$21 Billion Worth of F-35 Concurrency Orphans?
If all older model F-35s are included, costs could rise to $40 billion

BY DAN GRAZIER

The original can be found at http://www.pogo.org/straus/issues/weapons/2017/21-billion-worth-of-f-35-concurrency-orphans.html

The new F-35 Program Executive Officer, Vice Admiral Mat Winter, said his office is exploring the option of leaving 108 aircraft in their current state because the funds to upgrade them to the fully combat-capable configuration would threaten the Air Force’s plans to ramp up production in the coming years.¹ These are most likely the same 108 aircraft the Air Force reportedly needed to upgrade earlier in 2017.² Without being retrofitted, these aircraft would become “Concurrency Orphans,” airplanes left behind in the acquisition cycle after the services purchased them in haste before finishing the development process.

Left unsaid so far is what will become of the 81 F-35s purchased by the Marine Corps and Navy during that same period.³ If they are left in their current state, nearly 200 F-35s might permanently remain unready for combat because the Pentagon would rather buy new aircraft than upgrade the ones the American people have already paid for. What makes this particularly galling is the aircraft that would be left behind by such a scheme were the most expensive F-35s purchased so far. When the tab for all the aircraft purchased in an immature state is added

up, the total comes to nearly $40 billion.4 That is a lot of money to spend on training jets and aircraft that will simply be stripped for spare parts.

The Pentagon and Lockheed Martin have been assuring the American people for years that the price tag for the F-35 is on its way down.5 Much of that effort was part of the campaign to convince Congress of the cost savings of approving the Economic Order Quantity, or multiple-year block buy of F-35 components.6 Program officials believe a block buy will save $2 billion. But it is difficult to be enthusiastic about the prospect of saving $2 billion when the program could potentially have wasted up to ten or perhaps twenty times that amount.

Upgrades are unusually complex for the F-35 because of the design process being used for the program. The program is developing the F-35 in several phases, called blocks, with each block adding more capabilities. According to Lockheed Martin’s website, Block 1A/1B combined basic training capabilities with some security enhancements. Block 2A remained a training version, with the ability to share data between aircraft. Blocks 2B and 3i are the first versions with any combat capabilities. The Marine Corps controversially declared Initial Operational Capability with Block 2B aircraft in 2015.8 But this version is hardly ready for combat.9 The Pentagon’s testing office has repeatedly said that any pilots flying Block 2B F-35s who find themselves in a combat situation would “need to avoid threat engagement and would require augmentation by other friendly forces.”10 In other words, the Blocks 2B and 3i aircraft—the configurations of the 108 Air Force F-35s and the 81 Marine Corps and Navy F-35s—would need to run away from a fight and have other aircraft come to their rescue.

**VERY Expensive Trainers**

Getting to the bottom of exactly how much money has been wasted buying potentially combat-incapable fighters is a bit of a challenge. There are various ways to calculate the cost of weapon systems. To make it even more difficult, the numbers have been

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deliberately obscured by the Pentagon and the defense industry over the years.\(^{11}\) Using Lockheed Martin's own numbers for aircraft deliveries, it is possible to make a few calculations to begin to get an idea about how much money may have been spent on these potential concurrency orphans.\(^{12}\)

The defense industry likes to use the Unit Recurring Flyaway cost. This is just the material cost of the airframe plus the fee to have it put together. This figure sometimes does not include the cost of the engine and it does not include the support and training equipment, spare parts, software upgrades, or contractor fees necessary to actually make the aircraft work.

Under the best-case scenario, the only aircraft that would remain concurrency orphans are the 108 Air Force Block 2B and 3i F-35As. Without knowing exactly when the 108 aircraft in question were built, it is impossible to know precisely how much was spent to procure them. But, using publicly available information, it is possible to calculate a reasonably approximate figure since the Air Force acquired its first 108 F-35As in Low Rate Initial Production lots 1-9.

Using the Lockheed Martin/Air Force figures (MUCH lower than the real costs) for the first 108 F-35As purchased, the American people spent approximately $14.117 billion to purchase fighter planes that may never be fully combat capable.\(^{13}\)

When you factor in the cost of the engine and the support equipment necessary to acquire an aircraft that is actually capable of operating, the dollar amounts are much different than what the Pentagon and Lockheed Martin advertise. This figure can be called the procurement unit cost.

By simply multiplying the number of aircraft purchased per lot by average procurement unit cost for the corresponding year, the American people spent approximately $21.4 billion for those 108 orphaned F-35As.\(^{14}\)

That is slightly more than has been spent on the entire four-year fight against ISIS.\(^{15}\)

What remains to be seen is what will happen to all of the Block 2B aircraft remaining in the other services: during the period in question,

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\(^{11}\) Winslow Wheeler, “Alphabet Soup: PAUCs, APUCs, URFs, Cost Variances and Other Pricing Dodges,” *TIME*, June 4, 2013.

\(^{12}\) Lockheed Martin F-35 Fast Facts


\(^{14}\) Center for Defense Information, “F-35 Concurrency Orphan Costs.”

the Marine Corps purchased approximately 53 of those F-35Bs and the Navy purchased 28. “The JPO is unaware of any option currently under consideration by the Services that would keep 2B or 3i configured jets as a final end state,” Joe DelaVedova, Public Affairs Director for the F-35 Joint Program Office said. “We did provide data to the Services for this potential; however, the JPO analysis shows the best path forward is to modify fielded jets to the 3F configuration.” Our analysis shows when the costs to purchase all variants of the F-35s bought between 2007 and 2014 (the approximate timeframe the first 108 F-35As were purchased), are added together, taxpayers have spent $39.4 billion.

The Natural Result of Concurrency

The risk that the services would be stuck with less-than-capable aircraft is one the Pentagon knowingly took when leaders decided to overlap the development and testing of the program with the production. That overlap is what is known as concurrency.

The F-35 program is one of the most concurrent programs in history. The services will have nearly 800 F-35s either on hand or in the manufacturing pipeline before the design is fully proven through testing under the current plans.

While the F-35 program is still technically in “low rate initial production,” this is really only true in a strictly legalistic sense. Lockheed Martin is expected to produce 90 F-35s in 2018. In total taxpayers have bought and contracted for 266 aircraft so far, which seems to go somewhat beyond the “the minimum needed to provide production representative test articles for operational test and evaluation (OT&E) (as determined by DOT&E for [Major Defense Acquisition Programs] or special interest programs), to establish an initial production base for the system and provide efficient ramp up to full-rate production” standard established in the Department of Defense acquisition regulations.

The danger of purchasing hundreds of aircraft before a program produced a stable and fully tested design has been well known for years. Concurrency, as a RAND Corporation analyst explained in testimony before the House Government Reform Committee on May 10, 2000, is rooted “in the politics of the acquisition process.” This practice serves to limit the available political options for restructuring programs experiencing significant test failures or cost overruns. When the Pentagon makes substantial procurement commitments well before development or testing is complete, it severely increases the political costs of cancelling the program due to all the money already invested and all the jobs already created.

Dr. Michael Gilmore, the now-retired Director of Operational Test and Evaluation, warned that the services would likely have to send aircraft back to the maintenance depots for modification. The list of modifications is already quite extensive. The Air Force lists 213 change items in its FY 2018 budget request. The modifications required go far beyond mere software upgrades: they include serious structural upgrades including fixes to the landing gear, ejection seats, and the aircraft’s bulkhead structures.

Some aircraft would have to undergo this process several times before they could be in the full combat configuration.

The Government Accountability Office identified $1.8 billion worth of retrofitting costs to the program in 2016, with $1.4 billion going to already known problems and another $386 million worth of anticipated fixes that had yet to be identified. These figures are almost certainly much lower than the true cost to retrofit the aircraft already purchased because, as the testing process continues, it’s natural that more and more problems will be revealed. The F-35 program is expected to cost $406.5 billion in development and procurement costs alone. The true cost to upgrade the earlier generation aircraft must be much higher than what is being publicly reported if the Pentagon has deemed it cheaper to just purchase new aircraft.
Whistleblowers are essential for Inspectors General to uncover waste, fraud, and abuse. A September 2017 report by the Government Accountability Office (GAO) found significant inconsistencies in how civilian, contractor, and intelligence whistleblower allegations are handled by the Department of Defense Inspector General (DoD IG).  

The report is a slog, but in the end the GAO’s interviews with investigators and supervisors reveal that the processes for reviewing whistleblower cases are inconsistent at best, raising questions about whether the office can fairly and appropriately handle those who come forward with allegations of misconduct.

While DoD IG appears to be the place Department of Defense whistleblowers who experience retaliation should go, the office declines to pursue the vast majority of the complaints it receives. DoD IG is actually only the primary investigative body for DoD contractor, subcontractor, grantee, and subgrantee whistleblowers, non-appropriated fund instrumentality (NAFI) whistleblowers, and civilians under the Defense Civilian Intelligence Personnel System (DCIPS). The office refers most military whistleblowers to their military service IGs for investigation, with oversight by DoD IG. Most Defense Department civilians (those paid through appropriated funds) have their cases dismissed. DoD IG expects, and usually instructs, Defense Department civilians not under the DCIPS to turn instead to the Office of Special Counsel (OSC), the agency responsible for protecting the merit system and enforcing many provisions of the Whistleblower Protection Act. In some cases the DoD IG may choose to hold on to a case if it “may be of interest.” DoD IG’s guide to filing a reprisal complaint says this includes reprisal involving senior officials, security classification, matters within the intelligence community, or DoD IG sources. DoD IG told GAO that cases they would investigate themselves could also include sexual assault.

From fiscal year 2013 to fiscal year 2015 DoD IG dismissed without investigation 91 percent of the civilian, contractor, and subcontractor complaints it received. The GAO found

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2 Department of Defense Inspector General, “Guide to Filing a DOD Civilian Appropriated Fund Employee Whistleblower Reprisal Complaint.”
a number of significant weaknesses in the office’s processes for declining cases. Interviewing complainants is key and a best practice, since most whistleblowers never thought they would become whistleblowers and consequently don’t know the standards and evidence necessary to show they have a potential reprisal case. Yet, the GAO found DoD IG declined 63 percent of the cases for which they are the primary investigative body without interviewing the whistleblower.

The number of cases declined by DoD IG has been an ongoing concern for the Project On Government Oversight, and raises questions about whether there is effective and fair enforcement of whistleblower protections. A large part of the problem, the GAO found, was that the DoD IG had “no consistent understanding of why and when cases should be declined,” with three out of the four supervisors “unsure whether any policy or criteria for declining cases existed.”

DoD IG has made several improvements to the timeliness of its investigations, correcting many of the problems previously identified by POGO and the GAO. Timeliness is essential to effective investigations and the ability to hold accountable those who the IG believes have retaliated against whistleblowers. But this must also be balanced against the need for quality investigations and interviews to provide whistleblowers their due process rights and to uphold the intent of the law. In this case improved timeliness may be coming at a cost to a fair consideration of reprisal claims—one supervisory investigator told the GAO that declining cases was “‘fostered’ by management” and “arose to improve timeliness.”

This subjective discretion for whistleblower cases creates a lot of confusion and raises questions of fairness and due process for people who want to report wrongdoing. Declining or referring these cases to other entities may also undermine the capacity of DoD IG to oversee the Department. Some IGs have seen that it is in their best interest to retain and prioritize whistleblower cases so they can better spot misconduct and other problems. For example, the Department of the Interior IG shifted its operations after realizing they “don’t pay enough attention to the people who have the guts to step forward and tell us stuff.” The Interior’s Associate IG for Whistleblower Protection participated in weekly meetings with senior investigators and Hotline staff to sort through intake. DoD IG has set up a similar set of roundtables to review cases, but the majority of investigators told the GAO the meetings happened “infrequently or not at all.”

There remain concerns about the independence of reprisal investigations. A 2015 GAO report found DoD IG’s military reprisal investigations did not have an adequate process for monitoring potential conflicts of interest, which meant DoD IG could not ensure decisions regarding the independence of investigations was appropriate. The 2017 GAO report found similar weaknesses for the IG’s civilian investigations. In addition to a lack of process, 8 of the 28 investigators and supervisory investigators GAO interviewed raised concerns about bias in investigations. “Investigators stated examples of perceived bias that, if true, indicate a climate that may not be consistently favorable to independent and objective investigations,” the GAO wrote.

The 2017 report also highlights one of the challenges of whistleblowers seeking to raise allegations anonymously. Many whistleblowers who choose to report waste, fraud, or abuse anonymously do so because they fear they may be retaliated against if they report allegations under their own name. In the case of DoD IG, some whistleblowers have also raised concerns that the office would reveal their identity to their managers and subject them to additional retaliation.

Finally, the GAO had concerns about DoD IG’s ability to oversee the reprisal investigations conducted by intelligence component IGs (IGs for the Defense Intelligence Agency (DIA), National Geospatial-Intelligence Agency, National Reconnaissance Office, and National Security Agency (NSA)). DoD IG has the discretion to investigate these cases or refer them to the component IGs. Despite requirements for component IGs to provide timely notification to DoD IG of every reprisal allegation they receive, GAO found the NSA IG and DIA IG only reported investigations they were pursuing, and in several cases the notification was provided months after an investigation had been initiated. The shortfalls identified by the GAO thus far have actually made some of the intelligence component IGs consider reducing their reporting on reprisals to DoD IG.

Whistleblowers go to IGs expecting them to be honest brokers of the law, particularly for laws designed to protect sources who advance their investigations. Unfortunately this report doesn’t give them much confidence their allegations about waste, fraud, and abuse will ever receive due consideration.
Procurment wags like to say there are only two stages in building a new weapon for the U.S. military: too early to tell, and too late to cancel.

There’s a grain of truth in that (cf. the F-35 fighter, the most costly weapon in world history), but, as usual, it’s not the whole story. Too often we spend billions of dollars on developing weapons only to see them canceled after little or no production. That rarely happens for a lack of performance, which the Pentagon will reliably state can be fixed with just a little more money. Which leads to the real reason most programs are killed: a lack of cash.

Not to put too fine a point on it, but the Pentagon often reminds me of a drug addict, always seeking its next speedball fix. Not the troops on the front line, mind you, but the career-minded bureaucrats back at headquarters who are forever planning and developing weapons, sometimes dubious, the nation will never be able to afford.

When it comes to buying weapons, there are two kinds of waste: the premium that U.S. taxpayers fork over for every weapon bought under the Defense Department’s sclerotic and irrational arms-buying process, and then what’s spent, wasteful or not, for the ones never fielded. Yes, there are some technological spinoffs achieved from never-produced arms, but that’s kind of like boasting about the improved laser pointers beloved for Defense Department Power Point presentations spun off from the billions spent by the military on laser weapons that forever remain just over the horizon.

Let’s tackle that second waste line here. Because if we have to pay what amounts to a tax on every weapon we actually field, it’s vital to ensure we don’t pump money into weapons that are going to be scrapped before ever making it to the battlefield.

Generally, the Pentagon is as optimistic that its future funding will rise as it was about the wars in Afghanistan and Iraq being short. Part of the brilliance of American technology is the fervor for the next big thing (nuclear weapons, anyone?), and that is a trait we want to encourage.

But there needs to be a governor on military procurement lashed to historic budget realities instead of Pentagon procurement pipe dreams. Monetary mirages persist despite repeated claims that the uniformed troops’ civil-
ian overseers have scrubbed the services’ wish lists clean of like-to-haves instead of must-haves.

Defense Secretary Dick Cheney famously killed the Navy’s A-12 attack plane in 1991. He vainly tried to kill the Marines V-22 tilt-rotor aircraft, but the Corps and its Congressional cohort kept the thing on life support until Cheney and his boss, the first President Bush, changed their minds about the program as part of a failed porkfest to win re-election in 1992.

I can remember watching the Army’s fledgling Crusader howitzer program (“America’s Army: Always Naming Weapons to Be Used in the Middle East With a Tin Ear”) down at the Yuma Proving Grounds in Arizona in 2000. The desert shuddered as the Crusader hurled fire extinguisher-size artillery rounds farther and faster than ever before. The Pentagon had declared it an “Essential Science and Technologies/Leap-Ahead Technologies” system. Yeah, right.

“Now under development, the Crusader is the world’s most fearsome mobile howitzer. It is also among the costliest and heaviest ever built,” I reported in 2001, its already cut-in-half program still carrying an $11 billion price tag.1 “While the Crusader won’t be ready for action until at least 2008, the kind of war it was meant to fight is already obsolete.” Sixteen months later Defense Secretary Donald Rumsfeld agreed, and killed the program. “This decision is not about any one weapon system, but merely about a strategy of warfare—a strategy that drives the choices that we must make about how best to prepare our total forces for the future,” Rumsfeld said.

Millions in Crusader funding was diverted to the Army’s Future Combat Systems (plural for the FCS’s eight different vehicles, as is the Army’s wont). With a price tag as high as $200 billion, the program could use every penny it could find. But in 2009, Defense Secretary Bob Gates killed the FCS, using words echoing Rumsfeld’s justification for scrapping the Crusader.

In addition to the A-12, Crusader, and FCS (that last one was $20.7 billion down the drain), other big programs killed since I arrived at the Pentagon in 1979 include the Comanche attack chopper ($9.8 billion), and the Air Force’s YAL-1 Airborne Laser—crammed into a 747—designed to shoot down enemy missiles shortly after their launch. “Right now the ABL would have to orbit inside the borders of Iran in order to be able to try and use its laser to shoot down that missile in the boost phase,” Gates complained when he grounded it for good in 2009 after a $5 billion investment. “There’s nobody in uniform that I know who believes that this is a workable concept.”

Two years later, Gates also terminated the Marines Expeditionary Fight Vehicle—basically a swimming tank—with extreme prejudice after spending $3 billion on it. “If fully executed, the EFV—which costs far more to operate and maintain than its predecessor—would essentially swallow the entire Marine vehicle budget and most of its total procurement budget for the foreseeable future,” Gates said.2 Cheney killed the A-12 after the Navy spent $5 billion on it. But that’s small potatoes compared to the sea service’s new destroyer. The Navy said back in 1999 that it would buy 32 DDG-1000s for $46 billion, less than $1.5 billion a pop. But after cost growth put the program into a death spiral (the buy was cut to 24, and then to 7), the Navy ended up buying only 3 of them—for an eye-watering $7.5 billion each—before it was put out of its misery in 2009.

Here’s the key to ending this waste. Last year, Todd Harrison, the defense-budget expert at the Center for Strategic and International Studies, published an interesting chart in his budget analysis report:

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3 “Statement on Department Budget and Efficiencies,” Department of Defense, January 6, 2011.
4 Todd Harrison, Analysis of the FY 2017 Defense Budget, Center for Strategic & International Studies, April 2016.

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It’s a tad complicated, but it shows the Pentagon’s optimism overdose when it presents its annual budget request to Congress for the coming year, and the four years after that. They call it the Future Years Defense Plan, or FYDP (pronounced FID-dip). What’s notable about the chart is how the Pentagon’s estimate of its budget growth over the coming five years (those dotted lines aiming to the high heavens on Harrison’s chart) generally falls far short of the money it actually got (that’s the flatter, more realistic, solid line).

“Senior leaders in the Department of Defense keep thinking things will surely turn around in a couple of years, so they plan for higher budgets,” Harrison said last week. “And then fiscal pressures end up pushing the budget down.” Back in 2011, for example, the Pentagon was developing weapons as if it were going to have a $641 billion budget in 2015—18 percent more than it actually got that year. When you have to jettison nearly two dimes out of every dollar, lots of programs are going to have to be killed.

When J. Michael Gilmore was the Pentagon’s top weapons tester in 2011, he called the Defense Department “the Department of Wishful Thinking.” That’s why Pentagon budget forecasts have “traditionally been a lagging indicator of the budget’s trajectory, particularly during drawdown,” Harrison said in his report. After President Reagan’s defense buildup began shrinking in 1986, it took the Pentagon a full six years—an eternity in Washington—to reflect declining budgets in its future spending projections.

The wishful thinking happened again after 9/11. That’s when the Pentagon had a cash gusher that allowed it to launch too many high-tech programs that would never fit into future budgets. “Pentagon leadership prepared for the future by putting far too much stock in rosy notions of transformation and technological relief that mistook changes in the character of warfare for a shift in the nature of war,” Mackenzie Eaglen of the American Enterprise Institute said in a report earlier this month.5 “In some cases, this led to cost overruns and schedule slips in major weapons acquisition programs, rendering them easy targets for future cancelation.”

Whether its warplanes or interstate highways, there’s a human tendency to favor buying new over maintaining old. A 2011 Pentagon report faulted the uniformed military services responsible for this sad state of affairs. The Pentagon’s top civilians “sought to mitigate this problem—and hence lower weapon systems costs—by encouraging the services to prioritize their major programs, cancel marginal ones before they grew too large to stop, and restrict the number of new program starts still on the drawing board,” J. Ronald Fox wrote in the authorized Pentagon report called Defense Acquisition Reform, 1960–2009: An Elusive Goal. “The services, however, opposed this strategy, because, in their view, it required trade-offs that reduced managerial control and operational flexibility in their own backyards and reduced the number of acquisition programs under way.”

Did you catch that? You have now entered the Pentagon’s hall of mirrors. The services opposed killing weapons because that “reduced the number of acquisition programs underway”? Sure enough, that’s what happens when you order programs scrapped.

“Rather than cut programs outright,” Fox added, “the Army, Navy, and Air Force favored maintaining the same number of programs but proceeding at a lower rate, increasing unit cost, and placing much of the blame for structural problems in the weapons acquisition process on [Pentagon civilians] and Congress.” So much for civilian control of the military. (Fox has served as a Pentagon civilian, so you might have to take his assessment with a grain of salt.)

In any event, as Eaglen says, spending $75 billion for unfielded weapons in the decade after 9/11 is a terrible way to spend taxpayer bucks.

That’s the bad news.

The good news is that by killing those 28 weapons systems, taxpayers pocketed the $371 billion not spent on hardware the Pentagon deemed vital to national security not so long ago. ■

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The official grand jury indictment of Present Trump’s former campaign manager, Paul Manafort, included violations of the Foreign Agents Registration Act (FARA), a rarely enforced law that’s meant to provide transparency into how foreign powers wield influence in the United States.1

Under FARA, persons in the United States who are working on behalf of a foreign government or political party to influence U.S. policy must register their activities with the Department of Justice (DOJ). These foreign agents are required to provide significantly more detail about their work than are domestic lobbyists.

According to the indictment, Paul J. Manafort, Jr. and his business partner, Richard W. Gates III, conducted a multi-million dollar lobbying campaign on behalf of the Ukrainian government and Ukrainian political parties from 2008 to 2014. Neither registered their activities with the DOJ, which the indictment alleges violated the law. Both pleaded not guilty to the charges in the indictment.2

Manafort and Gates were allegedly able to lobby on behalf of the Ukrainian government and political parties without detection in part because the DOJ relies on voluntary compliance instead of rigorous enforcement. According to the indictment, both of them provided false information to DOJ, including denying they had met with U.S. government officials and media outlets on behalf of their Ukrainian clients.

In 2014, the Project On Government Oversight released an investigation into the DOJ’s enforcement of FARA and found that registrants regularly break the law with little to no penalties.3 Violations included failure to register, late registration, and improper disclosure of activities and documents. The DOJ has only pursued enforcement action a handful of times in recent years, making these indictments highly unusual.

Under FARA, the Department only has two enforcement tools at its disposal: pursuing criminal charges or filing a civil injunction. A civil injunction essentially means that the DOJ can request a district court to order registrants to obey a law they should already be obeying and to order them to halt their activities until they comply. The DOJ has not pursued a civil injunction for FARA violations since 1991.

Alternatively, the Department can pursue a criminal charge, which has a much higher burden of proof and the DOJ must be able to convince a grand jury to indict. Until these indictments, the DOJ had only pursued criminal charges for FARA violations seven times in the last 50 years.

There are several reasons the Department has failed to adequately enforce FARA. A 2016 audit by the DOJ Inspector General found that the FARA enforcement unit does not believe they have all the tools necessary to determine the extent of those failing to register.4 More troubling was the finding that within the DOJ there’s a great deal of disagreement as to the actual purpose of the law and what constitutes a prosecutable foreign lobbying law case. Within the Justice Department there’s a great deal of disagreement as to the actual purpose of the law and what constitutes a prosecutable foreign lobbying law case.

4 Department of Justice Office of the Inspector General, Audit of the National Security Division’s Enforcement and Administration of the Foreign Agents Registration Act, September 2016.
potential registrants. Clearly that’s not enough.

Those widespread delinquencies were thrust into the national spotlight during the 2016 election cycle. In August 2016, the Associated Press reported that Manafort and Gates were consulting for a pro-Russian group in Ukraine and helped the Ukrainians connect with two major foreign lobbying firms: the Podesta Group, Inc. and Mercury LLC. Both firms, as well as Manafort and Gates, stated at the time that even though the Ukrainian group qualified as a foreign client under FARA, they did not believe disclosure was required. Tony Podesta, founder of the Podesta Group, left the firm after it was revealed this investigation would include the firm’s involvement in the Ukrainian lobbying campaign. The firm is now closing.

Although Manafort and Gates are the only people to be publicly indicted under FARA so far this year, the press has identified additional lobbyists who may have failed to comply with FARA’s registration requirement. Earlier this year President Trump’s former National Security Advisor, Michael Flynn, was found to have been lobbying on behalf of the Turkish government without registering under FARA.

Because he was technically hired by a private company, Flynn filed reports on his activities and those of his company, Flynn Intel Group Inc., under the Lobbying Disclosure Act (LDA). A loophole in FARA allows for those hired by foreign corporations to register under the far less strict LDA. Flynn registered retroactively under FARA and stated there was an “uncertain standard.” And he’s not wrong. The law isn’t clear on how to understand who primarily benefits from the lobbying. Furthermore, neither FARA nor the LDA takes into consideration that foreign governmental and commercial interests are not always as distinct from one another as they are in the United States.

Flynn’s, Manafort’s, and Gates’ activities demonstrate how often FARA is misunderstood and how misinterpretation of the law can leave the public and even Congress in the dark about who is working behind the scenes to influence U.S. policy.

Both sides of the aisle have had issues with making sure their relationships with foreign governments, parties, and companies are as transparent as they should be. Hillary Clinton’s foreign connections also demonstrate how FARA falls short of capturing all the various ways foreign influence can creep into the U.S. policymaking process. The House Oversight and Government Reform Committee and the House Permanent Select Committee on Intelligence have launched a joint investigation into the Obama Administration’s approval of a deal involving Russia, the uranium industry, and the Clinton Foundation. Although no evidence has been revealed to indicate illegal activity by Clinton, the timing of donations to her foundation in connection with the State Department’s part in approving the deal have raised some eyebrows. While this is not the kind of activity that would be captured under FARA as it’s currently written, the incident reveals how inadequate our foreign influence laws are in the United States.

Hopefully the high-profile indictment of Manafort and Gates may serve as a warning that the days of lax enforcement of FARA are over. But it’s worrying that this is only becoming an issue because a specially appointed counsel is looking into a specific foreign influence issue.

5 Jeff Horwitz and Desmond Butler, “AP Sources: Manfort tied to undisclosed foreign lobbying,” Associated Press, August 17, 2016.
The Project On Government Oversight is a nonpartisan independent watchdog that champions good government reforms. POGO’s investigations into corruption, misconduct, and conflicts of interest achieve a more effective, accountable, open, and ethical federal government.

INSIDE

1  **$21 Billion Worth of Concurrency Orphans?**
   If all older model F-35s are included, costs could rise to $40 billion
   BY DAN GRAZIER

5  **Watchdog Finds Majority of Pentagon Whistleblowers out of Luck**
   BY MANDY SMITHBERGER

7  **Watching the Defense Department’s Waste Line**
   Why does the Pentagon develop so many weapons that it never builds?
   BY MARK THOMPSON

10 **Manafort Indictment Demonstrates How Foreign Lobbying Laws Fall Short**
    BY LYDIA DENNETT

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