



SENATE REPUBLICAN

POLICY COMMITTEE

Legislative Notice

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House Amendment to S. 3001 – FY 2009 Defense Authorization Bill

On September 24, 2008, the House passed S. 3001, as amended by agreement of the House and Senate Managers of the bill, by a vote of 392-39. The House amendment was accompanied by a Joint Explanatory Statement of the House and Senate Managers.

Noteworthy

- As amended, S. 3001 authorizes \$611.1 billion for national defense programs, \$1.4 billion less than the sum requested by the President and authorized in the Senate-passed version of the original bill. This figure includes \$68 billion for operations in Iraq and Afghanistan.
- In keeping with the original Senate bill, this bill authorizes a 3.9 percent across-the-board pay raise for all uniformed service personnel, 0.5 percent more than the President's request, and rejects the President's request for an increase in TRICARE fees.
- This bill authorizes an increase of 7,000 Army soldiers and 5,000 Marines.
- This bill responds to the veto threats articulated in a September 9, 2008 Statement of Administration Policy by eliminating or substantially altering provisions related to security contractors in combat zones, interrogation of detainees by private contractors, public-private competitions to fill certain Department of Defense workforce gaps; and defense intelligence matters.
- It authorizes an additional \$2.1 billion in supplemental funding for six more C-17 airlift aircraft.
- It provides \$523 million to continue the F-22 fighter aircraft production line in FY 2010, but would prohibit spending more than \$140 million until the next President certifies whether continuing F-22 production is in the national interest.

Background

The Administration's fiscal year (FY) 2009 defense budget request, transmitted to Congress on February 4, 2008, was for \$612.5 billion. This includes \$542.5 billion for the "base budget" national defense programs, and an additional \$70.0 billion emergency supplemental "bridge" fund for operations in Iraq and Afghanistan. On May 22, 2008, the House approved its FY 2009 Defense Authorization bill, H.R. 5658, by a vote of 384-23. The Senate followed on September 17, 2008, passing S. 3001, as reported by the Armed Services Committee, with only three amendments, by a vote of 88-8. Agreement on a larger "managers' package" of amendments to the Senate version could not be reached because of a failure to resolve various matters, including issues relating to a procedurally problematic "incorporation by reference" of earmark tables into the bill.

The Senate bill passed without the appointment of conferees. Instead of a formal conference, the House and Senate managers of the bill (the "Managers") reached agreement on a modified version of the bill. This agreement was implemented as a House amendment to the Senate bill, which passed in the House on September 24, 2008 by a vote of 392-39.

On September 23, 2008, the agreed House-amended version of S. 3001 (hereinafter, the "agreed bill" or "this bill") was filed in the Senate along with a Joint Explanatory Statement of the House and Senate Managers of the bill (the "explanatory statement"), in lieu of a conference report. The Explanatory Statement addressed the incorporation-by-reference issue, as explained below.

The agreed bill comes to the Senate as a House message, rather than as a privileged conference report, and is amendable in the Senate.

Bill Provisions

The agreed bill authorizes \$611.1 billion for national defense programs, \$1.4 billion less than the sum requested by the President and authorized in the Senate bill. This figure includes \$68 billion for operations in Iraq and Afghanistan, which is \$1.9 billion less than the sum requested by the President and authorized in the Senate bill.

Division A – Department of Defense (DOD) Authorizations

Title I – Procurement

This title authorizes \$104.0 billion in procurement funding, \$1.3 billion more than the President's request and about \$200 million less than in the Senate bill. The authorization of appropriations (Sections 101-105) is based on the House bill, with technical amendments. Significant departures from the Senate bill include the following (variations greater than \$100 million):

- decreased funding for Army aircraft procurement;
 - decreased funding for Army weapons and tracked combat vehicles;
 - decreased funding for Navy aircraft procurement;
 - increased funding for Navy shipbuilding and conversion;
 - decreased funding for Air Force aircraft procurement; and
 - elimination of funding for the Rapid Acquisition Fund.
- It authorizes the following for specific weapons systems:
 - \$3.6 billion for the Future Combat System;
 - \$1.6 billion to upgrade M1 Abrams tanks and M2 Bradley Fighting Vehicles;
 - \$229 million for the Armed Reconnaissance Helicopter, for five fewer aircraft than in the Senate bill, and 13 fewer than requested by the President;
 - \$1.1 billion for 119 Stryker vehicles;
 - \$2.9 billion for 20 F-22A Raptors, the next generation air-superiority strike-fighter designed to incorporate next-generation stealth technology and replace the F-15, which is \$147 million less than the Senate bill;
 - \$1.5 billion for seven F-35 Joint Strike Fighters (JSF), which is \$169 million less than the Senate bill, and one less aircraft. The JSF is the all-purpose strike-fighter designed to replace the F-16;
 - \$1.6 billion for 22 E/A-18 G Growlers, the Navy's electronic surveillance and electronic warfare variant of the F-18, meant to replace the aging EA-6;
 - \$1.9 billion for the next-generation F/A-18 E/Fs, the Navy's upgrade of the current F/A-18 C/D aircraft;
 - \$2.1 billion for 30 V-22 aircraft, planned as the next generation air-mobility air-assault aircraft;
 - \$1.1 billion for 24 Trident II ballistic missiles;
 - \$281 million for 207 Tomahawk cruise missiles;
 - \$2.5 billion in advanced procurement for a third DDG-1000 destroyer;
 - \$2.1 billion for procurement of the next Virginia-class attack submarine;
 - \$600 million in unrequested funding for advanced procurement of two LPD-17 San Antonio class amphibious ships; and
 - \$920 million for two Littoral Combat Ships.

This title adopts a variety of provisions from the House bill:

- This title adopts (in some cases with modifications) a variety of provisions from the House bill, including the following:
 - a requirement that future Administration requests for funding under the Future Combat System (FCS) program include separate procurement lines for the FCS manned ground vehicles, unmanned ground vehicles, unmanned aerial vehicles, unattended ground systems, and other FCS elements;
 - a restriction on funding for the Armed Reconnaissance Helicopter pending certification that the program has successfully passed certain tests;

- a relaxation of the cost-cap mechanism for the Littoral Combat Ship;
- a requirement that the Air Force maintain at least 74 KC-135E tanker aircraft in ready storage;
- a repeal of the authorization of multi-year procurement for a certain category of tanker aircraft;
- a reporting requirement on the requirements for aerial refueling in connection with the KC-(X) competition, and on the commercial aircraft available for use as potential aerial refueling platforms;
- a reporting requirement on body armor acquisition strategy; and
- a requirement for common ground stations and payloads for manned and unmanned aerial vehicles common to the Department of Defense.

Title II – Research, Development, Test and Evaluation (RDT&E)

The bill approves \$77.8 billion for RDT&E, nearly \$2 billion less than the President’s request and \$2 billion less than the Senate bill, including:

- \$11.0 billion for the Army, \$900 million more than the Senate bill and \$420 million more than the president’s request;
 - \$19.3 billion for the Navy, \$100 million less than the Senate bill and substantially close to the President’s request;
 - \$26.3 billion for the Air Force, \$2 billion less than the Senate bill and \$1.8 billion less than the President’s request;
 - \$20.9 billion for Defense-wide activities, substantially equal to the Senate bill, but \$556.6 million less than the President’s request; and
 - \$188.8 million for Defense Operational Test and Evaluation.
- This bill adopts from the House bill a number of complex policy provisions and reporting requirements relating to the Future Combat System.
 - This bill substantially adopts the Senate bill’s provisions relating to missile defense with two important exceptions: First, the bill authorizes \$43 million for the Polish interceptor field (a reduction of \$90 million) which Poland recently agreed to host, and which the Senate bill fully funded; and second, the bill eliminates the \$5 million authorization in the Senate bill for an independent study of a space test-bed for missile defense. It substantially preserves the Senate bill’s \$411 million reduction to the President’s request for the Missile Defense Agency.
 - The bill contains a \$43 million reduction to the President’s request for Conventional Prompt Global Strike development, which the Senate bill fully funded.

- It eliminates the President's \$33.3 million request for the Reliable Replacement Warhead program, which was fully funded in the Senate bill.
- This bill expands the Senate bill's restriction on funding for a second Air-Borne Laser aircraft, consonant with the House bill.
- This title authorizes \$530 million for a second competitive Joint Strike Fighter propulsion system.

Title III – Operation & Maintenance (O&M)

For O&M, this title authorizes \$154.2 billion, about \$200 million more than the Senate bill, and \$599 million less than the President's request, including:

- \$31.3 billion for the Army;
- \$34.8 billion for the Navy;
- \$35.2 billion for the Air Force;
- \$5.6 billion for the Marine Corps;
- \$25.9 billion for Defense-wide;
- \$2.6 billion for the Army Reserve;
- \$1.3 billion for the Navy Reserve;
- \$3.1 billion for the Air Force Reserve;
- \$213 million for the Marine Corps Reserve;
- \$5.9 billion for the Army National Guard;
- \$5.9 billion for the Air National Guard; and
- \$434 million for Former Soviet Union Threat Reduction programs.

Title IV – Military Personnel

This title authorizes \$124.8 billion for military personnel.

- It adds 7,000 active-duty soldiers to the Army, for a total of 532,400.
- It adds 7,000 active-duty Marines, for a total of 194,000.
- It authorizes active duty end strength for the Navy of 326,323 and for the Air Force of 317,050.
- It increases the size of the Army National Guard (by 1,300) and increases the number of full time support National Guardsmen by 2,856.

Title V – Military Personnel Policy

This title provides a number of career, benefit, and other enhancements for active and reserve military personnel.

- As part of a phased revision to General and Flag Officer authorities, this title authorizes the Secretary of Defense to designate up to 324 general and flag officer joint duty positions that do not count against service authorizations for flag and general officers.
- It authorizes National Guard officers, not just those officers in command, to retain their state status while serving on active duty when authorized by the President and with the consent of the Governor.
- It authorizes promotion of National Guard and reserve officers selected for a vacancy promotion who are ordered to active duty in support of a contingency operation.
- It authorizes reserve component chaplains and medical officers to be retained in an active status until they turn 68.
- It requires the Secretary of Defense to establish a task force on suicide prevention.
- It increases authorized strength at the U.S. Military Academy, the U.S. Naval Academy, and the U.S. Air Force Academy to 4,400 cadets or midshipmen.
- It authorizes the Secretary of Defense to establish programs, including tuition assistance, to assist spouses of active-duty service members in obtaining education and training required for a degree, credential, or professional licensure in order to expand their employment and portable career opportunities.
- It authorizes \$55 million in DOD supplemental educational aid to local school districts that are affected by the assignment or location of military families, including \$35 million for supplemental DOD impact aid, \$5 million for educational services to severely disabled children, and an additional \$15 million for districts experiencing rapid increases in the number of students due to rebasing, activation of new military units, or base realignment and closure. This is a total increase of \$10 million from last year's authorization.
- It calls for a strategic plan to enhance the role of the National Guard and Reserves.
- It provides 10 days of paternity leave for new fathers on active duty.

Title VI – Compensation and Other Personnel Benefits

This title authorizes pay increases and various other bonuses and special pay authorities aimed at encouraging enlistment, reenlistment, and continued service by active-duty and reserve military personnel.

- It authorizes a 3.9 percent across-the-board pay raise for all uniformed service personnel – the ninth year in a row that military pay increases have exceeded those of the private sector.
- It extends authorizations to provide a number of benefits targeted at reserve members experiencing extended and frequent mobilization, psychologists, nuclear-qualified officers, and certain prospective officers who pursue certain foreign language training during pre-commissioning training.
- Other provisions in the title facilitate travel for service members’ pets, and the professional books and equipment of spouses, in case of permanent change of duty station.

Title VII – Health Care

This title contains several provisions meant to improve health benefits and medical service for service members. This bill contains approximately \$25 billion for defense health care programs.

- This title rejects the President’s request to raise TRICARE fees.
- This title calls for a task force on suicide prevention.
- It contains a number of additional health care enhancements, including:
 - It calls for an increase in availability of chiropractic care for active duty service members at 11 additional military installations.
 - It waives copayments for preventive health care services for certain TRICARE beneficiaries.
 - It requires the establishment of a smoking cessation program under TRICARE.
 - It provides incentives to military personnel and families to access preventive health care services.
 - It establishes a Center of Excellence on hearing loss and auditory system injuries.
 - It raises the cap on extended health care services for military dependents with disabilities, including autism.
 - This title extends for a year the Department of Defense and Veterans Administration Oversight Committee for wounded warriors transition and care.

Title VIII – Acquisition Policy and Management

The provisions of this title are generally designed to increase transparency and oversight in major defense acquisition programs, and make certain other enhancements to the contracting process, including the creation of a contingency contracting corps to manage contracting in contingency environments, and the provision of multiyear contracting authority for the purchase of alternative and synthetic fuels. This title contains a number of important provisions relating to security contractors such as those used extensively in Iraq and Afghanistan.

- It requires private security contractors operating in combat situations in Iraq and Afghanistan to comply with Department regulations and rules on the use of force, as well as orders and directives from combatant commanders regarding force protection, security, health, safety, and interaction with local nationals.
- It requires the development of conflict-of-interest safeguards in that call for the performance of functions closely associated with “inherently governmental functions.” This significantly expands the scope of a similar provision in the Senate bill.
- It contains a provision expressing the sense of Congress that functions, when performed in combat areas, constitute “inherently governmental functions,” and should not be performed by private contractors. This is a significant departure from the original provisions in both the Senate and House bills, which drew veto threats from the Administration.
- This title contains other noteworthy departures from the Senate bill, include the following:
 - a provision requiring the Department to issue guidance on the use of personal service contracts;
 - a requirement for Department guidance on considering the national technology and industrial base as a factor in awarding contracts for major acquisition programs;
 - a provision that would make cost accounting standards apply to certain federal contracts performed outside the United States;
 - adopts a provision from the House bill that prohibits contractors from using foreign shell companies to employ U.S. persons to perform Department of Defense contracts, and imposes an additional reporting requirement on the Comptroller General; and
 - contains a subtitle designated the “Clean Contracting Act of 2008,” that provides for government-wide improvements in the acquisition contracting process.

Title IX – Department Policy and Management

- This title adopts a provision of the House bill that calls for a plan to enhance the roles of the National Guard and reserves.
- It modifies the provision for a space posture review in the Senate bill, with reference to the national industrial base.
- This title essentially nullifies the Senate bill provision regarding the management of the anti-submarine warfare Advanced Sensor Applications Program (ASAP).

Title X – General Provisions

- Section 1005 contains a controversial provision that purports to incorporate the funding tables in the explanatory statement “as if included in the text of the Act.”
 - During Senate consideration of the Senate bill, some members expressed concern that because matter incorporated by reference into a bill is treated differently under the procedural rules of the Senate than matter incorporated into text, the two cannot be considered equivalent. Concerns were also expressed that because matter incorporated by reference is in a secondary document, the visibility and transparency of the matter contained therein is reduced.
 - Democratic senators acknowledged these concerns but concluded that it was too late to try to insert the tables into the text of the bill in full because of printing problems. Other members insisted that if the tables could not be inserted into the text of the bill, then the incorporating clause should be struck in order to clarify that only the text contained within the four corners of a bill can have the force of law. Agreement could not be reached on bringing the latter amendment up for a vote. Because of this in large measure, the Senate bill passed without many expected amendments.
- This bill extends the authority for joint task forces to use counterdrug funds to support law enforcement agencies conducting counterterrorist activities. It extends the authority to use counterdrug funds to support the Colombian government’s counter-narcotics effort.
- This bill authorizes the creation of a Center for Complex Operations to enhance the training of military personnel and civilian counterparts across different agencies, and to increase unity of effort in complex operations, including stability, security, transition, and reconstruction operations; counterinsurgency operations; and irregular warfare.
 - This provision responds to the increasing need to tackle counterinsurgency and stability operations with resources from across the Executive Branch.

- A provision that originally appeared in Title X of the Senate bill prohibiting the interrogation of detainees by contractor personnel was not included in this bill, and instead expresses the sense of Congress that contractor personnel should not engage in such interrogations.

Title XI – DOD Civilian Personnel Policy

This title provides streamlined hiring for and management of the civilian workforce of the Department (the National Security Personnel System). It provides expedited hiring authority for health care professionals. It lifts certain caps on salaries for federal civilian employees participating in a military operation, or in response to a declared emergency, in U.S. Central Command's area of responsibility.

Title XII – Matters Relating to Other Nations

This title has a number of provisions related to international security affairs, including international assistance and training, Iraq and Afghanistan, particular focus on Iraqi refugees, and a variety of reports.

- This title extends authorities to train and equip foreign military forces, expands this authority to include maritime security forces, and increases the annual funding for this program from \$300.0 million to \$350.0 million.
- It increases funding available for the Regional Defense Combating Terrorism Fellowship Program.
- It provides authority for the Department to distribute electronically training materials to enhance the interoperability of foreign military and civilian personnel with U.S. personnel.
- It provides authority for DOD personnel to participate in the NATO multinational military centers of excellence.
- It requires a report by 2010 on how DOD has used the capacity-building authorities to assist in evaluating whether to extend or modify these authorities.
- It increases funding for the Commanders' Emergency Response Program over the Senate bill, authorizing \$1.7 billion for FY08 and \$1.5 billion for FY09.
- It provides that no funds expended in the bill can be provided for construction of permanent bases in Iraq, or to exercise U.S. control of oil resources.
- It requires a report on status of forces agreements reached with Iraq.

- It authorizes funding for training and equipping the Pakistan Frontier Corps for operations along the Afghan border.

Title XIII – Cooperative Threat Reduction With States of the Former Soviet Union

This title authorizes \$434.1 million for Cooperative Threat Reduction (CTR) programs, \$20 million more than the budget request.

Title XIV – Other Authorizations

This title contains authorizations for other military programs and working capital funds.

Title XV – Authorization of Supplemental Appropriation for Operation Iraqi Freedom and Operation Enduring Freedom

This title authorizes \$68 billion for operations in Iraq and Afghanistan, which is \$1.9 billion less than the sum requested by the President and authorized in the Senate bill.

- The authorization includes \$2.1 billion for six unrequested C-17 transport aircraft.
- This title authorizes \$1 billion for training and equipping of the Iraqi Security Forces, a cut of 50 percent from the President's request.
- It prohibits any funding for construction or rehabilitation of facilities or installations for use by any Iraqi governmental entities, with exceptions.

Title XVI – Reconstruction and Stabilization Civilian Management

This title contains the Reconstruction and Stabilization Civilian Management Act of 2008. It contains a variety of provisions to improve U.S. capacity to prepare, plan for, and conduct stabilization and reconstruction operations, and provides new authorities to the Secretary of State related to these missions.

Division B – Military Construction and Family Housing Activities

This bill authorizes \$24.9 billion for military construction and housing programs, \$538 million more than the President's budget request but lower than the Senate bill authorization of \$25.3 billion.

- This bill authorizes \$3.1 billion for the Army and \$1.2 billion for the Marine Corps to assist in providing facilities associated with the planned increases in the Army and Marine Corps personnel.
- It authorizes \$3.2 billion to support and expand quality housing for all service members and their families. It also contains a provision that will improve management for privatized housing units.
- Contains several provisions to facilitate the movement of large units from station in Japan to bases in Guam.

Division C – Department of Energy National Security Authorizations and Other Authorizations

Title XXXI – Department of Energy National Security Programs

The agreed bill authorizes \$16.1 billion in FY08 for Department of Energy's energy security and energy supply assurance programs, which is \$143.2 million more than the sum in the president's request and in the Senate bill. Highlights include the following:

- It authorizes \$9.75 billion for the National Nuclear Security Administration (NNSA).
- It authorizes \$5.3 billion for defense environmental cleanup activities.
- It authorizes \$222.4 million for defense nuclear waste disposal.
- It authorizes \$7.6 million for energy security and assurance.
- It authorizes \$434 million for "Nunn-Lugar" funding to aid in dismantling of nuclear weapons in the former Soviet Union.
- It authorizes \$452 million for securing nuclear weapons and materials outside the U.S.

Administration Position

A Statement of Administration Policy (SAP) for the agreed version of S. 3001 was not available at press time.