

THE NATIONAL DEFENSE AUTHORIZATION ACT: THE STURDY OX OF LEGISLATION

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I. INTRODUCTION

Throughout the country and across the political spectrum, there is a consensus that Congress is not working the way it should. A Gallup poll released in July 2020 found that just eighteen percent of Americans approve of the job Congress is doing, and it is no wonder.¹ Few significant bills are passed while important problems continue to fester.² Invectives are hurled back and forth through dueling press conferences and tweets. Legislation that does get passed often comes at the last possible moment and is written largely in the offices of party leaders. The legislative branch does not seem to be functioning as our civics classes taught us it should. The dysfunction has mounted in recent years under both political parties as political pressures pull each side toward polarization and hardline stands.

There is one notable exception. Every year for the past 59 years, Congress, under majorities of both parties, and presidents of both parties, has passed and signed into law a National Defense Authorization Act (“NDAA”). The Act “establishes and organizes the agencies responsible for national defense, sets policies for the department, and authorizes the appropriations of funds”³ Each year’s NDAA authorizes the number of ships, planes, and vehicles the military will buy, the pay and benefits service members will receive, the military construction projects to be built, and the amounts devoted to research and development of new technologies. It also addresses a number of significant policy issues.

The NDAA may well be the last vestige of traditional legislating of the sort we learned about in school. While not addressing all the issues facing the country in national security, the NDAA has successfully tackled some

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¹ Megan Brennan, *Congress’ Approval Drops to 18%, Trump’s Steady at 41%*, GALLUP (July 30, 2020), <https://news.gallup.com/poll/316448/congress-approval-drops-trump-steady.aspx> [<https://perma.cc/27XJ-Z7V2>].

² See Paul Kane & Derek Willis, *How Congress Stopped Working*, PROPUBLICA (Nov. 5, 2018, 10:00 AM), <https://www.propublica.org/article/how-congress-stopped-working> [<https://perma.cc/V6PE-7WJ9>].

³ NESE F. DEBRUYNE & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., 98-756, DEFENSE AUTHORIZATION AND APPROPRIATIONS BILLS: FY1961-FY2020, 1 (2020), <https://crsreports.congress.gov/product/pdf/RL/98-756> [<https://perma.cc/57HN-GX2U>].

complex problems and often with bipartisan support.⁴ For that reason, the NDAA does not usually draw the amount of attention given to more controversial bills.

Still, it is not invulnerable. The pressures toward polarization threaten a bill where compromise is required. The NDAA's fifty-nine-year streak attracts a variety of extraneous and often controversial issues that cannot, or at least do not, pass Congress on their own. Members of both political parties will have to make a serious, concentrated effort to continue the NDAA's streak if it is to last. But it is important for the country that it does.

Americans need to see that their government can still function as intended, at least on some topics. That affirmation provides reassurance that one's individual representative and senators have a voice and can make a difference. Thus, the individual American citizen has a voice and can make a difference as well.

Part of the NDAA's success derives from its process, which will be described below. Another part comes from the substance of the bill, which will be described generally and then by highlighting several recent successes and one notable failure. Shining a brighter light on this legislative outlier may help provide the example that Congress and the country could use right now.

II. LEGISLATIVE PROCESS

Writing the House NDAA follows a well-honed process that involves formal committee rules and decades of tradition.⁵ It begins with two sources of input. One is the Administration's budget request, which is normally sent to Congress each year in early February and includes requests for legislative provisions, as well as for funding levels of various defense programs. The other source is provisions proposed by members of the Armed Services Committee and its professional staff. These are generated from hearings, travel to bases and industry sites, various meetings and briefings, as well as issues from the previous year that were not resolved.

Several months of hearings and briefings examine the various requests as well as other issues that may arise. Usually in April or May, a chairman's mark, or initial draft of the bill, is assembled in each of the subcommittees and by the committee chairman for those issues reserved for the full committee. Those marks are the starting point for committee deliberations and amendments.

⁴ *See id.*

⁵ *Committee Rules*, HOUSE ARMED SERVICES COMMITTEE, <https://armedservices.house.gov/> [<https://perma.cc/UF64-SZ96>] (last visited Oct. 16, 2020) (publishing the most recent version of the committee rules). *Hearings*, HOUSE ARMED SERVICES COMMITTEE, <https://armedservices.house.gov/> [<https://perma.cc/UF64-SZ96>] (last visited Oct. 16, 2020) (making available the testimony from committee hearings).

Each of the subcommittees holds a markup for its portion of the bill during which relevant amendments may be offered, debated, and voted upon. Each of the subcommittee marks is presented to the full committee where further debate and amendments are considered. The full committee provisions, as well as the funding authorization levels, are also discussed and then added to the bill.

If an amendment falls within the jurisdiction of another committee, the amendment must be accompanied by a written waiver from that committee in order to be considered.⁶ Any amendment to add spending must offset that spending with reductions elsewhere.⁷

In recent years, few amendments have been offered in subcommittee deliberations, but about 300 to 400 amendments are submitted for the full committee consideration of the bill.⁸ The committee leadership and staff work with committee members and their staffs on the language of the specific amendments, vetting the language with other interested members, so that the vast majority of the amendments are accepted with little debate. A few amendments may be offered to emphasize a point and then be withdrawn. Somewhere around forty or fifty amendments are debated, and roughly half of them are decided by a voice vote, with the other half decided by a roll call vote.⁹

Normally, the full committee markup process in the House takes from twelve to as many as twenty hours, all open to the public. Arrangements are in place to move to a classified setting if needed, but members attempt to avoid the logistical challenge that entails. The resulting product is usually a bill that is reported favorably to the full House by an overwhelming vote, often with only a small handful of dissenting votes.¹⁰

Consideration of the legislation then moves to the full House where all House Members may file proposed amendments with the House Rules Com-

⁶ VALERIE HEITSHUSEN & BRENDAN W. MCGARRY, CONG. RESEARCH SERV., IF10515, DEFENSE PRIMER: THE NDAA PROCESS 2 (2020), <https://fas.org/sgp/crs/natsec/IF10515.pdf> [<https://perma.cc/7JS6-9GVN>].

⁷ See *id.* These requirements are by tradition and imposed by unanimous consent at the beginning of each markup.

⁸ Internal committee records reveal that for the FY 2016 bill, 335 amendments were filed for full committee markup. For FY 2017, 338 amendments were filed; for FY 2018, 347 amendments; for FY 2019, 420 amendments. STAFF OF H. COMM. ON ARMED SERVICES, STATISTICS FOR NDAA MARKUP AND FLOOR FY 14-21 (Nov. 2, 2020) (on file with author).

⁹ For example, nineteen roll-call votes were taken on amendments during committee consideration of the FY 2019 bill. H.R. Rep. No. 115-676, pt. 1, at 511 (2018), <https://www.congress.gov/congressional-report/115th-congress/house-report/676/1?q=%7B%22search%22%3A%22NationalDefense+Authorization+Act%22%7D&s=2&r=17> [<https://perma.cc/B9YB-KE6W>].

¹⁰ With the exception of the FY 2020 bill, for the last six years the NDAA has been favorably reported out of the House Armed Services Committee with two or fewer dissenting votes. See H.R. Rep. No. 116-442, at 529 (2020) (no dissenting votes); H.R. Rep. No. 116-120, at 578 (2019) (twenty-four dissenting votes); H.R. Rep. No. 115-676, at 530 (2018) (one dissenting vote); H.R. Rep. No. 115-200, at 563 (2017) (one dissenting vote); H.R. Rep. No. 114-537, at 667 (2016) (two dissenting votes); H.R. Rep. No. 114-102, at 606 (2015) (two dissenting votes).

mittee. Some amendments may be identical to those defeated during the committee process. Some may be amendments which could not be offered in committee because of jurisdiction. Still others may be completely different from any of those previously considered, including amendments which strike or modify key sections of the bill.

The Rules Committee hears testimony from members seeking to have their amendment “made in order” or permitted to be offered and considered on the House Floor. Hundreds of amendments are usually made in order.

In fact, as other opportunities to legislate have diminished,¹¹ the number of amendments proposed for the NDAA has grown. For example, for the fiscal year (“FY”) 2016 bill, which was debated in 2015, 355 amendments were filed with the Rules Committee for House Floor consideration and 135 of them were made in order.¹² 379 were filed and 181 made in order the next year.¹³ For the FY 2018 bill, 440 amendments were filed and 210 allowed for debate.¹⁴ For FY 2019, the numbers had grown to 578 and 271.¹⁵ The most recent bill hit a record with 752 amendments filed and 407 made in order.¹⁶

Whereas there had been rough parity in amendments made in order between those proposed by the majority party and those offered by minority party members, in the last two years majority-sponsored amendments have been much more heavily favored.¹⁷ In the FY 2021 NDAA, forty-six percent of the amendments made in order were Democratic amendments while only eleven percent were Republican amendments.¹⁸ Forty-three percent of the amendments made in order were sponsored by members of both parties.¹⁹ Democratic members of the House proposed more amendments to the Rules Committee, but the disparity is still a change from the historical practice.

Once the rule governing the terms of debate and amendments is adopted by the full House and an hour of general discussion is held, the amendment process begins. Many of the amendments the Rules Committee has made in order can be accepted by both sides of the aisle. They are grouped together en bloc with minimal debate and approved. Other amend-

¹¹ See Kane & Willis, *supra* note 2.

¹² See HOUSE COMM. ON RULES, *H.R. 1735 - National Defense Authorization Act for Fiscal Year 2016*, <https://rules.house.gov/bill/114/hr-1735> [<https://perma.cc/PF7Y-K3FY>].

¹³ See HOUSE COMM. ON RULES, *H.R. 4909 - National Defense Authorization Act for Fiscal Year 2017*, <https://rules.house.gov/bill/114/hr-4909> [<https://perma.cc/UMB6-W248>].

¹⁴ See HOUSE COMM. ON RULES, *H.R. 2810 - National Defense Authorization Act for Fiscal Year 2018*, <https://rules.house.gov/bill/115/hr-2810> [<https://perma.cc/ZR2Z-CBE2>].

¹⁵ See HOUSE COMM. ON RULES, *H.R. 5515 - National Defense Authorization Act for Fiscal Year 2019*, <https://rules.house.gov/bill/115/hr-5515> [<https://perma.cc/QUM5-L4MS>].

¹⁶ See HOUSE COMM. ON RULES, *H.R. 6395 - National Defense Authorization Act for Fiscal Year 2021*, <https://rules.house.gov/bill/116/hr-6395> [<https://perma.cc/2LJQ-9FCH>].

¹⁷ For example, during consideration of the FY 2017, 2018, and 2019 bills, Republicans were the majority party in the House, and the percentage of the amendments made in order offered by House Republican Members was 57%, *see supra* note 13; 49%, *see supra* note 14; and 42%, *see supra* note 15, respectively.

¹⁸ *See supra* note 16.

¹⁹ *See supra* note 16.

ments are debated under strict time limits, sometimes resolved by a voice vote, but often with recorded votes being ordered. There are generally between ten and twenty recorded votes on amendments on the House Floor and then a vote on final passage of the bill.

The vote on final passage has been, with the exception of the FY 2020 bill, overwhelmingly bipartisan and supportive. For example, in the most recent bill, approved by the House on July 21, 2020, 295 members voted for the bill, including 187 Democrats and 108 Republicans, while of the 125 members voting against it, 43 were Democrats and 81 were Republicans.²⁰ Much of the Republican opposition stemmed from extraneous provisions that were added, including several related to public lands issues in the Western United States.²¹

The Senate Armed Services Committee follows a committee process similar to the House, although most of the Senate subcommittee and committee deliberations are classified and thus not available for public viewing. The Senate floor consideration usually involves agreement on a significant number of amendments and votes on a handful. The vote to invoke cloture, limiting the time for further debate, is usually overwhelming as is the vote on final passage. When the Senate approved its FY 2021 NDAA on July 23, 2020, the vote was eighty-six to fourteen, with ten Democrats and four Republicans voting no.²²

As each body's NDAA is debated on their respective floors, the administration sends a long list of objections to each of the House and Senate bills, often threatening to at least recommend that the President veto the bill as written.²³ Some of these threats are taken more seriously than others.²⁴ Some

²⁰ OFFICE OF THE CLERK, UNITED STATES HOUSE OF REPRESENTATIVES, *Roll Call 152* | *Bill Number: H.R. 6395*, (July 21, 2020), <https://clerk.house.gov/Votes/2020152> [<https://perma.cc/975U-S28J>].

²¹ *See, e.g.*, Press Release, Congressman Scott Tipton, Tipton: NDAA Wilderness Amendments Detrimental To Military Readiness, National Security (July 20, 2020) <https://tipton.house.gov/media/press-releases/tipton-ndaa-wilderness-amendments-detrimental-military-readiness-national> [<https://perma.cc/C44V-8XAP>] (expressing criticism of NDAA provisions that would “add wilderness protections to several hundred thousand acres of federal lands within” Colorado); Press Release, Congressman Doug Lamborn, Lamborn Opposes Partisan Defense Bill (July 21, 2020), <https://lamborn.house.gov/media/press-releases/lamborn-opposes-partisan-defense-bill> [<https://perma.cc/7UQV-9VB6>] (explaining opposition to the bill because certain provisions would, amongst other things, lead to the “the largest land grab in Colorado’s history”).

²² UNITED STATES SENATE, *Roll Call Vote 116th Congress - 2nd Session*, (July 23, 2020), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=2&vote=00140 [<https://perma.cc/3HYW-HAQU>].

²³ *See, e.g.*, OFFICE OF MGMT. & BUDGET, STATEMENT OF ADMINISTRATION POLICY: H.R. 6395 — NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2021 (July 21, 2020); OFFICE OF MGMT. & BUDGET, STATEMENT OF ADMINISTRATION POLICY: S. 2943 — NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2017 (June 7, 2016).

²⁴ For example, the Statement of Administration Policy sent by the Trump Administration about the FY 2021 House NDAA encompassed thirteen pages and addressed nearly sixty issues of concern. The levels of opposition ranged from “strongly object,” “object,” “concern,” and “urges” to “raises constitutional concerns.” *See* OFFICE OF MGMT. & BUDGET, STATEMENT OF ADMINISTRATION POLICY (2020), *supra* note 23. Negotiators then must make a judge-

of the objections reflect the different viewpoints between the Legislative and Executive Branches. Others help inform the negotiations in the House-Senate conference.

Once both bodies have passed their version of the NDAA, a conference committee is appointed from the House and Senate Armed Services Committees. The House conferees include members from other committees that have jurisdiction over particular provisions. Again, in one of the few remaining public meetings of a legislative conference committee, members of the House and Senate converge to discuss the issues that must be resolved and to listen to their colleagues.

Staffs from the two committees prepare a side-by-side comparison of the two bills so that provisions on the same or similar topics can be reconciled. They begin to work through the minor issues, elevating substantive differences to conference members.

It normally takes several weeks to negotiate, resolve, and write the legislative language that becomes the final conference report. That bill, which is not amendable, must be passed again by both the House and Senate before being presented to the President.²⁵

The NDAA has been vetoed five times over the last fifty-nine years,²⁶ most recently by President Obama in 2016.²⁷ Then, as in each of the other instances, adjustments were quickly made, the conference report again passed, and the revised bill was signed into law.²⁸

This description of the legislative process for the NDAA will strike most readers as nothing remarkable. In fact, it largely follows the teaching of how a bill becomes law in junior high or high school civics, not to mention Saturday morning cartoon infomercials of years past. What makes it noteworthy, however, is how rare this normal process has become.

More commonly now, significant bills are assembled primarily by or under the direction of congressional leadership, the Speaker of the House, Majority Leader of the Senate, and their staffs.²⁹ Because sixty votes are normally required to pass legislation in the Senate, the Senate Minority Leader is usually involved; the House Minority Leader less so.

Other bills may be written by committees of jurisdiction, but rarely with the kind of widespread member contribution involved in the NDAA

ment about what provision or combination of provisions would cause the president to veto the bill.

²⁵ U.S. CONST. art I, § 7, cl. 2–3 (specifying that a “Bill” may become a “Law” only by approval by both Houses of Congress and presentment to the President, followed either by presidential signature or a presidential veto which can be overcome by supermajorities in both Houses).

²⁶ See Steven Mufson, *Obama Uses Veto for Only Fifth Time, Rejecting Defense Authorization Bill*, WASH. POST (Oct. 22, 2015), https://www.washingtonpost.com/business/economy/president-to-use-veto-for-only-fifth-time-to-reject-defense-authorization-bill/2015/10/22/58a455a6-78d4-11e5-bc80-9091021aeb69_story.html [<https://perma.cc/8ZW5-QBFG>].

²⁷ H.R. No. 1735, 114th Cong. (2015) (vetoed by President Obama).

²⁸ S. 1356, 114th Cong., 129 Stat. 726 (2015).

²⁹ See Kane & Willis, *supra* note 2.

process. The closest are the annual appropriations bills, but even they are controlled by leadership and receive a diminished level of input from rank-and-file members when compared to previous years.

It is this process, most of which is in full view of the public and which invites many members to contribute, that has helped the NDAA maintain bipartisan support in a time of increasing political polarization and thus navigate the legislative gauntlet to become law.

III. SUBSTANCE

Of course, process would count for little if the bill being advanced were not substantive and meaningful. In fact, each year's NDAA is significant. While Congress occasionally considers other legislation dealing with aspects of national security, and while there is always some bill dealing with appropriations, even if it is just a continuing resolution, the NDAA is the primary opportunity for the Legislative Branch to help shape national security policy and, to some extent, funding priorities.

Article I, Section 8 of the U.S. Constitution gives Congress specific responsibilities related to the military. It is the job of Congress to “raise and support,” “provide and maintain,” and “make Rules for the Government and Regulation of” the military forces of the United States.³⁰ While the President is the Commander in Chief and determines, subject to funding restrictions, how the military will be used,³¹ it is Congress that has the duty to build the military capability that will be available to the President. The Necessary and Proper Clause helps reinforce Congress's authority and responsibility to conduct oversight and sometimes to impose parameters under which military capability is used.³² And, of course, the Constitution gives Congress the power to declare war,³³ which since World War II has been in the form of authorization to use military force (“AUMF”).³⁴

Discretionary spending, which Congress must approve every year, comprises about one-third of federal outlays.³⁵ Roughly half of that one-third, or fifteen percent of the federal budget, is authorized program-by-program in the NDAA.³⁶ Funding for the National Nuclear Security Administra-

³⁰ U.S. CONST. art. I, § 8, cl. 12–14.

³¹ U.S. CONST. art. II, § 2, cl. 1.

³² JENNIFER K. ELSEA ET AL., CONG. RESEARCH SERV., CONGRESSIONAL AUTHORITY TO LIMIT MILITARY OPERATIONS, 15 (2013), <https://fas.org/sgp/crs/natsec/R41989.pdf> [<https://perma.cc/S3EW-RGHZ>] (arguing Congress can modify previous authorizations pursuant to its power to make laws necessary and proper to effectuate its constitutional powers).

³³ U.S. CONST. art. I, § 8, cl. 11.

³⁴ See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2056–57 (2005); see, e.g., Authorization for Use of Military Force of 2001, Pub. L. No. 107-40, 115 Stat. 224.

³⁵ CONG. BUDGET OFFICE, DISCRETIONARY SPENDING IN 2019: AN INFOGRAPHIC (2020), <https://www.cbo.gov/publication/56326> [<https://perma.cc/472N-FJMW>].

³⁶ See *id.*; see also *infra* note 37.

tion in the Department of Energy is included.³⁷ Congress rarely enacts authorizations for the remaining half of discretionary spending.³⁸ Those programs either proceed based on authorizations from many years ago or their funding is simply appropriated.³⁹

In addition to authorizing funding for defense programs, recent NDAs have also included some major revisions and reorganizations of permanent law. For example, the FY 2017 NDAA included a complete rewrite of the Uniform Code of Military Justice.⁴⁰ The FY 2019 bill implemented a total reorganization and consolidation of the statutes related to defense acquisition in the hopes of making it easier to understand and do business with the Department of Defense (“DOD”).⁴¹

In recent years, the annual NDAA has grown in both size and scope. The FY 2020 bill consisted of more than 1,100 pages of text for hundreds of provisions, plus another 600 pages of explanation.⁴² Not all provisions are of equal weight. Some are relatively minor, requiring that the DOD provide certain information to Congress or perhaps expressing the view of Congress on some matter. Other provisions, however, are significant and far-reaching.

Because it is one of the few bills to regularly pass and get signed into law, the NDAA is used increasingly as a legislative vehicle to enact a variety of provisions unrelated to defense. Extraneous subjects were rarely included just a few years ago, but now entire bills are bolted on to the NDAA. Some touch on national security, such as the State Department Authorization Bill⁴³ or the Intelligence Authorization Bill.⁴⁴ But others have no connection, such

³⁷ CONG. RESEARCH SERV., DEFENSE PRIMER: THE NDAA PROCESS (2020), <https://fas.org/sgp/crs/natsec/IF10515.pdf> [<https://perma.cc/2S6Z-YHV8>].

³⁸ According to the Congressional Budget Office, approximately \$332 billion was appropriated in FY 2020 without an authorization. See CONG. BUDGET OFFICE, EXPIRED AND EXPIRING AUTHORIZATIONS OF APPROPRIATIONS: FISCAL YEAR 2020 (2020), <https://www.cbo.gov/system/files/2020-02/56082-CBO-EEAA.pdf> [<https://perma.cc/5YLB-CJ7J>].

³⁹ See *id.*

⁴⁰ The reforms to the Uniform Code of Military Justice (“UCMJ”), consisting of over seventy pages of legislative text, modernized nearly every aspect of the pre-trial, trial, and post-trial phases of the court-martial process. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5001–5542, 130 Stat. 2124, 2894–2968 (2016) (establishing reforms including creation of a magistrate program, improved public access to court documents, expanded victims’ rights to provide input and participate in court proceedings, reorganized and expanded the punitive articles in the UCMJ, established standard panel (jury) sizes, improved transparency in the sentencing process, and streamlined post-trial processing).

⁴¹ John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, §§ 800–09, 132 Stat. 1636, 1825–44 (2018).

⁴² H.R. REP. NO. 116-333 (2020) (Conf. Rep.).

⁴³ Press Release, U.S. House of Representatives Comm. on Foreign Affairs, Engel and McCaul Applaud Passage of State Department Authorization in NDAA (July 23, 2020), <https://foreignaffairs.house.gov/2020/7/engel-and-mccaul-applaud-passage-of-state-department-authorization-in-ndaa> [<https://perma.cc/CE6D-UKRG>].

⁴⁴ Press Release, Senator Mark R. Warner, Rubio, Warner Applaud Intelligence Authorization Act Passage in FY 2021 NDAA (July 23, 2020), <https://www.warner.senate.gov/public/index.cfm/2020/7/rubio-warner-applaud-intelligence-authorization-act-passage-in-fy-2021-ndaa> [<https://perma.cc/7YTW-EKXZ>].

as a measure granting paid parental leave to all federal employees⁴⁵ or a provision preventing the Administration from reorganizing the Office of Personnel Management.⁴⁶ The NDAA has become a sturdy ox pulling a legislative wagon on which a lot of legislative baggage is carried. We can only hope that the load does not become too heavy.

There are always a number of policy issues that are addressed in the NDAA. One notable issue, however, has been absent: AUMFs.

IV. AUTHORIZATIONS FOR USE OF MILITARY FORCE

In fulfilling its responsibilities under the Constitution to declare war or to authorize the use of military force, Congress has clearly been deficient. Under the rules of the House and the Senate, declarations of war and authorizations to use military force are not within the jurisdiction of the Armed Services Committees; rather, they fall under the House Foreign Affairs and Senate Foreign Relations Committees.⁴⁷ But NDAs were used in 2011 and 2012 by the House in an attempt to update or clarify the 2001 AUMF⁴⁸ that passed a few days after the terrorist attacks of September 11, 2001.

In the FY 2012 bill, that modification reflected the arguments being made in court cases,⁴⁹ first by the Bush administration⁵⁰ and then by the Obama administration,⁵¹ that the intention of Congress in 2001 was to include affiliated and successor organizations of al-Qaeda and the Taliban in the authorization of force.⁵² It seemed relatively uncontroversial for Congress to amend the AUMF by adding explicit language that both administrations argued was implicit. The modification passed the House with little disagreement, but the Senate was never convinced because of a general concern about unintended consequences. In the FY 2013 House bill, a provision to clarify detention authority again referenced and supported the arguments

⁴⁵ National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, §§ 7601–06, 133 Stat. 1198, 2304–09 (2019).

⁴⁶ *Id.* § 1112, 133 Stat. at 1601–03; *see also* Nicole Ogrysko, *Congress to Formally Block OPM-GSA Merger with Defense Authorization Bill*, FED. NEWS NETWORK (Dec. 10, 2019, 7:51 AM), <https://federalnewsnetwork.com/opm-reorganization/2019/12/congress-to-formally-block-opm-gsa-merger-with-defense-authorization-bill/> [<https://perma.cc/5CHB-ZD8U>].

⁴⁷ *See Jurisdiction*, U.S. HOUSE REPRESENTATIVES COMMITTEE ON FOREIGN AFF., <https://foreignaffairs.house.gov/jurisdiction> [<https://perma.cc/JTH3-Y8Z2>]; S. COMM. ON FOREIGN REL., 116 CONG., RULES OF THE COMM. ON FOREIGN REL. (Comm. Print 2019), https://www.foreign.senate.gov/imo/media/doc/SFRC%20Rules_116th%20Congress.pdf [<https://perma.cc/RTA5-XN2D>].

⁴⁸ Authorization for Use of Military Force of 2001, Pub. L. No. 107-40, 115 Stat. 224.

⁴⁹ National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1034 (as passed by House, May 26, 2011).

⁵⁰ *See, e.g.*, Parhat v. Gates, 532 F.3d 834, 842, 844 (D.C. Cir. 2008).

⁵¹ *See, e.g.*, Hamily v. Obama, 616 F. Supp. 2d 63, 75–76 (D.D.C. 2009); Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 7, *In re* Guantanamo Bay Detainee Litig., No. 08-442(TFH) (D.D.C. Mar. 13, 2009).

⁵² *See* H.R. REP. NO. 112-78, at 209 (2011).

being made in court,⁵³ but as before, the provision was dropped in conference.⁵⁴

Other efforts were made to update or even repeal the 2001 AUMF. A proposal offered by the White House in the later years of the Obama administration to authorize the use of force against ISIS⁵⁵ did not find much support.⁵⁶ Internal attempts to find agreement were quickly bogged down due to issues of geographic limitations, time limitations, dictates on weapons and tactics, and other issues.⁵⁷ Another central concern, shared by both the administration and many in Congress, was that the existing AUMF should not be repealed until a new version was in place. But at the heart of the various arguments was the fact that in an increasingly polarized political climate, Republicans were not willing to trust President Obama, especially after his decision to participate in the effort to remove Qaddafi in Libya without congressional approval, and Democrats were not willing to trust President Trump.

The House-passed FY 2020 NDAA included a repeal of the 2002 AUMF against Iraq,⁵⁸ but, for a host of reasons, not one Republican voted for final passage of the larger bill, and the provision was dropped in conference.⁵⁹

The result is that Congress has abdicated one of its major responsibilities over the last twenty years,⁶⁰ and the courts, by default, have assumed

⁵³ National Defense Authorization Act for Fiscal Year 2013, H.R. 4310, 112th Cong. § 1031 (as passed by House, May 18, 2012).

⁵⁴ See H.R. REP. NO. 112-705, at 876 (2012) (Conf. Rep.).

⁵⁵ Press Release, The White House, Letter from the President—Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant (Feb. 11, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection> [https://perma.cc/8W9U-NEEV].

⁵⁶ See Amber Phillips, *President Obama's Push for Military Authorization to Fight ISIS Won't Go Anywhere in Congress. Here's Why.*, WASH. POST (Dec. 7, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/12/07/3-reasons-congress-wont-authorize-obamas-use-of-force-against-the-islamic-state/> [https://perma.cc/W54F-3FXS].

⁵⁷ Shortly after he became Speaker of the House in October 2015, Rep. Paul Ryan (R-Wis.) asked Rep. Ed Royce (R-Cal.), then Chairman of the Foreign Affairs Committee, and the Author, then Chairman of the Armed Services Committee, to conduct a listening session with Republican House members to determine whether agreement could be reached on how to update the 2001 AUMF while President Obama was still in office. There were a handful of conversations with House Democratic members as well.

⁵⁸ National Defense Authorization Act for Fiscal Year 2020, H.R. 2500, 116th Cong. § 1270W (as passed by House, July 12, 2019).

⁵⁹ Patrick Kelly, *House Approves NDAA with No Republican Votes*, ROLL CALL (July 12, 2019), <https://www.rollcall.com/2019/07/12/house-approves-ndaa-with-no-republican-votes/> [https://perma.cc/8AT4-GYRS].

⁶⁰ One can argue that this failure threatens to diminish public support for military operations by not securing the support of a majority in the House and Senate and the validation that the legislative process provides. A further consequence might be a widened separation between the military and civilian populations.

much of the power to establish parameters for military action by interpreting decades-old AUMFs.⁶¹

On other sensitive issues, however, the NDAA process has led to more successful results. Among them are oversight of counterterrorism campaigns outside the major war zones,⁶² oversight of cyber operations,⁶³ military retirement reform,⁶⁴ and decisions regarding whether women should be required to register in the Selective Service System.⁶⁵

V. OVERSIGHT OF SENSITIVE MILITARY OPERATIONS

One of the arguments used to bolster the case for updating the 2001 AUMF is that al-Qaeda, ISIS, and other terrorist groups are no longer confined to one or two specific geographic regions but have tentacles throughout much of the world.⁶⁶ Since 9/11 the United States has been involved in military counterterrorism operations in West Africa, East Africa, Southeast Asia, in addition to the Middle East and South Asia. Differences of opinion may exist about whether some of those operations were covered by the 2001 AUMF, but the only independent oversight must come from Congress because of the sensitive and nearly always classified nature of these actions.

In addition, terrorist groups have become increasingly sophisticated in using global media to portray counterterrorism operations as reckless, with innocent civilians too often the victims.⁶⁷ Rather than just chasing leaked or carefully planted stories in the media, Congress needed a regular, systematic oversight process over this global counterterrorism campaign and clearer insight as to whether it was being conducted properly and producing the desired results.

Critics also pointed to the fact that a statutory requirement existed for congressional notification of covert actions executed under Title 50⁶⁸ but there was no such requirement for sensitive operations carried out under Title 10.⁶⁹ Having a similar structure of notification and oversight under both authorities would make it more difficult to avoid oversight.

⁶¹ The D.C. Circuit has had to decide whether specific individuals fall within the authority created by the 2001 AUMF. *See, e.g.,* Al-Bihani v. Obama, 736 F.3d 542 (D.C. Cir. 2013); Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010); Bensayah v. Obama, 610 F.3d 718 (D.C. Cir. 2010); Al-Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. 2010).

⁶² *See infra* Part V.

⁶³ *See infra* Part VI.

⁶⁴ *See infra* Part VII.

⁶⁵ *See infra* Part VIII.

⁶⁶ *See* CTR. FOR ETHICS & THE RULE OF LAW, UNIV. OF PA., CONSIDERATIONS FOR A NEW AUTHORIZATION FOR THE USE OF MILITARY FORCE (2018), <https://www.law.upenn.edu/live/files/7911-aumf-policy-note-final20-april-2018pdf> [<https://perma.cc/WBN7-GEMH>].

⁶⁷ *See* SETH G. JONES, HUNTING IN THE SHADOWS: THE PURSUIT OF AL QA'IDA SINCE 9/11, at 149–50 (2012).

⁶⁸ *See* 50 U.S.C. § 3093 (2018).

⁶⁹ *See* Jeffrey H. Smith, *Keynote Address*, 28 MICH. J. INT'L L. 543, 546–47 (2007).

Congress had previously required DOD to provide the Armed Services Committees with a briefing on counterterrorism operations quarterly.⁷⁰ The NDAA for FY 2014 imposed a more formal structure with requirements for timely notice of capture or kill operations against terrorists and for subsequent reporting on the legal authority for the action as well as the results.⁷¹ The quarterly briefings would then be used to oversee the trajectory of the campaigns.

This new structure sought to strike a balance between facilitating essential congressional oversight and not imposing overly burdensome requirements or interfering with timely military decisions. It also sought to minimize the chances of unauthorized disclosures, which could not only damage the success of the missions but add to the risk faced by American servicemembers.

Like most administrations, the Obama administration preferred to carry out its policies, and especially its military operations, without the prying eyes of Congress. Civilians in the office overseeing Special Operations were more supportive than military commanders, especially those at U.S. Central Command. While the White House did not support the new oversight structure, it did allow the Pentagon to pursue talks with the committees in order to ensure any oversight framework was realistic.

Subsequent bills adjusted the requirement based on experience with its implementation and on changing conditions. Initially, it explicitly excluded Afghanistan,⁷² both because the pace of operations there would make such a requirement too burdensome and because that conflict received a fair amount of oversight on its own.⁷³ A later modification replaced the Afghanistan exclusion with one that limited the notification requirement to operations “outside a declared theater of active armed conflict.”⁷⁴ An even later modification returned to a country-specific exemption, excluding operations “conducted within Afghanistan, Syria, or Iraq.”⁷⁵ That same year also saw the addition of a requirement to report partnered operations, covering those cases in which U.S. forces utilized proxy or irregular forces for sensitive military operations.⁷⁶

⁷⁰ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1042, 127 Stat. 672, 857 (2013).

⁷¹ *Id.* §§ 1041–43, 127 Stat. at 856–57.

⁷² *Id.* § 1041, 127 Stat. at 856–57.

⁷³ Search Results for House Armed Services Committee Hearings with the Word “Afghanistan,” HOUSE ARMED SERVICES COMMITTEE, <https://republicans-armedservices.house.gov> [<https://perma.cc/RX56-7PSV>] (search for: Afghanistan Type:Congress_Hearing) (sample of the hearings held by the House Armed Services Committee on Afghanistan).

⁷⁴ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1036, 130 Stat. 2000, 2391–92 (2016).

⁷⁵ John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, §§ 332, 1031, 132 Stat. 1636, 1725, 1953 (2018).

⁷⁶ *Id.*

VI. OVERSIGHT OF CYBER OPERATIONS

If congressional oversight of global counterterrorism operations is difficult, overseeing cyber operations is even more challenging. The electrons carrying out cyber operations literally move at the speed of light. Congressional oversight moves a little slower. Identification of the source of cyberattacks and intrusions is difficult; perpetrators use proxies, often multiple proxies, to mask their origin.⁷⁷ Operational decisions must be made in real time as electrons fly around the globe. Another factor that has complicated this type of oversight is the fact that most of these operations and capabilities have been shrouded in classified intelligence activities. Oversight was complicated further when a new combatant command, U.S. Cyber Command, was being formed, with accompanying growing pains.⁷⁸

Yet, cyber is now a domain for warfare and one that can have devastating consequences—including physical results that can lead to death.⁷⁹ Given the ability to mask the source of an adversary's operations and the potential consequences of a cyberattack,⁸⁰ more vigorous oversight by Congress became essential. Congress could not step back from that responsibility because it was hard.

Using the framework from counterterrorism, the FY 2018 NDAA established an oversight structure for cyber operations conducted by the U.S. military.⁸¹ Admittedly, timely notification of an activity that is essentially continuous and that must entail rapid decision-making must be context appropriate. However, borrowing the approach from counterterrorism to require timely notifications, supporting legal authority, and quarterly overviews presented to Congress seemed to make sense.⁸²

As before, there was no formal veto threat from the administration over the provision. It did not want to publicly oppose congressional oversight. Plus, the counterterrorism oversight framework served as precedent. A complicating factor, however, was the commingled nature of cyber operations and intelligence activities, some of which were largely indistinguishable. That was also a source of friction within the Executive Branch as U.S. Cyber

⁷⁷ See Larry Greenemeier, *Seeking Address: Why Cyber Attacks Are So Difficult to Trace Back to Hackers*, *Sci. Am.* (June 11, 2011), <https://www.scientificamerican.com/article/tracking-cyber-hackers/> [<https://perma.cc/4M5Z-24F5>].

⁷⁸ See, e.g., Mark Pomerleau, *What New Documents Reveal About Cyber Command's Biggest Operation*, *CYBERCOM* (Jan. 21, 2020), <https://www.fifthdomain.com/dod/cybercom/2020/01/21/what-new-documents-reveal-about-cyber-commands-biggest-operation/> [<https://perma.cc/49E9-JUNV>].

⁷⁹ See Jeremy Straub, *Hackers Could Kill More People Than a Nuclear Weapon*, *LIVESCIENCE* (Aug. 27, 2019), <https://www.livescience.com/cyberattacks-could-kill-more-than-nuclear-attacks.html> [<https://perma.cc/6BBT-G35N>].

⁸⁰ See Greenemeier, *supra* note 77.

⁸¹ National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1631, 131 Stat. 1283, 1736–38 (2017).

⁸² Once again, covert actions conducted under Title 50 were not covered by this provision. See *id.*

Command stood up and matured, causing consternation between the new Command, the National Security Agency, and the military services, the latter of which had carried the bulk of force structure, capability, and authority for cyber operations. The confusion within the Executive Branch made negotiating and implementing a structure for cyber-operations oversight more challenging than for counterterrorism.

Adjustments continue to be made to ensure that there is the proper balance of facilitating Congress's duties while taking into account the unique characteristics of this domain. For example, the FY 2020 NDAA modified the application of the law to focus on the significance of the operation, collateral effects, intelligence gain or loss, and potential retaliation.⁸³

Undoubtedly, the framework will continue to evolve. But, as a leading law professor in national-security law wrote, "Congress continues to do little-heralded but important work fine-tuning the domestic legal architecture within which U.S. Cyber Command performs its increasingly important mission."⁸⁴

VII. MILITARY RETIREMENT REFORM

Anyone concerned about the size and growth of the federal budget knows that about two-thirds of the problem is mandatory spending.⁸⁵ Mandatory spending is also known as "entitlements" because everyone who meets the qualifications is "entitled" to receive the benefit regardless of the total cost of the program. While there have occasionally been successful efforts to reform entitlement programs, such instances have been rare.⁸⁶ Generally, reform has been deemed too politically difficult.⁸⁷ Thus, the mandatory-spending portion of the federal budget has continued to grow.⁸⁸

Personnel costs within the military, including the cost of military retirement, have also grown in recent years, both in real dollars and as a percentage of the DOD budget.⁸⁹ Beyond its mounting costs, the military retirement

⁸³ National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 1632, 133 Stat. 1198, 1745–46 (2019).

⁸⁴ Robert Chesney, *Military Cyber Operations: The New NDAA Tailors the 48-Hour Notification Requirement*, LAWFARE (Dec. 18, 2019), <https://www.lawfareblog.com/military-cyber-operations-new-ndaa-tailors-48-hour-notification-requirement> [<https://perma.cc/H9TM-57QH>].

⁸⁵ See *Discretionary Spending in 2019: An Infographic*, CONG. BUDGET OFF., <https://www.cbo.gov/publication/56326> [<https://perma.cc/PH8B-97AT>].

⁸⁶ See generally D. ANDREW AUSTIN, CONG. RESEARCH SERV., R44763, PRESENT TRENDS AND THE EVOLUTION OF MANDATORY SPENDING (2017), <https://crsreports.congress.gov/product/pdf/R/R44763/3> [<https://perma.cc/HSC5-Z2TC>].

⁸⁷ See Kimberly Amadeo, *Current Federal Mandatory Spending*, BALANCE 4–5 (Mar. 3, 2020), <https://www.thebalance.com/current-federal-mandatory-spending-3305772> [<https://perma.cc/9JEV-9YZT>].

⁸⁸ See *id.*

⁸⁹ See ECON. POLICY PROJECT, BIPARTISAN POLICY CTR., RAPID GROWTH IN U.S. MILITARY PERSONNEL COSTS DRIVEN BY PAY AND BENEFIT INCREASES (2014),

system was considered archaic, and created in and for another age in which individuals often worked for the same company for their entire career. Under the military retirement system, a service member would need to serve twenty years before becoming eligible to collect any pension.⁹⁰ A servicemember could serve nineteen years in the military and walk away without a penny of retirement savings or benefits. In fact, eighty-three percent of those who served in the enlisted ranks, and a slightly lower percentage of officers, left the military without any retirement benefits.⁹¹

Changing the system, however, would evoke the same adamant opposition which has kept other entitlement programs from being updated, especially from those benefiting or planning to benefit from the old system. In all fairness, past beneficiaries have made career decisions based on the rules of that old system.

In the FY 2013 NDAA, Congress established a commission to examine military compensation in order “to ensure the long-term viability of the All-Volunteer Force,” support quality of life for servicemembers, and “modernize and achieve fiscal sustainability for the compensation and retirement systems for the Armed Forces.”⁹²

Congress issued its final report in January 2015, recommending in part that the military transition from the legacy-retirement system to a new blended one.⁹³ Under this proposal, the military would retain a defined-benefit plan that encourages service members to remain for twenty years, while adding a component similar to a civilian 401(k) that would benefit those who serve for fewer than twenty years. Based on the commission’s recommendations, the FY 2016 NDAA enacted a new military retirement system.⁹⁴

Under the plan, those who had already served more than twelve years were automatically “grandfathered” and would see no change in their retire-

Growth_format.pdf [https://perma.cc/8JWJ-UXHN]; see also Veronica de Rugy, *Personnel Costs May Overwhelm Department of Defense Budget*, MERCATUS (Feb. 4, 2014), https://www.mercatus.org/publications/government-spending/personnel-costs-may-overwhelm-department-defense-budget [https://perma.cc/L9BR-RR5D] (stating that personnel costs, including retirement spending, are becoming an unsustainably large part of the federal military budget); Leo Shane, *Rising Military Personnel Costs May Mean Future Cuts in Troop Numbers*, MIL. TIMES (Aug. 25, 2020), https://www.militarytimes.com/news/pentagon-congress/2020/08/25/rising-military-personnel-costs-may-mean-future-cuts-in-troop-numbers/ [https://perma.cc/LF37-6VFW] (finding that rising personnel costs in the military are not proportional to increases in the troop numbers).

⁹⁰ See *Military Pay and Pensions*, USA.GOV, https://www.usa.gov/military-pay#:~:text=Legacy%20High%2D3%20(High%2D36)%20System&text=also%20called%20High%2D36%20or,by%20your%20years%20of%20service [https://perma.cc/T25P-6U74].

⁹¹ MILITARY COMP. & RET. MODERNIZATION COMM’N, REPORT OF THE MILITARY COMPENSATION AND RETIREMENT MODERNIZATION COMMISSION 10, 23 (2015), https://docs.house.gov/meetings/AS/AS00/20150204/102859/HHRG-114-AS00-20150204-SD001.pdf [https://perma.cc/A5PU-ANPH].

⁹² National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 671, 126 Stat. 1632, 1787–88.

⁹³ See MILITARY COMP. & RET. MODERNIZATION COMM’N, note 93, at 19–41.

⁹⁴ See National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, §§ 631–35, 129 Stat. 726, 842–52 (2015).

ment benefits.⁹⁵ Currently serving servicemembers with twelve or fewer years were also grandfathered, but they could also choose to move to the new blended retirement plan. Those entering the service after a certain date would automatically be enrolled in the new, blended system.

The blended system retained a defined-benefit component, but at a lower amount. It added, however, a defined contribution in which the government would contribute an automatic one percent to the service member's Thrift Savings Plan account and match contributions up to an additional four percent. These contributions would vest after just two years of service.⁹⁶ Other features, such as continuation pay, an option for lump-sum payments, and mandatory financial literacy classes were added.⁹⁷ Estimates were that, when fully implemented, the change would save taxpayers at least two billion dollars a year⁹⁸ and at the same time make the military a more attractive career choice for many who did not intend to stay the full twenty years.

Building on the public engagement of the commission, Congress actively engaged with relevant organizations that represented the interests of active and retired servicemembers. The Armed Services Committees also held hearings and briefings to educate the public and House Members on the proposed changes.⁹⁹ The provisions were incorporated into the NDAA and passed with minimal controversy.¹⁰⁰ The fact that the transition to the new system was gradual, and that those caught in the middle had a choice of which system to use, reduced the concern about the government renegeing on a commitment.

The shelves in Congress groan under the weight of reports written by various commissions with recommendations that never become law. Critics charge Congress with being too willing to outsource hard decisions to commissions. But a group of knowledgeable, dedicated citizens who examine a particular issue, engage with the public, deliberate, and issue recommendations to Congress can drive change that cannot be achieved by Congress acting on its own. Not only can such a body take the time to deeply study an issue and gain a balanced perspective, it can help explain the issue to the public as well as the benefits of its proposals to interested groups and to the wider public. Not all commissions work that way, but those that do perform a valuable public service.

⁹⁵ *Id.* § 631, 129 Stat. at 842–45.

⁹⁶ *Id.* § 632, 129 Stat. at 845–47.

⁹⁷ *Id.* § 633, 129 Stat. at 847–50.

⁹⁸ Mike Causey, *Military's New Retirement System: Big Deal, Big Decision*, FED. NEWS NETWORK (Nov. 8, 2017, 1:00 AM), <https://federalnewsnetwork.com/mike-causey-federal-report/2017/11/militarys-new-retirement-system-big-deal-big-decision/> [<https://perma.cc/GEY4-923K>].

⁹⁹ See Laura J. Junor et al., *Military Retirement Reform: A Case Study in Successful Public Sector Change*, 86 JOINT FORCE Q. 73, 78 (2017).

¹⁰⁰ See National Defense Authorization Act for Fiscal Year 2016, §§ 631–35, 129 Stat. at 842–52.

VIII. WOMEN IN THE DRAFT

Success in reforming military retirement helped inform Congress on how to handle another delicate issue—whether the Selective Service System should include a requirement that women register for a potential military draft. While the issue of including women in the draft had been considered as early as World War II, only men were required by law to register with the Selective Service System since the draft ended and the All-Volunteer Force was created in 1973.¹⁰¹ In 1981, the Supreme Court, in *Rostker v. Goldberg*,¹⁰² upheld the male-only registration requirement, reasoning that the primary purpose of registration was to provide for a large supply of combat troops during war.¹⁰³ Since only men could serve in combat arms, the disparate treatment was justified.¹⁰⁴

Since December 2015, however, all military occupations have been open to women,¹⁰⁵ so the issue needed another look. There were and are strong opinions on both sides of the question, with objections including the argument that “women are hard-wired to run families and raise children, as well as those suggesting women are more likely to suffer physical injuries.”¹⁰⁶ There was also the lingering question of whether the Selective Service System should be maintained at all. Both Chambers had wrestled with the issue in their FY 2017 NDAs,¹⁰⁷ but a more comprehensive and thoughtful approach was needed.

The FY 2017 NDAA created a commission charged with examining the issue of whether the Selective Service System should be maintained and, if so, who should be required to register in the System.¹⁰⁸ It was also given a broader mandate to look at how to increase participation, not just in military service, but in public service more broadly.¹⁰⁹

¹⁰¹ *Why Aren't Women Required to Register?*, SELECTIVE SERV. SYS., <https://www.sss.gov/register/women/> [https://perma.cc/Z48L-82AN].

¹⁰² 453 U.S. 57 (1981).

¹⁰³ *Id.* at 76.

¹⁰⁴ *Id.* at 77–78.

¹⁰⁵ Ash Carter, Sec’y, Dep’t of Def., Remarks on the Women-in-Service Review (Dec. 3, 2015), <https://www.defense.gov/Newsroom/Speeches/Speech/Article/632495/remarks-on-the-women-in-service-review/> [https://perma.cc/GDF7-MY8X].

¹⁰⁶ Corey Dickstein, *Should Women Register for the Draft? Experts Debate as Trump Administration Challenges Court Ruling*, STARS & STRIPES (Apr. 25, 2019), <https://www.stripes.com/news/us/should-women-register-for-the-draft-experts-debate-as-trump-administration-challenges-court-ruling-1.578544> [https://perma.cc/F43L-WVMA].

¹⁰⁷ See generally Leo Shane III, *House Drops Plans to Make Women Register for Draft*, MIL. TIMES (May 17, 2016), <https://www.militarytimes.com/news/pentagon-congress/2016/05/17/house-drops-plans-to-make-women-register-for-draft/> [https://perma.cc/66V5-J2WL]; Jennifer Steinhauer, *Senate Votes to Require Women to Register for the Draft*, N.Y. TIMES (June 14, 2016), <https://www.nytimes.com/2016/06/15/us/politics/congress-women-military-draft.html> [https://perma.cc/CG7C-CNZS].

¹⁰⁸ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 551–57, 130 Stat. 2000, 2130–37 (2016).

¹⁰⁹ *Id.*

Following the best practices of prior commissions, it held listening sessions around the country and solicited input from many organizations and individuals. The final report, issued in March 2020, recommended that the Selective Service System be continued and that mandatory registration include both women and men.¹¹⁰ It also made a number of observations and recommendations about public service beyond just military service.¹¹¹

While the commission's final report was not released in time for Congress to hold hearings on its recommendations or address them in the FY 2021 NDAA, they will be a prime topic for the FY 2022 bill. Some version of its recommendations is likely to be adopted.

IX. CHALLENGING ISSUES BEFORE US

Whether sensitive operationally or socially, NDAA's have found a path to follow in addressing difficult issues. Predictably, not everyone is pleased with the outcomes, but most would say that, in these examples among others, progress was made. There is no shortage of sensitive issues looming ahead that will test the ability of Congress to meet the nation's needs. Two examples come to mind: information operations and artificial intelligence.

A. *Information Operations*

Propaganda or information operations have always been an element of warfare.¹¹² Using the methods of communication available at the time, all nations have included an informational component to their military campaigns.¹¹³ But, the internet and increasingly sophisticated algorithms have significantly increased the potency of such tools, especially when used against a nation with an open media environment and little censorship.

Shaping or manipulating information, whether as part of other military campaigns or standing on its own, could be considered its own domain of warfare, whatever method of transmission is used. One attempt to define information warfare is "a strategy for the use and management of information to pursue a competitive advantage, including both offensive and defen-

¹¹⁰ NAT'L COMM'N ON MILITARY, NAT'L, & PUB. SERV., *INSPIRED TO SERVE: THE FINAL REPORT OF THE NATIONAL COMMISSION ON MILITARY, NATIONAL, AND PUBLIC SERVICE* 61 (2020), <https://www.inspire2serve.gov/sites/default/files/final-report/Final%20Report.pdf> [<https://perma.cc/GL83-953J>].

¹¹¹ *See id.*

¹¹² For an overview of the role of information operations in warfare, see Nick Brunetti-Lihach, *Information Warfare Past, Present, and Future*, STRATEGY BRIDGE (Nov. 14, 2018), <https://thestrategybridge.org/the-bridge/2018/11/14/information-warfare-past-present-and-future> [<https://perma.cc/4WGV-HSV5>]; Adam Elkus, *Information Warfare: A Historical Approach*, CTOVISION (Sept. 16, 2011), <https://ctovision.com/information-warfare-a-historical-approach/> [<https://perma.cc/UZ6Z-VVNT>].

¹¹³ *See* Brunetti-Lihach, *supra* note 114.

sive operations.”¹¹⁴ We see evidence of that all around us and all over the world. The 2016 American presidential election gave many Americans a better understanding of the extent to which other nations are attempting to shape events here at home through information and misinformation.¹¹⁵

Terrorist organizations, such as al-Qaeda and ISIS, have put a major emphasis on their information operations. Those guiding our antiterrorism and anti-extremist efforts also point to these tools as central to success.¹¹⁶ The government has publicly acknowledged that Russia, China, Iran, and to some extent North Korea work in the information domain to influence U.S. actions.¹¹⁷

The sensitive nature of this area can be illustrated by the controversy engendered by the repeal of an archaic law known as the Smith-Mundt Act.¹¹⁸ In 1948, Congress enacted a restriction that prohibited any State Department-created messages intended for foreign audiences from being disseminated domestically.¹¹⁹ It may have been an understandable safeguard for the time of print, radio, and, in its infancy, television. The limitation made no sense, however, in the time of the internet, which knows no geographic borders. This limitation prevented the United States and our ideas from competing in a primary method of communication because the State Department was prohibited from taking any action or producing any material that would violate the 1948 Act.

The NDAA for FY 2013 repealed outdated portions of the Smith-Mundt Act, removing this barrier to getting America’s story and perspective out, while still prohibiting any messages from targeting Americans.¹²⁰ But the repeal was opposed by those who feared a taxpayer-financed conspiracy to influence American public opinion. Among the charges were that the repeal made it “perfectly legal for the media to purposely lie to the American peo-

¹¹⁴ CATHERINE A. THEOHARY, CONG. RESEARCH SERV., IF10771, DEFENSE PRIMER: INFORMATION OPERATIONS 1 (2020), <https://crsreports.congress.gov/product/pdf/IF/IF10771> [<https://perma.cc/D4ER-FD4H>].

¹¹⁵ See generally OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY ASSESSMENT 2017-01D, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS (2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf [<https://perma.cc/Y63H-7AYK>].

¹¹⁶ See Alberto M. Fernandez, *Here to Stay and Growing: Combating ISIS Propaganda Networks*, BROOKINGS INSTITUTION (Oct. 21, 2015), <https://www.brookings.edu/research/here-to-stay-and-growing-combating-isis-propaganda-networks/> [<https://perma.cc/B3XV-WVFU>].

¹¹⁷ See, e.g., Press Release, Office of the Dir. of Nat’l Intelligence, Statement by NCSC Director William Evanina: Election Threat Update for the American Public (Aug. 7, 2020), <https://www.dni.gov/index.php/newsroom/press-releases/item/2139-statement-by-ncsc-director-william-evanina-election-threat-update-for-the-american-public> [<https://perma.cc/W3SQ-WBQE>]; Matthew Ha, *North Korea Turns to Cyber Disinformation Attacks amid Global Coronavirus Outbreak*, FOUND. FOR DEF. DEMOCRACIES (Apr. 1, 2020), <https://www.fdd.org/analysis/2020/04/01/north-korea-turns-to-cyber-disinformation-attacks-amid-global-coronavirus-outbreak/> [<https://perma.cc/7Y7M-3DX2>].

¹¹⁸ Smith-Mundt Act, Pub. L. No. 80-402, 62 Stat. 6 (1948).

¹¹⁹ See *id.* § 501, 62 Stat. at 9–10.

¹²⁰ National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 1078, 126 Stat. 1632, 1957–59.

ple” and that it was now “allowing propaganda to be used on the citizens of the USA by its own government.”¹²¹ Some of those allegations continue to circulate.¹²²

Engaging in the worldwide battle of ideas, especially between open, democratic societies and authoritarian ones, is essential for the United States and like-minded nations. Some of those efforts may have to be classified. Oversight by Congress of the full range of government work in this area is needed to reassure the public and to maintain appropriate checks on the substance and the method of delivery. But as with anything that occurs in cyberspace, decisions must be made in real time. A structured, anticipatory method of oversight can help ensure that the United States is active in this essential domain and that appropriate parameters are followed.

B. Artificial Intelligence

Among the most promising but also potentially problematic developments in the nature of warfare are the ramifications of artificial intelligence (“AI”). Artificial intelligence is already becoming a part of the daily lives of most Americans but will explode in number of applications and in reach into all aspects of our lives.¹²³ Yet, once again, the technology is advancing far faster than the policies or the thinking about ethical guidelines for its use.

Some significant thinking has been done about the appropriate use of AI in military applications. In October 2019, the Defense Innovation Board issued ethical guidelines for the “design, development, and deployment of AI for both combat and non-combat purposes.”¹²⁴ These ethical guidelines were officially adopted by the Secretary of Defense in February 2020.¹²⁵ But only Congress can play the crucial role of acting as the bridge between technology experts and the public in discussing and making decisions on what

¹²¹ Samantha Putterman, *No, Obama Didn't Make It Legal for Media Outlets to 'Purposefully Lie' to the American Public*, POLITIFACT (Aug. 23, 2019), <https://www.politifact.com/fact-checks/2019/aug/23/facebook-posts/no-obama-didnt-make-it-legal-media-outlets-purpose/> [<https://perma.cc/SV7Y-M5FW>].

¹²² *See, e.g.*, Cheryl Pass, *Government Propaganda Exposed*, FAYETTEVILLE OBSERVER (Apr. 30, 2020, 8:30 AM), <https://www.fayobserver.com/story/opinion/columns/2020/04/30/opinion-government-propaganda-exposed/112322534/> [<https://perma.cc/PJF7-HZW4>].

¹²³ *See* Rachit Agarwal, *15 Examples of Artificial Intelligence You're Using in Daily Life*, BEEBOM (Feb. 21, 2020, 1:18 PM), <https://beebom.com/examples-of-artificial-intelligence/> [<https://perma.cc/QBE4-ZLEB>]; Ilija Mihajlovic, *How Artificial Intelligence Is Impacting Our Everyday Lives*, TOWARDS DATA SCI. (June 13, 2019), <https://towardsdatascience.com/how-artificial-intelligence-is-impacting-our-everyday-lives-eae3b63379e1> [<https://perma.cc/35GV-P7D2>].

¹²⁴ DEF. INNOVATION BD., U.S. DEP'T OF DEF., *AI PRINCIPLES: RECOMMENDATIONS ON THE ETHICAL USE OF ARTIFICIAL INTELLIGENCE BY THE DEPARTMENT OF DEFENSE 2* (2019), https://media.defense.gov/2019/Oct/31/2002204458/-1/-1/0/dib_ai_principles_primary_document.pdf [<https://perma.cc/AT4W-M89Z>].

¹²⁵ *See* Press Release, U.S. Dep't of Def., *DOD Adopts Ethical Principles for Artificial Intelligence* (Feb. 24, 2020), <https://www.defense.gov/Newsroom/Releases/Release/Article/2091996/dod-adopts-ethical-principles-for-artificial-intelligence/> [<https://perma.cc/74RZ-UUGE>].

guidelines are appropriate for the United States. And again, only Congress can provide the independent oversight of classified applications that will be vital for national security.¹²⁶

Our geopolitical adversaries have no such constraints. The pace of their AI development is limited only by their technical capabilities. China in particular is devoting a massive effort to acquiring AI technology from around the world and to developing and advancing its own capabilities.¹²⁷ Like much of its defense effort, the focus is primarily on exploiting U.S. vulnerabilities. Strategists have envisioned nightmare scenarios where China has deployed autonomously firing weapons that operate at a speed and precision the United States cannot match.¹²⁸

Congress has been active in this area, increasing funding for AI development, supporting DOD's Joint AI Center, and creating a commission of leading experts, chaired by former Google CEO Eric Schmidt with former Deputy Defense Secretary Robert Work as Vice Chairman.¹²⁹ An interim report from the National Security Commission on Artificial Intelligence recommended a number of actions that Congress should take as soon as possible, and eighteen of them were incorporated into the House-passed FY 2021 NDAA.¹³⁰ A final report is scheduled to be released in the fall of 2020.

No one effort will answer all of the issues associated with such a rapidly developing set of technologies. But the hope in creating the Commission is that it can provide not only a set of recommendations to be enacted now, but that it can also identify key issues and questions with which Congress and the country should wrestle into the future.

¹²⁶ See *supra* Part V.

¹²⁷ See ELSA B. KANIA, BROOKINGS INST., "AI WEAPONS" IN CHINA'S MILITARY INNOVATION 1 (2020), https://www.brookings.edu/wp-content/uploads/2020/04/FP_20200427_ai_weapons_kania_v2.pdf [<https://perma.cc/ZEX2-ZZM4>]. See generally WM. C. HANNAS & HUEY-MEEI CHANG, CTR. FOR SEC. & EMERGING TECH., CHINA'S ACCESS TO FOREIGN AI TECHNOLOGY: AN ASSESSMENT (2019), https://cset.georgetown.edu/wp-content/uploads/CSET_China_Access_To_Foreign_AI_Technology.pdf [<https://perma.cc/DTF8-8ACD>].

¹²⁸ See Zach Hughes, *Fog, Friction, and Thinking Machines*, WAR ON ROCKS, (Mar. 11, 2020), <https://warontherocks.com/2020/03/fog-friction-and-thinking-machines/> [<https://perma.cc/X998-R9DZ>]; ELSA B. KANIA, CTR. FOR A NEW AM. SEC., BATTLEFIELD SINGULARITY: ARTIFICIAL INTELLIGENCE, MILITARY REVOLUTION, AND CHINA'S FUTURE MILITARY POWER 5 (2017), <https://s3.us-east-1.amazonaws.com/files.cnas.org/documents/Battlefield-Singularity-November-2017.pdf?mtime=20171129235805&focal=none> [<https://perma.cc/NB7Q-MRDK>]. See generally Henry A. Kissinger, et al., *The Metamorphosis*, ATLANTIC (Aug. 2019), <https://www.theatlantic.com/magazine/archive/2019/08/henry-kissinger-the-metamorphosis-ai/592771/> [<https://perma.cc/W9E8-RZVX>].

¹²⁹ John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1051, 132 Stat. 1636, 1962–65 (2018).

¹³⁰ See William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. (as passed by House, July 21, 2020); NAT'L SEC. COMM'N ON ARTIFICIAL INTELLIGENCE, INTERIM REPORT: NOVEMBER 2019 24–47 (2019), <https://science.house.gov/imo/media/doc/Schmidt%20Testimony%20Attachment.pdf> [<https://perma.cc/JAP5-SMFB>].

X. CONCLUSION

In the face of frustration with the inability of Congress to take meaningful action on the nation's problems, the NDAA stands out—not as a perfect or even an adequate legislative response to the rapidly changing national security environment, but as an outlier from the usual gridlock and top-down approach that has characterized Congress. While inadequate on some issues, on others, it has found a way to craft solutions within our constitutional framework that help meet the needs of our time.

The bipartisanship that attaches to the annual NDAA stems in part from its fifty-nine-year record of being signed into law. Because members of the House and Senate know that there will be another NDAA passed the next year, they are more likely to settle for a partial or compromise solution this year. There will always be another opportunity to do more. Knowing that there will be a bill signed into law every year also helps keep DOD and other affected departments accountable to Congress and transparent in their decisions. The cause of good government is advanced. Moreover, no one wants to be responsible for breaking the streak, which incentivizes both parties and both branches of government to work together to keep it going.

Admittedly, the process and substance related to this bill have one key advantage over most others: the focus is our national security and defense of the nation. While there have been profound differences over the years, both political parties have largely supported the general direction of policy after World War II: staying engaged in the world and maintaining a strong military. That consensus has helped fuel tremendous progress by virtually any metric for Americans and for the rest of the world. It has also helped propel the NDAA on its fifty-nine-year run. That bipartisan approach is, however, under attack within both parties. If it falls apart, this last vestige of textbook legislating will not survive either, degrading both our nation's security and the functioning of our representative democracy.