

The Honorable John McCain
Chairman
Senate Committee on Armed Services
228 Russell Senate Office Building
Washington, DC 20510

The Honorable Mac Thornberry
Chairman
House Committee on Armed Services
2120 Rayburn House Office Building
Washington, DC 20515

The Honorable Jack Reed
Ranking Member
Senate Committee on Armed Services
228 Russell Senate Office Building
Washington, DC 20510

The Honorable Adam Smith
Ranking Member
House Committee on Armed Services
2120 Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

The Project On Government Oversight (POGO) has spent over 37 years investigating waste, mismanagement, and abuse inside the Department of Defense. We ask you to consider the following positions during the conference for the Fiscal Year (FY) 2019 National Defense Authorization Act (H.R. 5515). We applaud your Committees' oversight and legislative work to address these issues and hope you will ensure this bill results in policies that benefit our service members and taxpayers.

I. Missed Opportunities for Cost Savings

Excessive spending. Unfortunately, both bills continue to further a policy of excessive spending without establishing priorities or a clear strategy. Both bills also continue to rely upon the Overseas Contingency Operations (OCO) account as a slush fund for various pet projects.

Base Realignment and Closure (BRAC) would result in savings and increase effectiveness (Sec. 2703 in the House bill and Sec. 2702 in the Senate bill). POGO opposes provisions prohibiting the Department from conducting another BRAC round. BRAC results in savings, which can be used to increase readiness and capabilities of our military forces. We hope the Committee

will also require the Department to implement recommendations issued by the Government Accountability Office to improve the accuracy of its assessments of excess capacity.^[1]

Accelerating F-35 purchases increases costs and program risks (Secs. 151 and 215 in the House bill). POGO continues to be concerned about concurrency in the F-35 program and opposes accelerated acquisition that will increase costs to taxpayers and undermine operational effectiveness. The design of the F-35 is far from stable, with nearly a thousand deficiencies remaining. There are already concerns the critical initial operational test and evaluation process might be delayed as unresolved design flaws prevent successful completion of key testing points.^[2] These additional aircraft will be added to the hundreds of others purchased already that will have limited combat value and require lengthy and expensive retrofits when and if the design is ever completed.^[3] We are particularly concerned that Sec. 151 of the House bill includes a “buy-to-budget” provision that would allow for the purchase of additional F-35s without authorization from the Committees, even though the program does not meet the statutory requirement for the item to remain substantially unchanged throughout the period of acquisition.^[4] If the committees choose to keep this provision, we urge you to require the Secretary of Defense to certify that this funding would not come from operational test and evaluation funding.

Wasting money on the Littoral Combat Ship. POGO opposes buying more Littoral Combat Ships (LCSs). The House bill, unfortunately, requires the Navy to purchase two ships more than the Department requested in its budget. Large cost overruns, schedule delays, and a demonstrated lack of combat survivability and lethality discovered during operational testing and deployments should have resulted in cancelling, or at least slowing down, the LCS program. Maintenance problems and training needs led the Navy to admit they may not be able to deploy any LCSs this year.^[5] Congress should buy weapons based on national security needs, not parochial pork-barrel interests. But even on that metric there is still a substantial amount of work for the two LCS shipyards as they compete for the future frigate program.^[6]

Wasting money on failed nuclear programs (Sec. 3115 in the House bill and Sec. 3118 in the Senate bill). POGO opposes continued funding for the construction of the Mixed Oxide Fuel Facility (MOX) program authorized by Senate Sec. 3118. Although House Sec. 3115 also authorizes continued funding for the program, the House provision includes language that would allow the Energy Secretary to waive the requirement to continue building this boondoggle if there is an alternative plutonium disposition plan that is cheaper and faster. Both the Obama and the Trump administrations have asked Congress to cancel MOX, which is billions of dollars over budget, 41 years behind schedule, and will never succeed. Energy Secretary Rick Perry personally wrote to Congress certifying an alternative plan earlier this year.^[7] Congress should cancel this program and avoid 50 years of wasteful spending on a program that has clearly failed.

Codifying earmarks into law (Sec. 3118 in the House bill and Sec. 1653 in the Senate bill). Wish lists provided by the National Nuclear Security Administration (NNSA) and Pentagon allow officials to circumvent the Secretaries of Defense and Energy and appeal directly to Congress for more money. While individual requests may have merit, in the aggregate these “unfunded requirements” requests contribute to an unbalanced force and should not be further encouraged

through legislative mandate by Congress. POGO opposes Sec. 3118 in the House bill, which would require NNSA to provide Congress this list whether or not there is a need for additional funding. POGO also opposes Sec. 1653 in the Senate's bill, which would require the Missile Defense Agency to also provide an annual wish list. These agencies' priorities should be detailed in their budget requests, and it's up to Congress to play an oversight role to ensure that the agency has the necessary funds to complete its mission without unnecessary spending.

Eliminating the Use of Lowest Price Technically Acceptable Contracts (Sec. 886 in the House bill). The language in House Sec. 886 is a gift to defense contractors that oppose competition and efforts to save taxpayer dollars. Moreover, it will essentially scare off any contracting officer from using lowest price technically acceptable source selection criteria. While that source selection method is inappropriate in certain circumstances, Congress should not ban it; rather, agencies should be advised to use lowest priced technically acceptable where appropriate and with well-crafted requirements.

II. Strengthening Transparency and Accountability

Improving financial management (Sec. 1005 in the House bill and Secs. 1004 and 1005 in the Senate bill). Taxpayers expect the agency with the largest discretionary budget to be able to pass an audit, and we appreciate the work of the Committees to hold the Pentagon accountable. POGO supports Sec. 1005 in the House bill and Sec. 1004 in the Senate bill, which require the Secretary of Defense to provide the congressional defense Committees a report ranking all of the military departments and defense agencies according to how close they are to achieving auditable financial statements. We urge conferees to also require these reports to be made available to the public. POGO also supports Sec. 1005 in the Senate bill to enhance the ability of the Department to ensure accounting firms hired to perform this audit are responsible by requiring firms under contract or under consideration for a contract or renewal to provide information regarding any disciplinary proceedings.

Basing contract awards on past performance (Sec. 816 in the Senate bill). The award of government contracts is predicated on a basic principle—taxpayer dollars should be awarded only to responsible companies. Unfortunately, the government doesn't always have the information it needs to make this decision, as revealed by the Air Force awarding a \$48 million contract to a Korean firm whose current and former executives had been indicted on charges including bribery, embezzlement, and fraud.²⁰ POGO supports Sec. 816, which would require the Secretary of Defense to develop policies to ensure information regarding the past performance of certain subcontractors and joint venture partners is available to contracting officers awarding Department contracts. Unfortunately, it only applies to first-tier subcontractors that perform work worth at least 20 percent of the value of the prime contract. This provision would be even more effective if it applied to all first-tier subcontractors (regardless of the value of the work performed) and all lower tier subcontractors

performing a portion of the contract valued at not less than 20 percent of the value of the prime contract.

Increasing the Micro-Purchase Threshold (Sec. 822 in the House bill and Sec. 813 in the Senate bill). POGO has been a strong opponent of increasing the micro-purchase threshold too quickly and to \$25,000. POGO is pleased that the House and Senate settled on a \$10,000 threshold, which will reduce wasteful spending.

Gathering Information on Service Contracts (Secs. 824 and 825 in the House bill and Sec. 821 in the Senate bill). POGO supports both chambers' efforts to gather and report more information about the Department's use of service contracts. Service contracts account for nearly \$160 billion in Department spending and should be monitored to eliminate duplicative work assignments as well as waste, fraud, and abuse. Service contracting information must be used to positively impact budgeting and manpower decisions and mission and readiness capabilities.

Requiring Up front Fair and Reasonable Prices for Technical Data (Sec. 827 in the House bill). POGO supports the current mandatory requirement to negotiate a price for technical data prior to the selection of a contractor for the engineering and manufacturing development of a major weapon system, or for the production of a major weapon system. The addition of the phrase "to the maximum extent practicable" will result in paying higher prices for such data after the contract is awarded. We agree with the Advisory Panel on Streamlining and Codifying Acquisition Regulations that to "maintain competition throughout the lifecycle, data rights and IP—as applicable to both hardware and software—must be addressed up front, not as an afterthought."^[9]

Limiting Department Access to Certified Cost or Pricing Data (Sec. 817 in the Senate bill). The proposed change in this section, striking an "and" and inserting an "or" seems simple, but it will significantly weaken the Truth in Negotiations Act (TINA). The result will be wasteful overspending. This change would be a gift to defense contractors and place the government in a position where it is buying without obtaining vital cost or pricing data from its contractors—essentially, it would be like buying a car without seeing the sticker price. The agency will lose any ability to ensure that it is buying products or services at fair and reasonable prices.

"Commercial" Definitions Will Lead to Overpricing and Abuse (Secs. 831 and 833 in the House bill and Sec. 851 in the Senate bill). Since the mid-1990s, the government has been buying "commercial" goods and services that are not actually sold in the commercial market. Making matters worse, these purchases are often made without any government review of the cost data that supports the final price the contractors are proposing. Based on the history of wasteful spending involving commercial items, POGO remains concerned about the House definitions of commercial products and services. DoD cannot continue to classify items that are merely "of a type" and "offered for sale" as commercial—but not actually ever sold in commercial quantities—because the prices of items with little or no market availability are not set by the commercial market. POGO supports the Senate language in Section 851 requiring a report on commercial item reforms, which should include a review of competition and pricing to ensure the Department and taxpayers are not overpaying for products or services.

Reporting on Other Transaction Authority Needs to Go Deeper (Secs. 211 and 878 in the House bill and Sec. 872 in the Senate bill). POGO continues to be concerned with the use of Other Transaction Authority (OTA), which allows contractors to avoid protections that ensure competition, fair and reasonable prices, and transparency. The proposed reporting requirements in the House bill for “projects performed through transactions other than contracts, cooperative agreements, and grants” will only yield information about OTAs that is already publicly available. The provision should be made stronger by adding reporting requirements mandating a random review of such agreements to determine that they are being used properly, whether costs or prices are fair and reasonable, whether awardees are traditional or nontraditional, and whether any project should be or has been converted to a contract governed by the Federal Acquisition Regulation. We are glad the Senate language requires service acquisition executives of the military departments to collect and use this data to update policy and guidance. Additionally, the \$500,000,000 threshold for prototype OTs in section 211 of the House bill is ripe for wasteful spending and should be eliminated at Conference.

Reducing oversight agencies increases the risk of waste and abuse of taxpayer funds (Secs. 912, 915, and 917 in the House bill). POGO is concerned that some of the provisions in the legislation will remove important oversight of contract spending, undermine auditor independence, and reduce the effectiveness of information technology acquisition. As former Associate Director for National Security and International Affairs at the Office of Management and Budget Gordon Adams has pointed out, these efforts may only result in “recreating the management inefficiencies that led to centralization in the first place.”^[10] Dividing up some of these functions among the Services, which is unlikely to result in significant savings, may instead result in much larger costs and problems for the military down the road.

Reducing disclosure and accountability for information security (Secs. 1634(m)(2), 1639(d), 1640(b), and 1726(c) in Senate bill). We urge Congress to reject provisions in the Senate bill that would extend further authority to the Department to withhold information from the public. Section 1634(m)(2), for example, would exempt any and all records of the newly created Cyberspace Solarium Commission from release under the Freedom of Information Act (FOIA). This type of blanket exemption for any record created by the commission, regardless of sensitivity or type, is antithetical to the established notion that the public is entitled to know what the federal government is doing unless the information is covered by specific exemptions. Other sections with these types of blanket exemptions are Sec. 1639(d), Sec. 1640(b), and Sec. 1726(c). We appreciate your consideration of our concerns and welcome an opportunity to meet with you or your staff to discuss these matters further.

Sincerely,

Danielle Brian
Executive Director

- [1] Government Accountability Office, *Defense Infrastructure: DOD Needs to Improve the Accuracy of Its Excess Capacity Estimates*, May 24, 2018.
- [2] Government Accountability Office, *F-35 Joint Strike Fighter: Development is Nearly Complete, but Deficiencies Found in Testing Need to be Resolved*, June 5, 2018.
- [3] For more on the costs of retrofits see Dan Grazier, “**\$21 Billion Worth of F-35 Concurrency Orphans?**” Project On Government Oversight, October 12, 2017.
- [4] 10 U.S.C. §2308(a)(1).
- [5] Megan Eckstein, “**Navy May Not Deploy Any Littoral Combat Ships This Year,**” *USNI News*, April 11, 2018.
- [6] Ronald O’Rourke, Congressional Research Service, *Navy Littoral Combat Ship (LCS) Program: Background and Issues for Congress*, April 5, 2018, p. 9.
- [7] Secretary of Energy Rick Perry, **Waiver letter to congressional committees**, May 10, 2018.
- [8] Shawn Boburg and Aaron C. Davis, “**Korean firm tied to Trump lawyer got U.S. contract despite corruption probe,**” *Washington Post*, June 18, 2018.
- [9] **Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations**, Volume 2, June 2018, p. 51.
- [10] Gordon Adams, “**Thornberry Is Getting Rolled by the Services,**” *Defense One*, April 25, 2018.