



Eric Bunn Sr.
National Secretary-Treasurer

Dr. Everett B. Kelley
National President

Jeremy A. Lannan
NVP for Women & Fair Practices

October 12, 2022

Dear Senator:

On behalf of the more than 700,000 federal and District of Columbia employees represented by the American Federation of Government Employees, AFL-CIO (AFGE), including 300,000 working in the Department of Defense, I am writing to urge your support for the following amendments to the “James M. Inhofe National Defense Authorization Act for Fiscal Year 2023,” filed as Senate Amendment (SA) 5499 to H.R. 7900 (hereinafter referred to as “FY 2023 NDAA”).

Please support S. Amendment No. 5886, sponsored by Sen. Feinstein, that would prevent any position in the competitive service from being reclassified to an excepted service schedule that was created after September 30, 2020, and limits federal employee reclassifications to the five excepted service schedules in use prior to fiscal year 2021.

Please support S. Amendment No. 6228, sponsored by Sen. Sinema, that would increase death gratuities and funeral allowances for federal employees.

Please support S. Amendment No. 5837, sponsored by Sen. Carper, “Fairness for Federal Firefighters,” that would provide workers’ compensation presumptions for federal firefighters for various illnesses arising from their exposures during the course of their careers.

Please support S. Amendment No. 6184, sponsored by Sen. Tester, “First Responders Fair Retirement,” that would allow disabled federal first responders (e.g., law enforcement officers, customs and border protection officers, and firefighters) to continue receiving federal retirement benefits in the same manner as though they had not been disabled. Under current law, federal first responders are subject to a mandatory retirement at age 57. To facilitate this earlier retirement, federal first responders are required to pay a greater percentage of their salary toward retirement. Additionally, their annuity amount is calculated at a higher rate than other federal employees. This bill allows a federal first responder to remain in the accelerated retirement system if they are placed in another civil service position outside of the enhanced system after returning to work from a work-related injury or illness. Further, if such an employee is separated from service before they are entitled to receive an annuity, they may receive a refund of their larger contributions.

Please support S. Amendment No. 6256, sponsored by Sen. Kaine, that would add \$550M to the Defense Commissary Agency (DeCA) Working Capital Fund for Fiscal Year 2023 to help combat food insecurity among military families and address the impact of inflation on the cost of food.



Please oppose S. Amendment No. 6211, sponsored by Sen. Gillibrand, that would slightly change the markup version of the Cyber and Digital Scholarship program being established for federal employees by allowing for non-competitive conversion of a person who may have successfully completed up to five years of academic work or training leading to a degree or certificate, and completed five years within the excepted service, to then obtain a term, career-conditional or career appointment. This is still is not as generous as the highly successful ROTC Scholarship program which without any reservation commissions successful scholarship graduates into a regular or reserve position. Frankly, when one compares the two programs, this program is not set up to meet the kind of diversity and inclusion goals that the ROTC program typically obtains simply because most graduate and professional degrees which ROTC may cover are more than the five year maximum that this provision allows for. To obtain a full graduate or professional degree in a Cyber field would require a student to incur a high level of debt that few can afford, leading to far less diversity in this program. It also seems short-sighted to delay a non-competitive conversion until the completion of five years of excepted service. More needs to be done to improve this provision if quality, diversity, and inclusion is one of the objectives.

Please support S. Amendment No. 6251, sponsored by Sen. Murray, requiring a review of the pay for Department of Defense and Coast Guard Child Care providers.

Please support S. Amendment No. 6155, sponsored by Sen. Van Hollen, that would extend National Guard authorities to the Mayor of the District of Columbia. These authorities would have ended the January 6th insurrection much earlier.

Please support S. Amendment No. 6157, sponsored by Sen. Sanders, that would prohibit contracting with employers that violate the National Labor Relations Act.

Please oppose S. Amendment No. 6043, sponsored by Sen. Fischer, that would expand the so-called “pilot program on enhanced personnel management system for cybersecurity and legal professionals in the Department of Defense,” to the rest of the Department’s civilian workforce. This “pilot” has been a failure and not been used by the Department, largely because recruiting personnel into “renewable term” appointments is not a great recruitment and retention inducement for high quality job candidates who have better options elsewhere for permanent positions. In an era where the Department has significant skills gaps in critical areas in support of the National Defense Strategy, doing more of the same kind of failed effort that has not worked is not the right path forward. This is simply an ill-informed ideological anti-federal worker provision that should be repealed rather than expanded. Indeed, the original hearing in the SASC personnel subcommittee in 2018 that generated the supposed basis for the pilot had no witnesses at all that provided any foundational basis whatsoever for creating renewable term appointments.

Please oppose S. Amendment No. 5548, sponsored by Sen. Lankford, that would further chip away at long-term job security. The rule that was in effect for decades was that temporary appointments could not exceed one year, with one renewal period providing for temporary appointments not to exceed two years in total. Term appointments were generally limited to four years without extension. The amendment generally follows the old rule but seems to allow the

extension of term appointments for up to six years. Also, paragraph (c) of this amendment allows for critical term or temporary appointments of up to 18 months without need to post or even provide information to the U.S. Office of Personnel Management for inclusion in the governmentwide job listings database. This kind of excessive misuse of term appointments shows a failure to plan and effectively treats these employees as “at will” employees. It is completely incompatible with any kind of strategic human capital planning that leverages and develops an employee’s skills on a long-term basis and is a shabby way to treat people. It is no wonder human capital planning remains on the Government Accountability Office’s (GAO’s) high-risk list for DoD and the federal government. As the GAO points out in their audit, DoD has yet to provide Congress with employee perceptions of such appointments, which were a requirement when the original earlier statutory authority was enacted. *See* GAO-20-532, “Defense Workforce: DoD Needs to Assess Its Use of Term and Temporary Appointments (Aug 6, 2020).

Please oppose S. Amendment No. 5542 sponsored by Sen. Lankford, that would modify the “Criteria for granting direct-hire authority to agencies,” because it manipulates and obfuscates the criteria by replacing “qualified candidates” with “highly qualified candidates” language. Prior to the use of category ratings, lists were developed using rank order criteria, including Veterans Preference, where applicable. Interposing the category rating concept of “highly qualified” candidates to determine whether there is a shortage of candidates, thus enabling agencies to use direct hire procedures (bypassing normal merit-based assessment and examining, including Veterans Preference requirements) weakens the application of merit system principles to civil service hiring. After issuing a vacancy announcement where many existing employees and outside candidates are found to be “qualified,” this amendment would allow an agency to claim that direct hire is necessary because qualified candidates are not adequate, and that they want “highly qualified candidates” whatever that may mean. Based on an insufficient number of qualified candidates, under the scheme of the amendment, the agency can go right to direct hire, which ironically is the worst way to ensure that merit system principles are upheld, as direct hire effectively negates any but the most cursory examination or assessment process.

This proposed scheme is also unnecessary since agencies can set qualification requirements including what criteria are necessary to be met in order to be considered qualified. If they set the standards high enough, qualified and highly qualified should be almost, if not exactly the same. In effect, the agency sets the standards and then declares those standards are not good enough, so they need to use some amorphous (and allegedly higher) standard instead. The reason this peculiarly affects category ranking is because there are no lawfully recognized distinctions between individuals within a category. They are all treated the same, so they are either: 1) not qualified and receive no additional consideration; 2) qualified and should receive consideration; or 3) highly qualified and should receive consideration over those who are “merely” qualified. Under a more transparent regime than contemplated by this amendment, the agency would include in its announcement how it distinguishes qualified from highly qualified candidates. This amendment further perpetuates a closed, non-transparent system of hiring which provides too much flexibility to agency supervisors to hire who they know rather than to truly compete jobs. Perpetuating and encouraging processes to artificially claim that there are an insufficient number of highly qualified applicants in order to enable use of direct hire procedures is nothing but a shell game and a “work around” of merit principles. This amendment will further suffocate the

quality and diversity of the civil service workforce by affording too much discretion to agencies to manipulate the process to use direct hire procedures.

Please oppose S. Amendment No. 5555, sponsored by Sen. Lankford, that would permanently exempt Domestic Defense Industrial Base Facilities, Major Range and Test Facilities Base and the Office of the Director of Test and Evaluation from the examination, certification and appointment provisions of subchapter I of chapter 33 of title 5, United States Code. This temporary authority has been unsuccessful in addressing the departments significant recurring skills gaps in STEM fields. The Department needs to broaden, rather than narrow, the pool of highly qualified candidates from more diverse sources. Direct hire authorities are a band aid that just allows managers to hire who they know and are comfortable with without going through the merit hiring processes, greatly narrowing the range of candidates ever considered for federal employment. Making permanent an authority that has not worked is a recipe for continued mission failure and persistent skills gaps. The Department needs to broaden the pool of candidates and seek the most highly qualified candidates from diverse sources to meet these fields gaps.

Please oppose S. Amendment No. 5550, sponsored by Sen. Lankford, that would raise the threshold from 15 percent to 25 percent for hiring recent college graduates into professional or administrative positions in the competitive service without regard to the examination, certification and appointment requirements of title 5 first established to ensure an apolitical, merit-based competitive civil service. The government should not be narrowing the pool of candidates considered to simply a small group that happen to be the first to be targeted for recruitment just to shorten the time to hire. Instead, the government should be expanding the pool to obtain the most highly qualified candidates while seeking greater diversity. This provision goes in the opposite direction and rather than increasing the threshold for this exception to fully open merit-based competition, this provision should instead be repealed.

Please oppose S. Amendment No. 5559, sponsored by Sen. Lankford, that purports to limit and regulate the use of scientific information in rule-making by federal agencies. Scientific judgments and their application are not within the expertise of legislative bodies but require rigorous education, training and peer review.

Please oppose S. Amendment No. 5547, sponsored by Sen. Lankford, that would make changes to the socioeconomic labor threshold for service contracts. The \$2,500 threshold for application of the Service Contract Act is a long-established and reasonable requirement that is necessary to ensure that market-based wages and fringe benefits are provided to employees working on federal service contracts. Attempts to raise this threshold are thinly veiled anti-worker provisions touted as “efficiency reforms.”

We have concerns about some of the provisions in S. Amendment No. 5620, sponsored by Sen. Menendez, the Department of State Authorization Act. While AFGE supports efforts to increase diversity in the various bureaus and functions of the State Department, we note that such efforts should strive to uphold basic merit system principles, and that nothing in Sections 5401 and 5402 be read to permit otherwise. The backbone of our Foreign Service is the high quality officers, specialists and title 5 civil service personnel who staff these functions.

In particular, Section 5502 on the Cyber workforce, while perhaps well-intentioned, is poorly drafted, and bypasses all civil service rules, making such employees effectively “at will.” Notably, Section 5502(a)(5) even dispenses with all pay statutes that would normally set a maximum pay cap on these positions. The apparent hasty drafting of this section should be reconsidered to provide for selection of personnel, and their retention, based on merit system principles, including due process protections against arbitrary removals. The lack of any statutory guidance on pay for these positions is a serious error that should be corrected.

Please support S. Amendment No. 5463, sponsored by Sen. Warnock, that would regulate how access to public education is to be considered when making basing decisions for the Department of Defense.

Please support S. Amendment No. 5631, sponsored by Sen. Cardin, that prohibits the reduction of Senior Executive Service positions at the Navy Laboratories and Naval Surface Warfare Centers.

Please support S. Amendment No. 5632, sponsored by Sen. Cardin, that prohibits elimination of Chemical Biological Incident Response Force of the Marine Corps.

Please support S. Amendment No. 5629, sponsored by Sen. Cardin, that regulates the movement or consolidation of the Joint Spectrum Center to Fort Meade or another appropriate location.

Please oppose S. Amendment No. 5622, sponsored by Sen. Braun, directing a study to identify duplicative research programs within the Department of Defense. Identifying so-called duplication in basic research is highly subjective and arbitrary. Sometimes breakthroughs in innovation occur precisely because of some level of duplication in basic research.

Please oppose S. Amendment No. 5623, sponsored by Sen. Braun, providing a “Sense of the Senate regarding recognizing National debt as a threat to National Security.” Failing to raise the debt ceiling in a timely manner to account for obligations already incurred by Congress is a far greater threat to national security than the mis-conceived notion that all debt is bad. Similarly, weaponizing the national debt to prevent needed human capital investments is a greater threat to national and economic security.

Please support S. Amendment No. 5613, sponsored by Sen. Hagerty, directing a briefing to Congress on the source of the repair decision-making process for depots and the costs and risks to readiness resulting from those decisions. This briefing would include an objective balance of workload between the public and private sectors.

Please support S. Amendment No. 5604, sponsored by Sen. Cortez Masto, directing an Air Force assessment of combat-to-dwell policy and health within the remotely piloted aircraft community. Such stresses on the force metrics are also affected by ensuring an appropriate and balanced level of civilian employee force structure, and presumably this assessment would take that into consideration.

Please support S. Amendment No. 5598, sponsored by Sen. Hawley, that directs an assessment of conflicts of interest among consulting firms, such as Deloitte and McKinsey & Company.

Please support S. Amendment No. 5582, sponsored by Sen. Cornyn, that requires the Department to clarify the roles and responsibilities for force modernization within the Army.

Please support S. Amendment No. 6349, sponsored by Sen. Casey, “The Pregnant Workers’ Fairness Act,” ensuring non-discrimination and reasonable accommodations among employers of pregnant workers.

Please support S. Amendment No. 6398, sponsored by Sen. Klobuchar, “The Electoral Count Reform Act,” a bi-partisan clarification and reform needed to avoid a repeat of efforts to subvert the peaceful transition in the 2020 Presidential election.

Please support S. Amendment No. 6440, sponsored by Sen. Warner, requiring a report and training related to food insecurity among military personnel and their families.

Please support S. Amendment No. 6081, sponsored by Sen. Feinstein, prohibiting indefinite detention of citizens and lawful permanent residents.

Please oppose S. Amendment No. 6110, sponsored by Sen. Ernst, arbitrarily restricting Internal Revenue Service hiring.

Please oppose S. Amendments No. 6217 and 6218, sponsored by Sen. Romney, that would require a GAO report on alternative modeling for locality pay formulations. This amendment derives from the Trump administration’s Federal Salary Council and would facilitate the manipulation of locality pay determinations. It would replace current practices based on objective data and consistent rules and introduce non-transparent and subjective criteria into federal pay setting. Direction for any GAO review should not be biased to favor a political approach to locality pay determinations.

Please support S. Amendment No. 5852, sponsored by Sen. Shaheen, providing for leave relating for abortion care and services for members of the Armed Forces. A similar provision is needed for federal employees and their families.

Please support S. Amendment No. 5855, sponsored by Sen. Shaheen, requiring a study and report on the rate of cancer -related morbidity and mortality for individuals assigned to Pease Air Force Base and Pease Air National Guard Base.

Please support S. Amendment No. 5880, sponsored by Sen. Markey, requiring disclosure to Congress of Presidential Emergency Action documents.

Please support S. Amendment No. 5902, sponsored by Sen. Carper, of the “PLUM Act,” that requires a periodically updated public website on political appointee positions.

Please oppose S. Amendment No. 6279, sponsored by Sen. Rosen, that would establish a civilian Cyber Security Reserve Pilot at the Cyber Security and Infrastructure Security Agency. The duration of the reserve assignments, particularly if they are predominantly less than a few months, are insufficient to provide any meaningful benefit to the government and are of more benefit to the so-called “reservist” and their private sector employer who are gaining access to governmental programs by the “reservist’s” participation. This bill punts on the ethical conflict of interest reporting concerns, where at least the corresponding House version minimally addresses this issue by requiring private sector “reservists” to be appointed as “special government employees,” who have disclosure requirements for reporting potential conflicts of interest. However, it is our view that non-public disclosure requirements are insufficient to ensure full compliance. Before proceeding with this ill-defined concept, Congress should consider defining the actual scope and cost of these requirements.

Please oppose S. Amendment No. 6156, sponsored by Sen. Sanders and Sen. Grassley, that would arbitrarily reduce by one percent any amount available to a Defense Component in the absence of an unqualified audit opinion. In FY 2020, Independent Public Accounting (IPA) firms conducted 24 standalone audits of DoD reporting entities, of which eight received unqualified opinions, one received a modified (or qualified) opinion and the remaining 15 reporting entities, as well as the overall DoD consolidated audit, received a disclaimer of opinion. The DoD budget estimates it will spend \$1.281 billion on the financial audit, and during hearings, as well as in the budget document itself, there appears to be more discussion dedicated to the financial audit than more pressing problems of national security. The audits solely relate to the development of a balance sheet of assets and liabilities for a sovereign entity funded with Congressional appropriations on an annual cash basis rather than on an accrual basis. There is no bona fide private market for most of the services and assets being assigned a “value” on a consolidated balance sheet for governmental sovereign entities, meaning the bulk of this exercise lacks economic substance. The Department conceivably could still receive an unqualified audit opinion and be wasting billions of dollars or have mission failures.

We have concerns with portions of S. Amendment No. 5950, sponsored by Sen. Warner, “The Intelligence Authorization Act for Fiscal Year 2023.” While we are not opposing this amendment, we are disappointed that it only makes minor improvements in the area of adverse security clearance and access determinations in Section 508, but does not address three major defects in security clearance adjudications: (1) While most federal employees in DoD must obtain and retain a security clearance as a condition of employment, there are many positions not requiring a security clearance that are still subject to the same clearance procedures as if they have access to sensitive, unclassified information; (2) 50 U.S.C. § 3001 and the Clinton-era executive order incorporated by reference into the statute does not provide for judicial review of adverse Executive Branch determinations; and (3) These defects are major weaknesses in enforcing the Civil Rights laws invoked by the Executive Order, including protected classes 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. This is a major loophole negating due process protections for federal employees, particularly in egregious circumstances where no access to classified information is required but these procedures were applied nevertheless, as occurred in *Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013) (en banc), cert. denied sub nom. *Northover v. Archuleta*, 134 S. Ct. 1759 (2014), where an employee with debt incurred from

inadequate health insurance coverage lost their job through an adverse security clearance determination in circumstances where this employee did not have access to bona fide classified information.

Please oppose S. Amendment No. 5561, sponsored by Sen. Lankford on the “blended workforce” that would undercount the number of contractors providing services to federal agencies by relying on counting only contractors with access to agency property or computer systems. Last year when this amendment was offered, we reached out to Sen. Lankford’s staff as we have some expertise on successful efforts previously used by the Army and the efforts currently used by the GSA under the System for Award Management (SAM) to collect some contract services data provided to the federal government. We reached out because there is otherwise much that is commendable in this amendment in its recognition that personnel caps on federal agency hiring undermine adequate human capital planning; and that so-called “efficiencies” from using personnel caps merely shift government work to contractors who currently are not transparent in agency budgets, with contractor inventories sidelined to procurement offices with access to SAM. This amendment centers responsibility in the Office of Personnel Management (OPM) for managing this effort, when the only way its objectives would be met would be if Office of Management and Budget (OMB) budget examiners were made responsible for obtaining and using more holistic data on contract support in conjunction with civilian full time equivalent projections. Currently OMB budget examiners are only concerned with the *de minimus* slice of advisory and assistance contracts rather than the full array of contracted services that displace federal employees or are substituted for military, a slice about as small as the slice that this amendment would capture. Accordingly, the amendment has some good ideas on what the problems are, but assigns them to the wrong agency and largely ignores good and bad business practices and lessons learned in compiling and using contractor inventories. Reinventing the wheel is never a good idea, and this amendment requires many changes.

Please support S. Amendment No. 6294, sponsored by Sen. Collins, on the Department of Defense providing support to Defense-affiliated families (military and civilian) supplanted from the Department’s child development centers.

Please support S. Amendment No. 6295, sponsored by Sen. Collins, that affirms as one of the main objectives of the NDAA to include the capacity of public shipyards to meet current and anticipated needs of the Navy to maintain and repair ships.

Please support S. Amendment No. 6326, sponsored by Sen. Brown, that would provide that the scorecard for basing decisions used by the military departments be coordinated with the Secretary of Defense to ensure consistency and be published for public comment in the *Federal Register*. This is better than a similar amendment, No. 5921, sponsored by Sen. Scott, that only requires coordination with the Secretary of Defense without any *Federal Register* publication requirement.

Please support S. Amendment No. 5922, sponsored by Sen. Boozman, directing a Department of Defense report on the adequacy of the cost of living allowance for members of the military.

We would only add that the amendment should also include the impact on the Department's civilian workforce.

Please support S. Amendment No. 5819, sponsored by Sen. Murkowski, that would expand the Commissary store doorstep delivery pilot program.

Please support S. Amendment No. 6007, sponsored by Sen. Lee, that would require the Department of Defense to provide its rationale for Active and Reserve end strengths and its civilian workforce projections, with justifications for any increase or decrease to each, while this requirement already exists, oversight tends to be non-holistic with the primary focus on active end strength, and secondarily reserve end strength followed by the civilian workforce. All of these are inter-related and should be discussed in the same setting.

Please support S. Amendment No. 6013, sponsored by Sen. Lee, establishing a framework for Congressional review of National Emergencies.

Please support S. Amendment No. 6319, sponsored by Sen. Manchin, that takes a significant step in addressing the failures of online platforms to adequately police themselves for incendiary and violence-inducing communications. While this does not completely address the problem, it is a first step in that direction.

Please support S. Amendment No. 5729, sponsored by Sen. Blunt, directing a review by the Department of the Army of its execution of food service contracts.

Please support S. Amendment No. 6174, sponsored by Sen. Durbin, requiring a report on credit and debit card user fees imposed on veterans and caregivers at Commissary stores and MWR facilities.

Please support S. Amendment No. 5831, sponsored by Sen. Ossoff, that would require a report on blood testing of Department of Defense firefighters for exposure to perfluoroalkyl and polyfluoroalkyl substances.

Please support S. Amendment No. 5751, sponsored by Sen. Warner, requiring the Department of Defense to appoint a senior official responsible for addressing food insecurity.

Please support S. Amendment No. 6046, sponsored by Sen. Warren, that would rescind the medals of honor awarded to Soldiers who participated in the Wounded Knee massacre on December 29, 1890.

We have significant concerns with S. Amendment No. 6049, sponsored by Sen. Reed, that would establish a White House position at Cabinet level equivalency that overlaps with the responsibilities of the Office of Personnel Management, the Department of Defense, other federal agencies, and state and tribal governments. Creating duplicative bureaucracies is a recipe for more turbulence and complexity, and in the case of the civil service, has the potential to further weaken the underpinnings of an apolitical competitive service at a time when there are significant skills gaps across the federal government and within DoD needed to address the

National Defense Strategy and other national priorities. While we certainly share the objective of re-instilling in the American public the concept of civic virtue and valuing public service in all its forms, whether military, volunteer activities, or at the state or federal levels, which is an important objective during this time of national division, we do not believe this amendment does anything to concretely address its noble objectives in terms of specific concrete programs. Adding more bureaucracy with overlapping responsibilities does little to advance the amendment's stated objectives. We are willing to engage (and in fact do regularly engage) with the non-governmental organizations that likely generated the recommendations contained in the amendment, as well as with committee staff on constructive, concrete and specific programs that more directly address the issues of common concern here; that is how to revive the civic virtue animating a shared sense of public service to heal the divisions in our society that are necessary for cohesion in a democratic republic. Neither AFGE nor other unions representing federal employees were constructively engaged or consulted as a part of the process that generated this amendment. We believe that consulting with a broader spectrum of groups would benefit the objectives we all share.

For questions or more information please contact John Anderson at John.Anderson@afge.org or 703-943-9438.

Sincerely,

A handwritten signature in blue ink, appearing to read "Julie M. Taylor". The signature is fluid and cursive, with a prominent initial "J" and "T".

Legislative Director