HITCHING A RIDE ON THE NATIONAL DEFENSE AUTHORIZATION ACT

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A Thesis Submitted To The Honors College
In Partial Fulfillment of the Bachelors degree
With Honors In
Political Science
THE UNIVERSITY OF ARIZONA
MAY 2018

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Abstract

The National Defense Authorization Act has been passed by Congress for each of the last 56 years. This ‘must-pass’ piece of legislation provides a unique opportunity for members of Congress to offer provisions - some unrelated to defense - to the defense authorization as an amendment in order to get them passed into law. Since the 1950s there has been a steady decrease in the number of bills passed by Congress caused by a steady increase in partisanship and many other contributing factors. It is now more difficult for members of Congress to pass legislation. Non-germane amendments to the defense authorization often have a long legislative history and their addition to the NDAA is a last-resort effort to get the bill enacted. The NDAA is a good candidate for non-germane amendments since it is seen as a must-pass bill that encourages bipartisan coalitions and as few filibusters as possible. As paths for legislation to become law get fewer and fewer, the NDAA will remain an important outlet for those seeking to make or change laws.

Keywords: National Defense Authorization Act, defense spending, non-germane, amendments, NDAA
**Introduction**

Legislation authoring defense spending has been passed by Congress every year for the last 56 years. The National Defense Authorization Act (NDAA as it is called) allows Congress to shape Pentagon spending and priorities, and because of this it has become a “must-pass” annual bill. Congress is often presented as a ‘do nothing’ organization that sits and bickers instead of passing useful legislation. This idea has become especially prevalent in recent years as Congress has passed fewer and fewer bills as illustrated in Figure 1. Despite this decline in the passage of legislation, without fail Congress has passed the NDAA. Since the defense authorization is one of the only bills that is dependably enacted, regardless of which political party is in control, it is often used as a tool by Senators to pass policy into law that otherwise would have been lost in throws of partisan politics.  

Tacking on provisions that are not necessarily related to the defense authorization (or adding non-germane amendments in parliamentary language) is a tool used periodically by members of both parties, typically Senators, to win passage of legislation that may not have made

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1 Graph: Washington Post article “Yes, President Obama is right. The 113th Congress will be the least productive in history.”
https://www.washingtonpost.com/news/the-fix/wp/2014/04/10/president-obama-said-the-113th-congress-is-the-least-productive-ever-is-he-right/?utm_term=.1f81edc46de1

2 Shogan, Colleen: Chapter “Defense Authorization: The Senate's Last Best Hope (2011)” p.2
it through the process as a stand-alone bill. Since the NDAA is seen as a ‘must-pass’ piece of legislation, any delay in the legislative process such as a filibuster (a technique used by Senators to postpone a vote by holding the floor) is ardently avoided, for the most part. The one way to end a filibuster is through cloture. Needing three-fifths of the votes in the Senate (60) to pass, cloture ends debate on a bill and forces a vote on the measure. Knowing that the Senate does not want to delay the passage of the NDAA, Senators will introduce non-germane amendments (colloquially knowns as riders) in the hopes of hitching a ride on a bill almost certain to make it into law.

Introducing non-germane amendments to the NDAA and forcing a vote on them allows legislation to be passed that would not have been passed otherwise or has failed to pass on previous attempts. For example, a major expansion of federal hate crimes law might never have been enacted if the provision had not hitched a ride on the NDAA for the fiscal year of 2009. It had been introduced to Congress many times over the 12 years preceding 2009, in fact it was included in the NDAA for fiscal 2008 but was removed from the final version of the bill. While it didn’t become law in 2008, it got farther than it had any year previous as a stand alone measure, so when the Democratic Party won the White House, sponsors of the bill added it to the NDAA once more and it became law.

Any piece of legislation that is continuously enacted by Congress is worth examination, but the National Defense Authorization Act also represents one of the few outlets for Senators in particular to find a path to law for their bill. An analysis of the National Defense Authorization and the use of non-germane amendments reveals an effective legislative strategy that provides a way to push a bill through Congress.
Success of the NDAA

The success of the National Defense Authorization is largely due to the fact that it is seen as a must-pass bill and neither political party has the desire or will to risk killing the measure. This encourages cooperation and the creation of bipartisan amendments and additions to the bill. The fact that the bill deals primarily with national defense also plays a role in encouraging cooperation. Coalitions will be made of people from across the aisle that come together on issues of defense because the safety of the country is not typically a partisan issue. The bill also has real-world value for members, authorizing millions of dollars worth of base construction, weapons development and military pay. Military spending is a national priority, and having a hand in it is of great importance to members of Congress. While many on the House and Senate Armed Services Committee oppose adding extraneous material to their work, the reality is the NDAA is one of only a few annual authorization bills left members can count on to achieve their goals.

Background Information

The annual National Defense Authorization Act is one of the two bills used by Congress to oversee and allocate national defense spending, the other being the annual Defense Appropriations bill. The first defense authorization act was passed in 1961, and since then many programs have been added to its scope. The NDAA authorizes the agencies responsible for national defense, establishes general funding levels, and defines policies that regulate how the money will be spent.

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3 See full history at armedservices.house.gov/ndaa/history-ndaa
Every year since 1961, Congress has enacted a National Defense Authorization, but not without difficulty in some years. The President has vetoed the NDAA four times during this period and each time Congress made revisions to the measures to meet the executive’s concerns. These revisions resulted in each veto being negated by the signing of another version of the defense authorization. The first veto in 1978, was by President Jimmy Carter, who vetoed the NDAA because it included funding for construction of a nuclear aircraft carrier. He signed a version of the bill two months later after that provision was removed. President Ronald Reagan vetoed the fiscal 1989 NDAA in 1988 because it cut funding for research on the Strategic Defense Initiative as well as funding for ICBM modernization and ballistic missile submarines, but once again it was revised to meet the President’s concerns and he signed it. The third veto also resulted in a revision of the NDAA after President Bill Clinton took issue with provisions that would restrict his ability to conduct contingency operations and a variety of other issues. The most recent veto, by President Bush in 2008, will be discussed at length in the following sections.

H.R. 1585 Fiscal Year 2008 - Summary

In order to illustrate the legislative path of the NDAA as well as the complications that go along with it, this paper will follow the fiscal 2008 version of the NDAA, H.R. 1585, and how it worked its way through Congress. This year is noteworthy not only because of the atypical veto, but because “it was the largest defense authorization bill since World War II in real terms, and the first since Sept. 11, 2001, to authorize emergency funding for an entire fiscal year of operations in Iraq and Afghanistan.”

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4 CRS Insight report on Presidential Vetoes of Annual Defense Authorization Bills
The process took most of the year, as is to be expected, but it was not signed by the October 1st deadline. “Although Congress regarded the authorization as must-pass legislation, especially in war time, the fiscal 2008 bill became caught up in acrimonious debates over the war in Iraq and how far Congress should go in trying to direct its conduct. The result was a drawn-out process that lasted from the first markups in May until early 2008.” 6

The bill was introduced by House Armed Services Committee Chairman Ike Skelton (D-MO) on March 20th, 2007, and was referred to the House Committee on Armed Services. After the Armed Services Committee and its subcommittees marked up H.R. 1585, it was reported back to the House on May 11th. The House passed the bill on May 17th, by a vote of 397-27. The bill then went to the Senate. The Senate passed its amended version of the bill by a vote of 92-3 on Oct. 1. 7 Leadership created a conference committee to reconcile the differences between the two bills. After the conferees reached agreement, the final version of the bill was sent to first to the House then to the Senate for their approval. The bill was then sent to the President. Typically, this is the end of the story, but the President vetoed this NDAA. He objected to Section 1083 of the bill “which would have made assets of the Iraqi government that were located in the United States liable to seizure in lawsuits filed by persons who had been victims of the government of deposed Iraqi dictator Saddam Hussein.” 8 Once Congress changed that provision, the bill went back to the President and was signed, PL 110-181.

The President’s Budget Proposal: Fiscal Year 2008

6 “Defense Funds” CQ Almanac
The President typically submits his defense budget request on the first Monday in February each year. His request provides a baseline for the House and the Senate as they draft their own versions of the defense spending plan. The President also may submit requests to individual committees for certain legislation. For fiscal 2008, President Bush requested “$483.2 billion for the regular operations of the Department of Defense (DOD), $141.8 billion for military operations in Iraq and Afghanistan, $17.4 billion for the nuclear weapons and other defense-related programs of the Department of Energy, and $4.8 billion for defense-related activities of other agencies. On July 31, 2007, the President requested an additional $5.3 billion for war-fighting costs, and on October 22, he requested an additional $42.3 billion for that purpose, bringing his total request for FY 2008 war costs to $189.3 billion and the total national defense request to $694.8 billion.”

The proposal was fairly standard and nothing stuck out as having the potential to cause an issue. The House and Senate proceeded with the defense authorization process.

**House Proceedings: H.R. 1585**

The bill alternates between the House and Senate on who goes first, in 2007 the House went first with the defense authorization bill, H.R. 1585. The bill was referred to the Committee on Armed Services where it was then sent to each subcommittee for review. Subcommittees are each responsible for portions of the defense authorization. The subcommittee members, led by the chairs, evaluated their portion of the NDAA and had to mark it up with any policy changes they wanted to make. In 2007, the Armed Services subcommittees were: Emerging Threats and

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Competencies, Military Personnel, Oversight and Investigations, Readiness, Seapower and Projection Forces, Strategic Forces, and Tactical Air and Land Forces. Each subcommittee considered the bill and reviewed language pertaining to their jurisdiction. Once they were satisfied it was approved through a markup session. Each subcommittee had to approve their section of the bill, before it was reported to the full committee.

The Committee on Armed Services put all the sections together and a markup session was held to allow panel members to offer amendments and discuss provisions of the bill. The markup is a long process, sometimes lasting into late the night if there are a lot of changes to be made. Eventually after the committee had considered the whole bill, they ordered H.R. 1585 to be reported favorably (with amendment) on May 5 by a vote of 58 - 0.

The House then considered H.R. 1585 under the special rule process. Special rules are written by the House Rules Committee and then approved by the House. Typically special rules limit how much time the House will debate a bill, and they also control which amendments may be offered and how long each would be debated for. This time, the rule, H Res. 403, provided for 1 hour and 30 minutes of general debate and allowed certain specified amendments to be offered.

The House debated the special rule for an hour before voting on it, but because they are tools of the leadership, rules almost never fail. In keeping with this, the House approved the rule for consideration of HR 1585 by a vote of 229-194. The House then proceeded to debate the bill for an hour and a half before moving on to consideration of amendments. Every amendment once

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10 Congressional Record of House Proceedings
https://www.congress.gov/bill/110th-congress/house-resolution/403
proposed is debated and either approved, disapproved, or withdrawn. The House typically does not allow non-germane amendments to be proposed during this stage.

In 2007, the House debated 20 amendments, 13 of which were adopted. Many of the amendments were clarifying the text of the bill or adding language to ensure correct interpretation of the bill. Although amendments at this stage are germane, not all amendments are approved of or supported by both parties.

For example, in 2007 House Republicans were unhappy that an amendment they had proposed was rejected by the Rules Committee and not allowed to be considered on the House floor. To protest, Republicans offered motions to adjourn throughout the day. They didn’t believe their motions would pass - they didn’t have the votes - but they hoped to protest the exclusion of their amendment from the bill by delaying the process. They delayed for as long as they could, but eventually the House passed H.R. 1585 by a vote of 397 - 27, approving $1.2 billion more than the President requested initially.

**Senate Proceedings**

The bill was sent to the Senate and placed on the Calendar of Business. It was not sent to committee, because the Senate Armed Services Committee had been working on its own version of the bill already (S. 1547), and on June 27th the Senate took the House bill and amended it with the text of the Senate version of the bill. Senators then offered dozens of amendments both germane and non-germane.

Senator Reid proposed an amendment for Senator Edward M. Kennedy, D-MA, to expand federal hate crimes laws (SA. 3035) on September 25th. This non-germane amendment was
essentially a bill that Senator Kennedy and a few other Senators had been trying enact for many years. The Hate Crimes Act, as it was called, sparked a long debate and eventually required a cloture vote.

Proposed on the 25th, the amendment was considered by the Senate over the next two days as those who opposed attempted to filibuster it. Non-germane amendments generally face some opposition simply because they are seen as a distraction from the issue of defense; the Hate Crimes amendment was no different. "There may be a time and place for a hate crimes discussion, but it is certainly not now when national security legislation is being held up," said Senate Republican Conference Chairman Jon Kyl of Arizona. "Forcing a vote on the so-called hate crimes amendment shows an utter lack of seriousness about our national defense."

This claim, made by many Senate Republicans, was rebuked by Senators like Sen. Bob Menendez, D-N.J. who said "For some, it never seems to be the right time or the right place." Wanting to end debate on the issue, then Senate Minority Leader Mitch McConnell offered a cloture petition. Cloture is the only way to end debate in the Senate by a vote; and it was invoked by a vote of 60 - 39 (the minimum vote required). The Senate ultimately approved the amendment by voice vote on September 27th and the Senate continued to consider other amendments to the NDAA.

Ultimately, the Hate Crimes Prevention Act was removed during the conference as the differences between the House and Senate versions of the bill were reconciled. Although the amendment did not make it to the final version of the fiscal 2008 bill, it progressed much further as part of the NDAA than it ever had on its own. This attempt set the stage for the 2009 effort that

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resulted in the act becoming law. Since this attempt, non-germane amendments have become more common in the NDAA (though still rather rare), and the tactic is recognized as a viable way to get controversial legislation passed into law.

The Senate process concluded on October 4th when the Senate passed its version of the bill as an amendment to H.R. 1585. Since there were differences between the Senate bill and the House bill, congressional leadership created a conference committee to reconcile the two versions. Members of the House and the Senate were assigned to different portions of the bill to work through, and the conference was successful in resolving all the differences between the chambers. The House passed the conference report on December 12th by a vote of 370 - 49, and the Senate followed suit on December 14th by a vote of 90 - 3. The compromise version of the National Defense Authorization Act was presented to the President on December 19th, but the story doesn’t end there.

**NDAA 2008 Pocket Veto**

Instead of signing the bill into law, President George W. Bush pocket vetoed the bill. In July, the Bush Administration had released a statement of administration policy outlining his concerns with the current version of the bill then under consideration. While the President stated he would be against any amendment on U.S. withdrawal from Iraq, there was no mention of the provision that ultimately led to his veto. 12

As part of his veto, Bush stated that he objected to a provision of the bill [section 1083] that would “potentially [be] forcing a close U.S. ally to withdraw significant funds from the U.S.

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financial system, [it] would cast doubt on whether the United States remains a safe place to invest and to hold financial assets,”13 The defense authorization was being passed during the height of U.S. involvement in the Iraq War, so the President opposed any provision that would harm the financial status of Iraq during a time of reconstruction. “The President said this provision would allow plaintiffs to tie up in lawsuits billions of dollars-worth of Iraqi assets, thus hamstringing that country’s efforts at economic reconstruction and political reconciliation.” 14

Since Bush did not want the bill to become law, but knew that Congress would be likely to override his veto, he chose to “pocket veto” the bill. Since Congress was no longer in session, the unsigned bill would die if the President did not sign it within 10-days of receiving it (not including Sundays). “The adjournment of the Congress has prevented my return of H.R. 1585 within the meaning of Article I, section 7, clause 2 of the Constitution.” 15

Leaders in Congress argued that it had not yet adjourned, and that if the President did not sign the bill, it would become law. A White House spokesperson stated that the Administration considered Congress adjourned and that the bill would die at midnight on December 31st. This pocket veto was complicated, because the President also issued a “Memorandum of Disapproval” in which he outlined his reasons for not signing the bill. In effect, this “protective return” as it was called, gave Congress the chance to get a new version of the bill passed without having to go through the entire process again. This was only the fourth veto of the NDAA ever, and it caused quite an uproar.

14 CRS Report - Defense: FY 2008 Authorizations and Appropriations
H.R. 4986, Second Try

Since the President had provided detailed reasoning as to why he vetoed the bill, it was fairly easy for Congress to adjust the legislation to ensure his signature. As introduced, H.R. 4986 was the same in most respects to H.R. 1585, but it “was modified to allow the President to waive application to Iraq of the provision that he had cited as grounds for his veto.” In addition, “the new version of the bill also would make retroactive to January 1, 2008 a 3.5% pay raise for military personnel and the renewal of authorization for several types of bonuses, including enlistment and reenlistment bonuses.” H.R. 4986 was introduced in the House on January 16th, 2008 by Chairman Skelton who then moved that the rules be suspended, and the bill passed. The House agreed by a vote of 369 - 46. The Senate passed the bill on January 22nd by a vote of 91 - 3 with no amendments. The new NDAA was signed by the President on January 28th, and the long, arduous process to pass the “must-pass” bill was complete. Just in time to start the process for the next fiscal year.

Hate Crimes Prevention Act - Major Success for Non-Germane Amendments

As mentioned previously, the Hate Crimes Prevention Act was added by amendment to the 2008 NDAA but was struck from the final version of the bill during conference committee negotiations. The 2008 amendment was not the first time the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (HCPA) had been seen in Congress. Supporters began their efforts to win its passage in 1997, and for 12 years Congress passed and amended many different versions of the bill, but ultimately none of them became law. The bill passed the House twice,

once in 2007 where it was sent to the Senate and was referred to the Judiciary Committee which took no action on it; and once in 2009.

The Kennedy Hate Crimes Act or the Hate Crimes Prevention Act “gives the Department of Justice (DOJ) the power to investigate and prosecute bias-motivated violence by providing the DOJ with jurisdiction over crimes of violence where a perpetrator has selected a victim because of the person's actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or disability” \textsuperscript{18}. The bill was introduced by Congressman John Lewis and Senator Edward M. Kennedy and supported by 26 House members and a dozen Senators. Kennedy championed the bill saying “The Civil Rights Act of 2008 will restore the bedrock principle that individuals may challenge all forms of discrimination in public services and will strengthen existing civil rights protections. Our civil rights and fair labor laws must have effective remedies that ensure accountability for discrimination, or America will never be America.”\textsuperscript{19}

The act was eventually renamed after Matthew Shepard, a gay college student who was brutally murdered in Laramie, Wyoming in 1998, and James Byrd Jr. a black man who was dragged to death behind a pickup truck in Texas that same year. After Matthew’s death, Wyoming legislators considered extending the state’s hate crime bill to encompass anti-LGBTQ actions, but the measure failed. Following James’ death, the Texas legislature strengthened the state’s hate crimes laws in 2001\textsuperscript{20}, but not to the extent that supporters had hoped. The horror of the crimes left many feeling the state actions were insufficient and this gave impetus to the federal effort.

\textsuperscript{18} "Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act." Human Rights Campaign. (n.d.).
Opponents of the expanded hate crimes provision claimed that the act was “far broader and more amorphous than any properly defined criminal offense should be, thus inviting prosecutorial abuse, politically motivated prosecutions, and related injustices”. They also claimed that the act would be counterproductive as states already had laws against hate crimes and that the act would overstep the boundaries between state and federal government.

While the Civil Rights Act of 2008 did not end up making it onto the final version of the defense authorization, it did get added to the NDAA for fiscal 2009. The bill was introduced to the House (H.R. 1913) by the House Judiciary Committee chair Representatives John Conyers (D-MI) and Mark Kirk (R-IL) and was passed with a bipartisan vote of 249 - 175. The bill was introduced to the Senate (S. 909) by Senators Edward Kennedy (D-MA), Patrick Leahy (D-VT), Arlen Specter (D-PA), Susan Collins (R-ME) and Olympia Snowe (R-ME), and on July 16, 2009 the Senate voted to proceed with the legislation as an amendment (S. Amdt. 1511) to the Defense Authorization bill (S. 390). With the hate crimes legislation attached, the Senate passed the NDAA on July 23rd. Since the hate crimes amendment was not part of the House’s version of the NDAA (it passed on its own), the difference had to be reconciled in conference committee.

During the final negotiations of the NDAA, the hate crimes amendment was officially named the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.

The House passed the conference report

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21 “Hate Crimes Act of 2009” Brian Walsh - Senior Legal Research Fellow at the Heritage Foundation’s Center for Legal and Judicial Studies
22 Right: President Obama with Judy Shepard (Mother of Matthew Shepard), Louvon Harris and Betty Byrd Boatner (Sisters of James Byrd Jr.) On Oct. 28, 2009
with the amendment included on October 8th and the Senate followed on October 22, 2009. On October 28th President Barack Obama signed the bill into law as part of the National Defense Authorization Act (Public Law No. 111-84).

The HCPA as it was passed provides funding and assistance to state, local, and tribal jurisdictions to help them investigate and prosecute hate crimes. “It also creates a new federal criminal law which criminalizes willfully causing bodily injury (or attempting to do so with fire, firearm, or other dangerous weapon)” when the motivation for the crime was ‘hate-based’. Had the HCPA not been tacked to the defense authorization it is likely the bill would never have become law as it would never have passed through the Senate on its own. Supporters of the bill didn’t have the 60 votes needed to end a filibuster, so by itself the bill would have failed. By attaching it to the “must pass” NDAA, Senators made the cost of filibustering the bill too high for opponents of the hate-crimes provisions. They were unwilling to filibuster a defense authorization since they supported the vast majority of the legislation in the bill. In the case of HCPA the Democratic party was responsible for introducing the amendment and advocating for its inclusion despite it being non-germane, but Republicans have also been known to add non-germane amendments to the NDAA.

Non-Germane amendments in recent years

Non-germane amendments continue to find their way into the NDAA, as is to be expected while it is becoming more difficult for even routine authorizations to be passed into law. In 2016, Representative Rob Bishop (R-Utah) offered an amendment to the fiscal 2017 NDAA (H.R.

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23 Department of Justice overview of the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009
4909) to allow expansion of military training grounds in Utah by giving states the ability to opt out of federally mandated land-use restrictions put in place to protect the habitat of a bird called the sage grouse (left). This seems like a germane amendment on its face since it has to do with military training grounds, but the amendment also would have limited “the scope of sage grouse conservation activities and prohibited the Interior Department from altering the status of the bird until Sept. 30, 2026.”

Bishop’s amendment spoke to a wildlife controversy that had roots in 2010. That year conservationists had attempted to further protect the Sage Grouse population by listing it as an endangered species. A lawsuit was filed against the U.S. Fish and Wildlife Services calling for the species to be listed, but the agency forestalled any action because there were higher priorities. Although it did not get added to the endangered list, there were already areas that were home to the sage grouse that could only be used for certain activities/military purposes. By listing the species as endangered, supporters could ensure that all land-use would cease in areas considered a habitat for the bird. When the issue was brought to light by Representative Bishop, conservationists pushed for the species to be listed as endangered to protect the land from further development that would be permitted by Bishop’s amendment. This call went unheard as legislators and other White House staff including “Interior Secretary Sally Jewell said the

24 Photo of a Utah sage grouse from Deseret News Utah
unprecedented efforts to conserve the bird across Utah and 10 other Western states meant the species did not need to be listed.”\textsuperscript{27} Instead they said that the land-use restrictions should be expanded. Bishop and other legislators that supported the amendment claimed that restricting land use would have “a significant impact and already has had an impact on military readiness, especially the ranges.”\textsuperscript{28} Any expansion of those protections would arguably limit the ability of the military forces in Utah to use the land currently occupied by the military training facility to conduct certain types of combat readiness training. These claims were later disputed by the Pentagon in a statement that it did “not believe [the sage-grouse conservation] plans will affect military training, operations or readiness to any significant degree.”\textsuperscript{29} Senator McCain (R-AZ), chairman of the Senate Armed Services Committee, also opposed the amendment on the grounds that it had nothing to do with national defense.

Bishop not only sought to prevent the expansion of land-use restrictions in sage grouse habitats, his amendment also would effectively block the implementation of all federal sage grouse management plans designed to help protect the bird population. As the controversy around the amendment grew, it became a subject of debate as to whether the issue was germane to the NDAA or not. If the motivation behind the bill was in fact expansion of military training grounds and not a work-around of conservation acts then it would be germane, however a study\textsuperscript{30} found that listing the sage grouse as endangered, and thereby preventing all land-use of populated areas, would cost the U.S. around $5.6 billion in economic output, most of that being from oil and gas. Despite worry that Bishop was trying to protect his own state’s oil and gas interests and

\textsuperscript{27} Deseret News Utah: National Defense Authorization Act includes provisions on sage grouse
\textsuperscript{28} Rep. Bishop for NBC News
\textsuperscript{29} Acting Assistant Secretary of Defense for Readiness Daniel Feehan for E&E News
\textsuperscript{30} Economic Report of Sage Grouse Distribution from the Law Offices of Lowell E. Baier
opposition from both parties, the House passed the NDAA with his amendment on April 28th, 2016 after 16 hours of debate. When the bill made its way through the Senate, there was great anticipation to see if that version would also include the provision, but it did not. The same amendment had made it to this stage in the previous year’s NDAA process but was struck from the final version of the bill. History repeated itself when the Senate passed the NDAA without Bishop’s amendment.

**Benefits and Disadvantages of Non-Germane Amendments to the NDAA**

Most proposed bills die in committee, and if a bill makes it to the Senate floor, it can be filibustered and supporters on the measure may not have the votes needed for cloture. Adding it as an amendment to the NDAA while the bill is being considered on the floor guarantees it debate time and consideration which could have been denied to the bill should it be caught in committee.

Adding a bill to the NDAA as a non-germane amendment is often considered a last resort move for the legislation. If it cannot pass through Congress on its own, perhaps it can be used as a bargaining chip. Support for the non-germane amendment may be given in exchange for votes supporting a germane amendment. It is also an opportunity to push through last minute legislation before an election. Should the party introducing the bill think they are likely to lose majority, they will try to attach their item to the NDAA to make sure it goes through while their party is in control. This was the case in 2009 when Democrats thought they might lose control of Congress during the midterm elections and the hate crimes amendment was tacked on. The HCPA probably had enough votes at that point in time to be signed on its own, but the process would have taken too long and Democrats didn’t want to miss their chance.
Perhaps the most common argument against non-germane amendments is that they are a partisan move on a bill supposed to be bipartisan. Once in a while there will be a bipartisan bill tacked on to the NDAA that’s non-germane, but more often than not it is a partisan move. It also delays the actual process of the NDAA. With more amendments to consider and more debate on those amendments, the defense authorization is put at risk of not passing or at least not passing on time. It makes sense to keep such a high-stakes bill as streamlined as possible, but for big-issue legislation, in a Congress that increasingly passes few bills, the opportunity is just too good to pass up.

Conclusion

Since Congress is often criticized for passing too few bills and taking too long to enact relevant legislation, it is likely that the pressure to streamline the legislative process of the NDAA will increase. The continued importance of the NDAA was affirmed when the bill for fiscal 2018 was still signed into law despite the rocky political climate. As paths for passing legislation into law become fewer and fewer and the political climate more hostile, the National Defense Authorization Act will remain an important outlet for those seeking to make or change laws.

Works Cited


Hitching a Ride on the National Defense Authorization Act


