

Building an NDAA that Strengthens America's Military

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KEY TAKEAWAYS

Congress should pass a National Defense Authorization Act (NDAA) for the coming fiscal year and add to a streak of consecutive years that an NDAA has been passed.

The conference committee will have an important task to build on the bipartisan support that the bill had in the Senate, but that the House failed to garner.

The road ahead is not without its challenges, but they are not insurmountable.

Introduction

The passage of the Bipartisan Budget Act of 2019 effectively determined how much the country will be able to dedicate to its national defense in 2020 and 2021. The law sets the 2020 national defense budget at \$738 billion and the 2021 budget at \$740.5 billion.¹ It is very unlikely that our political leaders will display any willingness to change these during the coming budgetary discussions.

The Bipartisan Budget Act of 2019 will effectively increase our national debt—and further demonstrates a lack of financial discipline by our political leaders.² The deal is likely to bring two more years of timely and predictable budgets to the Department of Defense (DOD).³ It fails to achieve the growth necessary outlined by the Bipartisan Commission on the National Defense Strategy and senior defense leaders,⁴ but it avoids the worst-case

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scenarios that were possible.⁵ The budget deal being done allows for more substantive discussion about how to properly leverage the defense resources that will be available for the next two years and how to put the final touches on the National Defense Authorization Act (NDAA) for fiscal year (FY) 2020.

This *Backgrounders* aims to provide policy recommendations on some of the important issues that remain to be resolved after the passage of both the House and the Senate versions of the bill.⁶ The focus is on the points of disagreement between both chambers of the legislative branch and other important issues that will shape the DOD and national defense in the coming years. The conference committee has plenty of work ahead of them to harmonize the bills.

General Transfer Authority

The House version of the NDAA follows the lead of the House appropriators and reduces the general transfer authority of the Department of Defense from \$4 billion to \$1 billion.⁷ The Senate version sets its general transfer authority at \$4 billion. The reduction is a reaction to the method President Trump used to fund the construction of physical barriers on the southern border.

While the sentiment is understandable, by reducing general transfer authority, Congress is reducing the financial flexibility of the Pentagon without actually changing any outcome on the border debate. The Pentagon would be severely constrained in its ability to manage its budget, and this would ultimately lead to lower readiness. The conference committee should maintain the \$4 billion in transfer authority.

War Powers

Section 1270W of the House bill repeals the 2002 Iraq Authorization for the Use of Military Force (AUMF). It does not affect the 2001 9/11 AUMF, nor does it affect any ongoing military (or any other) operations against al-Qaeda, the Taliban, ISIS, or associated forces. The primary purpose of the 2002 Iraq AUMF has been accomplished, and thus is no longer necessary to prosecute the ongoing war. This provision is similar to the bill by Senators Todd Young (R-IN) and Tim Kaine (D-VA), which would repeal not only the 2002 Iraq AUMF but also the outdated and unnecessary 1991 AUMF, which was used to authorize the First Gulf War.⁸ Repealing the 2002 Iraq AUMF is good policy as it is no longer necessary; its primary purpose has been accomplished. Congress needs to get back in the business of exercising its constitutional duty of deciding on whether to authorize wars.

The House NDAA also prohibits the use of military force against Iran unless it is congressionally authorized or in self-defense.⁹ It is a sign of weakness that Congress is choosing to signal to the leaders of Iran that military force is not an option for the U.S. The current situation is quite volatile, and Congress should not attempt to limit the options of the executive branch, as it might lead to more miscalculation from either party in the region by Iran.

Space Force

Both the House and the Senate versions of the NDAA have provisions that create a Space Force as a part of the Department of the Air Force.¹⁰ The House bill calls it a Corps instead of a Force, but both have similar solutions to the question of how the United States should organize itself to ensure space dominance.¹¹ Both bills emphasize restructuring the acquisition system responsible for purchasing space assets under a civilian official and creating a four-star billet responsible for leading the Space Force. The Senate version of the bill would also add a second four-star billet for the Vice Chief of Staff, an important addition that the House bill does not have.

The main flaw of both bills is their narrow focus on space assets belonging to the Air Force, leaving space organizations outside the Air Force largely untouched. According to the Government Accountability Office, there are 60 stakeholders in space throughout the federal government.¹² Of those, only 12 are under the control of the Air Force. Hopefully, this is just the start of the process and the Space Force is able to incorporate other space organizations in the future.¹³ The conferees should consider broadening the language describing the organizations subsumed in the space force.

Low-Yield Nuclear Warheads Deployment

The House NDAA prohibits the use of funds to deploy a low-yield ballistic missile warhead.¹⁴ The goal of deploying low-yield warheads is to add a credible rung to the escalation ladder. As explained by Heritage's former Research Fellow Michaela Dodge, "If an adversary thinks the U.S.' only option in response to an adversary's limited nuclear use is to use U.S. high-yield nuclear weapons, an adversary might be tempted to use his low-yield nuclear weapons thinking that U.S. response options are not credible."¹⁵ The diversification of the American nuclear arsenal provides more options that are credible for decision makers—and thus creates more avenues to de-escalate conflicts. The committee should drop this prohibition.

New START Provisions

The House bill expresses the consensus of Congress that the new Strategic Arms Reduction Treaty (START), currently set to expire on February 5, 2021, ought to be extended until February 2026.¹⁶ However, the current provisions of the treaty have not succeeded in changing Russian behavior when it comes to arms control and their nuclear arsenal.

The United States needs to take advantage of the coming termination of the current treaty to put arms control on a better footing that actually serves the interests of the country in the new era of great power competition. Further, the current transparency mechanisms of the treaty are severely lacking. A new regime of arms control needs to be built. This is not a matter of simply maintaining the status quo.¹⁷ The Conference should not push the executive branch to extend the new START without extensive debate and consideration.

Ground Based Strategic Deterrent

The Ground Based Strategic Deterrent (GBSD) is the program that will replace the 1970s-era Minuteman missiles that are currently the land-leg of our nuclear triad. These missiles are in dire need of being replaced and have been already had their life cycle extended multiple times.

The House NDAA calls for a reduction of \$103 million in this program.¹⁸ This reduction would necessarily delay the program and open it up to increased risk. The land-based element of our nuclear triad is essential for nuclear deterrence of both the United States and our allies.¹⁹ The conferees should fully fund the program.

Research and Development of INF Treaty Covered Assets

The House version of the NDAA in Section 1270J prohibits spending \$76 million in research-and-development funding for Intermediate-Range Nuclear Forces (INF) Treaty response options until the Administration provides a lengthy series of documents.²⁰ At least one of those documents is likely impossible to obtain—a commitment from an ally to host deployment of a ballistic or cruise missile. Due to repeated and willful violations of the treaty by Russia, the U.S. left the INF treaty on August 2, 2019.²¹ The Russians made no effort to return to compliance. This leaves the U.S. at a distinct military disadvantage compared to Russia—and other potential adversaries as well.

The U.S. currently has no land-based missiles with ranges of 500 km to 5,500 km. By contrast, the Russians have fielded multiple battalions of the SSC-8 (9M729) cruise missile (which violate the INF treaty). Other potential adversaries, such as China, have thousands of ground-launched missiles with ranges of 500 km to 5,500 km.²² The Administration's request for \$76 million to develop options to respond to these threats is both justified and appropriate.

The House bill proposes the Administration continue efforts to persuade the Russians to return to INF Treaty compliance. Such efforts have been underway for at least five years—with nothing to show for them. The committee should remove all restrictions on the funding of INF treaty response options.

F-15EX Procurement

President Trump's budget request called for the purchase of eight F-15EXs, a previous-generation fighter aircraft. The Senate NDAA authorized that purchase. The House, on the other hand, took a more prudent approach. It authorized the purchase of two units as prototypes, with the next six contingent on the Pentagon delivering a report that, among other things, outlines the life-cycle sustainment plan for the aircraft.

The ideal choice would be to not purchase them at all. As outlined by Heritage's Senior Fellow John Venable, the F-15EX "could never survive in a modern day, high-threat environment, and...it would be soundly defeated by an F-35 in almost any type of air-to-air engagement."²³ Some point to the need for fighters for homeland defense. However, buying an \$80.3 million jet that would be limited to stateside employment by the time it is fielded is irrational.

Others believe the U.S. should buy the F-15EX based on lower operating costs, basing their comparisons on different points of program maturity—while ignoring the normal reductions in cost that will come as the F-35 matures.²⁴ The Secretary of the Air Force clearly stated in the "The Air Force We Need" that the service needs to grow fighter capacity,²⁵ but it needs to do that without the employment limitations from the F-15X. The conferees should not authorize the purchase of the F-15X and should move the associated funding to accelerate the acquisition of the F-35A.

Army Helicopter

As part of the highly publicized night-court process developed by then-Secretary of Army Mark Esper, the Army proposed a reduction in

the advanced procurement funding for the CH-47F Block II program.²⁶ The Army will need congressional support if it is to actually implement the changes identified through the night-court process. This program is a great indicator as to whether the service will be able to move its resources to higher level priority or if it will be a hostage to congressional desires to maintain “business as usual.”

The House NDAA added \$28 million to the program, showing that it is not willing to let the Army move resources from lower priority areas that have established interests. The Conference should let the reduction remain and show its support for the tough choices the Army must make to support its modernization efforts.

Army’s Integrated Personnel System

The House version of the NDAA in Section 4201 reduced the Army’s Integrated Personnel and Pay System-Army (IPPS-A) Research, Development, Testing, and Evaluation funding by \$43 million, citing “program decrease.”²⁷ IPPS-A is the Army’s new enterprise-level, Web-based human resources system that provides integrated personnel and pay capabilities and a comprehensive personnel record for all soldiers, regardless of their component, whether National Guard, Regular Army, or Reserve.²⁸

The program did have some turbulence and had been delayed, but it is now on a sound footing and needs full FY 2020 funding in order to remain on schedule. IPPS-A would help the Army pass the full DOD audit and would also assist the Army with its goals to better conduct talent management. The committee should restore full funding to the Army’s IPPS-A program.

European Deterrence Initiative

Both versions of the NDAA contain provisions that would request the Department of Defense to provide Congress with future years’ defense program for the European Deterrence Initiative (EDI).²⁹ Developing this program is a necessary step towards making EDI more credible, predictable, and effective. EDI started as an ad hoc response to Russian aggression and has become an important part of American forward presence in Europe. It should be a part of the regular defense budget and its regular planning process: Having the five-year program is a good step in that direction.³⁰ The committee should emphasize the importance of having the five-year plans and the desire to move EDI to the base budget.

U.S.–Azerbaijan Military Cooperation

The House NDAA prohibits the use of funds to transfer defense articles and services to Azerbaijan unless the President certifies to Congress that the articles or services do not threaten civil aviation.³¹ The amendment refers to a single quote in 2011 from an Azerbaijani official suggesting that Azerbaijan will shoot down civilian airplanes using the airport in Armenian-occupied Nagorno-Karabakh, which is internationally recognized as being part of Azerbaijan’s territory.

However, according to a Congressional Research Service report: “In early February 2013, however, Azerbaijani Azeri Deputy Foreign Minister Araz Azimov stated that military forces would not shoot down civilian airliners flying over NK [Nagorno-Karabakh], but would ‘force’ them down. He pledged that Azerbaijan would follow the rules on such action in accordance with the Convention on International Civil Aviation, ratified by Azerbaijan in 1992.”³² The U.S. government’s decision to provide military assistance to another country should be based on American security interests—not pressure groups lobbying Congress.

Azerbaijan is a regional economic leader in the South Caucasus and an important economic actor in the Caspian region.³³ It is also a strong supporter of Israel. Further, Azerbaijan allows the U.S. to use its territory to transport supplies for Afghanistan, bypassing Russia. Azerbaijan plays a very important role serving Europe’s energy needs, and the Southern Gas Corridor will help reduce Europe’s dependency on Russian gas. The U.S. should provide military and security assistance to all deserving partners. The House should drop its prohibition.

U.S.–Saudi Arabia–UAE Relationship

There are multiple provisions in the House NDAA that would alter the U.S.–Saudi Arabia relationship and the ongoing operations that the United States supports. The Saudi–U.S. security relationship is a valuable instrument for protecting U.S. interests in an extremely volatile region. Saudi Arabia plays a key role in helping to stabilize the region, especially in Syria and Yemen, where it is an important counterbalance to Iran.

One provision of the House NDAA would prohibit the export of air-to-ground munitions to Saudi Arabia and the United Arab Emirates (UAE).³⁴ This would put Saudi Arabia and the UAE at a significant military disadvantage and would weaken their ability to contain Iran’s behavior in the Gulf. The UAE provides ongoing and essential logistical support for U.S. Navy

fleet operations, which use the UAE's Jebel Ali port more than any other foreign port in the world.³⁵ Further, Dubai in particular is the sixth-largest port in the world for commercial container traffic. This provision would essentially prevent both the UAE and Saudi Arabia from deterring Iranian aggression in the region.

Another provision prohibits the use of emergency authorities for the sale or transfer of defense articles and services to both countries.³⁶ Congress is ignoring the real threat that Iran poses to the UAE and Saudi Arabia. If a conflict broke out in the Gulf, the UAE and Saudi would likely be the first targets.

There is also a provision to prohibit American support for military activities against the Houthis.³⁷ As it stands, a military stalemate on the ground is possible due to U.S. support of the Arab Coalition's effort to combat a Houthi takeover of Yemen, creating an environment in which the Houthis come to the negotiating table.

Cutting off U.S. military support for the Saudi-led coalition would not end the war, nor necessarily improve the humanitarian situation in Yemen. In fact, it could exacerbate the situation by depriving the Saudis of precision-guided weapons, increasing civilian casualties, and prolonging the fighting. A weakened UAE–Saudi coalition would erode the leverage needed to attain an acceptable peace agreement that limits Iran's influence in Yemen. Such a one-sided policy would reward Iran, which has played a destabilizing role by transferring sophisticated arms, including ballistic missiles that the Houthis have launched against Saudi cities, airports, and other civilian targets.

The House NDAA further prohibits the United States from supporting the work of the international coalition against the Houthis in Yemen.³⁸ This prohibition represents a non-nuanced view of the conflict in the region that would harm the United States' interests in the region and its relationship with regional allies.³⁹ This language should be dropped from the final version of the NDAA.

All of these provisions would weaken Saudi Arabia and the UAE's air-combat capabilities, weapons systems, and intelligence/logistical support, empowering Iran and leaving the Gulf unable to deter and defend against Iranian aggression. If the United States wants other countries to help in maintaining the current international order, it should support them when they are doing so. The committee should adopt a nuanced view of these relationships and try to preserve important avenues of cooperation between the countries.

Real Property Portfolio Management

The House NDAA included a good provision requiring a report evaluating service-level best practices on recording and maintaining real property data.⁴⁰ One of the biggest obstacles faced by advocates for better real property management is that the DOD lacks standardized data collection and management. This is a substantive effort to get an understanding of how much is actually occupied and how it is utilized. The initial steps of the Base Realignment and Closures are dedicated to this type of data collection, which shows the importance of the process.⁴¹

This report would be a step forward in understanding how the department currently uses its property, how to manage it better, and how to best steward taxpayer resources. The conferees should adopt the House reporting language.

Military Privatized Housing

America was shocked when reports of unsanitary and substandard military privatized housing (MPH) came to light in a February 2019 Senate hearing, at which residents shared stories of mold, vermin, and retaliation following complaints.⁴² What was described was clearly unacceptable. Both the House and the Senate responded with significant new legislation in their versions of the NDAA in Sections 2801 and 3001, respectively.⁴³ Both contain helpful provisions, including requirements for a tenant bill of rights, dispute-resolution mechanisms, and transparency in maintenance requests. All are sorely needed.

The Senate version, however, contains a vastly greater amount of detail and requirements, and in some cases, these new requirements are either unnecessary or inappropriate. For example, in Section 3012, the Senate proposes the unnecessary creation of a new office at the Office of the Secretary of Defense level for a “Chief Housing Officer.” The responsibility for appropriate housing is a command function, vested in the Secretary of Defense and the Service Secretaries for them to organize as they see fit. Further delegation is not appropriate—and further bureaucracy is unwelcome.

In Section 3014, the Secretary of Defense is required to consider past performance of the landlords in decisions to renew contracts. The Federal Acquisition Regulation Section 12.206 already establishes contract past performance as a key consideration in contracting. This section, too, is unnecessary.

Section 3016 inappropriately requires the DOD to hire independent housing inspectors unaffiliated with the government or the landlord to

inspect military housing. Once the landlord and the government have entered into a contract, supervision of the landlord's performance is an inherently *governmental* function.

Section 3034 prohibits the landlord from using call centers outside the United States. This is an inapt requirement, as many organizations rely on overseas call centers. It is the landlord's and government's responsibility to supervise the performance of these call centers, regardless of where they are located.

Finally, and most significantly, Section 3017 requires the government to tax the basic allowance for housing payments to landlords in the amount of either 2 percent or 3 percent—and to use those funds to pay for the extensive system of military privatized housing oversight required in the draft Senate legislation. If enacted, this provision could reasonably be expected to impact the landlord's ability to conduct necessary housing maintenance by reducing the amount of operating funds available for such purpose. If additional funding is needed to oversee MPH, it should be paid for by direct appropriation.

Guantanamo Bay

The House version of the NDAA includes a provision that would prohibit the transfer of terrorists to, and detention at, Guantanamo Bay.⁴⁴ Guantanamo Bay is a safe, humane, and well-run detention facility and should remain a viable option for unlawful enemy combatants who can be lawfully held under the 2001 AUMF and under the laws of war. The provision calling for a disposition plan for detainees at Guantanamo Bay should be interpreted by the Administration merely as a requirement to provide Congress with what they think will happen with detainees in the future and nothing more.

Any attempt to limit the Commander in Chief's ability to prosecute the war—and especially which detainees can be taken to Guantanamo Bay—potentially violates the separation of powers and is unwise policy. It is an open legal question, and indeed a litigation risk, whether the 2001 AUMF would cover ISIS members if they were brought to Guantanamo Bay.

The Berry Amendment

Section 810 of the Senate NDAA reduces the small-purchase threshold within the Berry Amendment from \$250,000 to \$150,000 and prevents a contract for more than \$150,000 from being “divided into several

purchases or contracts for lesser amounts.”⁴⁵ The Berry Amendment covers the purchase of food, clothing, tents, and other basic goods, and the small-purchase threshold allows the DOD to readily source non-essential items for national defense. Supporters of this provision claim that the current small-purchase threshold invites risks of outsourcing manufacturing contracts to adversaries like China, but the DOD already has the authority and flexibility to avoid relying on potential adversaries for critical resources.

Section 815 of the House NDAA expands the coverage of the Berry Amendment to stainless steel flatware and dinnerware.⁴⁶ The Berry Amendment and Buy American laws for the Department of Defense are intended to ensure that goods are available for national defense, but these laws also unnecessarily cover many commercial, non-defense-related goods. This provision would result in higher prices for flatware for the military, a waste of defense dollars. The Conferees should drop both these protectionist measures.

Sexual Orientation and Gender Identity

The House NDAA expands the prohibition on sex discrimination in determining eligibility for military service and the treatment of service members to include sexual orientation and gender identity.⁴⁷ The language constitutes a radical redefinition of sex from an immutable biological trait to a fluid, subjective one.

This needless, politicized change would require the military to grant biological males access to women’s spaces such as housing, restrooms, and showers if those males simply self-identify as women. The NDAA is a traditionally bipartisan bill: It should not be converted into a vehicle for controversial social policies.

Military Parades

The House version of the bill contains a prohibition on the exhibition or parade of any military forces and hardware for presidential review.⁴⁸ The prohibition is extremely broad and applies to any possible parade or exhibition at which the President would be involved.

At a moment in which the military is having challenges recruiting and the civilian–military divide is becoming more of an issue,⁴⁹ it is unwise to prohibit a situation designed for civilians to have more exposure to the country’s military. This measure would only add more distance between

the military and the society that it serves, simply because of congressional dissatisfaction with recent presidential actions. It is a shortsighted measure that the committee should drop.

Nuclear Fuel Capabilities

In addressing the military's need for tritium and enriched uranium,⁵⁰ the Senate NDAA wisely prioritizes defense uses and protects against diverting resources to projects that likely decrease capabilities and subsidize commercial civilian activities.⁵¹ Such language is necessary, considering recent pressures to conflate military and civilian uses of nuclear technology from proposed legislation (the Nuclear Energy Leadership Act), the Department of Energy's (DOE) civilian nuclear programs, and a recent trade case on uranium imports.⁵² In each instance, the objective has been to use superficial national security arguments to subsidize and stimulate civilian commercial uses for research and development, fuel-cycle infrastructure, and uranium.

Unlike the House NDAA,⁵³ the Senate version wisely protects defense uses from diversion to activities that likely would "reduce vessel capability, increase expense, or reduce operational availability" unless the DOD, DOE, and Navy certify otherwise.⁵⁴ The Senate version further seeks to provide additional assurance that defense needs can be met by directing the DOE to clarify whether the 1958 Agreement for Cooperation on the Uses of Atomic Energy for Mutual Defense Purposes with the United Kingdom could enable additional sources of tritium for the Navy.⁵⁵ The committee should adopt the Senate language.

Accountability for Environmental Management Work

The Senate NDAA requires the DOE to submit a report updating the projected costs to clean up facilities remaining from World War II and the Cold War to manufacture and test nuclear weapons.⁵⁶ Environmental liabilities maintained by the Office of Environmental Management (EM) grew \$110 billion from 2017 to 2018 (due to updated estimates), bringing the current total to \$377 billion.⁵⁷ The Government Accountability Office found that EM has not met annual progress and cost-reporting requirements to Congress.

Finally, in June 2019, the DOE also finalized new guidance on high-level waste classification that could impact clean-up costs.⁵⁸ The DOE has a legal and moral obligation to clean up these sites, and the mission of EM should

have the commensurate level of attention from the Secretary and Congress.⁵⁹ This is language that should stay in the final version of the NDAA.

Recommendations

The passage of the Bipartisan Budget Act of 2019 effectively resolved the question of how much the U.S. will dedicate to defense.⁶⁰ The main issues are around the provisions that will determine the shape and the direction of the Department of Defense. When considering the individual provisions of the FY 2020 NDAA, Congress should:

- **Enhance operational flexibility.** There are many provisions in both versions of the bill in which Congress indulged in its worst instincts—over-legislating and severely reducing the operational flexibility of the Department of Defense due to eroded trust. The reduction in general transfer authorities is a clear-cut example of reducing flexibility for the department. This loss of flexibility will negatively affect the ability of the DOD to fulfill its mission and will affect national security.
- **Build consensus in the conference committee.** The work of the committee should build on the consensus of the previous work of both the House and the Senate—and avoid controversial measures.
- **Focus on great power competition.** Congress needs to support the Department of Defense as it moves towards great power competition. The competition with both China and Russia will be a long-term engagement that must be carried out in a sustainable and holistic manner and with all the tools of national power. The NDAA needs to take positive steps toward better positioning the country for that type of competition.

Conclusion

Congress is well-positioned to pass a National Defense Authorization Act for the coming fiscal year and add to a streak of consecutive years with an NDAA. The conference committee will have an important task to build on the bipartisan support that the bill had in the Senate—but that the House failed to garner. The road ahead is not without its challenges, but they are surmountable.

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