



September 14, 2020

The Honorable James Inhofe
Chairman
Senate Committee on Armed Services

The Honorable Jack Reed
Ranking Member
Senate Committee on Armed Services

The Honorable Adam Smith
Chairman
House Committee on Armed Services

The Honorable Mac Thornberry
Ranking Member
House Committee on Armed Services

Dear Chairmen Inhofe and Smith and Ranking Members Reed and Thornberry:

The Project On Government Oversight (POGO) is a nonpartisan independent government watchdog founded by Pentagon whistleblowers concerned about unsafe and unaffordable weapon systems. For nearly 40 years we have advocated reforms to protect the military and taxpayers.

The National Defense Authorization Act is one of Congress's most important tools for overseeing the Department of Defense and holding its programs and officials accountable for waste and mismanagement. The significant resources needed to respond to the health and economic impacts of the coronavirus pandemic makes it imperative that every dollar you authorize through this bill be spent responsibly and enhance our national security. As you resolve differences between the House and Senate versions of the National Defense Authorization Act for Fiscal Year 2021 (H.R. 6395/S. 4049), we hope the final bill will include reforms to increase transparency and accountability.

Provisions we support:

Enhanced reporting on the revolving door between the Pentagon and defense contractors (Sec. 820B in the House bill). We appreciate that both committees rejected a Defense Department proposal to weaken lobbying restrictions on former senior Pentagon officials.¹ As your committees continue to examine these issues, the public would benefit from enhanced reporting on the scope of the revolving door. The last publicly accessible estimate from the

¹ Department of Defense Office of General Counsel, "Clarification of Activities with Respect to the Department of Defense by Certain Officers of the Armed Forces and Civilian Employees of the Department," 2020. <https://www.documentcloud.org/documents/6821220-DoD-Lobbying-Activities-Legislative-Proposal.html>; Coalition Letter to Senate and House Armed Services Committees, "Coalition Urges Congress to Reject Pentagon Proposal to Weaken Lobbying Laws," April 14, 2020. <https://www.pogo.org/letter/2020/04/coalition-urges-congress-to-reject-pentagon-proposal-to-weaken-lobbying-laws/>

Government Accountability Office was that 52 contractors employed 2,435 former Defense Department senior and acquisition officials who “previously served as generals, admirals, senior executives, program managers, contracting officers, or in other acquisition positions which made them subject to restrictions on their post-DOD employment.”² This provision increases disclosure by defense contractors about the contacts between their employees who are former senior Defense Department officials and the Pentagon.

Preserving the ability of Congress and the public to assess weapon effectiveness (Sec. 261 in the House bill). POGO strongly urges eliminating the sunset of the requirement for the director of operational test and evaluation to provide an annual report to Congress on the results of independent and realistic tests of major weapon systems to Congress. This is the most important report for congressional oversight in Congress’s efforts to ensure our weapons are safe and effective. Even the Section 809 Panel, which recommended getting rid of a number of Defense Department reports, highlighted this report as worth preserving.³

Curtailing abuse of the Overseas Contingency Operations (OCO) account (Sec. 1522 in the House bill). Overreliance on the OCO account encourages wasteful spending. Further, the Congressional Budget Office has told Congress that reliance on off-budget funding harms planning and makes it more likely the department will pursue lower priority, more expensive programs that normally would not make the cut.⁴ POGO supports this provision to require the secretary of defense to report, as the department did this year, which programs are funded through OCO and how the secretary would recommend transitioning these programs to the base budget.⁵ As the Budget Control Act sunsets, we urge your committees to work with the Pentagon to increase budget discipline by reducing reliance on this and other off-budget accounts.

Placing limits on transfers of military equipment to law enforcement (Sec. 1054 in the Senate bill). The Defense Department’s 1033 program has transferred billions of dollars in surplus military equipment to federal, state, and local police departments, and in at least one case, that included a fictitious law enforcement agency.⁶ Our Constitution Project’s Committee on Policing Reforms found “the use of military equipment and tactics by law enforcement risks eroding public trust and poisoning the crucial, but often precarious, relationship between

² Government Accountability Office, *Defense Contracting: Post-Government Employment of Former DOD Officials Needs Greater Transparency* (May 21, 2008), Executive Summary. <https://www.gao.gov/new.items/d08485.pdf>

³ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations* (January 2018), 267. https://discover.dtic.mil/wp-content/uploads/809-Panel-2019/Volume1/Sec809Panel_Vol1-Report_Jan2018.pdf

⁴ David Thornton, “Using OCO funds to bypass budget caps ‘departure from historical norms,’ CBO says,” *Federal News Network*, March 1, 2019. <https://federalnewsnetwork.com/budget/2019/03/using-oco-funds-to-bypass-budget-caps-departure-from-historical-norms-cbo-says/>

⁵ Office of the Under Secretary of Defense (Comptroller)/Chief Financial Officer, *Defense Budget Overview*, (February 2020 (Revised May 13, 2020)), 1-3, 6-1. https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2021/fy2021_Budget_Request_Overview_Book.pdf; This provision is also supported by Campaign for Liberty, National Taxpayers Union, R Street, and Taxpayers Protection Alliance. Taxpayers for Common Sense, “Joint Letter on FY2021 NDAA Amendments,” July 15, 2020. <https://www.taxpayer.net/national-security/joint-letter-on-fy2021-ndaa-amendments/>

⁶ Government Accountability Office, *DOD Excess Property: Enhanced Controls Needed for Access to Excess Controlled Property* (July 18, 2017), Executive Summary. <https://www.gao.gov/assets/690/685916.pdf>

communities and local law enforcement.”⁷ Harmful actions taken by some law enforcement demonstrate that the risks posed by the 1033 program to public safety and to constitutional rights far outweigh any ostensible benefits the current program may provide. Current and retired law enforcement officers wrote to the Senate this July to make clear that transfers of the most dangerous equipment “is not vital to the functioning of police or the safety of the officers in their ranks.”⁸ POGO supports the provision included in the Senate bill to limit what equipment can be transferred, but also urges the adoption of additional provisions to increase transparency and accountability for these transfers, and to prohibit the use of transferred equipment against First Amendment-protected activity. A good place to start would be to include the long overdue reforms to this program that were passed in June by the House as part of the George Floyd Justice in Policing Act.⁹

Creating an inventory of federal programs across the government (Sec. 1770 in the House bill). The government should know how many federal programs exist and be able to evaluate the purposes and objectives of those programs. This provision, based on the bipartisan and bicameral Taxpayers Right-To-Know Act, would require the Office of Management and Budget to create a public and regularly updated inventory of public programs.¹⁰

Enacting real whistleblower protections for the intelligence community (Secs. 9401 and 9402 in the Senate bill). Meaningful whistleblower protections for intelligence community employees to report wrongdoing through government channels is one of the most important tools for protecting classified information and preventing damaging leaks that could harm our national security. One of the classic forms of retaliation against whistleblowers in the intelligence community is to suspend or revoke their security clearance. While whistleblowers have been afforded some protections in the National Security Act, as amended, and in the Presidential Policy Directive 19, there has been an unfair burden of proof placed on the whistleblower to show that the revocation was an act of reprisal.¹¹ POGO strongly supports provisions from the Intelligence Authorization Act (S. 3905) to establish a fairer burden of proof and a process for parity for security clearance revocations. We are concerned, however, that this process does not include instances when a clearance is revoked for less than a year. We urge you to strike this language, which would otherwise preserve a loophole we’ve seen agencies repeatedly use to

⁷ The Constitution Project’s Committee on Policing Reforms, *Demilitarizing America’s Police: A Constitutional Analysis* (August 2016), 4.

https://docs.pogo.org/report/2016/The_Constitution_Project_Demilitarizing_Americas_Police_August_2016.pdf

⁸ Project On Government Oversight, “Law Enforcement Officers Support Military Equipment Limits,” July 20, 2020. <https://www.pogo.org/letter/2020/07/law-enforcement-officers-support-military-equipment-limits/>

⁹ Claudia Grisales, “House Approves Police Reform Bill, But Issue Stalled Amid Partisan Standoff,” NPR, June 25, 2020. <https://www.npr.org/2020/06/25/883263263/house-approves-police-reform-bill-but-issue-stalled-amid-partisan-standoff>; H.R. 7120, George Floyd Justice in Policing Act, Section 365.

<https://www.congress.gov/116/bills/hr7120/BILLS-116hr7120pcs.pdf>

¹⁰ This provision is also supported by the National Taxpayers Union, Demand Progress, FreedomWorks, Protect Democracy, the R Street Institute, and Taxpayers for Common Sense. National Taxpayers Union, “Seven Good Government Groups Urge Inclusion of Taxpayers Right-To-Know Act in NDAA,” July 1, 2020.

<https://www.ntu.org/publications/detail/seven-good-government-groups-urge-inclusion-of-taxpayer-right-to-know-act-in-ndaa>

¹¹ Rebecca Jones, “Revoking Clearances on a Whim Hurts Whistleblowers—and the Rest of Us,” Project On Government Oversight, September 14, 2018. <https://www.pogo.org/analysis/2018/09/revoking-clearances-on-a-whim-hurts-whistleblowers-and-the-rest-of-us/>

continue to retaliate against whistleblowers.

Working toward a diverse and inclusive military that better represents our values as a nation (Secs. 377, 520, and 534 in the Senate bill; Secs. 502, 503, 537, 571, 572, 574, 575, 576, 577, 578, 912, 1749, and 2829 in the House bill). Like the rest of our nation, the military continues to face systemic challenges with racism that undermine creating a diverse and inclusive force. Progress on addressing these issues is integral to enhancing readiness and addressing longstanding and pervasive injustices.¹² POGO supports the numerous steps included in the bill to address these issues. Many of these provisions are overdue reforms and originate from the Military Leadership Diversity Commission, including creating chief diversity officers. Some reforms, like removing personally identifiable information from promotion board materials, are beginning to be enacted by Secretary of Defense Mark Esper but should also be codified in law so they outlast any individual administration.¹³ It's also important to stop honoring traitors to our country.¹⁴ POGO supports prohibiting flying confederate flags and renaming confederate bases, which serve as racist symbols that undermine the broader goals of creating a more inclusive force.

Developing alternatives for the F-35's gun system (Sec. 145 in the Senate bill). Despite many years of development and testing, the gun for the Air Force's variant for the F-35 continues to be unable to shoot straight. Even worse, testing in 2019 showed that firing the gun caused structural damage to the aircraft.¹⁵ POGO supports this amendment, which would require the Air Force to begin the procurement process for an alternate 25mm ammunition solution.

Preserving the close air support capability our forces need (Sec. 155 in the Senate bill and Sec. 1047 in the House bill). The A-10 endures as the most effective platform for providing close air support to troops on the ground. While the F-35A is billed as having the ability to take over this role, continued gun accuracy problems make it unlikely that many ground troops will be willing to trust the F-35 as they do the A-10 to fire safely at enemy targets close to their positions.¹⁶ Until there is a dedicated attack aircraft replacement, POGO urges the committee to continue to preserve the Senate provision prohibiting retiring A-10s, while also preserving reporting requirements outlined in the House on updates on re-winged efforts.

Exposing corruption facilitated by hiding beneficial owners (Secs. 815 and Division F in the House bill). Companies that hide the identities of the individuals who control them exploit a

¹² Mark Thompson, "Racism in the Ranks," Project On Government Oversight, July 8, 2020. <https://www.pogo.org/analysis/2020/07/racism-in-the-ranks/>

¹³ Military Leadership Diversity Commission, *From Representation to Inclusion: Diversity Leadership for the 21st-Century Military* (March 15, 2011), 125-130. https://diversity.defense.gov/Portals/51/Documents/Special%20Feature/MLDC_Final_Report.pdf; Richard Sisk, "Esper Bans Use of Promotion Board Photos, Orders Review of Hair and Grooming Standards," *Military.com*, July 15, 2020. <https://www.military.com/daily-news/2020/07/15/esper-bans-use-of-promotion-board-photos-orders-review-of-hair-and-grooming-standards.html>

¹⁴ Mark Thompson, "Confederacy of Dunces," Project On Government Oversight, August 16, 2017. <https://www.pogo.org/analysis/2017/08/confederacy-of-dunces/>

¹⁵ Dan Grazier, "Uncorrected Design Flaws, Cyber-Vulnerabilities, and Unreliability Plague the F-35 Program," Project On Government Oversight, March 24, 2020. <https://www.pogo.org/analysis/2020/03/uncorrected-design-flaws-cyber-vulnerabilities-and-unreliability-plague-the-f-35-program/>

¹⁶ Dan Grazier, "Uncorrected Design Flaws" [see note 15].

system that breeds corruption that could be used to defraud taxpayers and the government, and to hide the spoils of illegal activity abroad and any links to foreign governments or terrorist regimes. POGO supports provisions to require disclosure of beneficial ownership for government contractors (Sec. 815), and to crack down on anonymous shell companies through the Corporate Transparency Act (Division F) that contained similar provisions and passed the House in a bipartisan vote last year.¹⁷

Enhancing tools to combat money laundering (Sec. 7206 in the House bill). The Financial Crimes Enforcement Network (FinCEN) protects the financial system from illicit use, and combats money laundering that furthers corruption and undermines our national security. One of the most effective ways to combat this corruption is through whistleblowers, but meaningfully protecting them requires providing financial rewards commensurate with the risks they take when cooperating with law enforcement. POGO supports this provision to modernize those protections and awards to incentivize more whistleblowers to come forward to combat money laundering.

Ensuring federal watchdogs are effective (Sec. 1115 in the House bill). Federal inspectors general are one of our most important tools for oversight and accountability. Unfortunately, the officials who perform those duties in an acting capacity do not always have the skills or expertise needed to be effective.¹⁸ This provision would ensure that any temporary vacancy in an inspector general's office will be filled with a qualified individual who understands the important work of these offices.

Protecting constitutional rights (Sec. 1044 in the Senate bill, Sec. 1052 in the House bill). The right of the people to petition their government is a central tenet of our democracy. Recent events demonstrate that the Defense Department has not always followed proper procedures and restrictions to ensure they are not improperly infringing upon Americans' civil liberties.¹⁹ POGO strongly supports provisions that restrict the use of funds in this bill to infringe upon Americans' First Amendment rights and that make sure that Congress exercises proper oversight of the invocation of the Insurrection Act.

Enhancing oversight and management of weapon sustainment costs (Sec. 803 in the House bill). The biggest expense for weapon systems is their sustainment costs, but the acquisition process as currently designed does not sufficiently focus on plans to manage and control these costs. Failing to control these costs contributes to ever-escalating budgets, and undermines

¹⁷ For more on the Corporate Transparency Act, including small business and law enforcement support, see: FACT Coalition, "House Adds Measure Ending Anonymous Companies to Annual Defense Bill," July 20, 2020. <https://thefactcoalition.org/house-adds-measure-ending-anonymous-companies-to-annual-defense-bill/>

¹⁸ Rebecca Jones, "Inspectors General Wanted: Swamp Creatures Need Not Apply," Project On Government Oversight, June 2, 2020. <https://www.pogo.org/analysis/2020/06/inspectors-general-wanted-swamp-creatures-need-not-apply/>; "Where are all the Watchdogs?": Hearing before the House Oversight and Government Reform Committee, 112th Congress (May 10, 2012) (testimony of Jacob Wiens, Investigator, Project On Government Oversight). <https://www.pogo.org/testimony/2012/05/testimony-of-pogos-jake-wiens-on-where-are-all-watchdogs-addressing-inspector-general-vacancies/>

¹⁹ Stephen Losey, "IG: Air Guard intel planes surveilled seven George Floyd protests without proper authorization," *Air Force Times*, August 21, 2020. <https://www.airforcetimes.com/news/your-air-force/2020/08/21/ig-air-guard-intel-planes-surveilled-seven-george-floyd-protests-without-proper-authorization/>

readiness and other modernization goals.²⁰ POGO supports prioritizing these costs in the Milestone C process.

Reestablishing a wartime contracting commission (Sec. 849 in the House bill). Congress’s role overseeing our wars, including making the decision to go to war, has been unconstitutionally diminished over the course of multiple administrations.²¹ POGO strongly supports this provision establishing a commission to look at spending on our many ongoing wars, including through the use of overseas contingency funds and private security contracts.

Analyzing the scope and costs of using private contractors overseas (Sec. 851 in the House bill). The Defense Department relies on private contractors for a number of support functions for the military’s operations, including everything from weapons maintenance to providing food and other supplies. The Government Accountability Office has identified the department’s management of operational contract support as an enduring high risk that poses “risk to operational effectiveness, timelines, and resource expenditures.”²² POGO urges the committee to preserve this provision that would require the Defense Department inspector general to assess the scope, costs, casualties, and management of private security contractors.

Restoring previous transparency around overseas operations (Subtitle N in the House bill). Decisions about our operations in Afghanistan must be informed by honest assessments of the effectiveness of Afghan national defense and security forces. This data helps Congress and the American people assess whether the \$86.3 billion Congress appropriated to help the Afghan government provide security, including these forces, has enhanced the country’s security.²³ POGO continues to be concerned about efforts by the department to classify this information to prevent the special inspector general for Afghanistan reconstruction from auditing the information and from informing Congress about the effectiveness of our efforts to train these forces. POGO strongly supports this provision to help inform the public debate about our operations in Afghanistan.

Ensuring taxpayer dollars don’t go to companies that repeatedly violate wage laws (Sec. 848 in the House bill). The federal government should not be doing business with irresponsible contractors that repeatedly or willfully violate laws against wage theft—particularly during a pandemic creating additional economic risks. Unfortunately, numerous reviews and investigations have found federal contractors among the companies that commit the largest wage violations and that fail to uphold basic safety requirements.²⁴ For example, one lawsuit against

²⁰ Scott Maucione, “Thornberry says ‘message received’ on high sustainment costs,” *Federal News Network*, February 3, 2016. <https://federalnewsnetwork.com/defense/2016/02/thornberry-says-message-received-high-sustainment-costs/>

²¹ Louis Fisher, “Unconstitutional Wars from Truman Forward,” 30 *Humanitas* 5 (2017). <http://www.loufisher.org/docs/ci/Unconstitutional%20Presidential%20Wars.%20Fisher.%20%202017.pdf>

²² Government Accountability Office, “DOD Contract Management,” 2019 *High Risk Report*. https://www.gao.gov/highrisk/dod_contract_management/why_did_study

²³ Special Inspector General for Afghanistan Reconstruction, *Quarterly Report to the United States Congress* (July 30, 2020), 67. <https://www.sigar.mil/pdf/quarterlyreports/2020-07-30qr.pdf>

²⁴ Wage violations are tracked in POGO’s Federal Contractor Misconduct Database at <https://www.contractormisconduct.org/> and in Good Jobs First’s Violation Tracker at <https://www.goodjobsfirst.org/violation-tracker>

General Dynamics Information Technology alleges the contractor misclassified its employees, costing those employees more than \$100 million in wages.²⁵ The National Employment Law Project found the costs of violations of these laws fall disproportionately on female workers.²⁶ POGO supports this amendment to direct federal agencies to initiate debarment proceedings for contractors with repeated and willful labor and wage violations.

Increasing transparency of Pentagon efforts to lobby Congress (Sec. 1006 in the House bill). Since the 106th Congress, the Defense Department’s website has made available to the public the legislative reforms the department sends to Congress.²⁷ Making those proposals public facilitates discussion and debate about how proposed changes will impact the military, the public, contractors, and other stakeholders. POGO supports requiring the department to continue to make any legislative reforms it proposes to Congress publicly available on its website.

Restoring reporting of troop deployment numbers (Sec. 1049 in the House bill). For years the Defense Department has reported on a quarterly basis the top-line troop level numbers; that kind of transparency is key to democratic accountability for our wars. Yet, in 2018, the department stopped reporting those numbers.²⁸ As former Defense Secretary Chuck Hagel pointed out in April, “The public and those who serve and defend this country and their families are entitled to know where we are sending our service men and women, why, and the numbers. That’s democracy.”²⁹ POGO urges the committee to keep this provision to require the department to report these top-line numbers.

Preventing artificial intelligence from exacerbating racial and gender bias (Secs. 5109 and 1053 in the House bill). Technology should not be used to violate individuals’ constitutional due process rights or to exacerbate societal racism or sexism. Unfortunately, numerous studies have found facial recognition technology is significantly less accurate when identifying women and people of color. This presents a significant threat to the liberty and life of innocent people, and raises significant concerns that this technology would expand racial profiling.³⁰ POGO supports this provision to clarify that the National Artificial Intelligence Initiative Act includes combatting discriminatory algorithmic bias against protected classes of persons.

²⁵ Project On Government Oversight Federal Contractor Misconduct Database, “Underpayment of Wages at HHS Call Centers,” April 23, 2018. <https://www.contractormisconduct.org/misconduct/2817/underpayment-of-wages-at-hhs-call-centers>

²⁶ National Employment Law Center, *Delivering for Taxpayers: Taking on Contractor Fraud and Abuse and Improving Jobs for Millions of America’s Workers* (September 6, 2018). <https://www.nelp.org/publication/delivering-for-taxpayers-taking-on-contractor-fraud-and-improving-jobs/>

²⁷ Department of Defense Office of the General Counsel, “DoD Legislative Proposals Prior Congresses.” https://ogc.osd.mil/olc/proposals_old/index.html

²⁸ Tara Copp, “Pentagon strips Iraq, Afghanistan, Syria troop numbers from web,” *Military Times*, April 9, 2018. <https://www.militarytimes.com/news/your-military/2018/04/09/dod-strips-iraq-afghanistan-syria-troop-numbers-from-web/>

²⁹ Julian Borger, “Trump administration challenged to reveal troop levels in war zones,” *The Guardian*, April 22, 2020. <https://www.theguardian.com/us-news/2020/apr/22/us-troop-levels-afghanistan-iraq-syria-military-foia>

³⁰ The Constitution Project’s Task Force on Facial Recognition Surveillance and Jake Laperruque, Project On Government Oversight, *Facing the Future of Surveillance* (March 4, 2019). <https://www.pogo.org/report/2019/03/facing-the-future-of-surveillance/>

Increasing transparency of Defense Department funds spent to build the border wall (Sec. 850 and 2801 in the House bill). POGO continues to question the constitutionality of the president declaring a national emergency to shift Defense Department funds to construct a border wall, a program for which Congress did not appropriate funding.³¹ That lack of authorization makes it even more important to transparently report how these funds are used, including all major changes to contracts for the wall. POGO supports these provisions to reassert Congress's power of the purse by limiting the amount of money that can be spent under this authority, and to make public significant changes to any contract related to the border wall.

Improving the Defense Department's financial management (Secs. 1002 and 1003 in the Senate bill and Sec. 1005 in the House bill). The Defense Department continues to be the only major federal agency unable to pass a financial audit.³² POGO supports provisions to continue the progress the department has made to achieve auditability, including providing incentives and remediation plans to achieve this goal.

Preserving troops' access to independent and nonpartisan information (Sec. 641 in the House bill). Since the Civil War, the members of the military have counted on *Stars and Stripes* to provide them news about the world, no matter where they are posted when they are reading it. Some of that award-winning work includes coverage of the "atomic veterans" of secret nuclear testing and cleanup who are fighting for health benefits, the mental health costs of the war in Afghanistan, and attempts by the military to steer positive coverage of that war.³³ We urge you to continue to fund this publication.

Provisions we oppose:

Accelerating F-35 procurement (Sec. 141 in the Senate bill). As the coronavirus pandemic continues to impact the F-35's supply chain, thereby increasing uncertainty about program costs, Congress should not be pushing the Defense Department to buy additional F-35s before operational testing is complete.³⁴ Concurrency—production of a weapon system even it's still being developed and tested—has long been shown to result in vastly overbudget, overdue, and malfunctioning weapon systems. In fact, recent congressional actions accelerating acquisition contributed to the department considering abandoning \$21 billion worth of F-35 "concurrency

³¹ Project On Government Oversight, "National Emergency Cuts Out the Constitution," February 15, 2019. <https://www.pogo.org/press/release/2019/national-emergency-cuts-out-the-constitution/>

³² Stew Magnuson, "Norquist Touts Goodness of Dreaded Defense-Wide Audit," *National Defense*, September 10, 2020. <https://www.nationaldefensemagazine.org/articles/2020/9/10/norquist-touts-goodness-of-the-dreaded-defense-wide-audit>

³³ Tina Crowley, "'Atomic veterans' series for Stars and Stripes wins DC journalist a top award," *Stars and Stripes*, June 10, 2020. <https://www.stripes.com/news/us/atomic-veterans-series-for-stars-and-stripes-wins-dc-journalist-a-top-award-1.633120>; Society of Professional Journalists, "2014 Sigma Delta Chi Award Honorees," April 23, 2015. <https://www.spj.org/sdxa14.asp>; "Stars and Stripes' stories on reporter profiling earn George Polk Award," *Stars and Stripes*, February 17, 2010. <https://www.stripes.com/news/stars-and-stripes-stories-on-reporter-profiling-earn-george-polk-award-1.99016>

³⁴ Valerie Insinna, "F-35 deliveries could slow down, as COVID-19 jolts Lockheed's supply chain," *Defense News*, April 21, 2020. <https://www.defensenews.com/air/2020/04/21/f-35-deliveries-could-slow-down-as-covid-19-jolts-lockheeds-supply-chain/>

orphans.”³⁵ There isn’t a publicly available estimate of the costs of concurrency of this program, but as development continues to shift to later blocks, it appears that much of the \$12.4 billion in increased costs for Block 4 can be attributed to the damaging and costly consequences of concurrency.³⁶ POGO opposes adding more F-35s than requested.

Undermining discipline in nuclear weapons spending (Sec. 1652 in the Senate bill). Allowing agencies to add their own spending priorities to other agencies’ budgets encourages waste and undermines budget discipline. We are troubled that this proposal empowers a Defense Department’s component to boost spending for its pet projects in the Department of Energy’s budget, and that this significant change was made without review or input from the congressional committees with primary jurisdiction.³⁷ While we appreciate that the Senate proposal was modified with those committees’ input, this significant policy change requires further review and oversight before enactment. POGO strongly opposes the proposal to give the Defense Department’s Nuclear Weapons Council the power to review and approve the National Nuclear Security Administration’s budget without having to propose offsets for any recommendations that increase spending.

Creation of a Pacific Deterrence Initiative fund (Sec. 1251 in the Senate bill and Sec. 1251 in the House bill). The Pacific Deterrence Initiative establishes yet another special off-budget fund, in this case for resources and capabilities focused on deterring China. Yet our national security strategy, including managing our competition with China, is already integrated into agencies and services across the Defense Department and can be implemented using existing budgets and authorities.³⁸ As the Budget Control Act expires, Congress should be reducing its reliance on side funds, and we strongly oppose Senate language that would prescribe a budget for this fund before the department has provided Congress a plan for it. We oppose the creation of this fund, though we do appreciate that both the Senate and House provisions include enhanced budget transparency and reporting requirements, and urge the committee to keep that language in the final bill.

Using off budget slush funds to fund base requirements (Sec. 1023 in the House bill). Defense Secretary Mark Esper was correct when he stated that the Navy must balance its spending priorities within its own budget and not count on other services and components to underwrite their priorities.³⁹ POGO continues to oppose the creation of a separate national sea-based deterrence initiative fund, and urges the committee to strike a provision to use that fund for

³⁵ Dan Grazier, “\$21 Billion Worth of F-35 Concurrency Orphans?” Project On Government Oversight, October 12, 2017. <https://www.pogo.org/analysis/2017/10/21-billion-worth-of-f-35-concurrency-orphans/>

³⁶ Department of Defense, *Comprehensive Selected Acquisition Reports for the Annual 2018 Reporting Requirement as Updated by the President’s Fiscal Year 2020 Budget* (August 1, 2019), 5.

<https://media.defense.gov/2019/Aug/01/2002165676/-1/-1/1/DEPARTMENT-OF-DEFENSE-SELECTED-ACQUISITION-REPORTS-%28SARS%29-DECEMBER-2018.PDF>

³⁷ John Donnelly, “Senate undoes proposed power shift in nuclear arms budgeting,” *Roll Call*, July 2, 2020. <https://www.rollcall.com/2020/07/02/senate-undoes-proposed-power-shift-in-nuclear-arms-budgeting/>

³⁸ Department of Defense, *Summary of the 2018 National Defense Strategy of the United States* (2018). <https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>

³⁹ David B. Larter, “Defense Secretary Esper says nuclear missile sub is ‘the Navy’s bill,’ setting up a fight with Congress,” *Defense News*, February 10, 2020. <https://www.defensenews.com/naval/2020/02/10/defense-secretary-esper-says-new-us-missile-sub-is-the-navys-bill-setting-up-a-fight-with-congress/>

Columbia-class submarines.⁴⁰

Sunsetting Afghanistan oversight before its time (Sec. 1532 in the Senate bill). The Special Inspector General for Afghanistan Reconstruction has been one of the most effective inspectors general in recent history, and continues to perform an essential mission as Congress assesses the administration's plans to draw down troops in Afghanistan.⁴¹ POGO vehemently opposes this provision to transfer its authorities to the Defense Department inspector general. That inspector general's office already has an increased workload as it assesses the department's response to the coronavirus pandemic⁴²; more concerning, the office lacks a permanent leader, and the only nominee lacks the credentials necessary to lead this important agency and mission.⁴³

Placing onerous conditions on reducing forces in Afghanistan (Sec. 1213 in the House bill). Our endless wars continue not only because multiple administrations have interpreted war authorizations too broadly, but also because Congress creates cumbersome requirements that prevent a peaceful exit.⁴⁴ Congress must continue to exercise oversight of our operations and diplomatic efforts in Afghanistan, but POGO opposes conditioning that withdrawal on a unanimous vote of military and political leaders.

Increasing the risks of wasteful spending (Secs. 841 and 842 in the Senate bill, Secs. 820 and 820C in the House bill). Repeated spare parts overcharges identified by the Defense Department

⁴⁰ Jacob Marx, "Special Shipbuilding Fund is Reckless and Unaffordable," Project On Government Oversight, May 12, 2015. <https://www.pogo.org/analysis/2015/05/special-shipbuilding-fund-is-reckless-and-unaffordable/>

⁴¹ Danielle Brian and Neil Gordon, "What is Going on Behind the Attacks on SIGAR?" Project On Government Oversight, May 6, 2016. <https://www.pogo.org/analysis/2016/05/what-is-going-on-behind-attacks-on-sigar/>

⁴² Announced projects include an audit of the Army Corps of Engineers' contract oversight of alternative care sites, an audit of military installations' public health emergency readiness, an audit of reimbursement for Northern Command and supporting components for coronavirus response assignments, assessing the armed forces retirement home's response to the coronavirus pandemic, and an audit of the implementation of provisions to reimburse federal contractors for coronavirus-related expenses. Department of Defense Office of Inspector General, Evaluation of the Armed Forces Retirement Home Response to the Coronavirus Disease–2019 Pandemic (Project No. D2020-DEV0PC-0158.000), July 27, 2020. <https://www.dodig.mil/reports.html/Article/2289283/project-announcement-evaluation-of-the-armed-forces-retirement-home-response-to/>; Department of Defense Office of Inspector General, "Audit of U.S. Army Corps of Engineers Contract Oversight Over the Construction of Alternative Care Sites for the Coronavirus Disease–2019 Response (Project No. D2020-D000AV-0144.000)," June 15, 2020.

<https://www.dodig.mil/reports.html/Article/2225960/project-announcement-audit-of-us-army-corps-of-engineers-contract-oversight-ove/>; Department of Defense Office of Inspector General, "Audit of the DoD Military Installations' Public Health Emergency Readiness (Project No. D2020-D000RG-0146.000)," June 10, 2020.

<https://www.dodig.mil/reports.html/Article/2221519/project-announcement-audit-of-the-dod-military-installations-public-health-emer/>; Department of Defense Office of Inspector General, "Audit of the Department of Defense Mission Assignments for Coronavirus Disease–2019 in the U.S. Northern Command Area of Responsibility (Project No. D2020-D000AU-0143.000)," June 8, 2020. <https://www.dodig.mil/reports.html/Article/2213297/project-announcement-audit-of-the-department-of-defense-mission-assignments-for/>; Department of Defense Office of Inspector General, "Audit of DoD Implementation of Section 3610 Authorized by the Coronavirus Aid, Relief, and Economic Security Act. (Project No. D2020-D000AH-0137.000)," May 27, 2020.

<https://www.dodig.mil/reports.html/Article/2213285/project-announcement-audit-of-dod-implementation-of-section-3610-authorized-by/>

⁴³ Project On Government Oversight, "Congress Should Reject Abend's Nomination to be DOD IG," August 7, 2020. <https://www.pogo.org/press/release/2020/congress-should-reject-abends-nomination-to-be-dod-ig/>

⁴⁴ Katie Bo Williams, "To Block Trump's Troop Withdrawals, Congress Turns An Old Tactic Upside Down," *Defense One*, July 14, 2020. <https://www.defenseone.com/policy/2020/07/unconventional-tactic-becomes-congress-go-weapon-against-troop-withdrawal/166880/>

inspector general highlight a longstanding problem that was most infamously exploited by TransDigm: Current procurement law is riddled with loopholes that put taxpayers and weapon programs at risk.⁴⁵ POGO supports the Defense Department acquiring commercial items when the goods and services are sold in substantial quantities to the general public, thus ensuring prices are established in a competitive marketplace. When a competitive market does not exist, however, it's important that the government be able to obtain certified cost or pricing data to negotiate price. Unfortunately, the definition of "commercial item" has been widely abused, with contractors seeking to have it applied to goods and services where the U.S. government is effectively the only customer. We are concerned about adding "innovative commercial products and services" to an already ambiguous definition of what is "commercial" because it ignores whether the goods or services are sold in substantial quantities in the competitive market. Failure to establish marketplace pricing means that contractors may price their goods or services in an unfettered manner, which is particularly problematic when an acquisition is conducted in a sole source environment. We are similarly concerned about raising thresholds for obtaining cost or pricing data under the Truth in Negotiations Act because it too poses risks that the government will have to pay higher prices that could otherwise have been avoided. POGO strongly opposes increasing the Truth in Negotiations Act threshold for Defense Department contracts and expanding the commercial item definition, both of which substantially increase the risk that the department will pay contract prices that are not fair and reasonable.

Reducing competition and accountability in contracting (Sec. 802 in the House bill). The use of Other Transaction Authority, aimed at attracting nontraditional contractors, poses significant risks to taxpayers and the Defense Department that may not be worth taking. POGO supports the goals of encouraging competition in federal contracting, which can lead to increased innovation and lower costs, and attracting new companies to do business with the Defense Department. However, we are concerned that the way this provision seeks to attain those goals—by changing the definition of nontraditional contractors in order to expand the use of the Other Transaction Authority—will do far more harm than good because Other Transaction Agreements are exempt from Cost Accounting Standards and Truth in Negotiations Act requirements designed to safeguard taxpayers from being ripped off.⁴⁶ As one anonymous congressional staffer told *Federal News Radio*, some uses of these agreements are "more akin to corporate welfare than a way to bring small and nontraditional companies with new ideas into the Pentagon's fold."⁴⁷ Moreover, the Congressional Research Service has found we still have very little data about how

⁴⁵ Department of Defense Inspector General, *Review of Parts Purchased From TransDigm Group, Inc.* (February 25, 2019). <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF>; Department of Defense Inspector General, *U.S. Air Force Spent Billions on F117 Engine Sustainment Without Knowing What a Fair Price Was*, (March 11, 2016). <https://media.defense.gov/2016/Mar/11/2001714219/-1/-1/1/DODIG-2016-059.pdf>; Department of Defense Inspector General, *Excess Inventory and Contract Pricing Problems Jeopardize the Army Contract with Boeing to Support the Corpus Christi Army Depot* (May 3, 2011). <https://www.documentcloud.org/documents/204808-full-unredacted-dod-office-of-inspector-general>; Scott Amey and Mandy Smithberger, Project On Government Oversight, *In for a TransDigm, Out for Billions* (May 29, 2019). <https://www.pogo.org/report/2019/05/in-for-a-transdigm-out-for-billions/>

⁴⁶ Scott Amey, *Other Transaction Agreements: Do the Rewards Outweigh the Risks?* (March 15, 2019). <https://www.pogo.org/report/2019/03/other-transactions-do-the-rewards-outweigh-the-risks/>

⁴⁷ Scott Maucione, "As OTAS grow, traditional contractors are reaping the benefits," *Federal News Network*, July 17, 2018. <https://federalnewsnetwork.com/contracting/2018/07/as-otas-grow-prime-contractors-are-reaping-the-benefits/>

those agreements are used, their costs, or whether they have been effective.⁴⁸ We urge you not to expand the definition of nontraditional contractors until there is more data to assess whether expanding use of Other Transaction Agreements serves the department's goals to increase innovation and expand competition.

Bolstering insider threat programs that improperly sweep up lawful whistleblowing (Sec. 9403 in the Senate bill). POGO does not support the strengthening of insider threat programs without adding qualifying language that makes clear whistleblowers are not insider threats. Specifically, the provision should make clear that whistleblowing and whistleblower disclosures are not “derogatory information,” and they should not be reported to contractors as possible insider threat activity. Insider threat programs have a history of failing to distinguish between protected whistleblowing disclosures and illegal leaks of information. The Office of Special Counsel has found that reporting whistleblowers to insider threat programs “creates a false impression that they have engaged in misconduct” and suggests to the whistleblower that “they are being tracked by their agencies.”⁴⁹ It is critical that this provision not chill lawful whistleblowing disclosures. We urge you not to fortify insider threat reporting to federal contractors without a clear bar against including whistleblowing-related activity as “derogatory information.”

We hope you will consider these recommendations to make the Department of Defense more effective, inclusive, responsible, and accountable.

Sincerely,



Danielle Brian
Executive Director

⁴⁸ Moshe Schwartz and Heidi M. Peters, Congressional Research Service, *Department of Defense Use of Other Transaction Authority: Background, Analysis, and Issues for Congress*, R45521 (February 22, 2019), 10. <https://fas.org/sgp/crs/natsec/R45521.pdf>; At best, the “Federal Procurement Data System - Next Generation” (FPDS) includes OTA information, but that data may not be complete or updated in a timely fashion.

⁴⁹ Daniel Van Schooten, “Insider Threat Programs Could Chill Whistleblowing, Agency Warns,” Project On Government Oversight, February 7, 2018. <https://www.pogo.org/analysis/2018/02/insider-threat-programs-could-chill-whistleblowing-agency-warns/>