



## **Analysis of S. 454: The Levin-McCain Weapons Systems Acquisition Reform Act**

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There is widespread agreement among liberals and conservatives that the Department of Defense's (DOD) process for acquiring weapons systems is broken. The evidence is irrefutable. For example, the Government Accountability Office (GAO) reported again this year that the Pentagon's major defense acquisition programs are a combined \$296 billion over budget.<sup>1</sup> There are a number of "bad apple" programs contributing to this cost growth. These programs need to be restructured or cancelled, a controversial process Defense Secretary Robert Gates [has taken on](#) with unusual fearlessness. Yet the problems in defense acquisition are much larger than a few bad apples.

The *Weapons Systems Acquisition Reform Act of 2009* (S. 454), introduced by Senators Carl Levin (D-MI) and John McCain (R-AZ), has quickly become the legislative vehicle of choice for repairing the Pentagon's weapons-buying process. This is hardly surprising. Besides their perches atop the Senate Armed Services Committee, which afford them enormous influence over military-related legislation, Levin and McCain both wield enormous political prestige and power. Any bill they throw their weight behind is sure to command attention on Capitol Hill.

While the politics of the Levin-McCain bill are straightforward, its policy objectives are more uncertain. The Levin-McCain bill is undoubtedly a step in the right direction, but the flaws in defense acquisition are structural and will not be fixed in one year with one piece of legislation, no matter how much *gravitas* the lead sponsors possess.

There is a general consensus among defense analysts that the Pentagon does not need new rules; it needs to enforce the rules that already exist. Thus, the changes necessary for real reform are not statutory, but cultural. Despite the Defense Science Board's admonition last year that "business as usual is no longer an option," DOD's acquisition culture seems impervious to change.<sup>2</sup>

For all of its merits – and there are many – the Levin-McCain bill is still riddled with the same loopholes and waivers that the Pentagon invokes much too regularly today to escape serious punishment for procurement misdeeds. Lawmakers should work to strengthen the bill as it winds its way through Capitol Hill this year.

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<sup>1</sup> GAO, *Defense Acquisitions: Assessments of Selected Weapon Programs* (March 2009), <http://www.gao.gov/highlights/d09326sphigh.pdf>.

<sup>2</sup> John Bennett, "Advisers: Overhaul DOD Arms Buying," *Defense News* (October 27, 2008).

## **Major Acquisition Reform Bills in Congress Today**

Senators Levin and McCain, the chairman and ranking member of the Senate Armed Services Committee, respectively, [introduced S. 454](#) on February 24. An identical bill (H.R. 1830) was introduced in the House of Representatives by Ellen Tauscher (D-CA) and John Spratt (D-SC).

The Senate Armed Services Committee [held its first hearing](#) on the Levin-McCain bill on March 3, only one week after it was introduced. President Barack Obama could not get onboard fast enough. He [declared](#) his support for the goals of the legislation at a press conference on March 4, less than 24 hours after the first hearing was completed (Obama [endorsed](#) the bill again on April 29). Sensing that they had the momentum, Levin and McCain quickly collected feedback from DOD and the defense industry and moved to the markup, which was completed in 12 minutes on April 2. Several changes (discussed below) made during [the markup](#) appreciably watered down the legislation.

Continuing its double-timed procession through the Senate, which under normal circumstances is glacially-paced, the Levin-McCain bill may be considered on the Senate floor as early as the week of May 4. Senate aides said the goal is to clear the bill before Congress leaves for its Memorial Day recess on May 22.

As an alternative to the Levin-McCain bill, Representatives Ike Skelton (D-MO) and John McHugh (R-NY), the chairman and ranking member on the House Armed Services Committee, respectively, on April 23 introduced [H.R. 2101](#), the *Weapons Acquisition System reform Through Enhancing Technical Knowledge and Oversight Act* (WASTE TKO). A [side-by-side comparison](#) distributed by the Committee indicates that there are significant differences between the Levin-McCain bill and the Skelton-McHugh bill. The House Armed Services Committee also created the [Panel on Defense Acquisition Reform](#), led by Representatives Rob Andrews (D-NJ) and Mike Conaway (R-TX), to examine the defense acquisition system.

## **Overview of the Levin-McCain Bill**

The [Levin-McCain bill](#) would make a number of changes to the Pentagon's weapons acquisition process. The bill would:

- Increase emphasis on systems engineering, developmental testing, and technological maturity assessments (Sec. 101-103)
- Establish a Director of Independent Cost Assessment (Sec. 104)
- Increase involvement by the combatant commands in determining requirements (Sec. 105)
- Require a preliminary design review before a system starts the system development phase (Milestone B) (Sec. 202)
- Increase life-cycle competition through measures such as competitive prototyping (Sec. 203)
- Terminate programs that violate "Nunn-McCurdy" cost growth rules (Sec. 204)

- Reduce organizational conflicts of interest (Sec. 205)

In its original pre-markup form, the Levin-McCain bill was greeted somewhat tepidly by defense policy experts. Some expressed concern that while several of the bill's provisions were attractive, the reforms might be too cosmetic and would divert Washington from other desperately needed changes.<sup>3</sup> Others worried that acquisition reform would be used as an excuse for cutting weapons systems and the defense budget overall.<sup>4</sup> Surprisingly, the typically-restrained GAO was the most optimistic. "Overall, we believe that the legislative initiatives being proposed," GAO assessed, "have the potential, if implemented, to lead to significant improvements in DOD's management of weapons system programs."<sup>5</sup>

If progressive policy experts' initial support was tepid, enthusiasm waned further after the markup, where Levin and McCain significantly watered down provisions on independent cost estimates, conflicts of interest, and life-cycle competition (see below). "They took a weak bill filled with loopholes and made it even worse," said Winslow Wheeler of the Center for Defense Information. In response to these concerns, Senators Claire McCaskill (D-MO) and Tom Coburn (R-OK) both publicly indicated that they might attempt to strengthen the bill through amendments once it reaches the Senate floor.<sup>6</sup>

## **Four Areas for Improvement**

Based on close scrutiny of the legislation and conversations with several reform-minded policy organizations, there are four provisions in the Levin-McCain bill that are cause for concern. The four provisions are obvious shortcomings that create loopholes that need to be remedied by Congress before the bill becomes law.

### **1. Establish a Director of Independent Cost Assessment (DICA) (Sec. 104)**

Levin-McCain would establish a Director of Independent Cost Assessment (DICA), reporting directly to the Secretary or Deputy Secretary of Defense, to review and conduct independent cost assessments of weapons acquisition programs.

<sup>3</sup> See Winslow Wheeler, "Adult Supervision Needed on Defense," *Politico* (March 16, 2009), <<http://www.politico.com/news/stories/0309/20031.html>>; and William Lind, "Pentagon Set to Sucker Yet Another President Over Procurement Reform," *United Press International* (March 12, 2009), <[http://www.spacedaily.com/reports/Pentagon\\_Set\\_To\\_Sucker\\_Yet\\_Another\\_President\\_Over\\_Procurement\\_Reform\\_Part\\_One\\_999.html](http://www.spacedaily.com/reports/Pentagon_Set_To_Sucker_Yet_Another_President_Over_Procurement_Reform_Part_One_999.html)>.

<sup>4</sup> See Mackenzie Eaglen, "Cutting the Defense Budget and Calling It Acquisition Reform," *Heritage Foundation* (April 1, 2009), <<http://blog.heritage.org/2009/04/01/cutting-the-defense-budget-and-calling-it-acquisition-reform/>>.

<sup>5</sup> GAO, *Defense Acquisitions: DOD Must Balance Its Needs with Available Resources and Follow an Incremental Approach to Acquiring Weapon Systems*, testimony before the Senate Armed Services Committee (March 3, 2009), pp. 11, <<http://armed-services.senate.gov/statemnt/2009/March/Sullivan%2003-03-09.pdf>>.

<sup>6</sup> Josh Rogin, "Amendments May Delay Acquisitions Overhaul," *CQ Today* (April 23, 2009).

Unfortunately, during markup the DICA’s jurisdiction for conducting independent cost assessments was limited from all major defense acquisition programs to only those programs where the Under Secretary for Acquisition, Technology & Logistics is the Milestone Decision Authority (MDA). Levin and McCain made this change because DOD argued that if the DICA’s purview was too wide, it would discourage the Services from improving their own cost estimation competencies.<sup>7</sup>

**The problem** is that by narrowing its jurisdiction, Levin and McCain prevented the DICA from performing independent cost assessments on many high-priced programs that have suffered from cost underestimation and growth. While troubled programs such as SBIRS-High, National Polar-Orbiting Operational Environmental Satellite System (NPOESS), Expeditionary Fighting Vehicle, F-35, and Littoral Combat Ship will be subject to the DICA’s assessments, the programs below will not be. While these programs might not be quite as high-profile, they still merit the type of vigorous independent oversight that the DICA could provide.

<b>Programs Exempt from DICA Under Marked-Up Levin-McCain Bill</b>	<b>Current Cost Estimate</b>	<b>Cost Growth to Date</b>
AMRAAM – Advanced Medium Range Air-to-Air Missile	\$14.9 billion	30.9%
C-130 AMP – Avionics Modernization Program	\$5.8 billion	102.8%
C-130J – HERCULES	\$12 billion	30.3%
C-17A – GLOBEMASTER III	\$62.3 billion	55.1%
C-5 AMP – Avionics Modernization Program	\$1.4 billion	22.4%
FBCB2 – Force Battle Command Brigade and Below Program	\$3.7 billion	34.3%
GMLRS – Guided Multiple Launch Rocket System	\$6 billion	105.3%
JASSM – Joint Air-to-Surface Standoff Missile	\$6.1 billion	30.2%
JDAM – Joint Direct Attack Munition	\$5.3 billion	29.6%
LONGBOW APACHE Airframe modifications	\$11.1 billion	55.3%
TACTICAL TOMAHAWK	\$4.4 billion	20.8%
TRIDENT II MISSILE	\$38.8 billion	34.8%

Source: DOD, *Selected Acquisition Report* (September 30, 2008)

**Potential solutions**

- Restore DICA’s jurisdiction over all major defense acquisition programs
- Strengthen acquisition workforces and tighten policies within the Services to ensure that they are producing reliable cost assessments

**2. Increase life-cycle competition (Sec. 203)**

In an effort to compensate for drastic consolidation within the defense industry, Levin-McCain would increase competition during the lives of programs through measures such as competitive prototyping, dual-sourcing, utilization of open architectures to ensure competition for upgrades, and licensing of additional suppliers. In its original form, Levin-McCain only permitted the life-cycle competition requirement to be waived if it rendered DOD “unable to meet critical national security objectives.” The requirement

<sup>7</sup> William Matthews, “U.S. Senate Tones Down Acquisition Reform Bill,” *Defense News* (April 2, 2009).

was watered down in markup, however, to permit a second waiver if the cost of life-cycle competition exceeds potential benefits. The Pentagon objected to the original requirement because “in some instances, it would be cost prohibitive to produce two or more prototypes.”<sup>8</sup>

**The first problem** is that the “national security” waiver is much too vague. This broad waiver authority would allow DOD to hide behind a self-defined banner of “national security” while simply maintaining the status quo.

**The second problem** is that the long-term benefits of life-cycle competition are difficult to forecast and are subject to manipulation and misrepresentation by lawmakers (who have a political interest when jobs are at stake) and companies (who have a proprietary interest when contracts are at stake). The second engine for the Joint Strike Fighter is a perfect illustration of these difficulties. Under Levin-McCain, who would make the determination between future benefits versus additional competition costs?

#### **Potential solutions**

- Make waiver not for “national security” but rather for “imminent combat needs” or similar language stipulating that the waiver is necessary to meet the needs of U.S. troops today
- Assign to an independent agency, such as GAO, any assessment of future benefits that might be derived from life-cycle competition

### **3. Establish termination criteria for Nunn-McCurdy cost breaches (Sec. 204)**

Nunn-McCurdy is a law which, as amended, requires DOD to notify Congress about weapons programs that experience “significant” cost growth (30 percent over original estimate) and certify to Congress that weapons programs that experience “critical” cost growth (50 percent over original estimate) are essential for national security, the only option available, and adequately structured. Levin-McCain would bolster Nunn-McCurdy by mandating that any weapons program that experienced “critical” cost growth be terminated unless the Defense Secretary certifies to Congress that the program is “essential to the national security of the United States.” Even if this “national security” waiver were successfully invoked, the offending program would still have its most recent milestone approval rescinded and would be required to obtain a new milestone approval before entering into any new contract.

The defense industry and the Pentagon pressured Levin and McCain to tone down the enhanced Nunn-McCurdy penalties. DOD wrote that the provisions “could cause significant disruptions in providing capability to our warfighters.”<sup>9</sup> Yet Levin and McCain refused to back down and did not alter their Nunn-McCurdy improvements in markup.

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<sup>8</sup> Ibid.

<sup>9</sup> John Donnelly, “With New Input, Senate Panel Expected to Adjust Defense Acquisitions Bill,” *CQ Today* (April 1, 2009).

**The problem** is that, under Nunn-McCurdy as it presently exists, DOD regularly recertifies programs suffering through “critical” cost growth as being vital to “national security” – and Congress unhesitatingly accepts the justification. Levin-McCain does nothing to prevent DOD from invoking “national security” in order to protect programs that should be terminated under Levin-McCain’s enhanced penalties. While enhanced penalties are good, the real problem is the loophole inherent in the “national security” waiver.

#### **Potential solutions**

- Make waiver not for “national security” but rather for “imminent combat needs” or similar language stipulating that the waiver is necessary to meet the needs of U.S. troops today

#### **4. Reduce organizational conflicts of interest (Sec. 205)**

Levin-McCain originally prohibited companies that hold systems engineering and technical assistance (SETA) contracts with DOD from participating in the development or construction of the same weapons systems on which they perform SETA work. Unfortunately, due to industry outcry, this provision was watered down in markup to allow SETA contracting companies to also perform development and construction as long as separate business entities are set up that are geographically separated, have their own employees and management, restrict personnel transfers and information transmittals, and require nondisclosure agreements.

**The first problem** is that even if separate business entities are created, the entities will still share the parent company’s proprietary interest in securing contracts. Levin-McCain might bar the entities from collaborating, but the entities still will belong to Boeing or Lockheed Martin, companies that have an interest in controlling as much of the procurement process as possible. Requiring separate entities does not address the fundamental problem: big defense contractors will still get to “grade their own tests” by exerting undue influence during both initial systems engineering and subsequent development-construction.

**The second problem** is enforcement. How will compliance with these regulations be verified? Will the companies submit their own compliance reports? What will be the penalty for violators?

#### **Potential solutions**

- Revert back to original pre-markup prohibition on companies performing both SETA and development-construction functions
- Outline explicitly in the bill any and all compliance procedures
- Clarify penalties for violators