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Congress of the United States

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March 25, 2004

The Honorable Donald Rumsfeld
Secretary
U.S. Department of Defense
The Pentagon
Washington, DC 20301-1155

Dear Mr. Secretary:

We are writing to request an explanation of the Defense Department's decision to retroactively classify assessments by independent Pentagon test evaluators that are highly critical of the testing program for the national missile defense system. The information in question is 50 specific recommendations for future deployment of the system made in a report issued in 2000 by the Defense Department's office of Operational Test and Evaluation. This report was provided to our Committee as part of an open hearing on this topic, and no part of it has ever before been classified. The report and its recommendations have been widely reported in the press and posted on numerous websites, including those of members of Congress.

Background

The office of Operational Test and Evaluation (OT&E) is an independent assessment office within the Pentagon created by Congress to oversee testing programs and, in particular, to ensure that weapons development programs are adequately tested before they are fielded. The legislation establishing this office in 1983 removed testing oversight from military officials and lodged it with a civilian director because immature weapons systems were repeatedly being deployed without adequate testing.[1]

At an unclassified Committee hearing on missile defense on September 8, 2000, Philip Coyle, then the Director of OT&E, testified about major deficiencies in the missile defense

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[1] *Pentagon Weapons Testing Move Is Assailed,* Washington Post (Dec. 15, 1983) ("Congress established an independent office after hearing testimony that backers of new weapons in the Pentagon authorized production of weapons that do not work and have not been reliably tested").

testing program.[2] During his testimony, he mentioned that he had prepared a report on these deficiencies in the context of the previous Administration's decision whether to deploy the system. In its report, OT&E concluded that the testing program was so immature that a rigorous assessment of the system could not even be made. OT&E also set forth 50 recommendations explaining how the system should be tested for any future deployment.

At the hearing, Rep. Tierney asked Mr. Coyle to provide his complete report and recommendations for the record, and Mr. Coyle agreed. Rep. Tierney also made a request for the report to be made part of the Committee's public hearing record, and this motion was accepted without objection. At no time during the hearing did Mr. Coyle or Lt. Gen. Ronald Kadish, the director of the missile defense program and also a hearing witness, express any national security or other reservations about providing the report.

After the hearing, the Defense Department refused for over eight months to provide the report to Congress. On September 28, 2000, Rep. Tierney wrote to Rep. Christopher Shays, Chairman of the National Security Subcommittee, requesting that Mr. Coyle "submit <u>for the record</u> his formal report."[3] Chairman Shays then wrote to the Defense Department, making clear the Committee's request, and noting that the report eventually would be "included <u>in the official hearing record</u>."[4]

When the Department continued to refuse to provide the report, 55 members of Congress from the Committees on Government Reform, Armed Services, and International Relations sent a formal request for you to intervene on January 24, 2001.[5] This request also made clear that the report would be made public:

> Mr. Coyle agreed to make the report available to the Subcommittee, which voted unanimously to make it <u>part of the hearing record</u> . . . . You are requested to deliver Mr. Coyle's report to the Subcommittee <u>forthwith, in its entirety, and without alteration</u>.[6]

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[2] Subcommittee on National Security, Veterans Affairs, and International relations, Committee on Government Reform, *Hearing on National Missile Defense: Test Failures and Technology Development,* 106th Cong. (Sept. 8, 2000).

[3] Letter from Rep. John F. Tierney to Chairman Christopher Shays (Sept. 28, 2000) (emphasis added).

[4] Letter from Chairman Christopher Shays to Lt. Gen. Ronald Kadish (Oct. 4, 2000) (emphasis added).

[5] Letter from Rep. John F. Tierney et al. to Secretary of Defense Donald Rumsfeld (May 4, 2001).

[6] *Id.*

Finally, more than eight months after the initial request, the Department delivered the report on May 31, 2001. No explanations were provided regarding the Department's refusal to honor earlier requests. In producing the report, Pentagon officials again tried to keep it from public view. The Department marked the document "For Official Use Only," and in a cover letter conveying the report, the Department's legal counsel stated that the Pentagon "has not approved the release of this report to the general public."[7]

These actions had no justification. The report was never classified, either in its entirety or with respect to any of its contents (i.e., data, charts, or appendices). The Department had a substantial amount of time to review the document for national security concerns and found none. Moreover, there were no claims that the document contained personal financial information, medical information, or confidential business information.

To provide the Department with a further opportunity to explain its rationale, Rep. Tierney wrote to you seeking a detailed justification for the Department's position.[8] Although an official from your legislative affairs office reiterated a general desire to prevent the public from viewing the report, the Defense Department otherwise was unresponsive. As a result, Chairman Shays made the report available to the public in June 2001 pursuant to the motion previously adopted by the Committee. Although Chairman Shays has been a supporter of the missile defense program, he stated at the time: "If the proponents can't be persuasive that's our fault, but the question should be addressed in public."[9]

Since the public release of the OT&E report, members of Congress have discussed its recommendations numerous times in public, and nongovernmental experts have examined the recommendations in detail. In fact, the Special Investigations Division of the minority staff of our Committee issued a public report specifically relating to this topic.[10]

Retroactive Classification

It now appears that the Defense Department has retroactively classified as "secret" the 50 specific recommendations set forth by OT&E in 2000 as considerations for any future deployment. This classification was made known to us not by the Defense Department, but by

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[7] Letter from Stuart F. Aly, Acting Deputy General Counsel (Legal Counsel) to Chairman Christopher Shays (May 31, 2001).

[8] Letter from Rep. John F. Tierney to Secretary of Defense Donald Rumsfeld (June 12, 2001).

[9] *No Defense for the Missile Shield,* Washington Post (June 21, 2001).

[10] *The Coyle Report: A Comprehensive Pentagon Study Criticizing the National Missile Defense Test Program,* Special Investigations Division, Minority Staff, House Committee on Government Reform (June 26, 2001).

the U.S. General Accounting Office, which has been conducting work for us on the adequacy of the missile defense testing program in the context of President Bush's decision to deploy the system.

At our request, GAO conducted an investigation into whether the Defense Department under the Bush Administration has complied with OT&E's recommendations regarding the missile defense system. GAO prepared a report of its work in June 2003.[11] However, the Defense Department subjected GAO to "an extensive declassification process."[12] In briefings on this report, a GAO official informed our staff on February 12 that the Defense Department would no longer allow GAO to discuss OT&E's specific recommendations from 2000 in unclassified settings.[13] When issuing its final unclassified report two weeks later, GAO explained that the Defense Department "classified the full text of the recommendations."[14]

Preventing Public Debate

The decision to classify the 50 specific recommendations set forth by the Pentagon's chief testing officer is highly dubious. It appears to be an attempt to stymie public debate through the use of the classification system.

These recommendations had never been classified before, they were requested at an open hearing of Congress, and they were provided without any indication that disclosure of their contents could endanger national security. They were released to the public, and they have been distributed widely. Classifying OT&E's recommendations at this point will have absolutely no effect on whether our adversaries can gain access to this information.

Instead, the principal effect of the Department's actions will be to prevent members of Congress from being able to issue thorough and thoughtful critiques of Administration actions in a public forum.

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[11] U.S. General Accounting Office, *Missile Defense: Actions Being Taken to Address Testing Recommendations, but Updated Assessment Needed* (June 30, 2003) (GAO-03-279C).

[12] U.S. General Accounting Office, *Missile Defense: Actions Being Taken to Address Testing Recommendations, but Updated Assessment Needed* (Feb. 2004) (GAO-04-254). GAO formally requested declassification on November 4, 2003, and the Defense Department approved an unclassified version on February 12, 2004. GAO issued its unclassified report on February 26, 2004, and released this report publicly on March 11, 2004.

[13] Meeting between Robert Levin, Director, U.S. General Accounting Office, and Minority Staff, House Government Reform Committee (Feb. 12, 2004).

[14] U.S. General Accounting Office, *supra* note 12.

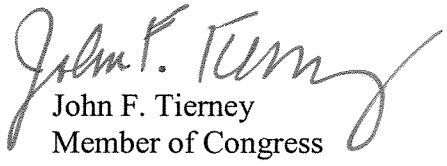
We may have honest disagreements about whether a missile defense system is a priority for the nation. But we should agree that if U.S. taxpayers are going to spend $10 billion per year on this system, they should have confidence that it will work. We believe the public has a right to know whether the Bush Administration complied with recommendations made by the most senior testing officials at the Pentagon, or whether the Administration is rushing into production a system that has no proven capabilities in order to have a false election-year accomplishment.

Conclusion

We request that you review this matter and reconsider your decision to classify the OT&E recommendations. If you insist on keeping this information classified, we request a detailed explanation for your decision. We have copied this letter to the Chairmen and Ranking Members of the House and Senate Armed Services Committees in order to apprise them of the situation.

Sincerely,

Henry A. Waxman
Ranking Minority Member



John F. Tierney
Member of Congress

cc: The Honorable John W. Warner, Chairman
The Honorable Carl Levin, Ranking Minority Member
Senate Committee on Armed Services

The Honorable Duncan Hunter, Chairman
The Honorable Ike Skelton, Ranking Minority Member
House Committee on Armed Services