

DEPARTMENT OF DEFENSE: KEEPING OUR NATION SAFE AND SECURE

REINVIGORATING THE COMPETITIVE SERVICE TO ADAPT TO FUTURE TECHNOLOGICAL CHANGES

Issue

Federal employees bring skills, talents, and experiences that are all too often ignored as job requirements change through the introduction of new technologies and artificial intelligence applications. Managers give lip service to human capital planning, while in reality hiring processes for civilian employees often do not use any assessment tools (or unreliable ones when they do) to fill individual jobs rather than focusing on building important competencies in the civil service. There is a critical need for fair and objective tools for measuring the skills of job applicants.

Additionally, the Armed Services Committees and the Department of Defense have a tendency to create further impediments to recruiting and retaining scarce and valuable skills by viewing the civilian workforce as if they were members of the military committing to a prescribed term of enlistment rather than as a valuable assets that have options to leave and work elsewhere. Examples of these misconceptions include misguided efforts to expand the excepted service using the Cyber Excepted Service as a model; limiting competition through direct hire by exclusively focusing on time to hire rather than expanding the pool of candidates under consideration and improving the tools for inventorying the skills of job candidates; the use of bureaucratic pay for performance measurement systems such as AcqDemo; and expanding the use of term and temporary hires—all of which are incompatible with effective talent management and upskilling the workforce through human capital planning. The Defense Business Board is currently supposed to be addressing these issues in response to directive report language from the Fiscal Year 2022 National Defense Authorization Act (NDAA). Although AFGE has provided three written letters to the Defense Business Board (DBB) on these topics, it is unclear based on interim public results whether the DBB may be continuing down the same paths that have weakened, rather than strengthened, civilian hiring and talent management.

Background/Analysis

1. Section 1109 of the FY 2020 NDAA consolidates various direct hire authorities established on a piecemeal basis over the course of several NDAAAs into a single provision, which sunsets on September 30, 2025. Section 1109 also requires the Secretary of Defense, in coordination with the Office of Personnel Management (OPM), to provide for an independent study to identify steps that could be taken to improve the competitive hiring process consistent with ensuring a merit-based civil service and diverse workforce in DoD and the federal government. The study is required to consider the feasibility and desirability of using “cohort hiring” or hiring “talent pools” instead of conducting all hiring on a “position-by-position basis.” The study is to proceed in “consultation with all stakeholders, public sector unions, hiring managers, career agency and OPM personnel specialists, and after a survey of public sector employees and job applicants.” The results of that study were recently

- published by the Institute for Defense Analysis, but only shared with Congress after AFGE challenged a separate Department of Defense report sent to Congress on Oct. 14, 2022, that seemed to claim that no study had been contracted with IDA; misrepresented the communications between AFGE and IDA on the study; and rather than using a randomized statistical survey of job applicants, simply provided demographic data on the diversity of hires.
2. The National Security Commission on Artificial Intelligence, the Government Accountability Office, Congress, and DoD have all recognized that the Department has significant skills gaps in various Scientific, Technological, Engineering, Mathematical, and Manufacturing (STEMM) fields as well as acquisition, financial management, cyber, artificial intelligence, and foreign language skills. Recruiting in these fields is critical to meeting 21st century threats to our national security as articulated in President Biden's National Defense Strategy.
 3. These skills gaps have persisted after numerous "flexibilities" have been provided to the Department of Defense, including:
 - a) The Secretary of Defense has since 1989 had broad authority to establish hiring levels and compensation for civilian faculty at the National Defense University and Defense Language Center;ⁱ
 - b) The Secretary of Defense has since 2011 had authority to deviate from title 5 in a so-called "pay for performance" demonstration project for the acquisition workforce;ⁱⁱ
 - c) The Cyber Excepted Service is exempt from OPM oversight and from the Classification Act, does not allow non-veterans in intelligence fields to appeal adverse actions to the Merit Systems Protection Board, and has an excessive three-year probationary period;
 - d) Section 9905 of Title 10 provides the secretary various direct hire authorities for depot maintenance and repair; the acquisition workforce; cyber, science, technology and engineering or math positions, medical or health positions, child care positions, financial management, accounting, auditing, actuarial, cost estimation, operational research, and business administration;
 4. The perspective of DoD leadership has consistently been one of seeking and obtaining exemptions from the government-wide processes administered by OPM that are intended to ensure an apolitical civil service. The Department has sought these authorities purportedly for greater management flexibility, often to the detriment of retaining highly skilled employees recruited by the Department.
 5. In fact, the misuse of these authorities arguably has been one of the primary factors leading to persistent skills gaps in the workforce. There is an inherent contradiction between unfettered management "flexibility" to set the terms and conditions of employment and the very idea of human capital planning that views employees as possessing both existing skills and potential talent that can only be developed through a long-term commitment. There is a flawed perception that an employee has only a single skill that cannot be adapted and developed as the Department's missions

change. Personnel caps have been used to discard employees and their skills through the egregious misuse of term and temporary appointments.

6. Another contributing factor to these management problems in the Department has been lax oversight by OPM of the delegated examining authority provided to the Department, a delegation that has persisted over a couple of decades. As a result, there has been a proliferation of separate career programs within each military department for the same kinds of skills.
7. For anyone concerned with civilian control of the military, the likely genesis of this proliferation of separate, disjointed civilian career programs within the Department resides in the preference of military supervisors for managing a civilian workforce in the kind of framework they are accustomed to for the military. Sometimes this cultural propensity manifests itself in a lack of recognition that the Americans with Disabilities Act or other civil rights laws applicable to the federal government workforce must be applied to the civilian workforce in DoD.
8. Sometimes this results in each Military Department creating separate developmental paths and certification requirements for similar sets of skills, a practice that creates significant barriers for promotion of internal candidates or lateral entry for external candidates.
9. Moreover, management practices and culture often erect barriers to hiring more than any lack of authorities. For example the National Security Commission on Artificial Intelligence reported that the Department failed to recognize experience as a substitute for educational credentials when determining appropriate compensation for Cyber workers, something that title 5 already allows without any legislative action.
10. Congressional “reforms” – frequently the result of Department or study commission recommendations – often emulate the highly expensive accession methods used by the military, such as recent recommendations by the National Security Commission on Artificial Intelligence for a new “Digital Academy” – based on the military academy model.
11. There are less expensive alternatives to fill skills gaps, if only the Department, with the assistance of a reinvigorated OPM, were to revive the objective assessment tools that had been successfully used before to generate larger lists of qualified and diverse candidates.
12. The Fiscal Year 2023 NDAA in section 1535 responded in part to AFGE arguments that larger numbers of diverse candidates could be generated at less cost than a Digital Academy by expanding the existing three-year Cyber Scholarship programs for federal government employees to make them as generous as ROTC commissioning programs, which pay for four years of college and even for graduate and professional school, with a comparable service commitment.ⁱⁱⁱ

13. Additionally, a larger population of qualified and diverse candidates could be generated by expanding the use of cohort hiring or standing registers, a method that can only practically be used through objective assessment tools for screening candidates, in lieu of the burdensome practice of requiring job applicants to separately apply for similar jobs on the website USAJOBS. The paucity of qualified and diverse candidates on referral lists is in large part due to the failure to generate standing registers of qualified candidates from objective assessment tools that require applicants to apply only once rather than separately to each job opening.
14. AFGE's position, in general, has been to oppose direct hiring because exceptions to full and fair open competition for jobs have been used to circumvent consideration of internal candidates for jobs, weaken diversity, and exclude otherwise qualified candidates from consideration. Sometimes in the past AFGE has supported, purely on an exception basis, direct hire for depots but has seen these authorities later illegitimately expanded to cover areas such as installation support services in public works offices.
15. Direct hire authorities work "well" for a hiring managers who know specifically whom they want to hire by cutting off competition and shortening the length of the hiring process. But these authorities completely undermine recruiting the best qualified candidates from a diverse pool and largely perpetuate a closed system of hiring in the federal government, where getting hired means knowing someone on the inside.
16. The Merit Systems Protection Board suggested in November 2019 that agencies can hire better, not just faster and cheaper, by bringing subject matter experts into the hiring process and "ensuring that the advertised qualifications of a job posting more accurately line up to the competencies needed to be successful." Direct hire authorities are typically justified as a means of streamlining a "lengthy" hiring process to fill positions that would otherwise be filled with other labor sources (contractors or military). However, direct hire is a band-aid that fails to deal with the root causes of hiring delays and largely circumvents other Congressional objectives such as veterans' preference and open competition for jobs.
17. There are four root causes to hiring delays, none of which is addressed by direct hire authorities:
 - a) Budgetary uncertainty arising from continuing resolutions, hiring freezes, sequestration, furloughs, and arbitrary caps on the size of the civilian workforce reflected in Full-Time Equivalent projections in the budget or the number of authorized positions on an organization's staffing documents. Virtually every management layer of the DoD can create impediments to hiring by requiring organizations to seek their approval prior to initiating a hiring action.
 - b) Restrictions on the use of "over hires" for civilian positions even when a workload requirement exists and funding is available to a local manager to initiate hiring. These restrictions create incentives for managers to use

available funding for civilian employment to hire contractors instead, even for inherently governmental functions that by law cannot be contracted out. The GAO recently found that the depots in the organic industrial base sometimes commence hiring at 80% of their authorizations while waiting for vacancies to occur, rather than a more proactive approach of hiring at some percentage above 100% of authorizations to account for hiring lags.

- c) Downsizing and centralization of human resources offices, in the name of “efficiency,” which severs the relationship between hiring managers and the human resource recruiters who have been asked to do more with less.
- d) Security clearance processing and adjudication, which is entirely separate from the hiring process, is by far the most time consuming part of the overall process, and it has an enormous impact on the time it takes to fill many positions, regardless of whether direct hire authority is used.

Congressional or Agency Action

- Oppose adding additional direct hire authorities or expansions of the excepted service.
- Support preferences for competitive service hiring.
- Monitor and comment on the Department’s response through the Defense Business Board to the FY2022 NDAA Senate Armed Services Committee report language, which identified deficiencies in the hiring, development, and retention of STEM, Cyber, and other critical personnel and directed the Department to develop a coherent plan for greater use of competitive hiring, subject matter expert hiring panels, and use of standing registers of qualified candidates, among other measures.^{iv} Follow up on the Department’s response to the Senate Armed Services Committee markup directive report language: “Department of Defense civilian workforce career developmental programs,” at page 168.^v
- Prohibit the use appropriated funds that misuse term or temporary hiring for “enduring functions,” a business practice encouraged by the introduction of personnel caps and sequestration. During the McCain reductions of the civilian workforce, term or temporary hiring was statutorily exempted from those reductions.

ⁱ The department sometimes misuses term or temporary hiring authorities, most often to avoid personnel caps and to circumvent Budget Control Act caps, to the detriment of retaining and developing high-performing employees. Some of the Department’s actions have been ideologically motivated, seeking a less secure “at will” workforce rather than a professional, apolitical civil service. According to Government Accountability Office analysis of Department of Defense (DoD) data, during Fiscal Years 2016 through 2019, “approximately 35 percent of DoD term and temporary personnel were converted to permanent civilian positions within the federal government [after DoD had] increased term personnel by 40 percent.” See GAO 20-532: “DEFENSE WORKFORCE: DoD Needs to Assess Its Use of Term and Temporary Appointments” (Aug. 2020). The Defense Language Institute – Foreign Language Center (DLI-FLC) at Monterey, California, operates under a draconian personnel cap regime where any increase in a foreign language requirement in one area (e.g., Russian or Chinese instructors) results in an arbitrary reduction in other areas (such as Farsi, Arabic, Hebrew, Turkish, or other Middle Eastern languages). Highly trained foreign language faculty are arbitrarily terminated, ignoring long-term human capital planning that would emphasize retaining faculty with such specialized skills. To implement this draconian policy of treating faculty as “at will” employees, the Commandant of DLI-FLC hires faculty using annual renewable term appointments, which are extended or not on a completely arbitrary basis, year after year, and sometimes improperly replaced with private contractors. This mistreatment of faculty at DLI-

FLC as expendable “at will” employees is occurring at the same time that the Senate Appropriations Committee drafted directive report language to “encourage the Department of Defense to continue placing a high priority on the Language Training Centers and the Language Flagship strategic language training program” and designated the funding for these programs as a “congressional special interest.”

ii A recent RAND review of the AcqDemo identified the following problems:

1. It is not clear whether the AcqDemo flexibility has been used appropriately, as starting salaries for AcqDemo participants were about \$13,000 higher than starting salaries for “comparable” GS employees in DoD.
2. As occurred in NSPS and similar pay-banding structures, “female and non-white employees in AcqDemo experienced fewer promotions and less rapid salary growth than their counterparts in the GS system.”
3. Only about 40% of respondents to the RAND survey perceived a link between their contribution and compensation, a figure that “is lower than comparable survey statistics from other demonstration projects.”
4. Subject matter expert interviews and survey write-in responses opined that AcqDemo was overly bureaucratic and administratively burdensome – taking time away from actual mission performance: appraisal writing, feedback sessions, and pay pool administration, in particular, were perceived to be time-consuming and inefficient.

Additionally, the claim by AcqDemo proponents that it “links employees pay and awards to their contribution to mission outcomes rather than longevity” is unsupported. In fact, some employees at APG support AcqDemo precisely because it provided greater salary increases overall than the GS system for every employee and had good grievance outcomes, largely because of the failure of management to do all the bookkeeping required on a timely basis with respect to setting objectives and counseling, which would seem to run counter to the argument of its proponents in management and the 809 Panel that describe it as rewarding and recognizing excellent performers.

iii Section 1535 expanded these scholarships for up to six years, and allowed successful candidates who complete these scholarships to enter into not just Cyber Excepted Service but into competitive service jobs after AFGE clarified for SASC proponents that DoD had incorrectly claimed that military ROTC graduates incurred a six year probationary period when, in fact, AFGE showed that military had more due process protections available to them from adverse discharge determinations than civil servants separated within their probationary periods. The military had internal checks and balances from the chain of command for any adverse action, including independent separation boards, as well as the ability to litigate their separations in the federal courts right up to the Supreme Court; on the other hand, civil servants separated within their probationary period lack any recourse with the Merit Systems Protection Board. This point was made to argue against mandating that scholarship recipients be subjected to expanded probationary periods for the duration of their commitment after completing their scholarship on top of the 3 year Cyber Excepted Service probationary period.

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v “The committee notes that skill gaps in hiring, development, and retention of personnel in Science, Technology, Engineering, Mathematics, and Manufacturing (STEMM), Cyber, Artificial Intelligence, acquisition workforce, financial management, and critical functional areas required by the National Defense Strategy (NDS) persist, even after numerous legislative initiatives that provided greater flexibility in setting the terms and conditions of employment. Each military department has created its own separate career program brands for the same kinds of skills, often with their own separate developmental paths and certification and training requirements that create a cumbersome application process and may at times impede consideration of otherwise qualified candidates for civilian jobs. The committee believes that this fragmented approach does not meet the needs of the Department. Accordingly, the committee directs the Secretary of Defense to provide a report to the Committees on Armed Services of the Senate and the House of Representatives not later than January 1, 2022, on its plan to streamline civilian personnel management across the Department of Defense (DoD) with the goal of further developing the skills the Department needs to meet the priorities of the NDS while maintaining an apolitical civilian workforce. The plan should at least address the following elements: (1) Emphasis on competitive hiring using objective assessments of qualifications in lieu of rigid tools for classification; (2) Promoting innovative management of the Federal workforce; (3) Using data analytics to establish a systematic process to ensure the current and future DoD workforce is aligned with the current and future mission of the Department; (4) Use of subject matter expert hiring panels to limit rigid assessments of qualifications; (5) Recognition of alternative developmental paths to establish qualifications required for positions; (6) Emphasis on diversity and inclusion; (7) Increasing use of standing registers of qualified applicants to fill open positions; (8) Emphasis on active recruitment methods through visits to high schools, trade schools, colleges, universities, job fairs, and community groups rather than passive recruitment through job postings; (9) Utilizing standardized and uniform Government-wide job classification; (10) Reducing cumbersome application processes, including the requirement to use Federal resumes; (11) Legislative proposals required to achieve these outcomes.”

1. What could DoD do to improve its branding to attract DoD civilians (or all federal civilians for that matter).

AFGE ANSWER: Branding is very much affected by how employees are treated and how their work is characterized relative to the Department’s missions. When the Department testifies to Congress and gives exclusive attention to active component military, secondarily to reserve component military, a discussion of weapon system platforms, and only as an after-thought discusses the civilian workforce contribution, that messaging adversely affects the “branding”

for the civilian workforce. When some members of Congress disparage the civil service as the “deep state” or when the civilian workforce’s contributions to mission are mischaracterized as overhead and appropriate targets for reduction in the budget process, the instability in funding the civilian workforce creates a massive disincentive to using civilians where appropriate. The total force management function is broken and the value of the civilian workforce with respect to optimizing military force structure, lethality, readiness, reducing stress on the military force and the number of high demand low density military occupational specialties, and the opportunity costs from inefficient uses of military for functions that can more efficiently be performed by civilian employees are all issues that will not be recognized when civilian manpower program and budget issues, contract services requirements and the use of military are performed in a separate silos. This non-holistic analysis of the total force results in massive disincentives for human capital planning for the civilian workforce.

Branding efforts should not fall into the trap of suggesting that the civilian workforce is only valuable if they are managed like military. There are good reasons, as we have documented in the past, from a recruitment and retention perspective, of not taking a “one size fits all” approach and fully implementing the Americans with Disabilities Act and other civil rights laws in the way one recruits and develops federal government employees.

Successful branding is very much affected by transparent and predictable compensation; stability in retaining employment reflected by short and not lengthy probationary periods; and a commitment to developing the talents of the workforce, something that extended probationary periods and unstable appointments undermine. No one should ever disparage the federal workforce as “bureaucrats.” These are the mixed messages in current public discussion of the DoD civilian workforce and every effort should be made to make sure that the civilian DoD workforce is supported and acknowledged in a positive way.

2. **What ideas do the unions have to improve the recruiting process and reduce bureaucracy and time to hire?**

AFGE ANSWER: The first idea is to recruit for competencies rather than tailoring to jobs linked to specific individuals. This *requires* adhering to objective assessment tools that examine “learning agility,” which was a term the DBB itself used in an earlier draft study. Objective assessment tools have the potential to expand the pool of diverse and highly qualified candidates in the most efficient way, far more so than targeted visits to specific locations. The Department has been focused exclusively on time to hire and not on increasing the numbers of candidates or candidate quality. They claim to be focused on diversity, but because DoD often simply hires (using direct hire or excepted appointing authorities) the first candidates in a specific category they happen to encounter rather than seeking the broadest possible pool of candidates, diversity is undermined.

While the speed of hiring may be important, placing blame for delays on title 5 processes is entirely misguided and inaccurate. Even accounting for the time spent on personnel-related competitive examination processes, well over 50% of the calculated “time to hire” is spent on security-related background checks. Regardless of the hiring process or authorities used, security background checks are necessary, time-consuming and delay the ability of DoD (and other agencies) to make offers. Suggesting that “hiring delays” primarily relate to personnel processes when DoD’s own data show that security backlogs are the actual culprit in “hiring delays” is quite misleading. No one can fix a problem when the diagnosis of the cause of the problem is inaccurate, and the cause of this “problem” is not something that can or should be abandoned or relaxed.

3. **Are there any steps in the process that you feel are essential to safeguard the rights of current/future employee rights in the recruitment process?**

AFGE ANSWER: An open, transparent, and competitive hiring process that considers all qualified candidates is the key to protecting all employees’ rights. Use of excepted or direct hire authorities (which are typically used in a closed environment) is contrary to maintenance of a highly-qualified, diverse and dynamic workforce. It not only undermines employee rights, it undermines the apolitical, professional civil service. Open competition, transparent competition, not direct hire or excepted service -- these are the “steps” that are “essential” to safeguarding employees and the public interest in a civil service free from corruption.

4. **Are there any key metrics the unions believe may help steer the DoD toward civil service recruitment/talent pipeline improvements?**

AFGE ANSWER: While “time to hire” is an important metric, it should stop being the exclusive or even the most important metric used by the Department. The “size of the candidate” pool and the distribution of candidates relative to various objective metrics using objective assessment tools that rank the density of candidates over time relative to various competencies similar to the way the Armed Forces have used the ASVAB would be a step in the right direction.

This distribution could also be used to account for the diversity of candidates. None of these metrics should be used to unfairly alter or bias objective assessment tools but rather to objectively assess how the Department is doing and how this country is doing in investing in the future of its workforce. Retention and promotion data should also be included as metrics. Up or out policies as applied to the military should not be used for civilians, but instead talents in the workforce that might not have been the initial focus of hiring should be identified, particularly as workplace requirements change and persons hired for one skill develop other skills that are also important in meeting the Department's missions. The absence of objective assessment tools is a key impediment to inventorying those talents.

5. What results have initiatives like the Career Skills Program yielded? From your analysis, have the programs produced a high number of quality government employees? Are transitioning Vets aware programs like CSP and other DOD civilian opportunities?

We are not able to answer this question, as we do not have the relevant information.

6. Are there any regulations/legal changes that you would suggest to improve/streamline the hiring process?

AFGE ANSWER: Existing provisions in title 5 and the implementing regulations are more than sufficient and reasonable. Title 10 exceptions to title 5 should be repealed, such as:

- a. Section 1595 of title 10 which is being implemented through renewable term appointments of faculty at Defense language schools without any RIF protections. Hiring a temporary workforce is very different than hiring a workforce with a long term commitment to developing their talents. This provision is being implemented by jettisoning Farsi and Arabic speakers for Russian, without consideration of long term risks or how language skills in one language can translate to the acquisition of language skills in other languages. It treats faculty like disposable widgets rather than valuable employees.
- b. The Secretary of Defense has had authority to deviate from title 5 in a so-called "pay for performance" demonstration project for the acquisition workforce since 2011 (section 1762 of title 10). RAND studies found Acq Demo to be discriminatory with respect to women and minorities. Employees and managers found Acq Demo to be disruptive to missions and involve excessive record keeping.
- c. The cyber excepted service which is essentially exempt from oversight by the Office of Personnel Management, is also exempt from the Classification Act in a way that does not necessarily result in more competitive salaries—just more discretion for management to play favorites. At some DoD agencies, it only allows veterans to appeal to the Merit Systems Protection Board, and it is subject to a very demoralizing 3 year trial, i.e., probationary period (see 10 U.S.C. 1599f);
- d. Various direct hire authorities as exceptions to competitive hiring are authorized for the Secretary of Defense in section 9905 of title 10, including depot maintenance and repair, acquisition workforce, cyber, science, technology and engineering or math positions, medical or health positions, child care positions, financial management, accounting, auditing, actuarial, cost estimation, operational research, and business administration. Direct hire shortens the process of hiring at the expense of consideration of broader candidate pools, adversely affecting transparency, obtaining the best qualified candidates, and diversity.
- e. Since 2016, a two-year probationary period (in contrast to the government-wide one year period) applies to most of the DoD workforce (excluding the 3 year cyber trial period). A long and expanded probationary period is contradictory to a long-term commitment to developing employees. Some of the Department's explanations of the supposed benefits of an expanded probationary period can only be plausibly explained by confusing the way military are accessed with terms of enlistment and assuming that an expanded probationary period affords flexibility for the civilian workforce when, in fact, unlike military, they are free to leave at any time they want. The idea that an expanded probationary period would somehow be an inducement for a person to want to work for the federal government where they could be arbitrarily terminated is truly an odd way to look at this.

7. If you were king for a day, what would you change?

AFGE ANSWER: We would ensure that all hiring is done in an open, transparent, competitive, merit-based objective environment that considers all qualified candidates. This is key to a strong and highly motivated civil service. Protecting employee rights through reasonable probationary periods (no more than one year) and robust due process protections are also key. We would limit excepted and/or direct hire as these authorities are contrary to maintenance of a highly-qualified, diverse and dynamic workforce.

Rather than treat civilian employees as fungible and/or disposal, DoD needs to value its civilian workforce as something other than as an inferior/adjunct to the military.

PREVENTING DETRIMENTAL CONVERSION OF DoD JOBS TO PRIVATE CONTRACTORS OR MILITARY PERFORMANCE

Issue: DoD civilian employee jobs are being replaced with contractors, primarily by not backfilling vacant DoD civilian positions and reapplying the funds programmed or budgeted for those positions to services contracts to perform the same requirements; or by replacing the DoD federal employee jobs with active or reserve military, to the detriment of readiness, lethality, overall efficiency, and effective human capital planning, talent management for recruiting and retaining a skilled civilian workforce.

Background/Analysis:

1. Section 2461 of title 10 prohibits converting DoD civilian employee job requirements to private sector performance without first going through a public-private competition.
 - a) Special preference programs for various kinds of small businesses are exceptions to 2461, expanded on in Department of Defense Appropriation rider section 8046.ⁱ
 - b) Depots are another exception pursuant to section 2464 of title 10 and Defense Appropriation rider section 8026.
 - c) The Department of Defense may waive section 2461 completely during any Presidentially declared National Emergency, although no Administration has explicitly chosen to do so.
 - d) Section 2461 has been adjudicated by the GAO as not applying to the non-appropriated fund workforce.ⁱⁱ
2. Section 325 of the FY 2010 NDAA made Congressional findings on the flaws of public-private competitions as devised by OMB Circular A-76 and implemented within DoD, imposing a “temporary” moratorium until these conditions are addressed.ⁱⁱⁱ
 - a) The Department, during the course of the Trump and Biden Administrations, has periodically offered legislative proposals to repeal both sections 2461 of title 10 and section 325 of the FY 2010 NDAA.
 - b) Those efforts have failed so far, primarily because the Department does not need to go to Congress to waive public-private competition requirements and the moratorium on public-private competitions. Additionally, AFGE has successfully disputed the Department’s claims that the conditions laid out in section 325 have been met. The most persuasive argument has been that the requirement for comprehensive contractor inventories with contract services budgets and accompanying enforcement mechanisms to preclude contracting that has been prohibited or limited by statute, have not been met as documented most recently by GAO findings.^{iv}
3. The Department of Defense issued annual policy reminders to improve compliance with the public-private competition moratorium during the latter part of the Obama Administration, which carried through to May 11, 2018, the last such issuance by the

Department during the Trump Administration. These policy updates included specific language that applied the requirement not just to encumbered DoD civilian positions but also to vacant positions or positions subjected to downsizing or reorganizations, as well as to the replacement of DoD civilian jobs by municipalities through interservice support agreements, and not just private sector contractors. These policy reminders were generated primarily through the intervention of HASC readiness subcommittee staff with the Department of Defense.

4. The Department of the Army included compliance with the public-private competition requirement, along with other limitations on privatization and requirements to consider insourcing work in checklists required for every services contract before it could be processed by contracting officers. The Army required SES level certifications that the task order or contract was not replacing jobs currently or previously performed by DoD civilian employees. The HASC and Joint Conferees for the FY2015 NDAA directed the Department to use the Army Checklist as the basis for Department-wide enforcement of the various limitations on privatization, including the public-private competition moratorium.^v
5. Former HASC Chair Thornberry championed a provision in the 2017 NDAA (currently codified at section 4506 of title 10) to ensure service contract requirements were transparent in the Department's planning, programming, budgeting, and execution system in response to GAO findings. As he put it: "The first of the major reform elements is to **add oversight to service contracts**. In fiscal year 2015, the Pentagon spent \$274 billion through contracts, including big-ticket weapon systems like the Ford Class aircraft carrier and the F-35 fighter jet. But 53 percent (\$144 billion) of this sum was actually spent on services – everything from lawn mowing on military bases to maintaining equipment to hiring specialized experts and administrative support. Unfortunately, DOD – and Congress – have limited insight into how and where this money is spent. The bill **requires more specificity in the funding requests for service contracts**, which will now be submitted through the DOD budget process, forcing the Pentagon to analyze actual needs and spending patterns much like they do for weapons. Those within the DOD who need to contract for a service will have to specify their requirements early enough to have them validated, the contracts awarded, and the funding secured. Congress will have a better idea of what kinds of services are being contracted and their cost, **improving oversight and enabling efficiencies**."^{vi}
6. Unfortunately, former HASC Chairman Thornberry's reform has yet to be implemented by the Department, as recently documented by the GAO. This led Congress to enact section 815 of the FY2022 NDAA (codified at 10 U.S.C. § 4506); however, the HASC noted in directive report language in the 2023 NDAA that DoD had still not implemented the reform and requested a briefing from the Secretary of Defense concurrent with the President's Budget submission this year. Indeed, last year, the Department was relieved from submitting a services contract budget under the assumption it would submit a fully compliant budget submission this year. But unfortunately, the Department failed to comply with the Congressional reporting requirements for an implementation plan,^{vii} a problem noted in HASC directive report language for the FY2023 NDAA.^{viii}

7. When the Department last had contractor inventories, the growth in contract services spending relative to the civilian workforce was easily demonstrated and depicted in charts from the Defense Business Board.^{ix} These findings of excessive costs for contractors compared with the civilian workforce were also validated by study by CAPE submitted to Congress.^x And the current DepSecDef summarized the results of several GAO audits in a *Foreign Affairs* article depicting how the McCain reductions merely shifted work done by the civilian workforce to contractors or military undermining any claimed efficiencies: “Predictably, for example, even though Congress directed the Defense Department to cut \$10 billion through administrative efficiencies between 2015 and 2019, the Pentagon failed to substantiate that it had achieved those savings. The reason those efforts rarely succeed is that they merely shift the work being done by civilians to others, such as military personnel or defense contractors.” DepSecDef Hicks, “Getting to Less: The Truth About Defense Spending,” *Foreign Affairs* (March 2020), p. 56.
8. These practices of using the civilian workforce vacancies as a slush fund for “false efficiencies” result in:
 - a) Massive levels of under-execution for the civilian workforce documented by the GAO, contributing to funding instability and massive disincentives to use civilian employees by managers, and are at the front end often not counted in the length of the hiring process for civilian employees.^{xi}
 - b) Reduced availability for military for operational deployments by using military for non-military essential functions that can be performed by civilian employees. This has an impact on military force structure, lethality, stress on the force for high demand low density military occupational specialties, readiness, and is a major opportunity cost to the detriment of force modernization. The original Defense Science Board that recommended establishment of the Defense Readiness Reporting System described the replacement of civilian structure with borrowed military manpower as a leading indicator of a hollow force. And more recently, the National Security Commission on Aviation Safety documented the adverse effects on retention of pilots and flying hours when pilots were repurposed to perform administrative tasks more efficiently performed by others.^{xii} These findings are repeatedly documented by RAND, IDA, CNA and the Congressional Budget Office.^{xiii}
 - c) Increased risk and costs when critical capabilities and intellectual capital are displaced into private sector control most recently exemplified by the reported use of U.S. technologies in the Iranian drones provided to Russian for use against Ukraine; Elon Musk’s control of STARLINK and threats to pull back from supporting Ukraine without additional funding from DoD; or when the GAO reports that most of the staff for the USD for Intelligence and Security are contractors or temporary reservists.
9. Section 129 of title 10 prohibits constraining the DoD civilian workforce with arbitrary personnel caps and requires reporting planned civilian increases or decreases and associated hiring plans over the course of the Future Year Defense Program years,

prohibiting converting to higher cost labor sources. The Department has ignored these reports since 2018.

10. Section 129a of title 10 prohibits downsizing the civilian workforce programmed over the Future Year Defense Program timeframe absent an appropriate analysis of the impact on workload, operational effectiveness, fully burdened costs of the total force of military, civilian employee or contract, readiness, lethality, military force structure and stress on the force. It further prohibits numerical goals or budgetary savings targets for converting civilian functions or the imposition of hiring freezes that inhibit total force management. Finally, it prescribes that any conversion of any civilian position to military performance must be approved at the Secretary of a Military Department level and must take into account the fully burdened costs of military versus civilian performance, as well as military necessity and career progression.
11. Section 8012 of the Defense Appropriation prohibits the use of appropriated funds to constrain the civilian workforce with personnel caps and further prohibits reductions of the civilian workforce that have not taken into account the metrics specified in section 129a.
12. The Department's regulation governing total force management is DODI 1100.22 and its regulation governing comparing the cost of Active Component Military to Civilian employee or contract performance is DODI 7041.04. No regulation yet exists for comparing reserve component military costs to civilian employee performance, but instead Congress and the Department have periodically contracted with federally funded research and development centers to perform that cost analysis.^{xiv}

Congressional Action

- Strengthen Congressional oversight by requiring statutory requirements for section 4506 of title 10 be enforced through an appropriation rider or requirement that no funds be expended for any services contract that has not had its requirements validated in the planning, programming, budgeting and execution process and included in a budget exhibit to Congress, just as is applied for the civilian and military workforce.
- Retain and enforce compliance with current language in section 129 of title 10 and corresponding Defense Appropriation section 8012 language prohibiting personnel caps on the civilian workforce that require reports to Congress on hiring plans over the Future Year Defense Program and any conversions to more costly labor sources.
- Retain and enforce compliance with current language in section 129a of title 10 and corresponding Defense Appropriation section 8012 language prohibiting reducing the civilian workforce programmed over the Future Year Defense Program years absent an appropriate analysis of the impact on workload, stress on the force, military force structure, operational effectiveness, readiness, lethality and the fully burdened costs of the total force of military, civilian employees and contracted services. Additionally,

enforce compliance with the approval process for conversions to military requiring Defense Component Head approval taking into account these factors.

- Ask for fund withholds for the USD (Comptroller), Director, Cost Assessment and Program Evaluation, Under Secretary of Defense for Acquisition and Sustainment and Under Secretary of Defense for Personnel and Readiness until each of them comply with their respective roles for implementing section 4506 of title 10 in the PPBES process.
- Provide examples to Congress of civilian positions not being backfilled and replaced with contractors in defiance of the public-private competition moratorium.
- Continue the public-private competition moratorium until such time as the flaws in A-76 are corrected and contractor inventories complete.
- Congress should require the department to address the requirements of section 325 of the FY 2010 NDAA in full, followed up by a GAO review.

ⁱ “The Department of Defense, without regard to subsection (a) of this section or subsection (a), (b), or (c) of section 2461 of title 10, United States Code, and notwithstanding any administrative regulation, requirement, or policy to the contrary shall have full authority to enter into a contract for the performance of any commercial or industrial type function of the Department of Defense that— (A) is included on the procurement list established pursuant to section 2 of the Javits-Wagner-O’Day Act (section 8503 of title 41, United States Code); (B) is planned to be converted to performance by a qualified nonprofit agency for the blind or by a qualified nonprofit agency for other severely handicapped individuals in accordance with that Act; or (C) is planned to be converted to performance by a qualified firm under at least 51 percent ownership by an Indian tribe, as defined in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)), or a Native Hawaiian Organization, as defined in section 8(a)(15) of the Small Business Act (15 U.S.C. 637(a)(15)). (2) This section shall not apply to depot contracts or contracts for depot maintenance as provided in sections 469 and 2474 of title 10, United States Code. (c) The conversion of any activity or function of the Department of Defense under the authority provided by this section shall be credited toward any competitive or outsourcing goal, target, or measurement that may be established by statute, regulation, or policy and is deemed to be awarded under the authority of, and in compliance with, subsection (h) of section 2304 of title 10, United States Code, for the competition or outsourcing of commercial activities.”

ⁱⁱ GAO Decision, Matter of John P. Santry -Designated Employee Agent, B-402827 (Aug. 2, 2010).

ⁱⁱⁱ The genesis and legislative history of the public-private competition moratorium are summarized in a CRS publication dated January 16, 2013, by Valerie Ann Bailey Grasso: Circular A-76 and the Moratorium on DoD Competitions: Background and Issues for Congress. The only issue not adequately addressed in this CRS publication pertinent to DoD relates to the impact of A-76 competitions on “military buy-back” costs documented by GAO (GAO-03-214); A-76 competitions required a military department either to reduce its end strength or reprogram the funds to Operations and Maintenance appropriations in order to complete the competition. Section 325 of the FY 2010 NDAA made congressional findings on the flaws of public-private competitions as devised by OMB Circular A-76 and implemented within DoD.

^{iv} GAO 21-267R, “SERVICE ACQUISITIONS: DoD’s Report to Congress Identifies Steps Taken to Improve Management But Does Not Address Some Key Planning Issues” (Feb. 22, 2021).

^v See Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, P.L. 113-291, pp. 820-1, “Requirement for policies and standard checklist in the procurement of services,” (Dec. 19, 2014). The Army checklist additionally helped identify “inherently governmental functions,” “closely associated with inherently governmental functions,” “critical functions,” authorized and unauthorized “personal services contracts,” limitations on contracting guards and firefighter positions; criteria for in-sourcing work pursuant to section 2463 of title 10, in addition to the public-private competition moratorium. The checklist was recognized by the GAO as contributing to the Army’s more comprehensive and accurate identification of “closely associated with inherently governmental” contracts to be considered for insourcing than every other

Defense Component. See GAO-16-46, DoD Inventory of contracted services: Actions needed to help ensure inventory data are complete and accurate (Nov. 18, 2015).

^{vi} HASC COMMUNICATIONS: 52539: Reform and Rebuild: National Defense Authorization Act for Fiscal Year 2018.

^{vii} Section 815 of the Fiscal Year 2022 National Defense Authorization Act, amending section 2329 of Title 10 (currently codified at section 4506 of title 10), requires senior officials to complete and certify a checklist ensuring that statements of work and task orders submitted to contracting officers comply with longstanding statutes that prevent replacing DoD civilian employees with contractors, subject to annual DoD Inspector General reviews, and require that service contract budgets comply with these requirements. The Joint Explanatory Statement accompanying this provision requires the Secretary of Defense to submit a plan for implementation to Congress not later than June 1, 2022. The plan must address: Responsibilities assigned to the offices of the Under Secretary of Defense (Comptroller), the Under Secretary of Defense (Acquisition and Sustainment), and the Under Secretary of Defense (Personnel and Readiness), as well as the Office of Cost Assessment and Program Evaluation; Identify changes needed to Military Department and Defense Agency programming guidance; Establish milestones to track progress and ensure that projected spending on services contracts is integrated into and clearly identified in the Department of Defense's Future Year Defense Program (FYDP); Issue standard guidelines for the evaluation of service contract requirements based on the May 2018 Handbook of Contract Function Checklists for Services Acquisition, which is modeled on the Department of the Army's Request for Services Contract Approval form. The Committees also required a Government Accountability Office review of the Department's Service Requirements Review Board process established by the Under Secretary of Defense (Acquisition and Sustainment). The FY 2022 NDAA also requires standard guidelines be developed to reflect statutory total force management policies and procedures related to the use of Department of Defense civilian employees to perform new functions and functions that are performed by contractors. The statute requires the services contract budget submitted in February 2023 include FYDP level of detail and be informed by the contractor inventory review required by section 2330a(e) using the standard total force management guidelines. The statute requires acquisition decision authorities to certify for each service contract that: A task order or statement of work being submitted to a contracting officer is in compliance with the standard total force management guidelines; That all appropriate statutory risk mitigations have been made (such as insourcing new work or previously contracted work); That each task order or statement of work does not include requirements formerly performed by Department of Defense civilian employees. The statute requires annual Inspector General reviews to ensure compliance.

^{viii} H. Rep. 117-397, National Defense Authorization Act for Fiscal Year 2023, Report of the Committee on Armed Services, House of Representatives for H.R. 7900 (July 1, 2022). "Total Force Management," pp. 237-239: "The committee observes with concern that the Department has not submitted the plan, including in particular any changes to programming guidance, and the roles and responsibilities of the Under Secretary of Defense Comptroller, Under Secretary of Defense for Acquisition and Sustainment, Under Secretary of Defense for Personnel and Readiness, and Office of Cost Assessment and Program Evaluation, due June 1, 2022, for improving visibility on future services requirements in the future years defense program, as required by section 815 of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117-81). The committee further observes that Department of Defense Instruction (DODI) 1100.22, the Under Secretary of Defense for Personnel and Readiness policy for total force management, has not been updated since December 1, 2017. Over one quarter of the Department's topline and the largest share of total force spending among military, civilian workforce, and contractors goes to service contracts, and yet their requirements still are not fully transparent or validated in the Department's planning, programming, budgeting, and execution system process.

Therefore, the committee directs the Secretary of Defense to brief the House Committee on Armed Services no later than March 1, 2023, on progress made to:

- (1) develop data analytics to specifically identify the quantitative and qualitative relationships of the sizing and composition of the Department of Defense civilian workforce to readiness, lethality, and stress on the force metrics,
- (2) to ensure that planning, programming, and budgeting reviews consider all components of the total force (active and reserve military, civilian workforce and contract support) in a holistic manner to avoid duplication and waste and ensure that risk, cost and mission validation and prioritization considerations consistent with this section and the National Defense Strategy inform the sourcing and prioritization of requirements, and
- (3) update DODI 1100.22 to reflect changes to section 129a and changes referencing total force management in other statutes, including sections 129 and 4506 of title 10, United States Code, to include the standard guidelines for the evaluation of service contract requirements.

The committee further notes that Government Accountability Office is planning to review the relationship between Department of Defense's management of its acquisition of services and the planning, programming, budgeting, and execution process. The committee directs the Comptroller General to provide, no later than March 1, 2023, a briefing on interim observations on the

department's use of Services Requirement Review Boards to review, validate, prioritize, and approve services requirements to inform the budget and acquisition process; and the Department's plans and progress towards ensuring that projected spending on service contracts is clearly identified in the Department's future years defense program. The Comptroller General will assess whether the Service Requirement Review Board's primary orientation on acquisition planning at a transactional level is impeding a more strategic, programmatic challenging of requirements and the inclusion of program data for services contracts in the program and budget data systems maintained by the Office of Cost Assessment and Program Evaluation and the Under Secretary of Defense Comptroller. The Comptroller General will also assess the impact the divestiture of the Enterprise Contractor Manpower Reporting Application on the Office of Cost Assessment and Program Evaluation's data analytics tools for comparing the fully burdened costs of service contracts by function and program to military and civilian workforces as required by DODI 7041.04."

^{ix} See Defense Business Board: "Fully Burdened and Lifecycle Costs of the Workforce," (DBB FY 18-01) at [https://dbb.defense.gov/Portals/35/Documents/Reports/2018/DBB%20FY18-01%20FBLCC%20Study%20Final%20\(Feb%202018\).pdf](https://dbb.defense.gov/Portals/35/Documents/Reports/2018/DBB%20FY18-01%20FBLCC%20Study%20Final%20(Feb%202018).pdf). See also, GAO-21-267R, "SERVICE ACQUISITIONS: DOD's Report to Congress Identifies Steps Taken to Improve Management, But Does Not Address Some Key Planning Issues," (22 Feb. 2021); GAO-16-46, "DOD INVENTORY OF CONTRACTED SERVICES: Actions Needed to Help Insure Inventory Data Are Complete and Accurate (18 Nov. 2015); GAO-16-119, "DOD SERVICE ACQUISITION: Improved Use of Available Data Needed to Better Manage and Forecast Service Contract Requirements (18 Feb. 2016); Section 815 of the Fiscal Year 2022 NDAA (codified at title 10 U.S.C. § 4506); Defense Business Board: "Fully Burdened and Lifecycle Costs of the Workforce," (DBB FY 18-01); "Pentagon buries evidence of \$125 billion in bureaucratic waste," by Craig Whitlock and Bob Woodward (Dec. 5, 2016); "The True Size of Government," Paul Light (Oct. 2017); AFGE Letter to DepSecDef Hicks on PPBE Reforms dated Jan. 21, 2022.

^x OSD, Cost Assessment and Program Evaluation, Comparing the Cost of Civilians and Contractors, January 2017 (responding to language from the 2017 NDAA).

^{xi} These bad business practices resulted in excessive levels of under-execution documented by the Government Accountability Office for the Fiscal Year 2015-2019 timeframe where civilian pay under-execution averaged \$1.8B overall. See also, GAO Report to HASC, HAC-D, SASC and SAC-D Congressional Staff, "Budget Justification Review: Analysis of Department of Defense Fiscal Year 2022 Civilian Personnel Budget Request (Aug. 9, 2021).

^{xii} "Diverting aviation professionals from their primary aviation duties with additional duties adds to an unsustainable workload. Due to personnel cuts, military aviation units have experienced cuts in administrative support over the past two decades, forcing aviators and maintainers to undertake additional administrative duties that interrupt their primary aviation tasks and contributed to fatigue and burnout." National Security Commission on Military Aviation Safety, "224 Lives, \$11.6 Billion, 186 Aircraft" (Dec. 2020). pp. 47-48; Institute for Defense Analysis: "Revisiting the Criteria for Military Essentiality in Total Force Manpower Management," Col Thomas C. Greenwood, USMC (Ret), Allison Abbe, Clark Frye, Anthony L. Johnson, Ani K. Khachatryan; Defense Science Board Task Force on Readiness; No 94-35783, June 15, 1994, Paul G. Kaminski and General Edward C. Meyer (Ret.); (December 2, 2015), <https://www.cbo.gov/publication/51012>; GAO-21-27R, Military Personnel: Perspectives on DOD's and the Military Services' Use of Borrowed Military Personnel (Nov. 18. 2020); see also, section 482 of title 10 requiring Defense Readiness Reporting System include: "Information regarding the extent to which any member of the armed forces is assigned or detailed outside the member's unit or away from training in order to perform any function that had previously been performed by civilian employees of the Federal Government." Note: Conversions of civilian positions to military performance can either be the result of a force structure change or from borrowed military manpower or through use of reservists.

^{xiii} Center for Naval Analysis (CNA) Study sponsored by P&R and published in September 2021 "Identifying Contributions of DoD's Civilian Workforce to Readiness;" CNA Study sponsored by P&R and published July 7, 2021: "Optimizing Total Force Management."

^{xiv} DODI 1100.22, "Policy and Procedures for Determining Workforce Mix," (April 12, 2010, Change 1, December 1, 2017); DODI 7041.04, "Estimating and Comparing the Full Costs of Civilian and Active Duty Military Manpower and Contract Support," (July 3, 2013; with Change 1 effective July 1, 2020); Institute for Defense Analysis: Analysis of Alternative Mixes of Full-Time Support in the Reserve Components (Aug. 2017).

APPENDIX:

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- **Historically twice as much has been spent on services contacts than the civilian workforce for the same number of people.** (See Defense Business Board Slides below).
 - “Predictably, for example, even though Congress directed the Defense Department to cut \$10 billion through administrative efficiencies between 2015 and 2019, the Pentagon failed to substantiate that it had achieved those savings. The reason those efforts rarely succeed is that they merely shift the work being done by civilians to others, such as military personnel or defense contractors.” DepSecDef Hicks, “Getting to Less: The Truth About Defense Spending,” Foreign Affairs (March 2020), p. 56.
 - CONGRESSIONAL ASK: Ensure program and budget reviews challenge, compete, and prioritize contract services requirements instead of the default practice of cutting the DoD civilian workforce. The Budget Control Act exacerbated these bad business practices through the sequestration rules, which were followed by the Section 955 of the FY2013 McCain cuts that were supposed to be applied to both civilian employees and contracts cut but ended up just being applied to civilian employees.

PRESERVING QUALITY HEALTH CARE FOR MILITARY MEMBERS AND THEIR FAMILIES

Issue

The Department is downsizing military medical treatment facilities by shifting beneficiaries to private healthcare (TRICARE) for any functions performed by military structure that does not deploy into combat zones.

Background/Analysis

1. In the 2017 NDAA, Congress directed DoD to reorganize the Defense Health Program and provided authority to convert military medical structures to civilian performance. To that end, Congress repealed requirements that military department surgeon generals certify to Congress about the impact on readiness and quality of care before privatizing any military medical structure. The Trump administration further misused this authority with plans to downsize both military and civilian structures in military medical treatment facilities. For any function that did not involve a military occupational specialty that was deployable into combat zones, the administration planned to shift care into already oversaturated local TRICARE markets. The administration claimed these actions were intended to improve readiness.
2. The effects of these actions have degraded the quality and level of health care provided to military beneficiaries and their families because the local markets, as Congress and the GAO found, lack the capacity to provide necessary care. These local health care network capacity problems were exacerbated further by the COVID-19 pandemic.
3. AFGE lobbied Congress during the course of the FY 2021 and FY 2022 NDAA to consider inclusion of H.R. 2581, “Nurse Staffing Standards for Hospital Patient Safety and Quality Care Act of 2019,” sponsored by Rep. Schakowsky and others, and the corresponding S. 1357 sponsored by Sen. Warren and others. Members of Congress with rural hospitals blocked this effort out of concerns it would force their closure, notwithstanding waiver provisions within these bills. There is currently a growing nationwide nurse and medical worker shortage that will potentially lead to further shortages, reduced access to care, and reduce the quality of care provided to patients.
4. The Biden Administration, the Trump Administration, and Congress have all failed to require the Department to backfill planned realignments of military medical structure with civilian employees, which would be an important way to mitigate the damage from past policies.
5. H.R. 7776, “James M. Inhofe National Defense Authorization Act for Fiscal Year 2023” contains the following provisions relevant to the medical reorganization:

- a) Sec. 706. Independent analysis of quality and patient safety review process under direct care component of TRICARE program.
 - b) Sec. 714. Maintenance of Core Casualty Receiving Facilities to improve medical force readiness.ⁱ This is notable for requiring the Secretary of Defense “to ensure the medical capability and capacity required to diagnose, treat, and rehabilitate large volumes of combat casualties and, as may be directed by the President or the Secretary, provide a medical response to events the President determines or declares as natural disasters, mass casualty events, or other national emergencies.” This further provides that the “[t]he Secretary shall ensure that the military medical treatment facilities selected for designation . . . are geographically located to facilitate the aeromedical evacuation of casualties from theaters of operations.” Finally, this provision requires Military Department Secretaries to assign military personnel to core casualty receiving facilities “at not less than 90 percent of the staffing level required to maintain the operating bed capacity necessary to support operation planning requirements” and further provides that these facilities “may be augmented with civilian employees to fulfill the staffing requirements.”
 - c) Sec. 715. Congressional notification requirement to modify scope of services provided at military medical treatment facilities.
 - d) Sec. 716. Improvements to processes to reduce financial harm caused to civilians for care provided at military medical treatment facilities.
 - e) Sec. 720. Modification of requirement to transfer research and development and public health functions to Defense Health Agency.
 - f) Sec. 731. Briefing and report on reduction or realignment of military medical manning and medical billets.
 - g) Sec. 741. Limitation on reduction of military medical manning end strength: certification requirement and other reforms. Among the certification requirements is a requirements to identify any plans of the Department to backfill military medical personnel positions with civilian personnel; and further requires a “plan to address persistent vacancies for civilian personnel in health or medical related positions, with a risk analysis associated with the hiring, onboarding and retention of such civilian personnel, taking into account provider shortfalls across the United States.” This plan is to include required funding across the fiscal years of the FYDP.ⁱⁱ
 - h) Sec. 746. Reports on composition of medical personnel of each military department and related matters. This annual reporting requirement from the Secretary of Defense is to be coordinated with the Secretaries of the Military Departments for a three year period and include any reduction plans for medical personnel with recommendations "for the number of covered positions for such medical personnel that should be required for purposes of maximizing medical readiness (without regard to current statutory limitations, or potential future statutory limitations, on such number), presented as a total number for each military department and disaggregated by grade."ⁱⁱⁱ
6. Even though the compliance with the public-private competition moratorium in the FY2010 NDAA section 325 and FSGG Appropriation section 742 would preclude the Department from privatizing work performed by federal government employees, the

USD (P&R) stopped issuing annual policy reminders to DoD components about this moratorium after 2018.^{iv} Additionally, statutory and joint conferee language from the FY2022 NDAA Section 815 directing the Comptroller, CAPE, USD (A&S) and USD(P&R) to establish compliance mechanisms and certifications for every services contract that they were not replacing civilian employees and complying with statutory requirements to use civilian employees for new requirements as well based on risk assessments, has not yet been implemented by the Department. The HASC version of the NDAA has directive report language strongly criticizing the Department's lack of action and requests a SecDef briefing with the next budget submission, coupled with several GAO reviews. This report language pertains to all civilian requirements and not just medical services.^v

7. The Department appears to be ignoring not only the public-private competition moratorium but also recent title 10 and Defense Appropriation clarifications that prohibit arbitrary personnel caps on the DoD civilian workforce, and in the case of section 8012 of the Defense Appropriation, stipulate that “[n]one of the funds appropriated by this Act may be used to reduce the civilian workforce programmed full time equivalent levels absent the appropriate analyses of the impact of those reductions on workload, military force structure, lethality, readiness, operational effectiveness, stress on the military force, and fully burdened costs.”
8. Sen. Gillibrand has championed addressing skills gaps in Cyber through a 6 year scholarship program intended to be as generous as the successful ROTC program for military.^{vi} AFGE convinced Sen. Gillibrand to make accessions into the civil service through this program either through the competitive service or excepted service rather than just the Cyber Excepted Service. AFGE did this by showing the caselaw that demonstrated how military in ROTC programs had more due process protections than civil servants separated within their probationary periods.^{vii} In order to compete better with the private sector in fulfilling skills gaps in military medical treatment facilities and the defense health activity, AFGE should advocate with Sen. Gillibrand to champion a similar program for nurses, medical technicians and doctors.

Congressional Action

- Take stronger action to ensure compliance with existing statutory prohibitions against converting DoD civilian jobs to contract by clarifying to the Pentagon that the USD (P&R) needs to issue an updated policy and start complying with the public-private competition moratorium and existing statutory prohibitions against arbitrary personnel caps and reductions that do not consider workload, cost and readiness impacts. The USD (P&R) and Department following their lead, including in the DHA reorganization, seem to be assuming that so long as there are no civilian RIFs, that they can convert the work to contract performance. That is a departure from their prior Departmental guidance since the Obama Administration and flouts the recent HASC “Total Force Management” directive report language.

- Monitor and provide questions for the record to Defense Appropriations and Authorizing hearings generally scheduled early in the year with respect to the various required briefings, reports and implementation plans required by the FY2023 NDAA.
- Revamp the “Nurse Staffing Standards for Hospital Patient Safety and Quality Care Act of 2019,” into something that addresses the objections of rural hospitals and provides better incentives such as scholarship programs for attracting and retaining talent, Consider the Cyber Scholarship program established in as a model for addressing medical skills gaps.

ⁱ (a) In General.--Section 1073d(b) of title 10, United States Code, as amended by section 713, is further amended by adding at the end the following new paragraph:

“(5)(A) The Secretary of Defense shall designate and maintain certain military medical treatment facilities as core casualty receiving facilities, to ensure the medical capability and capacity required to diagnose, treat, and rehabilitate large volumes of combat casualties and, as may be directed by the President or the Secretary, provide a medical response to events the President determines or declares as natural disasters, mass casualty events, or other national emergencies.

“(B) The Secretary shall ensure that the military medical treatment facilities selected for designation pursuant to subparagraph (A) are geographically located to facilitate the aeromedical evacuation of casualties from theaters of operations.

“(C) The Secretary--

“(i) shall ensure that the Secretaries of the military departments assign military personnel to core casualty receiving facilities designated under subparagraph (A) at not less than 90 percent of the staffing level required to maintain the operating bed capacity necessary to support operation planning requirements;

“(ii) may augment the staffing of military personnel at core casualty receiving facilities under subparagraph (A) with civilian employees of the Department of Defense to fulfill the staffing requirement under clause (i); and“(iii) shall ensure that each core casualty receiving facility under subparagraph (A) is staffed with a civilian Chief Financial Officer and a civilian Chief Operating Officer with experience in the management of civilian hospital systems, for the purpose of ensuring continuity in the management of the facility.

“(D) In this paragraph:

“(i) The term ‘core casualty receiving facility’ means a Role 4 medical treatment facility that serves as a medical hub for the receipt and treatment of casualties, including civilian casualties, that may result from combat or from an event the President determines or declares as a natural disaster, mass casualty event, or other national emergency.”(ii) The term ‘Role 4 medical treatment facility’ means a medical treatment facility that provides the full range of preventative, curative, acute, convalescent, restorative, and rehabilitative care.”

(b) Timeline for Establishment.--

(1) Designation.--Not later than October 1, 2024, the Secretary of Defense shall designate four military medical treatment facilities as core casualty receiving facilities under section 1073d(b)(5) of title 10, United States Code (as added by subsection (a)).

(2) Operational.--Not later than October 1, 2025, the Secretary shall ensure that each such designated military medical treatment facility is fully staffed and operational as a core casualty receiving facility, in accordance with the requirements of such section 1073d(b)(5).

ⁱⁱ SEC. 741. LIMITATION ON REDUCTION OF MILITARY MEDICAL MANNING END STRENGTH: CERTIFICATION REQUIREMENT AND OTHER REFORMS.

(a) Limitation.--

(1) In general.--Except as provided in paragraph (2), and in addition to the limitation under section 719 of the National Defense Authorization Act for Fiscal Year 2020 (Public Law 116-92; 133 Stat. 1454), as most recently amended by section 731 of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117-81; 135 Stat. 1795), during the five-year period beginning on the date of the enactment of this Act, neither the Secretary of Defense nor a Secretary concerned may reduce military medical end strength authorizations, and following such period, neither may reduce such authorizations unless the Secretary of Defense issues a waiver pursuant to paragraph (6).

(2) Exception.--The limitation under paragraph (1) shall not apply with respect to the following:

(A) Administrative billets of a military department that have remained unfilled since at least October 1, 2018.

(B) Billets identified as non-clinical in the budget of the President for fiscal year 2020 submitted to Congress pursuant to section 1105(a) of title 31, United States Code, except that the number of such billets may not exceed 1,700.

(C) Medical headquarters billets of the military departments not assigned to, or providing direct support to, operational commands.

(3) Report on composition of military medical workforce requirements.--The Secretary of Defense, in coordination with the

Secretaries of the military departments, shall conduct an assessment of current military medical manning requirements (taking into consideration factors including future operational planning, training, and beneficiary healthcare) and submit to the Committees on Armed Services of the House of Representatives and the Senate a report containing the findings of such assessment. Such assessment shall be informed by the following:

(A) The National Defense Strategy submitted under section 113(g) of title 10, United States Code.

(B) The National Military Strategy prepared under section 153(b) of such title.

(C) The campaign plans of the combatant commands.

(D) Theater strategies.

(E) The joint medical estimate under section 732 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Public Law 115-232; 132 Stat. 1817).

(F) The plan of the Department of Defense on integrated medical operations, as updated pursuant to paragraph (1) of section 724(a) of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117-81; 135 Stat. 1793; 10 U.S.C. 1096 note).

(G) The plan of the Department of Defense on global patient movement, as updated pursuant to paragraph (2) of such section. 724(a).

(H) The biosurveillance program of the Department of Defense established pursuant to Department of Defense Directive 6420.02 (relating to biosurveillance).

(I) Requirements for graduate medical education.

(J) The report of the COVID-19 Military Health System Review Panel under section 731 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Public Law 116-283; 134 Stat. 3698).

(K) The report of the Inspector General of the Department of Defense titled "Evaluation of Department of Defense Military Medical Treatment Facility Challenges During the Coronavirus Disease-2019 (COVID-19) Pandemic in Fiscal Year 2021 (DODIG-2022-081)" and published on April 5, 2022.

(L) Reports of the Comptroller General of the United States relating to military health system reforms undertaken on or after January, 1, 2017, including any such reports relating to military medical manning and force composition mix.

(M) Such other reports as may be determined appropriate by the Secretary of Defense.

(4) Certification.--The Secretary of Defense shall submit to the Committees on Armed Services of the House of Representatives and the Senate a certification containing the following:

(A) A certification of the completion of a comprehensive review of military medical manning, including with respect to the medical corps (or other health- or medical-related component of a military department), designator, profession, occupation, and rating of medical personnel.

(B) A justification for any proposed increase, realignment, reduction, or other change to the specialty or occupational composition of military medical end strength authorizations, which may include compliance with a requirement or recommendation set forth in a strategy, plan, or other matter specified in paragraph (3).

(C) A certification that, in the case that any change to such specialty or occupational composition is required, a vacancy resulting from such change may not be filled with a position other than a health- or medical-related position until such time as there are no military medical billets remaining to fill the vacancy.

(D) A risk analysis associated with the potential realignment or reduction of any military medical end strength authorizations.

(E) An identification of any plans of the Department to backfill military medical personnel positions with civilian personnel.

(F) A plan to address persistent vacancies for civilian personnel in health- or medical-related positions, and a risk analysis associated with the hiring, onboarding, and retention of such civilian personnel, taking into account provider shortfalls across the United States.

(G) A comprehensive plan to mitigate any risk identified pursuant to subparagraph (D) or (F), including with respect to funding necessary for such mitigation across fiscal years.

(5) Process required.--The Secretaries of the military departments, in coordination with the Secretary of Defense and the Chairman of the Joint Chiefs of Staff, shall develop and submit to the Committees on Armed Services of the House of Representatives and the Senate a process for the authorization of proposed modifications to the composition of the medical manning force mix across the military departments while maintaining compliance with the limitation under paragraph (1). Such process shall--

(A) take into consideration the funding required for any such proposed modification; and

(B) include distinct processes for proposed increases and proposed decreases, respectively, to the medical manning force mix of each military department.

(6) Waiver.--

(A) In general.--Following the conclusion of the five-year period specified in paragraph (1), the Secretary of Defense may waive the prohibition under such subsection if--

(i) the report requirement under paragraph (3), the certification requirement under paragraph (4), and the process requirement under paragraph (5) have been completed;

(ii) the Secretary determines that the waiver is necessary and in the interests of the national security of the United States; and

(iii) the waiver is issued in writing.

(B) Notification to congress.--Not later than five days after issuing a waiver under subparagraph (A), the Secretary of Defense shall submit to the Committees on Armed Services of the House of Representatives and the Senate a notification of the waiver (including the text of the waiver and a justification for the waiver) and provide to such committees a briefing on the components of the waiver. (b) Temporary Suspension of Implementation of Plan for Restructure or Realignment of Military Medical Treatment Facilities.--The Secretary of Defense may not implement the plan under section 703(d)(1) of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; 130 Stat. 2199) until the later of the following:

(1) The date that is one year after the date of the enactment of this Act.

(2) The date on which the Secretary of Defense completes the following:

(A) A risk analysis for each military medical treatment facility to be realigned, restructured, or otherwise affected under the implementation plan under such section 703(d)(1), including an assessment of the capacity of the TRICARE network of providers in the area of such military medical treatment facility to provide care to the TRICARE Prime beneficiaries that would otherwise be assigned to such military medical treatment facility.

(B) An identification of the process by which the Assessment conducted under subsection (a)(3) and the certification required under subsection (a)(4) shall be linked to any restructuring or realignment of military medical treatment facilities.

(c) Briefings; Final Report.--

(1) Initial briefing.--Not later than April 1, 2023, the Secretary of Defense shall provide to the Committees on Armed Services of the House of Representatives and the Senate a briefing on--

(A) the method by which the Secretary plans to meet the report requirement under subsection (a)(3), the certification requirement under subsection (a)(4), and the process requirement under subsection (a)(5); and

(B) the matters specified in subparagraphs (A) and (B) of subsection (b)(2).

(2) Briefing on progress.--Not later than two years after the date of the enactment of this Act, the Secretary of Defense shall provide to the Committees on Armed Services of the House of Representatives and the Senate a briefing on the progress made towards completion of the requirements specified in paragraph (1)(A).

(3) Final briefing.--Not later than three years after the date of the enactment of this Act, the Secretary of Defense shall provide to the Committees on Armed Services of the House of Representatives and the Senate a final briefing on the completion of such requirements.

(4) Final report.--Not later than three years after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committees on Armed Services of the House of Representatives and the Senate a final report on the completion of such requirements. Such final report shall be in addition to the report, certification, and process submitted under paragraphs (3), (4), and (5) of subsection (a), respectively.

(d) Definitions.--In this section:

(1) The term "medical personnel" has the meaning given such term in section 115a(e) of title 10, United States Code.

(2) The term "Secretary concerned" has the meaning given that term in section 101(a) of such title.

(3) The term "theater strategy" means an overarching construct outlining the vision of a combatant commander for the integration and synchronization of military activities and operations with other national power instruments to achieve the strategic objectives of the United States.

iii SEC. 746. REPORTS ON COMPOSITION OF MEDICAL PERSONNEL OF EACH MILITARY DEPARTMENT AND RELATED MATTERS.

(a) Reports.--Not later than 180 days after the date of the enactment of this Act, and annually thereafter for three years, the Secretary of Defense, in coordination with the Secretaries of the military departments, shall submit to the Committees on Armed Services of the House of Representatives and the Senate a report on the composition of the medical personnel of each military department and related matters.

(b) Elements.--Each report under subsection (a) shall include the following:

(1) With respect to each military department, the following:

(A) An identification of the number of medical personnel of the military department who are officers in a grade above O-

(B) An identification of the number of such medical personnel who are officers in a grade below O-7.

(C) A description of any plans of the Secretary to--

(i) reduce the total number of such medical personnel; or

(ii) eliminate any covered position for such medical personnel.

(D) A recommendation by the Secretary for the number of covered positions for such medical personnel that should be required for purposes of maximizing medical readiness (without regard to current statutory limitations, or potential future statutory limitations, on such number), presented as a total number for each military department and disaggregated by grade.

(2) An assessment of the grade for the position of the Medical Officer of the Marine Corps, including--

(A) a comparison of the effects of filling such position with an officer in the grade of O-6 versus an officer in the grade of O-7;

(B) an assessment of potential issues associated with the elimination of such position; and

(C) a description of any potential effects of such elimination with respect to medical readiness.

(3) An assessment of all covered positions for medical personnel of the military departments, including the following:

(A) The total number of authorizations for such covered positions, disaggregated by--

(i) whether the authorization is for a position in a reserve component; and

(ii) whether the position so authorized is filled or vacant.

-
- (B) A description of any medical- or health-related specialty requirements for such covered positions.
 - (C) For each such covered position, an identification of the title and geographic location of, and a summary of the responsibility description for, the position.
 - (D) For each such covered position, an identification of the span of control of the position, including with respect to the highest grade at which each such position has been filled.
 - (E) An identification of any downgrading, upgrading, or other changes to such covered positions occurring during the 10-year period preceding the date of the report, and an assessment of whether any such changes have resulted in the transfer of responsibilities previously assigned to such a covered position to--
 - (i) a position in the Senior Executive Service or another executive personnel position; or
 - (ii) a position other than a covered position.
 - (F) A description of any officers in a grade above O-6 assigned to the Defense Health Agency, the Office of the Assistant Secretary of Defense for Health Affairs, the Joint Staff, or any other position within the military health system.
 - (G) A description of the process by which the positions specified in subparagraph (F) are validated against military requirements or similar billet justification processes.
 - (H) A side-by-side comparison demonstrating, across the military departments, the span of control and the responsibilities of covered positions for medical personnel of each military department.
- (c) Disaggregation of Certain Data.--The data specified in subparagraphs (A) and (B) of subsection (b)(1) shall be presented as a total number and disaggregated by each medical component of the respective military department.
- (d) Definitions.--In this section:
- (1) The term "covered position" means a position for an officer in a grade above O-6.
 - (2) The term "officer" has the meanings given that term in section 101(b) of title 10, United States Code.
 - (3) The term "medical component" means--
 - (A) in the case of the Army, the Medical Corps, Dental Corps, Nurse Corps, Medical Service Corps, Veterinary Corps, and Army Medical Specialist Corps;
 - (B) in the case of the Air Force, members designated as medical officers, dental officers, Air Force nurses, medical service officers, and biomedical science officers; and
 - (C) in the case of the Navy, the Medical Corps, Dental Corps, Nurse Corps, and Medical Service Corps.
 - (4) The term "medical personnel" has the meaning given such term in section 115a(e) of title 10, United States Code.
 - (5) The term "military department" has the meaning given that term in section 101(a) of such title.

^{iv} See Office of Assistant Secretary of Defense for Manpower and Reserve Affairs, Office of the Under Secretary of Defense (Personnel and Readiness), Memorandum distributed to all Defense Components, subject: update on OMB Circular A-76 Public-Private Competition Prohibition -FY2018, dated May 11, 2018: "These provisions [Section 325 of the 2010 NDAA and Section 742 from FSGG Approp] prohibit the conversion of any work currently performed (or designated for performance by civilian personnel to contract performance and apply to functions and work assigned to civilian personnel, regardless of whether a position or billet is established for that work, or whether that position or billet is encumbered. This includes workload and positions/billets that are impacted as a result of ongoing agency reform initiatives and/or position vacancies and workload impacted by hiring constraints or funding shortfalls."

^v H. Rep. 117-397, National Defense Authorization Act for Fiscal Year 2023, Report of the Committee on Armed Services, House of Representatives for H.R. 7900 (July 1, 2022), "Total Force Management," pp/237-239: "The committee observes with concern that the Department has not submitted the plan, including in particular any changes to programming guidance, the roles and responsibilities of the Under Secretary of Defense Comptroller, Under Secretary of Defense for Acquisition and Sustainment, Under Secretary of Defense for Personnel and Readiness, and Office of Cost Assessment and Program Evaluation, due June 1, 2022, for improving visibility on future services requirements in the future years defense program, as required by section 815 of the NDAA for FY2022. The committee further observes that the Department of Defense Instruction [DODI 1100.22], the Under Secretary of Defense policy for total force management, has not been updated since December 1, 2017."

^{vi} SEC. 1535. DEPARTMENT OF DEFENSE CYBER AND DIGITAL SERVICE ACADEMY.

- (a) Establishment.--
 - (1) In general.--The Secretary of Defense, in consultation with the Secretary of Homeland Security and the Director of the Office of Personnel and Management, shall establish a program to provide financial support for pursuit of programs of education at institutions of high education in covered disciplines.
 - (2) Covered disciplines.--For purposes of the Program, a covered discipline is a discipline that the Secretary of Defense determines is critically needed and is cyber- or digital technology-related, including the following:
 - (A) Computer-related arts and sciences.
 - (B) Cyber-related engineering.
 - (C) Cyber-related law and policy.
 - (D) Applied analytics related sciences, data management, and digital engineering, including artificial intelligence and machine learning.
 - (E) Such other disciplines relating to cyber, cybersecurity, digital technology, or supporting functions as the Secretary of Defense considers appropriate.

(3) Designation.--The program established under paragraph (1) shall be known as the ``Department of Defense Cyber and Digital Service Academy" (in this section referred to as the ``Program").

(b) Program Description and Components.--The Program shall--

(1) provide scholarships through institutions of higher education to students who are enrolled in programs of education at such institutions leading to degrees or specialized program certifications in covered disciplines; and

(2) prioritize the placement of scholarship recipients fulfilling the post-award employment obligation under this section.

(c) Scholarship Amounts.--

(1) Amount of assistance.--(A) Each scholarship under the Program shall be in such amount as the Secretary determines necessary--

(i) to pay all educational expenses incurred by that person, including tuition, fees, cost of books, and laboratory expenses, for the pursuit of the program of education for which the assistance is provided under the Program; and

(ii) to provide a stipend for room and board.

(B) The Secretary shall ensure that expenses paid are limited to those educational expenses normally incurred by students at the institution of higher education involved.

(2) Support for internship activities.--The financial assistance for a person under this section may also be provided to support internship activities of the person in the Department of Defense and combat support agencies in periods between the academic years leading to the degree or specialized program certification for which assistance is provided the person under the Program.

(3) Period of support.--Each scholarship under the Program shall be for not more than 5 years.

(4) Additional stipend.--Students demonstrating financial need, as determined by the Secretary, may be provided with an additional stipend under the Program.

(d) Post-award Employment Obligations.--Each scholarship recipient, as a condition of receiving a scholarship under the Program, shall enter into an agreement under which the recipient agrees to work for a period equal to the length of the scholarship, following receipt of the student's degree or specialized program certification, in the cyber- and digital technology related missions of the Department, in accordance with the terms and conditions specified by the Secretary in regulations the Secretary shall promulgate to carry out this subsection.

(e) Hiring Authority.--In carrying out this section, specifically with respect to enforcing the obligations and conditions of employment under subsection (d), the Secretary may use any authority otherwise available to the Secretary for the recruitment, employment, and retention of civilian personnel within the Department, including authority under section 1599f of title 10, United States Code.

^{vii} See links below to the due process afforded in Army Reserve Officer separations, a title 10 statute on officer separations, a Supreme Court case and Circuit Court case illustrating the levels of due process before separating officers; compared to a recent MSPB decision involving the two year probationary period for a nurse civil servant in DoD where the MSPB lays out why it lacks jurisdiction to consider the nurse's appeal of their separation during the two year probationary period. Indeed, it can be argued that commissioned officers are afforded a greater degree of due process and appeal rights than a title 5 civil servant separated during their probationary period.

[05/18/22 10:00AM](#)

Committee Reports: [H. Rept. 117-347](#)

Committee Prints: [H.Prt. 117-70](#)

Latest Action: 12/23/2022 Became [Public Law No: 117-263](#). ([All Actions](#))

Roll Call Votes: There have been [6 roll call votes](#)

Tracker: Tip This bill has the status Became Law
Here are the steps for Status of Legislation:

https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN18027_AR135-175_FINAL.pdf

<https://uscode.house.gov/view.xhtml?path=/prelim@title10/subtitleA/part2/chapter60&edition=prelim>

[10 USC Ch. 60: SEPARATION OF REGULAR OFFICERS FOR SUBSTANDARD PERFORMANCE OF DUTY OR FOR CERTAIN OTHER REASONS - uscode.house.gov](#)

Editorial Notes Amendments. 1998— Pub. L. 105–261, div. A, title V, §503(c)(2), Oct. 17, 1998, 112 Stat. 2004, struck out item 1183 "Boards of review" and substituted "inquiry" for "review" in item

1184. 1984— Pub. L. 98–525, title V, §524(b)(2), Oct. 19, 1984, 98 Stat. 2524, substituted
"Authority to establish procedures to consider the separation of officers for substandard ...
[uscode.house.gov](https://www.uscode.house.gov)

<https://www.justice.gov/sites/default/files/osg/briefs/1998/01/01/98-0347.mer.aa.pdf>

https://cafc.uscourts.gov/opinions-orders/20-1856.OPINION.1-20-2022_1895442.pdf

United States Court of Appeals for the Federal Circuit

6 . NICELY. v. US. subject matter jurisdiction and (2) agreed with the BCNR that retired military officers qualify as
“civilians” within the meaning of 10 U.S.C. §1552(a)(1) and therefore are
cafc.uscourts.gov

[https://www.mspb.gov/decisions/precedential/BRYANT TAHUANA SF 315H 17 0558 I 1 OPINION AND ORDER 1910
305.pdf](https://www.mspb.gov/decisions/precedential/BRYANT_TAHUANA_SF_315H_17_0558_I_1_OPINION_AND_ORDER_1910305.pdf)

Tahuana Bryant, Appellant, v. Department of the Army, Agency. - United States Merit Systems Protection Board
UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD 2022 MSPB 1 Docket No. SF-315H-
17-0558-I-1 Tahuana Bryant, Appellant, v. Department of the Army,
www.mspb.gov

EXPANSION OF “COMMERCIAL ITEM” DEFINITIONS HAVE WEAKENED ORGANIC INDUSTRIAL BASE SUPPORT, AND GOVERNMENT COMMAND AND CONTROL OF WEAPON SYSTEMS

Issue

In the FY 2018 and 2019 NDAs, the definitions of “commercial items” were expanded very broadly in ways that could easily mischaracterize many weapon systems and components as commercial and thereby inappropriately shift the sustainment workload from the organic industrial base to the private sector. Military leaders could lose command and control, and depots could lose the ability to perform maintenance efficiently and effectively on new weapon systems. Government access to technical data rights and cost or pricing data could be diminished and the ability of the government to insource contract logistics support could also be affected.

Background/Analysis

The following definitional changes are of concern:

1. Changing the standard for designating the level of modifications to an item that would be required to deem an item as military unique. Many weapons and components that are only suited for military purposes could be modified to no longer be compatible with their civilian origins and yet would no longer be considered military unique.
2. Changing the standard from multiple state “and” local governments to multiple state “or” local governments “or” foreign governments. This greatly expands the list of military unique items that could be considered commercial even though they have never been sold in the commercial marketplace.
3. A single determination made by any contracting officer anywhere in the world designating an item as commercial stands as the final determination for that item for all purposes throughout the lifetime of that item for all acquisition actions unless the Secretary of Defense determines otherwise in writing.
4. A joint hearing between the House Armed Services Committee (HASC) Readiness and Tactical Land and Air Forces Subcommittees on Nov. 11, 2019, focused on sustainment problems with the F-35 fighter jet, which is DoD’s costliest weapons system with acquisition costs expected to exceed \$406 billion and sustainment costs estimated at more than \$1 trillion over its 60-year life cycle. According to an April 2019 GAO-19-321 audit, “F-35 Aircraft Sustainment: DoD Needs to Address Substantial Supply Chain Challenges,” the F-35 aircraft performance is “falling short of warfighter requirements - that is, aircraft cannot perform as many missions or fly as often as required ... due largely to F-35 spare parts shortages and difficulty in managing and moving parts around the world.” For example, F-35 aircraft were unable to fly nearly 30% of the May- November 2018 time period due to spare parts shortages and a repair backlog of about 4,300 F- 35 parts. Certain sets of F-35 parts are acquired years ahead of time to support aircraft on deployments, but the parts do not fully match the military services’ needs because the F-

35 aircraft have been modified over time. For example, 44% of purchased parts were incompatible with aircraft the Marine Corps took on a recent deployment. The GAO, the DOD IG and some in Congress during this hearing acknowledged that these problems are rooted in the government's lack of access to intellectual property.

5. However, these same members of Congress do not seem to recognize that the goal post has been moved even further with additional impediments to the government obtaining access to intellectual property in response to the Section 809 and Section 813 panels' recommendations that were recently enacted by Congress. For instance, a change made in Section 865 of the FY 2019 NDAA is currently being implemented in departmental rulemaking to remove an exception for major weapon systems to the presumption, for purposes of validating restrictions on technical data, that commercial items were developed exclusively at private expense. Currently, the general presumption of private expense at DFARS 227.7103-13(c (2)(i) is subject to an exception in subparagraph (c) (2)(ii) for certain major weapon systems and certain subsystems and components. The rulemaking deleted the exception, making the presumption apply to all so-called "commercial items" (in reality faux commercial items). Under the rulemaking, "Contracting officers shall presume that a commercial item was developed exclusively at private expense whether or not a contractor or subcontractor submits a justification in response to a challenge notice." See 84 FR 48513 (Sept. 13, 2019).
6. The industry members of the Section 813 Panel, who comprise a majority, are recommending that Congress rewrite federal acquisition law to allow for greater negotiation between government and industry on intellectual property developed with **governmental funding**. According to the minority members of that panel (from the government) this will "further remove any risk from the contractor and to transfer that risk to the government" by allowing "a contractor, through negotiation, to transfer all R&D risk to the government, accept billions of dollars in government funding, and retain all intellectual property rights without providing any intellectual property rights to the government."
7. The GAO itself, depending on who is leading the audit and when they did the audit, have sometimes supported industry's position on intellectual property (IP) and sometimes supported the notion that the government needs greater access to IP. See, e.g., GAO-06-839, *Weapon Acquisition: DoD Should Strengthen Policies for Assessing Technical Data Needs to Support Weapon Systems* (July 2006); versus GAO-17-664, *Military Acquisitions: DoD? Is Taking Steps to Address Challenges Faced by Certain Companies* (July 2017).
8. Some of the members of Congress who expressed great concern with these issues during the November 2019 hearing seem to have backed away in response to industry assurances that they are negotiating in good faith with the government to give the government access to all technical data "consistent with contractual arrangements," which were established when the government decided to shift all sustainment responsibility to the contractor in a performance-based logistics contract.

9. Section 807 of the Fiscal Year 2022 National Defense Authorization Act requires an “Assessment of Impediments and Incentives to Improving the Acquisition of Commercial Products and Commercial Services” by the Under Secretary of Defense (Acquisition and Sustainment) and the Chairman of the Joint Requirements Oversight Council (JROC), with a briefing to Armed Services Committees within 120 days of enactment covering the following topics: “Relevant policies, regulations and oversight processes with respect to the issue of preferences for commercial products and commercial services; Relevant acquisition workforce training and education; Role of requirements in the adaptive acquisition framework as described in DODI 5000.2; Role of competitive procedures and source selection procedures; Role of planning, programming, and budgeting structures and processes, including appropriations categories; Systemic biases in favor of custom solutions; Allocation of technical data rights; Strategies to control modernization and sustainment costs; Risks to contracting officers and other members of acquisition workforce of acquiring commercial products and services, and incentives and disincentives for taking such risks; Potential reforms that do not impose additional burdensome and time-consuming constraints on the acquisition process.”
10. Title 10, Section 2464 of the *U.S. Code* (U.S.C.) states that “it is essential for the national defense that the Department of Defense maintain a core logistics capability that is Government-owned and Government- operated,” specifying further that this “shall include those capabilities that are necessary to maintain and repair” weapon systems and other military equipment. These capabilities reside in GOGO arsenals, depots, production plants, shipyards, readiness centers, and logistics complexes operated by each of the military departments.
11. Title 10 U.S.C. §2466 prohibits DOD from spending more than 50% of its annual depot-level maintenance funds on contracting with nonfederal entities in a given fiscal year (sometimes referred to as the *50-50 rule*).
12. Title 10 U.S.C. §2476 establishes capital investment and congressional reporting requirements for the 21 covered depots. Each MILDEP must annually invest at least eight percent of the total value of its depot workload (averaged over the previous three years) into the capital budgets of its depots. Of this annual investment, 25% must be used for facilities sustainment, restoration, and modernization (FSRM). In addition, DOD must annually submit a report to the congressional defense committees detailing the MILDEPs’ depot investments, including benchmarks, funded workloads, and any impediments.ⁱ
13. H.R. 7776, “the James M. Inhofe National Defense Act for Fiscal Year 2023 contained the following provisions relevant to the organic industrial base:
 - a) Sec. 371. Budgeting for depot and ammunition production facility maintenance and repair: annual report.ⁱⁱ
 - b) Sec. 372. Extension of authorization of depot working capital funds for unspecified minor military construction.ⁱⁱⁱ

- c) Sec. 373. Five-year plans for improvements to depot and ammunition production facility infrastructure.^{iv}
- d) Sec. 374. Modification to minimum capital investment for certain depots.^v
- e) Sec. 375. Continuation of requirement for biennial report on core depot-level maintenance and repair.^{vi}
- f) Sec. 376. Continuation of requirement for annual report on funds expended for performance of depot-level maintenance and repair workloads^{vii}
- g) Sec. 377. Clarification of calculation for certain workload carryover of Department of the Army.^{viii}
- h) Sec. 803. Data requirements for commercial products for major weapon systems.^{ix}
- i) Sec. 806. Life cycle management and product support.^x This requires the Department of Defense to make technical data requirements decisions and core logistics and total force management risk assessments to inform strategic workforce planning on the number of military, civilian employees, and contractors needed to operate and sustain major weapon systems early in the acquisition life cycle.
- j) Below map from Congressional Research Service Dec. 30, 2022. Update on depots from depicts organic industrial base facilities:



Congressional Action

- Our members should in particular work through their uniformed leadership through the JROC to ensure the issues of cybersecurity risks, access to technical data rights, interoperability concerns and Doctrine, Organization, Training, Materiel, Leadership and Education, Personnel and Facilities (DOTMLEPF) issues are properly considered; as well as work through the DUSD(A&S) community which should be particularly concerned about the effects of the preference for commercial products and services has on escalating sustainment costs.
- Ask for additional GAO, DoD IG and FFRDC studies of the impact of recent acquisition reforms on sustainment and readiness costs, focusing on access to IP

and “right to repair” issues in depot and operational environments for the military departments.

- Scale back the commercial items application in the case of foreign military sales.
- Repeal section 865 of the FY2019 NDAA that changes the presumptions for weapon systems against governmental access to IP.
- Monitor HAC-D and SAC-D, DoD Comptroller and MilDep calculation of depot carryover and follow up as needed to ensure adequate funding of depot carryover.
- Monitor and follow up with any compliance concerns with respect to depot core logistics requirements in section 2464 and 2466 of title 10, asking for GAO review.

ⁱ In a 2022 report, GAO assessed the condition of most depot facilities and equipment as “fair-to-poor;” in response, some in DOD and Congress have raised concerns that the resourcing of maintenance depots is insufficient. These concerns informed Section 374 of the FY2023 National Defense Authorization Act (NDAA), which modified MILDEPs’ investment obligations by increasing the minimum investment requirement from 6% of the average annual depot workload to 8% of this total, with the further requirement that 25% of this investment be used for FSRM.

ⁱⁱ SEC. 371. BUDGETING FOR DEPOT AND AMMUNITION PRODUCTION FACILITY MAINTENANCE AND REPAIR: ANNUAL REPORT. Chapter 9 of title 10, United States Code, is amended by adding at the end the following new section (and conforming the table of sections at the beginning of such chapter accordingly):

“Sec. 239d. Budgeting for depot and ammunition production facility maintenance and repair: annual report”

(a) Annual Report. --The Secretary of Defense, in coordination with the Secretaries of the military departments, shall include with the defense budget materials for each fiscal year a report regarding the maintenance and repair of covered facilities.

(b) Elements. --Each report required under subsection (a) shall include, at a minimum, the following (disaggregated by military department):

“ (1) With respect to each of the three fiscal years preceding the fiscal year covered by the defense budget materials with which the report is included, revenue data for that fiscal year for the maintenance, repair, and overhaul workload funded at all the depots of the military department.

“ (2) With respect to the fiscal year covered by the defense budget materials with which the report is included and each of the two fiscal years prior, an identification of the following:

“ (A) The amount of appropriations budgeted for that fiscal year for depots, further disaggregated by the type of appropriation.

“ (B) The amount budgeted for that fiscal year for working-capital fund investments by the Secretary of the military department for the capital budgets of the covered depots of the military department, shown in total and further disaggregated by whether the investment relates to the efficiency of depot facilities, work environment, equipment, equipment (non-capital investment program), or processes.

“ (C) The total amount required to be invested by the Secretary of the military department for that fiscal year for the capital budgets of covered depots pursuant to section 2476(a) of this title.

“ (D) A comparison of the budgeted amount identified under subparagraph (B) with the total required amount identified under subparagraph (C).

“ (E) For each covered depot of the military department, of the total required amount identified under subparagraph (C), the percentage of such amount allocated, or projected to be allocated, to the covered depot for that fiscal year.

“ (3) For each covered facility of the military department, the following:

“ (A) Information on the average facility condition, average critical facility condition, restoration and maintenance project backlog, and average equipment age, including a description of any changes in such metrics from previous years.

“ (B) Information on the status of the implementation at the covered facility of the plans and strategies of the Department of Defense relating to covered facility improvement, including, as applicable, the implementation of the strategy required under section 359 of the National Defense Authorization Act for Fiscal Year 2020 (Public Law 116-92; 133 Stat. 1323; 10 U.S.C. 2460 note).

“(c) Definitions. --In this section:

- “(1) The term ‘ammunition production facility’ means an ammunition organic industrial base production facility.
- “(2) The terms ‘budget’ and ‘defense budget materials’ have the meaning given those terms in section 234 of this title.
- “(3) The term ‘covered depot’ has the meaning given that term in section 2476 of this title.
- “(4) The term ‘covered facility’ means a covered depot or an ammunition production facility.”.

iii SEC. 372. EXTENSION OF AUTHORIZATION OF DEPOT WORKING CAPITAL FUNDS FOR UNSPECIFIED MINOR MILITARY CONSTRUCTION. Section 2208(u)(4) of title 10, United States Code, is amended by striking “2023” and inserting “2025”.

iv SEC. 373. FIVE-YEAR PLANS FOR IMPROVEMENTS TO DEPOT AND AMMUNITION PRODUCTION FACILITY INFRASTRUCTURE. Chapter 146 of title 10, United States Code, is amended by inserting after section 2742 the following new section (and conforming the table of sections at the beginning of such chapter accordingly): “Sec. 2473. Annual five-year plans on improvement of depot infrastructure

“(a) Submission. --As part of the annual budget submission of the President under section 1105(a) of title 31, each Secretary of a military department shall submit to the congressional defense committees a plan describing the objectives of that Secretary to improve depot infrastructure during the five fiscal years following the fiscal year for which such budget is submitted.

“(b) Elements. --Each plan submitted by a Secretary of a military department under subsection (a) shall include the following:

“(1) With respect to the five-year period covered by the plan, an identification of the major lines of effort, milestones, and specific goals of the Secretary over such period relating to the improvement of depot infrastructure and a description of how such goals support the goals outlined in section 359(b)(1)(B) of the National Defense Authorization Act for Fiscal Year 2020 (Public Law 116-92; 133 Stat. 1324; 10 U.S.C. 2476 note).

“(2) The estimated costs of necessary depot infrastructure improvements and a description of how such costs would be addressed by the Department of Defense budget request submitted during the same year as the plan and the applicable future-years defense program.

“(3) Information regarding the plan of the Secretary to initiate such environmental and engineering studies as may be necessary to carry out planned depot infrastructure improvements.

“(4) Detailed information regarding how depot infrastructure improvement projects will be paced and sequenced to ensure continuous operations.

“(c) Incorporation of Results-oriented Management Practices. --Each plan under subsection (a) shall incorporate the leading results-oriented management practices identified in the report of the Comptroller General of the United States titled ‘Actions Needed to Improve Poor Conditions of Facilities and Equipment that Affect Maintenance Timeliness and Efficiency’ (GAO-19-242), or any successor report, including--

- “(1) analytically based goals.
- “(2) results-oriented metrics.
- “(3) the identification of required resources, risks, and stakeholders; and
- “(4) regular reporting on progress to decision makers.”.

v SEC. 374. MODIFICATION TO MINIMUM CAPITAL INVESTMENT FOR CERTAIN DEPOTS.

(a) Modification. --Section 2476 of title 10, United States Code, is amended--

(1) in subsection (a)--

(A) by striking “Each fiscal year” and inserting “(1) Each fiscal year”.

(B) by striking “six” and inserting “eight”; and

(C) by inserting after paragraph (1), as designated by subparagraph (A), the following new paragraph:

“(2) Of the amount required to be invested in the capital budgets of the covered depots of a military department under paragraph (1) for each fiscal year--

“(A) 75 percent shall be used for the modernization or improvement of the efficiency of depot facilities, equipment, work environment, or processes in direct support of depot operations and

“(B) 25 percent shall be used for the sustainment, restoration, and modernization (as such terms are defined in the Department of Defense Financial Management Regulation 7000.14-R, or successor regulation) of existing facilities or infrastructure.”.

(2) in subsection (b), by striking “, but does not include funds spent for sustainment of existing facilities, infrastructure, or equipment”.

(3) by redesignating subsections (c) through (e) as subsections

(d) through (f).

(4) by inserting after subsection (b) the following new subsection:

“(c) Compliance With Certain Requirements Relating to Personnel and Total Force Management. --In identifying amounts to invest pursuant to the requirement under subsection (a)(1), the Secretary of a military department shall comply with all applicable requirements of sections 129 and 129a of this title.”; and (5) in subsection (e)(2), as redesignated by paragraph (3), by adding at the end the following new subparagraph:

“(F) A table enumerating, for the period covered by the report, the amounts invested to meet the requirement under subsection (a)(1), disaggregated by funding source and whether the amount is allocated pursuant to subparagraph (A) or subparagraph (B) of subsection (a)(2).” (b) Technical and Conforming Amendments. -- (1) In general. --Such section is further amended in subsections (d) and (e), as redesignated by subsection (a)(3), by striking “subsection (a)” and inserting “subsection (a)(1)” each place it appears. (2) Additional technical and conforming amendments. --Section 2861(b) of title 10, United States Code, is amended-- (A) by striking “subsection (e) of section 2476” and inserting “subsection (f) of section 2476”; and (B) by striking “subsection (a) of such section” and inserting “subsection (a)(1) of such section”. (c) Applicability. --The amendments made by this section shall apply with respect to fiscal years beginning on or after October 1, 2023.

vi SEC. 375. CONTINUATION OF REQUIREMENT FOR BIENNIAL REPORT ON CORE DEPOT-LEVEL MAINTENANCE AND REPAIR.

(a) In General. --Section 1080(a) of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92; 129 Stat. 1000; 10 U.S.C. 111 note) does not apply to the report required to be submitted to Congress under section 2464(d) of title 10, United States Code.

(b) Conforming Repeal. --Section 1061(c) of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; 130 Stat. 2401; 10 U.S.C. 111 note) is amended by striking paragraph (45).

vii SEC. 376. CONTINUATION OF REQUIREMENT FOR ANNUAL REPORT ON FUNDS EXPENDED FOR PERFORMANCE OF DEPOT-LEVEL MAINTENANCE AND REPAIR WORKLOADS.

(a) In General. --Section 1080(a) of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92; 129 Stat. 1000; 10 U.S.C. 111 note) does not apply to the report required to be submitted to Congress under section 2466(d) of title 10, United States Code.

(b) Conforming Repeal. --Section 1061(c) of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; 130 Stat. 2401; 10 U.S.C. 111 note) is amended by striking paragraph (46).

viii SEC. 377. CLARIFICATION OF CALCULATION FOR CERTAIN WORKLOAD CARRYOVER OF DEPARTMENT OF THE ARMY.

For purposes of calculating the amount of workload carryover with respect to the depots and arsenals of the Department of the Army, the Secretary of Defense shall authorize the Secretary of the Army to use a calculation for such carryover that applies a material end of period exclusion. This clarification from HASC resulted from Army, DoD Comptroller and Defense Appropriator cuts to the Army in response to how a 2019 GAO report recommending standardizing the calculation of depot carryover had been misapplied by appropriators and DoD comptroller to penalize Army depot workforce funding: “Each year, billions of dollars of work is ordered from maintenance depots that cannot be completed by the end of the fiscal year. The Department of Defense (DOD) refers to this funded but unfinished work as carryover. For fiscal years 2007 through 2018, the Navy, Marine Corps, and Air Force depots averaged less than 6 months of annual carryover worth \$1.0 billion, \$0.2 billion, and \$1.9 billion, respectively. The Army depots averaged 10 months of annual carryover worth \$4.3 billion. Reasons for unplanned carryover include issues with parts management, scope of work, and changing customer requirements.” GAO-19-452: DoD Depot Maintenance: DoD Should Adopt a Metric That Provides Quality Information on Funded Unfinished Work (Jul. 26, 2019).

ix SEC. 803. DATA REQUIREMENTS FOR COMMERCIAL PRODUCTS FOR MAJOR WEAPON SYSTEMS.

(a) Amendments Relating to Subsystems of Major Weapons Systems. --Section 3455(b) of title 10, United States Code is amended--

(1) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B);

(2) by inserting “(1)” before “A subsystem of a major weapon system”; and

(3) by adding at the end, the following new paragraph:

“(2)(A) For a subsystem proposed as commercial (as defined in section 103(1) of title 41) and that has not been previously determined commercial in accordance with section 3703(d) of this title, the offeror shall--

“(i) identify the comparable commercial product the offeror sells to the general public or nongovernmental entities that serves as the basis for the ‘of a type’ assertion.

“(ii) submit to the contracting officer a comparison necessary to serve as the basis of the ‘of a type’ assertion of the physical characteristics and functionality between the subsystem and the comparable commercial product identified under clause (i); and

“(iii) provide to the contracting officer the National Stock Number for both the comparable commercial product identified under clause (i), if one is assigned, and the subsystem, if one is assigned.

“(B) If the offeror does not sell a comparable commercial product to the general public or nongovernmental entities for purposes other than governmental purposes that can serve as the basis for an ‘of a type’ assertion with respect to the subsystem--

“(i) the offeror shall--

“(I) notify the contracting officer in writing that it does not so sell such a comparable commercial product; and

“(II) provide to the contracting officer a comparison necessary to serve as the basis of the ‘of a type’ assertion of the physical characteristics and functionality between the subsystem and the most comparable commercial product in the commercial marketplace, to the extent reasonably known by the offeror; and

“(ii) subparagraph (A) shall not apply with respect to the offeror for such subsystem.”.

(b) Amendment Relating to Components and Spare Parts. --Section 3455(c)(2) of such title is amended to read as follows:

“(2)(A) For a component or spare part proposed as commercial (as defined in section 103(1) of title 41) and that has not previously been determined commercial in accordance with section 3703(d) of this title, the offeror shall--

“(i) identify the comparable commercial product the offeror sells to the general public or nongovernmental entities that serves as the basis for the ‘of a type’ assertion.

“(ii) submit to the contracting officer a comparison necessary to serve as the basis of the ‘of a type’ assertion of the physical characteristics and functionality between the component or spare part and the comparable commercial product identified under clause (i); and

“(iii) provide to the contracting officer the National Stock Number for both the comparable commercial product identified under clause (i), if one is assigned, and the component or spare part, if one is assigned.

“(B) If the offeror does not sell a comparable commercial product to the general public or nongovernmental entities for purposes other than governmental purposes that can serve as the basis for an ‘of a type’ assertion with respect to the component or spare part--

“(i) the offeror shall--

“(I) notify the contracting officer in writing that it does not so sell such a comparable commercial product; and

“(II) provide to the contracting officer a comparison necessary to serve as the basis of the ‘of a type’ assertion of the physical characteristics and functionality between the component or spare part and the most comparable commercial product in the commercial marketplace, to the extent reasonably known by the offeror; and

“(ii) subparagraph (A) shall not apply with respect to the offeror for such component or spare part.”.

(c) Amendments Relating to Information Submitted. --Section 3455(d) of such title is amended--

(1) in the subsection heading, by inserting after “Submitted” the following: “for Procurements That Are Not Covered by the Exceptions in Section 3703(a)(1) of This Title”.

(2) in paragraph (1)--

(A) in the matter preceding subparagraph (A), by striking “the contracting officer shall require the offeror to submit--” and inserting “the offeror shall, in accordance with paragraph (4), submit to the contracting officer or provide the contracting officer access to--”.

(B) in subparagraph (A)--(i) by inserting “a representative sample, as determined by the contracting officer, of the” before “prices paid”; and (ii) by inserting “, and the terms and conditions of such sales” after “Government and commercial customers”.

(C) in subparagraph (B), by striking “information on--” and all that follows and inserting the following: “a representative sample, as determined by the contracting officer, of the prices paid for the same or similar commercial products sold under different terms and conditions, and the terms and conditions of such sales; and”; and

(D) in subparagraph (C)--(i) by inserting “only” before “if the contracting officer”; and (ii) by inserting after “reasonableness of price” the following: “because either the comparable commercial products provided by the offeror are not a valid basis for a price analysis or the contracting officer determines the proposed price is not reasonable after evaluating sales data, and the contracting officer receives the approval described in paragraph (5)”; and (3) by adding at the end, the following new paragraphs: “(4)(A) An offeror may redact data information submitted or made available under subparagraph (A) or (B) of paragraph (1) with respect to sales of an item acquired under this section only to the extent necessary to remove information individually identifying government customers, commercial customers purchasing such item for governmental purposes, and commercial customers purchasing such item for commercial, mixed, or unknown purposes.

“(B) Before an offeror may exercise the authority under subparagraph (A) with respect to a customer, the offeror shall certify in writing to the contracting officer whether the customer is a government customer, a commercial customer purchasing the item for governmental purpose, or a commercial customer purchasing the item for a commercial, mixed, or unknown purpose.

“(5) A contracting officer may not require an offeror to submit or make available information under paragraph (1)(C) without approval from a level above the contracting officer.

“(6) Nothing in this subsection shall relieve an offeror of other obligations under any other law or regulation to disclose and support the actual rationale of the offeror for the price proposed by the offeror to the Government for any good or service.”.

(d) Applicability. --Section 3455 of such title is amended by adding at the end the following new subsection:

“(g) Applicability. --

“(1) In general. --Subsections (b) and (c) shall apply only with respect to subsystems described in subsection (b) and components or spare parts described in subsection (c), respectively, that the Department of Defense acquires through--

“(A) a prime contract.

“(B) a modification to a prime contract; or

“(C) a subcontract described in paragraph (2).

“(2) Subcontract described. --A subcontract described in this paragraph is a subcontract through which the Department of Defense acquires a subsystem or component, or spare part proposed as commercial (as defined in section 103(1) of title 41) under this section and that has not previously been determined commercial in accordance with section 3703(d).”.

^x SEC. 806. LIFE CYCLE MANAGEMENT AND PRODUCT SUPPORT.

(a) In General. --Section 4324(b) of title 10, United States Code, is amended--

(1) by redesignating paragraphs (1), (2), (3), (4), (5), (6), (7), and (8) as subparagraphs (A), (B), (C), (D), (E), (F), (G), and (J), respectively.

(2) by designating the matter preceding subparagraph (A), as so redesignated, as paragraph (1).

(3) in paragraph (1), as so designated--

(A) in the matter preceding subparagraph (A), as so redesignated--

(i) by inserting "In general. --" before "Before granting"; and

(ii) by inserting "for which the milestone decision authority has received views from appropriate materiel, logistics, or fleet representatives" after "approved life cycle sustainment plan".

(B) by amending subparagraph (G), as so redesignated, to read as follows:

"(G) an intellectual property management plan for product support, including requirements for technical data, software, and modular open system approaches (as defined in section 4401 of this title);";

(C) by inserting after subparagraph (G), as so redesignated, the following new subparagraphs:

"(H) an estimate of the number of personnel needed to operate and maintain the covered system, including military personnel, Federal employees, contractors, and host nation support personnel (as applicable);

"(I) a description of opportunities for foreign military sales; and"; and

(4) by adding at the end of paragraph (1), as so designated, the following new paragraph:

"(2) Subsequent phases. --Before granting Milestone C approval (or the equivalent) for the covered system, the milestone decision authority shall ensure that the life cycle sustainment plan required by paragraph (1) for such covered system has been updated to include views received by the milestone decision authority from appropriate materiel, logistics, or fleet representatives.".

(b) Milestone C Approval Defined. --Section 4324(d) of title 10, United States Code, is amended--

(1) by redesignating paragraph (7) as paragraph (8); and

(2) by inserting after paragraph (6) the following new paragraph:

"(7) Milestone c approval. --The term 'Milestone C approval' has the meaning given that term in section 4172(e)(8) of this title." See also: Joint Conferee Report Language explaining *Sec. 806 - Life cycle management and product support*. The House bill contained a provision (sec. 804) that would amend section 4324 of title 10, United States Code, to require the milestone decision authority to ensure the life cycle sustainment plan is approved by the product support manager, program manager, program executive officer, and an appropriate materiel, logistics, or fleet representative. The Senate amendment contained no similar provision. The agreement includes the House provision with a modifying amendment. We note that traditionally program sustainment costs have not been adequately integrated into the up-front acquisition planning process, though there is data and analysis to demonstrate that focusing on sustainment early in the acquisition process can achieve significant programmatic cost savings. The Government Accountability Office (GAO) has reported extensively on programs that experience sustainment cost growth, such as shipbuilding programs and the F-35 program and made recommendations on how programs can be operated and maintained affordably while meeting sustainment requirements. GAO has noted the importance of establishing connections between life-cycle costs, reliability requirements, and manpower estimates, as well as emphasized the importance of developing a business case analysis that addresses tradeoffs and the associated implications to help programs assess the costs, benefits, and risks of key acquisition decisions. We further note the Department of Defense (DOD) has issued a new policy on product support management (DOD Instruction 5000.91), which states, "[T]he DOD will conduct comprehensive product support and sustainment planning for defense systems across the program's life cycle." We therefore direct the Secretary of Defense to present a briefing to the Committees on Armed Services of the Senate and the House of Representatives, not later than March 1, 2023, on demonstrated or anticipated improvements resulting from implementation of the Department's policy for optimizing product support planning and execution, including its ability to enable competition for life cycle product support, retain core logistics capability through organic depot maintenance, and make total force management risk assessments.

DEFENSE RESALE ISSUES: Commissaries, Exchanges and Transient Lodging

Issue

The Administration and the Congress have recognized DeCA's vital role in combatting food insecurity, providing a hedge against food inflation, and addressing the financial stress of many military families, retirees, and veterans. The DoD and the Congress have provided additional funding to allow the commissary agency to largely discontinue the practice of raising prices to offset commissary operating costs. This non-pay benefit is vital to ensuring retention (at a time when DOD recruiting is under stress) of quality military personnel, thereby contributing force readiness. The Administration and Congress should continue this support.

Background/Analysis

1. The commissary benefit is a crucial non-pay benefit for the military and their family members, particularly in remote and overseas locations. Congress and the DoD have recognized the vital role that commissaries have in addressing chronic problems with financial distress and food insecurity. Commissaries demonstrated their worth during the COVID-19 pandemic and continued to ensure that food flowed to military families especially in remote and overseas areas. There is broad coalition support for preserving the commissary benefit among the military family advocacy groups.
2. The SecDef, in response to inflationary pressures invested \$250 M more for commissaries above the Administration's plan in 2022. And Congress authorized and appropriated the same amount in the FY2023 NDAA and FY2023 Defense Appropriation. The Department of Defense also moved in the direction of reducing its reliance on variable pricing as part of its effort to leverage DeCA to address food insecurity. Recent Congressional efforts to address the food insecurity problem with a Basic Needs Allowance have been found to be less effective than DeCA because of DeCA's direct mission to provide food security for the force and, providing a vital hedge against persistently high food prices, and the minimal levels of military with food insecurity issues qualifying for the Basic Needs Allowance. It is anticipated that the so-called "Freedom Caucus" in the House will generate amendments to reverse course by cutting the nominal appropriation funding DeCA and turn it into a for-profit business less responsive to the growing food insecurity problem among lower enlisted military families. The Senate and the Administration will need to apply some common sense to this issue and not reverse course and continue to invest in DeCA.
3. Congress continues to press for privatization Navy and Air Force transient lodging based on the Army's privatization of transient lodging. A provision calling for outright privatization of the Air Force, Navy and Marine Corps lodging was rejected but there are continued calls to review of this program aimed at privatizing the lodges. The House version of the FY2023 NDAA was rejected by the Joint Conferees based on GAO reviews and a Congressional Budget Office finding that privatizing the Navy and Air Force lodging would add \$5B to the deficit.¹ Lodging is a vital part of the Defense

mission, providing needed accommodations during emergencies such as the Afghan refugee resettlement and COVID-19. Moreover, the DoD has conducted a thorough review of the lodging programs and has concluded that in-house operations are more economical and are more responsive to the Defense mission. The Army privatization Model has failed to deliver on its promise of modernizing facilities and has resulted in major increase in temporary lodging expenses for military personnel.

Congressional Action

- Establish pilot programs for providing free produce to military families affected by food insecurity through the Commissaries.
- Support efforts to discontinue price hikes to offset commissary operating costs.
- Resist proposals to cut DeCA appropriations or impose frameworks that DeCA extract profits from sales to military families afflicted with food insecurity problems.
- Discontinue any efforts to outsource DoD lodging. Mandate insourcing Army transient lodging.
- Ensure the effects of inflation are adequately addressed for Department's MWR programs.

ⁱ The Congressional Budget Office scored this provision as “increasing direct spending by more than \$5 billion in the ten-year period beginning in 2022,” stating “CBO considers military lodging run by private entities to be a governmental activity that uses a private-sector financial intermediary to serve as an instrument of the federal government. In CBO’s view, investments by those entities to improve the lodging facilities be treated as governmental expenditures because most of the income for the project would be paid from appropriated funds such as per diem payments to service members. Because those investments would not be contingent on the availability of appropriated funds at the time they are made, CBO classifies them as direct spending. Using information [from the GAO] on the reported costs to improve privatized Army lodging, CBO estimates that enacting section 2814 would increase direct spending by more than \$5 billion ...” See H. Rpt 117-397, Part 2, pp. 5-6; see also, *Page 412*: “JOINT EXPLANATORY STATEMENT TO ACCOMPANY THE JAMES M. INHOFE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2023”--*Privatization of Navy and Air Force transient housing*. The House bill contained a provision (sec. 2814) that would require the Navy and Air Force, 11 years after this provision becomes law, to privatize their transient housing, prevent government direct loans, government guarantees, or government equity from being used to accomplish this privatization, and would require consultation with the Army, which has already completed the privatization process. The Senate amendment contained no similar provision. The agreement does not include this provision. We note that Chapter 169 of title 10, United States Code provides authority to the Secretaries concerned to privatize lodging facilities. The Secretary of the Army implemented the Privatization of Army Lodging in 2009 and has indicated cost avoidance of \$605.8 million since inception and \$85.2 million annually with better quality of facilities and higher customer satisfaction. However, according to the Government Accountability Office’s (GAO) report published on June 9, 2021, titled “Military Lodging: DOD Should Provide Congress with More Information on Army’s Privatization and Better Guidance to the Military Services” (GAO-21-214), found that the Army may be overstating its cost avoidance due to the methodology it uses to calculate said cost avoidance leaving in question if the reported financial benefits of privatization have actually been achieved. Therefore, we direct the Secretary of the Navy and the Secretary of the Air Force to provide a briefing to the congressional defense committees by not later than December 1, 2023, as to the anticipated steady state cost avoidance that could be anticipated if a lodging privatization effort were adopted, any barriers to implementing, and any impact to traveling servicemembers. The methodology to calculate any cost avoidance should take into account GAO’s concerns over the Army’s existing process and address how and if the cost avoidance metrics are impacted.”

DEFENSE RESALE ISSUES: Commissaries, Exchanges and Transient Lodging

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DEPARTMENT OF DEFENSE CHILD CARE ISSUES

Issue: AFGE represents Non-Appropriated Fund (NAF) workforce providing childcare services to military families (and civilian employees on a space available basis) in Child Development Centers located on military installations. There is a nationwide shortage of childcare workers primarily because of their health and safety working conditions exacerbated during the pandemic and low levels of compensation. The provision of quality childcare is important to recruitment and retention of both military and civilian employees in competitive labor markets where employers in highly compensated professions have Cadillac level childcare that is unaffordable to most Americans, while the absence of adequate childcare harmed economic growth by limiting the ability of families with children to have both parents working.

Background/Analysis:

1. The legislative history of the Military Child Care Act of 1989 included suggestions that reliance on non-appropriated funds limited Child Development Centers' ability to attract and retain quality personnel and to make necessary repairs and upgrades to facilities and equipment. To improve affordability Congress authorized the use of appropriated funds to subsidize family home day care providers. The Act also mandated training and credential requirements for employees. Throughout this paper an excellent Congressional Research Service analysis of the evolution of DoD's childcare program capabilities, which became absolutely necessary when the draft ended with the advent of the All-Volunteer Military and subsequent imperative to open up opportunities for more people to serve (including women) in order to meet end strength requirements is the source for most of the descriptions of this program in DoD.ⁱ
2. The 2015 Military Compensation and Retirement Modernization Commission recommended
 - a. Establishing standardized reporting of childcare wait times.
 - b. Exempting childcare personnel from future departmental hiring freezes and furloughs.
 - c. Supported DoD efforts to streamline Child Development Center position descriptions and background checks.
3. Secretary of Defense Ashton Carter's "Force of the Future" reforms extended hours of operation of Child Development Centers from a minimum of 12 to 14 hours a day to ensure hours of operation were consistent with servicemembers work hours at various installations. The FY2018 NDAA required the Child Development Centers to consider the "demands and circumstances" of the active and reserve component patrons of Child Development Centers.
4. The FY2018 NDAA provided direct hire authorities and required a review of the GS pay grades for DoD childcare to ensure "the Department is offering a fair and competitive wage" for these positions.

5. DoD currently has a mix of Child Development Centers on government-owned facilities on installations and subsidized and regulated private care in Family Care Facilities. Family Care Facilities afford military spouses the opportunity to own and operate a business while caring for their own children, and free up space at the Child Development Centers. Family Care Facilities present continuity of care problems if an FCC operator becomes ill or is moves in a permanent change of station. Also there are oversight concerns regarding quality of care and safety issues in FCC facilities. While Child Development centers are more expensive for DoD to operate, they are more preferable to service members in terms of stability, convenience, continuity of care and oversight.
6. Child Development Center wait list management is a major concern on large bases and high-demand areas. DoD's current target for how long a family is on a wait list is 90 days. In 2014, DoD estimated average wait times of three to nine months. Some family advocacy groups have advocated for higher wait list priority for certain active service members over DoD civilian employees. In the FY2020 NDAA Congress requires DoD to take remedial actions to "Reduce the waiting lists for childcare at military installations to ensure that members of the Armed Forces have meaningful access to childcare during tours of duty." Since February 1, 2020, wait list management prioritizes access for military families over DoD civilians with military priorities encompassing Priority 1A, 1B, 1C, 1D and civilian employees Priority 2.
7. In FY2020 NDAA Congress authorized an additional \$158M in MILCON funding for DoD to carry out construction projects for Child Development Centers on military installations.
8. FY2023 NDAA chartered still another round of studies on compensation for childcare, but nothing more proactive to address the current capacity shortfalls that impede military and civilian workforce recruitment and retention, creating substantial skills gaps and readiness shortfalls in DoD.
9. During the pandemic, there were health and safety issues in Child Development Centers associated with exposures to unvaccinated patrons in some installations, such as San Diego, California.
10. Nationwide, there is a shortage of childcare workers exemplified by the following press accounts:
 - a. "Why You Can't Find Child Care: 100,000 Workers Are Missing/Where did they go? To better-paying jobs stocking shelves, cleaning offices, or doing anything that pays more than \$15 an hour. See Dana Goldstein, "The New York Times," (Oct. 13, 2022).
 - b. "Childcare industry struggles with shortage of workers: 'This is unheard of' 'We're not paying what Chick-fil-A pays,' a day care director said, by Ben Gittieson and Karen Travers, ABC News (Oct. 20, 2022).
 - c. Meanwhile, if one looks at the Covington and Burling benefits for its lawyers: "**Childcare.** We offer emergency back-up care to all lawyers in the New

York, San Francisco, and Washington offices, providing in-home or center-based emergency back-up care for children as well as adults.”

11. NAF workers are not protected from privatization in public-private competitions.
12. Section 2463 of title 10 requires “special consideration” for federal government employee functions of “critical functions.” It can be argued that to compete for quality and skilled military and civilian workforce in current labor market, DoD must view childcare as a critical function and invest in the MILCON and DoD civilian workforce to meet its human capital needs. A NAF workforce is not competitive and converting the NAF childcare workforce to appropriated fund will afford greater job security and compensation.

Congressional Action

- No more studies. It is time to stem the readiness shortfalls arising from reduced accessions and retention problems for military by increasing CDC capacity.
- CDC capacity can be increased through increased MILCON and improving the compensation and job security of the workforce
 - By converting the NAF workforce to AF
 - By insourcing this “critical function”
 - By increasing CDC positions to reduce wait times for military
 - By increasing CDC positions to provide more space for civilian employees

ⁱ CRS Report (R45288), Kristy N. Kamarck, “Military Child Development Program: Background and Issues,” (Updated March 19, 2020). This very comprehensive report should be reviewed as it describes in detail some of the constituencies supportive and opposed to viewing military childcare as a core capability of the Department of Defense, and the rationale for their positions. It also describes in much more detail than this paper the incremental evolution of this programs capabilities in response to various oversight issues ranging from concerns about safety and health, training and quality.

ESTABLISH FACTUAL BASIS FOR DUE PROCESS APPEALS FOR SECURITY CLEARANCE DETERMINATIONS

Issue

Most federal employees in DoD must obtain and retain a security clearance as a condition of employment, and those not requiring a security clearance may still be subject to the same clearance procedures if they have access to sensitive, unclassified information. These procedures are established pursuant to a Clinton-era executive order and afford insufficient due process protections for federal employees.

Background/Analysis

1. AFGE lost a case in federal court involving a Defense Finance and Accounting Service (DFAS) employee whose job did not require access to classified information (only sensitive information) and who was fired from their job after incurring credit problems arising from health issues while this person had inadequate insurance coverage. The dismissal was based on the application of the procedures for determining access material. See, e.g., to classified *Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013) (en banc), cert. denied sub nom. *Northover v. Archuleta*, 134 S. Ct. 1759 (2014).
2. The Senate version of the FY 2022 NDAA bill included language (“Exclusivity, Consistency and Transparency in Security Clearance Procedures, and Right to Appeal”) co-sponsored by Sen. Warner (D-VA) and Sen. Collins (R-ME). The language was accepted for inclusion in a managers’ package; additionally, similar language was included in section 9401 of the Senate version of the FY2021 NDAA. Neither provision made it into the final NDAA, and while well-intentioned, included the following defects:
 - a. Lack of clarity on whether the appeal procedures could be applied to positions not requiring security clearances but merely requiring access to sensitive information.
 - b. No clear provision for judicial review of appeals.
 - c. A provision allowing an agency head to waive the procedures.
 - d. Summaries of testimony were permissible in lieu of verbatim transcripts.
3. The over-classification of documents is a risk to National Security by exposing too many persons to classified information intermingled with over-classified documents who do not have a need to know this information.
4. The over-classification of documents can also impede mission performance and incur unnecessary costs.

Congressional Action

Request following directive report language in either House or Senate version of NDAA after obtaining appropriate waiver of jurisdiction from the Intelligence Committees with jurisdiction as follows: Administrative Conference of United States and Federally Funded Research and Development Center Survey of Security Classification Procedures. Not later than 60 days from enactment, the Under Secretary of Defense, Personnel and Readiness, and the Under Secretary of Defense, Intelligence and Security, shall contract with the Administrative Conference of the United States and Federally Funded Research and Development Center to jointly survey employees, supervisors, job applicants, public sector unions, Civil Rights organizations, Whistleblower public interest organizations, and lawyers representing employees who incurred adverse actions as a result of a revocation of their security clearance or as a result of the applications of these procedures to positions that did not require access to bona fide classified information. The survey will be oriented on whether respondents believe or have examples of where the Department of Defense and other Executive Agencies have misapplied Executive Order Number 12968, "Access to Classified Information," as amended, as a condition of employment to federal government employee jobs where the requirements of the job did not require access to classified information. The surveyors shall review and summarize the extent to which any such misapplication reported by respondents in the survey negatively affected a protected class under Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, and The Americans with Disabilities Act of 1990. The surveyors shall further assess the availability of data systems in each Department, and review, summarize, and analyze any such data, on the demographics of revocations, and the adjudications of those revocations, with respect to each class protected under Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, and The Americans with Disabilities Act of 1990, including veterans with post-traumatic stress symptoms and employees with indebtedness problems attributable to health care emergencies and the lack of adequate insurance. The surveyors shall make recommendations on the best processes for developing systems to track demographic information on these issues with estimates of the costs. Additionally, the surveyors shall make recommendations on the degree to which any such misapplications could have been mitigated with telework arrangements, where workspace location rather than actual access and use of classified information were the basis of requiring a security clearance as a condition of employment. Finally, the surveyors shall analyze and summarize the degree to which individuals associated with neo-Nazi or white supremacist hate groups or ideologies were granted or retained clearances under these procedures. Not later than one year from enactment, the surveyors shall report their findings to the U.S. Senate Select Committee on Intelligence, the House Permanent Select Committee on Intelligence, the Senate Committee on Homeland Security and Governmental Affairs the House Committee on Oversight and Reform, the House Armed Services Committee, and the Senate Armed Services Committee.

RATIONALE FOR OPPOSING ANOTHER ROUND OF BASE REALIGNMENT AND CLOSURES (BRAC)

Issue

Another BRAC round would undermine DoD's efforts to rebuild its readiness and result in excessive unprogrammed investment costs in a politically divisive process with adverse economic impact and community dislocations.

Background/Analysis

1. Section 2703 of H.R. 7776, "the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023" prohibits another round of BRAC.
2. DoD has undergone five BRAC rounds from 1988 to 2005.
3. The Cost of Base Realignment Actions (COBRA) model used by DoD has typically underestimated upfront investment costs and overstated savings (see GAO 13-149). This occurred because:
 - a) There was an 86% increase in military construction costs in the last BRAC round caused by requirements "that were added or identified after implementation began."
 - b) DoD failed to fully identify the information technology requirements for many recommendations.
 - c) There was no methodology for accurately tracking recommendations associated with requirements for military personnel.
 - d) GAO found that stated objectives of consolidating training so that the military services could train jointly failed to occur in two thirds of the realignments for this purpose (see GAO-16-45).
4. Section 2702 of the FY 2019 NDAA provided authority for DoD to realign or close certain military installations when self-nominated by a state governor, subject to the Secretary of Defense, and reporting that savings will exceed the costs of implementation by the end of the fifth fiscal year after completion of the realignment. However, this provision contains a loophole that could allow privatizing activities on a base being closed, defeating the ostensible purpose of becoming more efficient. Additionally, section 2702 did not include a process ensuring meaningful input from affected employees and the labor unions representing them.

Congressional Action

- Do not authorize another BRAC round or alternative to BRAC. Carry forward section 2703, "Prohibition on conducting additional base realignment and closure (BRAC) round."
- Eliminate loophole in section 2702 permitting privatization and clarify process for employee and union input.