor eligibility either by obtaining waivers when their componentry comes from countries like China or by helping them analyze the broader ecosystem to identify compliant suppliers.

“I know of some economic consulting firms that do a portion of this work, but I don’t know of any other law firms that can offer this type of service,” Nikakhtar said.

Covington & Burling is another homegrown Washington firm with a strong focus on regulations and enforcement and a reputation for cross-practice collaboration.

Susan Cassidy—co-chair of the firm’s aerospace and defense group and its supply chain initiative—said in her practice she is seeing a significant uptick of investigations and counseling on issues relating to supply chain.

“Clients are facing increased scrutiny. The one thing that is absolutely clear is that the security of the government supply chain is extraordinarily important to the government. And they are slowing down and imposing those requirements on contractors who they see as the first line of defense,” said Cassidy.

The message from the DoD and Biden administration is clear, said Cassidy: “It’s supply chain, supply chain, supply chain.”