

BACKGROUND

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12 Issues for Congress in the 2015 National Defense Authorization Act

Edited by Michaela Dodge and Steven P. Bucci, PhD

Abstract

Two key bills guide the policies of the U.S. Department of Defense: (1) the appropriations bill, which provides defense funding, and (2) the National Defense Authorization Act (NDAA), which sets policies and guidelines for how the money will be spent. Over the past half-century, the NDAA has been the only bill that has made it to the President's desk for his signature each year. A Heritage Foundation team of top national security experts has identified 12 key policy issues that Congress should address in the next NDAA. Confronting these policy concerns will strengthen U.S. safety and security, as well as alliances and partnerships at home and abroad.

Two key bills guide the policies of the U.S. Department of Defense: (1) the appropriations bill, which provides defense funding, and (2) the National Defense Authorization Act (NDAA), which sets policies and guidelines for how the money will be spent. The NDAA has been the only bill that has made it to the President's desk for his signature each year over the past half-century.

As both houses of Congress brace for the deliberations for fiscal year (FY) 2015, there are 12 key policy issues the next NDAA should address. Confronting these policy concerns will strengthen U.S. safety and security, as well as alliances and partnerships at home and abroad.

1. Nuclear Weapons Remain Essential for U.S. Security

Since the end of the Cold War, the U.S. has significantly decreased its reliance on nuclear weapons and cut investments in its nuclear weapons complex. The nation has stopped conducting nuclear

KEY POINTS

- The National Defense Authorization Act (NDAA) remains key congressional legislation through which Members of Congress can influence U.S. defense and foreign policy. Congressional oversight is an essential element of the constitutional responsibility to provide for the common defense.
- The U.S. faces diverse security challenges. The world continues to become more dangerous, and the U.S. will need to maintain and advance capabilities that allow it to assure allies, deter adversaries, and defeat enemies should a conflict escalate.
- In the FY 2015 NDAA, Congress should focus on 12 key issues: U.S. nuclear deterrence, missile defense policy, cybersecurity, the importance of U.S. forward bases, China policy, Pentagon reforms, the next round of BRACs, reducing biofuel waste, U.S. terrorist detention policy during wartime, military sexual assault policy, protecting U.S. sovereignty from international treaties, and expanding the use of the State Defense Forces.

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Produced by the Douglas and Sarah Allison
Center for Foreign and National Security Policy

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

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weapons experiments that produce nuclear yield and has shifted the focus of the nuclear scientists and engineers from innovating and modernizing to sustaining U.S. nuclear weapons. Other countries have not taken these steps. China maintains a massive nuclear weapons production complex, as does Russia. Russia has *increased* its reliance on nuclear weapons, including tactical nuclear weapons, since the end of the Cold War. Moscow is also in breach of its legal and political arms control obligations.¹ Nuclear weapons have played, and will continue to play, a significant role in deterring adversaries and assuring allies.

The NDAA should mitigate some of the ill-advised steps the Obama Administration has taken since coming into office.² Congress should:

- **Provide much-needed funding for U.S. nuclear weapon infrastructure.** Congress should fund the nuclear complex at least at the levels set forth by Section 1251 of the National Defense Authorization Act of 2010 (the “1251 Report”).
- **Maintain and modernize the U.S. triad.** U.S. intercontinental-range ballistic missiles, bombers, strategic submarines, and their respective delivery vehicles are aging and require replacement systems in the next decades. The world continues to become more dangerous, and the triad is the ultimate insurance policy for an uncertain environment.
- **Defund unilateral nuclear weapons reductions.** Congress should not support further unilateral reductions unless they are a result of a treaty, subject to the Senate’s advice and consent, and with a partner that has a good standing with respect to arms control obligations.
- **Examine new nuclear weapons designs and capabilities.** The U.S. must maintain flexibility if it is ever required to strengthen U.S. assurances to its allies in Europe, South Korea, Japan, and the Middle East.
- **Fund—fully—the B61 tactical nuclear weapon Life Extension Program (LEP).** The B61 is the most visible commitment to transatlantic security. The LEP acts as an asset in sustaining science and engineering within the nuclear security complex.
- **Require nuclear certifications for the Air Force’s new bomber as soon as it achieves initial operational capability.** This step will likely save resources over the long term.³ In addition, it would also provide the U.S. further capability to signal its will to resolve a military conflict.
- **Restore funding for the proposed Chemistry and Metallurgy Research Replacement Nuclear Facility (CMRR-NF).** The CMRR-NF would provide the nation with additional capabilities to produce plutonium pits. The current pits are aging, and the nation can manufacture only a very limited number of plutonium pits from current nuclear facilities.
- **Encourage clarification of how the Department of Energy spends nuclear weapons funding.** Congress should require that the Department of Energy clarify which funding is designated for nuclear weapons modernization, nuclear weapons sustainment, or non-nuclear weapons activities in the National Nuclear Security Administration’s budget. This step is essential to understanding the nuclear weapons program and assessing its indirect benefits for U.S. science and technology bases.⁴

Nuclear weapons continue to play an essential role in U.S. security. Other countries are not only modernizing, but also increasing the role that nucle-

1. Ariel Cohen and Michaela Dodge, “Russia’s Arms Control Violations: What the U.S. Should Do,” Heritage Foundation *Issue Brief* No. 4105, December 11, 2013, <http://www.heritage.org/research/reports/2013/12/russia-s-arms-control-violations-what-the-us-should-do>.

2. Baker Spring, “Disarm Now, Ask Questions Later: Obama’s Nuclear Weapons Policy,” Heritage Foundation *Background* No. 2826, July 12, 2013, <http://www.heritage.org/research/reports/2013/07/disarm-now-ask-questions-later-obamas-nuclear-weapons-policy>.

3. Michaela Dodge and Baker Spring, “Nuclear Certification for a New Bomber,” Heritage Foundation *WebMemo* No. 3408, November 7, 2011, <http://www.heritage.org/research/reports/2011/11/nuclear-certification-for-a-new-bomber>.

4. Michaela Dodge and Baker Spring, “Bait and Switch on Nuclear Modernization Must Stop,” Heritage Foundation *Background* No. 2755, January 4, 2013, <http://www.heritage.org/research/reports/2013/01/bait-and-switch-on-nuclear-modernization-must-stop>.

Contributors

Theodore R. Bromund, PhD, is Senior Research Fellow in Anglo–American Relations in the Margaret Thatcher Center for Freedom, a division of the Kathryn and Shelby Cullom Davis Institute for International Studies, at The Heritage Foundation.

Steven P. Bucci, PhD, is Director of the Douglas and Sarah Allison Center for Foreign and National Security Policy, a division of the Davis Institute.

Dean Cheng is a Research Fellow for Chinese Political and Security Affairs in the Asian Studies Center at The Heritage Foundation.

Luke Coffey is Margaret Thatcher Fellow in the Thatcher Center.

Michaela Dodge is Policy Analyst for Defense and Strategic Policy in the Allison Center.

Steven Groves is Bernard and Barbara Lomas Senior Research Fellow in the Thatcher Center.

David Inserra is a Research Assistant for National Security and Cyber Security in the Allison Center.

Bruce Klingner is Senior Research Fellow for Northeast Asia in the Asian Studies Center.

Brett D. Schaefer is Jay Kingham Fellow in International Regulatory Affairs in the Thatcher Center.

Brian Slattery is a Research Assistant for Defense Studies in the Allison Center.

Charles Stimson is Manager of the National Security Law Program and Senior Legal Fellow in the Davis Institute. He served as Deputy Assistant Secretary of Defense for Detainee Affairs (2006–2007).

ar weapons play in their security strategies. The NDAA is a key tool to mitigate some of the Administration's damaging steps.

2. Pentagon's Cybersecurity Needs Improvement

The U.S. military has been one of the largest, if not the single largest, adopters of technologically advanced devices. From communications systems to weapons guidance systems, the Department of Defense has readily adopted new, powerful technologies that make the military more effective, efficient, and responsive. With the power and speed of these technologies, however, have also come cyber vulnerabilities. Whether through Internet-based attacks or malicious cyber hardware, many modern military systems can be the target of cyber attacks, jeopardizing or seriously impairing military operations.

Since the U.S. benefits greatly from modern systems, it must do more to secure those systems and prevent enemies from using cyber vulnerabilities against the U.S. Furthermore, the U.S. must leverage its strengths in cyber operations for offensive purposes where needed. To this end, Congress should use the NDAA to:

- **Encourage the private development of cybersecurity supply chain ratings and accreditation.** While the Department of Defense is arguably the most reliable government protector of the cyber supply chain, more work remains to be done. These ratings should be based on a private-sector set of best practices like that developed by the Open Group, to which the Department of Defense is a contributor. A specific way to encourage the adoption of this system would be to require government agencies that have security-related duties, such as the Department of Defense, to purchase technology only from organizations that are accredited by this cyber supply chain ratings system.
- **Continue to develop defensive and offensive cyber capabilities at U.S. Cyber Command and within the Combatant Commands and services.** Cybersecurity and operations are not merely IT activities that the military can assign to a department to handle. Each part of the military has a need for defensive cyber capabilities, and many also have the need for offensive capabilities. At the same time, U.S. Cyber Command is

critical in ensuring leadership and a centralized command for cyber operations. Congress should encourage continued growth and integration of defensive and offensive cybersecurity policies into all levels of strategy and operations.

- **Reject naive cooperation with malicious cyber nation-states.** Last year, The Heritage Foundation recommendations were incorporated in an NDAA amendment sponsored by Representative Ron DeSantis (R-FL), which requires that no Defense Department funds be used for collaborative cyber activities with China.⁵ This amendment passed the House because many in Congress understand that it is naive for the U.S. to cooperate on cybersecurity with a nation that is actively stealing military and economic secrets through cyber espionage. This kind of policy should be included again in this year's NDAA, and, given increasing evidence of Russian malicious behavior in cyberspace, Congress should also consider applying it to Russia.

Implementing these policies, together with expanding existing policies, such as cyber information sharing between the public and private sectors, will better prepare the Department of Defense to face serious cybersecurity challenges. From defending U.S. military networks to disrupting an enemy's, the U.S. military should continue to improve its cyber capabilities and policies.

3. Missile Defenses Deny Adversary the Benefit of a Surprise Attack

Today, more than 30 nations around the world possess ballistic missiles that can strike the U.S., its allies, and forward-deployed troops within minutes. This leaves a very short time to react and protect what the U.S. values most: its population and economic centers. U.S. ballistic missile defense (BMD)

systems can provide this protection. Some, like the Aegis sea-based BMD program, the Ground-Based Midcourse Defense, or the Patriot systems, are already fielded. The quantity of deployed interceptors is not enough to keep up with the threat. North Korea has ballistic missiles that can strike the U.S. homeland. It has nuclear weapons and an extensive cooperation with Iran.⁶

To keep up with ballistic missile threats and develop capabilities necessary for adopting the "protect and defend" strategy,⁷ Congress should:

- **Increase funding for missile defense modernization.** Congress should reverse the Obama Administration's cancellations of the boost phase BMD systems, including the Airborne Laser and the Multiple Kill Vehicle. Ballistic missiles are most vulnerable in the boost phase when they are relatively slow and have not deployed decoys yet. The Administration cancelled all U.S. boost phase programs in its first term, a damaging step also for the development of future ballistic missile technologies.
- **Provide funding for the East Coast BMD site.** Currently, all U.S. long-range interceptors are deployed on the West Coast, in Alaska and California. As a result, the U.S. East Coast is relatively less protected; all the while, a threat from Iran is increasing as Tehran continues to advance its ballistic missile and nuclear weapons programs.
- **Advance U.S. space-based capabilities.** U.S. missile defense systems depend on cueing, tracking, and discrimination provided by a network of ground and space-based radars. Space-based radars can accomplish these missions better than ground-based radars and are relatively less vulnerable. Additionally, space-based interceptors would provide the best possible protection to the U.S. and its allies against a ballistic missile attack.

5. Dean Cheng, "Chinese Cyber Attacks: Robust Response Needed," Heritage Foundation *Issue Brief* No. 3861, February 23, 2013, <http://www.heritage.org/research/reports/2013/02/chinese-cyber-attacks-robust-response-needed>.

6. Mark B. Schneider, "Does North Korea Have a Missile-Deliverable Nuclear Weapon?" Heritage Foundation *Lecture* No. 1228, May 22, 2013, <http://www.heritage.org/research/lecture/2013/05/does-north-korea-have-a-missile-deliverable-nuclear-weapon>.

7. Andrei Shoumikhin and Baker Spring, "Strategic Nuclear Arms Control for the Protect and Defend Strategy," Heritage Foundation *Background* No. 2266, May 4, 2009, <http://www.heritage.org/research/reports/2009/05/strategic-nuclear-arms-control-for-the-protect-and-defend-strategy>.

- **Refuse to integrate the Chinese air defense system with the North Atlantic Treaty Organization's network.** Last year, Turkey announced it might purchase a Chinese air defense system. This would be an unwise step and would potentially undermine Turkey's cooperation with NATO.

Congress must ensure that the U.S. is ahead of the ballistic missile threat. A viable missile defense enterprise is the way to do so.

Forward-basing U.S. troops in Europe is just as important now as it was during the Cold War.

4. The Value of U.S. Forces in Europe

The U.S. military presence in Europe deters adversaries, strengthens allies, and protects U.S. interests. Whether preparing U.S. and allied troops for deployment to Afghanistan or responding to a humanitarian crisis in the region, forward-based military capabilities in Europe allow the U.S. to project power and react to the unexpected more quickly and effectively. Reducing this capability would only make America and NATO weaker on the world stage.

The commonly held belief that U.S. forces are in Europe to protect European allies from a threat that no longer exists is simply wrong. In fact, forward-basing U.S. troops in Europe is just as important now as it was during the Cold War, for different reasons. One of the most obvious benefits of having U.S. troops in Europe is its geographical proximity to some of the most dangerous and contested regions in the world. Although largely peaceful itself, broader Europe has physical borders with Russia, the Arctic, Iran, Asia Minor, the Caspian Sea, and North Africa. Most of these areas have long histories of instability and a potential for future instability that could directly impact the security interests and economic well-being of the U.S. Some of the most important energy security and trade corridors—such as the transit routes in the Caucasus, the Suez Canal, and the Strait of Gibraltar—are on the periphery of Europe and are located in some of the world's most dangerous and unstable regions.

For example, in 2013, the U.S. deployed a detachment of Marines to a small American air base in Spain to form a U.S. rapid-reaction force for the North African region. This deployment was clearly linked to the 2012 terrorist attack in Benghazi, Libya, and gave the U.S. more options for responding to a crisis in the region. This deployment would not be possible if the U.S. did not already have a military presence in Europe.

Congress should:

- **Put America's national security interests ahead of defense cuts.** Important decisions, such as those concerning the numbers of bases and troops in Europe, need to be made as part of a strategic review of U.S. interests in Europe, not from a desire to slash the defense budget to find savings.
- **Show U.S. commitment to NATO and Euro-Atlantic security.** The U.S. troop presence in Europe is the most visible sign of U.S. support for NATO. At a time when NATO is in the process of transforming itself for the 21st century, it needs American leadership and commitment.
- **Reward key U.S. allies with closer defense cooperation.** Instead of reducing the numbers of U.S. military bases in Europe, the U.S. should be looking at the potential for establishing new bases—especially on the periphery of Europe and with allies who have been committed to Euro-Atlantic security, particularly the Baltic states.

U.S. military bases in Europe provide American leaders with increased flexibility, resilience, and options in a dangerous world. As part of a policy that is shrinking America's military presence in the world, the Obama Administration's defense cuts heavily impact the U.S. military footprint in Europe. Ultimately, these cuts will reduce the ability and flexibility of the U.S. to react to the unexpected in places on Europe's periphery, such as North Africa.

5. Department of Defense Needs Substantive Reform

Under the tight budget caps in the Budget Control Act, the Pentagon needs to get a handle on its outdated practices more than ever. "Health care costs are eating the Defense Department alive," quipped

then-Secretary of Defense Robert Gates in March 2010.⁸ So far, the executive and legislative branches have been unable to come together to find a solution to this serious issue. Additionally, defense acquisition reform, outdated export controls, and reducing the Pentagon's bloated bureaucracy should be part of an effort to make the Department of Defense more efficient. Savings should be reinvested to maintain and modernize the armed forces' capabilities.

Congress should:

- **Reform the military health care and retirement system.** Congress should enact reforms that would allow service members to transition from the current defined-benefit plans to defined-contribution plans while grandfathering current members into existing plans.⁹
- **Enact acquisition reform.** The reform requires removing layers of unnecessary and expensive over-regulation. Retired General Arnold Punaro, Chairman of the Department of Defense's Defense Business Board task force, said that he would prefer to "put a match" to the entire set of regulations governing the acquisition of weapons and military equipment and start over.¹⁰ Accountability for major acquisitions is another important component of the acquisition reform.
- **Update the outdated export-control regime.** The current export-control system is hampering the U.S. defense industrial base, trade, and national security. While the U.S. must preserve tight control of sensitive technologies, it must modernize its export-control regulations and permit its companies to compete globally on equal footing.
- **Reduce overhead.** Congress must tackle bureaucratic overhead in the Pentagon's military and civilian positions. This starts with requiring rel-

evant data from the Defense Department and then deciding on which positions can be eliminated without affecting the Pentagon's military mission.

Congress should allow military leaders to reinvest all funds recovered from pursuing these types of reforms in order to pay for the priority of modernization. This should include developing cutting-edge technologies that keep the U.S. ahead of its potential adversaries and purchasing new sets of equipment for all of the military services.

6. China Policy

The United States faces a number of security threats in the Asia-Pacific, and the Administration's "pivot to Asia" places a premium on ensuring a modern, capable U.S. military to support its political and economic goals. As China's military modernization and improvements proceed, the ability of the United States to dominate the western Pacific in the event of a crisis or conflict is becoming ever less clear. This limitation to domination is due not only to China's development of anti-access/area denial capabilities, but also to China's pursuit of comprehensive modernization of its entire military, including nuclear, conventional, space, and cyber systems. Meanwhile, North Korea under Kim Jong-un remains an unpredictable threat, exacerbated by the North Korean dictator's apparent lack of interest in reform or improved ties.

The visible commitment of resources is made even more urgent given the increasing doubt from America's regional allies about the viability of U.S. resolve and military capabilities. U.S. allies and opponents in Asia reading U.S. defense budgets see the mismatch between the bold rhetoric of the Obama Administration's Asia pivot strategy and the lack of necessary military resources devoted to fulfilling it. By overdramatizing and overselling an evolutionary development of U.S. foreign policy, the Obama Administration risks providing false reassurances to

8. Thom Shanker, "Gates Takes Aim at Pentagon Spending," *The New York Times*, May 8, 2010, http://www.nytimes.com/2010/05/09/us/politics/09gates.html?_r=0 (accessed February 10, 2014).

9. Baker Spring, "Saving the American Dream: Improving Health Care and Retirement for Military Service Members and Their Families," Heritage Foundation *Backgrounder* No. 2621, November 17, 2011, <http://www.heritage.org/research/reports/2011/11/saving-the-american-dream-improving-health-care-and-retirement-for-military-service-members?ac=1>.

10. Baker Spring, "The Culture of Over-Regulation Must Stop," The Heritage Foundation, *The Foundry*, September 10, 2012, <http://blog.heritage.org/2012/09/10/the-culture-of-over-regulation-must-stop/>.

allies of Washington's ability to deliver on its promises. Japan's 2013 *Defense White Paper* is premised on declining U.S. military strength vis-à-vis China, while South Korea worries that the planned 2015 transfer of wartime operational command could lead to America retreating from its security commitments.

The U.S. must fully fund its defense requirements. It is unrealistic to think that the United States can cut defense spending by an additional \$1 trillion over the next decade and maintain its current level of commitment. Shortchanging U.S. defense spending may appear to provide short-term budgetary gains, but any such gains will come at an unacceptable risk to America's armed forces, allies, and national interests in the Asia-Pacific.

As China modernizes its nuclear forces, fielding new intercontinental ballistic missiles (ICBMs) and deploying a new generation of ballistic missile submarines, and as North Korea's nuclear development program continues to progress, it is essential that the United States maintain a robust nuclear deterrent, including more modern warhead designs and a follow-on sub-surface ballistic nuclear (SSBN) capability, as well as sustaining investment in ballistic missile defenses. Similarly, adversary interest in fostering asymmetric advantages through counter-space and cyber capabilities means that corners cut in these key areas will create intolerable vulnerabilities.

To maintain American security interests, then, the U.S. should:

- **Reverse cuts in the missile defense program budget** that reduced U.S. ability to defend the homeland and America's allies against increasing North Korean and Chinese security threats. While the Obama Administration's reversal of its previous elimination of ground-based interceptors in Alaska was a proper first step, it needs to restore funding to other necessary missile defense programs.
- **Augment funding for conventional forces in the Pacific theater.** Due to budget cuts, one-third of U.S. Air Force planes worldwide are grounded, several U.S. Navy ships in the Pacific remain in port rather than deployed on training or operational missions, and U.S. Marine units' readiness has degraded.
- **Support the ability of key U.S. allies and friends, including Taiwan, to defend themselves.** This is best done by helping them help themselves through the sale of necessary defense systems and technologies, including missile defense systems, advanced fighter aircraft, and submarine and anti-submarine warfare technology.

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7. The Pentagon's Base Realignment Closures

As a result of the fiscal pressures, the Pentagon is planning on significantly reducing its end strength. By FY 2017, the Army is slated to drop from the current level of 570,000 active-duty members to 490,000.¹¹ The U.S. Marine Corps will shrink to about 174,000 by the end of 2016 (from 202,000 in 2010).¹² This reduction should be accompanied by reducing excess infrastructure where appropriate. In the past, efforts to conduct new rounds of Base Realignment and Closures (BRACs) faced fierce opposition from Congress. The Pentagon and the Services can take advantage of the lessons learned from the previous BRAC rounds and conduct the next process in a manner that does not hamper U.S. security.¹³

11. J. D. Leipold, "Odierno Takes Blunt Message to Capitol Hill," Army News Service, September 19, 2013, <http://www.army.mil/article/111806/> (accessed February 10, 2014).

12. Hope Hodge Seck, "Amos Defends Marine Corps Force of 174,000," *Marine Corps Times*, November 5, 2013, <http://www.marinecorpstimes.com/article/20131105/NEWS05/311050034/Amos-defends-Marine-Corps-force-174-000> (accessed February 10, 2014).

13. Michaela Dodge, "Beyond BRAC: Global Defense Infrastructure for the 21st Century," Heritage Foundation *Background* No. 2791, May 3, 2013, <http://www.heritage.org/research/reports/2013/05/beyond-brac-global-defense-infrastructure-for-the-21st-century>.

Congress should:

- **Require that the Pentagon consider its domestic and global infrastructure.** Current challenges rise beyond U.S. borders and require that the U.S. be able to project power and react to unfolding crises flexibly and as promptly as possible, before minor crises rise to more dangerous and extensive ones. It does not make sense to separate the domestic from global infrastructure or to consider one without understanding the impact on the other.
- **Identify opportunities for public-private partnerships.** Performance-based logistics not only increases efficiency within the Department of Defense, but also helps to build and strengthen relationships between the local communities and the military. Building on the good experience, Congress should incentivize the Pentagon to expand the approach where applicable, including with international customers.¹⁴
- **Incentivize transparency throughout the BRAC process.** The Pentagon must increase transparency regarding its BRAC decision-making process and inform Congress in the early stages of the process. Congress can also establish an independent BRAC commission that would review the Pentagon's choices. In addition, the Pentagon must be transparent when working with local communities and must be allowed to adopt a market-based approach to transferring its surplus property.

Around the world, American interests are coming under attack. At home, President Obama has dramatically reduced U.S. military ability to fight and win wars of the future.¹⁵ The negative trends must be addressed. A properly conducted BRAC process would help to assess the U.S.'s ability to respond flexibly and in a timely manner to international crises.

8. No Funding for Wasteful Biofuel Initiatives

The Obama Administration has pushed the use of biofuels in the Navy, directing significant funds in an attempt to replace oil with this alternative. The Administration has entered the Department of Defense into agreements with the Departments of Agriculture and Energy to direct additional taxpayer dollars to this initiative.

Navy Secretary Ray Mabus and others have argued that, since much of the world's oil originates in the Middle East, it is subject to volatile price fluctuations and potential shortages. However, America's accessible domestic oil supply has grown immensely in recent years. The price of oil has been declining as a result, and oil supply is more consistent. In comparison with biofuels, the environmental arguments against oil are also not valid. Biofuels create as much carbon dioxide waste as oil and are, in fact, *less* fuel-efficient.

As the U.S. military continues to struggle with the implementation of broad defense cuts, it cannot afford to waste yet more taxpayer dollars on unproven and potentially damaging biofuel programs.

Biofuel use is fraught with strategic and operational problems.¹⁶ First, the U.S. will continue to rely on oil in foreign ports, as there is no global biofuel infrastructure. Also, as mentioned, the fuel is less efficient than oil. If the Navy wants to consider strategically viable alternatives to oil, it should consider those that reduce reliance on fuel transport and consumption. Finally, studies have shown that biofuels may corrode ships' mechanical systems more rapidly than oil. This would lead to more frequent breakdowns of vessels, reducing at-sea hours and increasing maintenance costs. At \$26 per gallon,

14. Baker Spring, "Performance-Based Logistics: Making the Military More Efficient," Heritage Foundation *Backgrounders* No. 2411, May 6, 2010, <http://www.heritage.org/research/reports/2010/05/performance-based-logistics-making-the-military-more-efficient?ac=1>.

15. Steven P. Bucci and Michaela Dodge, "Top Five National Security Priorities for Congress in 2014," Heritage Foundation *Issue Brief* No. 4128, January 15, 2014, <http://www.heritage.org/research/reports/2014/01/top-5-national-security-priorities-for-congress-in-2014>.

16. Michaela Dodge and Brian Slattery, "Biofuel Blunder: Navy Should Prioritize Fleet Modernization over Political Initiatives," Heritage Foundation *Issue Brief* No. 4054, September 24, 2013, <http://www.heritage.org/research/reports/2013/09/navy-s-green-fleet-a-biofuel-blunder>.

biofuels are about seven times more expensive than conventional diesel. This cost premium, on top of other cuts in fleet readiness and modernization that the Obama Administration has overseen, will place unnecessary strain on funding.

Congress can support a robust U.S. Navy through the following NDAA actions:

- **Ensure that resources are directed to the Navy programs that need them.** Congress should redirect any funds in the President’s FY 2015 budget request that are slated for biofuels to the shipbuilding and fleet maintenance accounts.
- **Prohibit the use of Defense Department research funds for biofuels.** Research and development funding in the Navy should go to weapons modernization, not to forcing unnecessary social initiatives on the service.
- **Reverse biofuel’s bureaucratic momentum.** Spreading biofuel implementation across the Defense, Agriculture, and Energy Departments was a deliberate move for biofuels to gain more support and protection. The NDAA should prohibit the Defense Department from entering into further agreements with these agencies to push the biofuel agenda.

As the U.S. military continues to struggle with the implementation of broad defense cuts, it cannot afford to waste yet more taxpayer dollars on unproven and potentially damaging programs. Biofuels represent one of the clearest examples of misguided spending in the Defense Department. The NDAA can promote fiscal responsibility and provide for the common defense by stopping this initiative.

9. U.S. Terrorist Detention Policy During Wartime

On September 11, 2001, the United States was drawn into a new kind of war. That war continues to

this day. One of the flashpoints of controversy and debate over U.S. conduct in this war is the detainment of enemy combatants.¹⁷ Over the past decade, the United States and coalition partners have held over 75,000 detainees (security internees) in Iraq, over 25,000 detainees in Afghanistan, and 779 detainees in Guantanamo Bay, Cuba. Today, the United States is holding only 155 detainees at Guantanamo Bay. Despite the comparatively low number, public interest in the Guantanamo detainees is high because the principles involved are vital. Under the international law of armed conflict, and as recognized by the U.S. Supreme Court and authorized by Congress, the United States has the lawful authority to detain enemies who have engaged in combatant actions, including acts of belligerence, until the end of hostilities.¹⁸ The U.S. can detain captured enemy fighters not as punishment, but to keep them from returning to the battlefield. Detaining select enemy combatants during wartime under safe, secure, and humane conditions is vital for this war and any future armed conflict.¹⁹

The NDAA should continue to place common-sense restrictions on the Obama Administration and provide guardrails on the transfer of Guantanamo detainees. Congress should:

- **Continue to support the policy of allowing the Administration to transfer detainees from Guantanamo to third countries** under one of three conditions:
 1. If the Periodic Review Board determines that the detainee is “no longer a threat to the national security of the United States”;
 2. If the transfer is required to carry out a court order; or
 3. If the Secretary of Defense determines that “actions that have been or are planned to be taken will substantially mitigate the risk of

17. The Heritage Foundation, “Detention of the Enemy During Wartime,” <http://www.heritage.org/research/projects/enemy-detention/detention-of-the-enemy?ac=1>.

18. Charles Stimson, “Law of Armed Conflict and the Use of Military Force,” testimony before the Committee on Armed Services, U.S. Senate, May 16, 2013, <http://www.heritage.org/research/testimony/2013/05/the-law-of-armed-conflict>.

19. Charles Stimson, “The National Defense Authorization Act and Military Detention of U.S. Citizens,” Heritage Foundation *WebMemo* No. 3497, February 10, 2012, <http://www.heritage.org/research/reports/2012/02/facts-about-the-national-defense-authorization-act-and-military-detention-of-us-citizens>.

such individual engaging or reengaging in any terrorist or other hostile activity that threatens the United States and the transfer is in the national security of the United States.”²⁰

- **Continue to require 30 days’ notice to Congress** before a detainee is transferred from Guantanamo.
- **Continue to prohibit the use of appropriated funds** to construct or modify any facility in the United States, its territories, or possessions to house any Guantanamo detainee in the custody or control of the Department of Defense.
- **Continue to prohibit the use of appropriated funds** to transfer Guantanamo detainees to the United States for any purpose.

The military justice system is integral to the military’s mission of defending the nation.

10. Military Sexual Assault: How to Fix the Problem

Sexual assault is a real and recognized problem, both in the military and in civilian life. Sexual assault in the military harms victims, of course, and is detrimental to general morale, destroys unit cohesion, disrespects the chain of command, and damages the military as a whole. The military exists to defend the nation; that is its mission.²¹ To accomplish that mission, military leaders must ensure that those who serve are combat ready and, once ordered into armed conflict, combat effective. Maintaining good order and discipline in the

armed forces is essential to accomplishing the mission. The military justice system is integral to the military’s mission. Last year’s (FY 2014) NDAA contained prudent, sweeping, and meaningful reforms aimed at preventing and reducing sexual assault in the military. The major reforms will take effect in June 2014, and the modifications of Article 32 (the preliminary hearing) do not go into effect until December 2014.

Additionally, Congress and the President have each established panels of experts to study various aspects of sexual assault in the military. Most of those expert panels, set up over a number of years, have not yet reported their findings and recommendations. These reforms and those that may result from expert panel recommendations will take time to affect the military criminal justice system. Some of the new policies will have an immediate and visible effect. Others will not take effect for a year or more. Congress and the Administration should give these changes time to take root. Then, and only then, should they make any necessary additional changes.

The NDAA should retain the ability of commanders to refer cases of sexual assault and all other crimes to court martial.²² Congress should:

- **Require the judge advocates general** in the Army, Air Force, and Marine Corps to establish career litigation tracks for uniformed military prosecutors and defense counsel in order to better serve the needs of victims and defendants alike.²³
- **Refrain from any additional changes in the military justice system** until all expert review panels report their final recommendations and the newest reforms have been in place at least two years.

20. Section 1035 of the FY 2014 National Defense Authorization Act, in Committee Print, *National Defense Authorization Act for Fiscal Year 2014: Legislative Text and Joint Explanatory Statement to Accompany H.R. 3304, Public Law 113-66*, Committee on Armed Services, U.S. House of Representatives, 113th Cong., 1st Sess., December 2013, <http://www.gpo.gov/fdsys/pkg/CPRT-113HPRT86280/pdf/CPRT-113HPRT86280.pdf> (accessed February 26, 2014).

21. Charles Stimson, “Sexual Assault in the Military: Understanding the Problem and How to Fix It,” Heritage Foundation *Special Report* No. 149, November 6, 2013, <http://www.heritage.org/research/reports/2013/11/sexual-assault-in-the-military-understanding-the-problem-and-how-to-fix-it>.

22. Steven P. Bucci and Charles Stimson, “Changing the Military Justice System: Proceed with Caution,” Heritage Foundation *Background* No. 2795, May 9, 2013, <http://www.heritage.org/research/reports/2013/05/changing-the-military-justice-system-proceed-with-caution>.

23. Charles Stimson, “JAG Corps and Reforming the Military Justice System,” Heritage Foundation *Issue Brief* No. 3955, June 3, 2013, <http://www.heritage.org/research/reports/2013/06/jag-corps-and-reforming-the-military-justice-system>.

11. Impact of Multilateral and Bilateral Treaties on National Defense

Treaties have the potential to significantly affect America's national defense. Some treaty matters that Congress should monitor in the NDAA either to preserve U.S. protections or to block unwarranted impediments and restrictions include:

- **Arms Trade Treaty (ATT).** The U.S. has not ratified the ATT, and a bipartisan majority of the Senate opposes its ratification on the grounds that it is vague, is easily politicized, and could hinder the U.S. in fulfilling its commitments to provide arms to key allies. Many other leading arms exporters and importers oppose the ATT as well, but despite its own assertion that any ATT that did not include all U.N. members would be “less than useless,” the Obama Administration signed the ATT in 2013.²⁴ Congress should ensure that the NDAA reiterates its previous rejections of the ATT—including any support for establishment of a secretariat, which is called for by the treaty.
- **United Nations Convention on the Law of the Sea (UNCLOS).** The U.S. has repeatedly decided not to ratify UNCLOS since it was adopted in 1982. Though the U.S. has remained a non-party for more than 30 years, it has experienced no detriment to its national security interests. Nevertheless, from time to time, Congress has appropriated millions of dollars in funding for various parts of the bureaucracy created by UNCLOS. Needless to say, Congress should do nothing in the NDAA that would provide funds for the UNCLOS bureaucracy.
- **Rome Statute of the International Criminal Court (ICC).** The U.S. has not ratified the Rome Statute and has no legal obligations arising from the Clinton Administration's decision to sign the treaty.²⁵ Broadly, the U.S. has refused to join the ICC because it lacks sufficient safeguards against political manipulation, is not accountable to the U.N. Security Council, and violates national sovereignty by claiming jurisdiction over the nationals and military personnel of nonparty states in some circumstances. To address outstanding concerns, the U.S. adopted the 2002 American Service-Members' Protection Act (ASPA), as amended in 2007 and 2008, which restricts U.S. cooperation with and support of the ICC, and has negotiated approximately 100 bilateral Article 98 agreements with other countries in which they agree not to surrender U.S. persons to the ICC without American approval.²⁶ Despite a more conciliatory approach to the ICC, the Obama Administration has not substantially changed U.S. policy. In fact, the White House recently negotiated a new Article 98 agreement with Mali to allow U.S. participation in U.N. operations.²⁷ Congress should ensure that the NDAA does not reverse or dilute current policies and protections.
- **Comprehensive Test Ban Treaty (CTBT).** There are many fundamental problems with the CTBT, which the U.S. Senate rejected in 1999. Among these problems: The treaty does not define explosive nuclear testing, which the CTBT ostensibly seeks to ban, leading to differing interpretations; it is impossible to verify; it is unwise in the face of questions about America's nuclear preparedness; and it would constrain U.S. options

24. “Arms Trade Treaty,” Special Negotiator Donald Mahley, speaking for Under Secretary for Arms Control and International Security Affairs Ellen Tauscher, Carnegie Endowment for International Peace, February 18, 2010, <http://www.state.gov/t/us/136849.htm> (accessed February 26, 2014).

25. The Obama Administration has taken no action to abrogate the 2002 letter from John Bolton (then Under Secretary of State for Arms Control and International Security) to U.N. Secretary-General Kofi Annan. The letter states that “the United States does not intend to become a party to” the Rome Statute of the International Criminal Court and that “the United States has no legal obligations arising from its signature on December 31, 2000.”

26. The actual number is not officially available because some countries do not wish the U.S. to identify them. For an unofficial list, see Georgetown Law Library, “International Criminal Court—Article 98 Agreements Research Guide,” 2009, http://www.law.georgetown.edu/library/research/guides/article_98.cfm (accessed February 21, 2014).

27. News release, “Presidential Memorandum—Certification Concerning U.S. Participation in the United Nations Multidimensional,” The White House, January 31, 2014, <http://www.whitehouse.gov/the-press-office/2014/01/31/presidential-memorandum-certification-concerning-us-participation-united> (accessed February 10, 2014).

in the face of proliferation trends.²⁸ Nothing has changed since 1999 to make the treaty any more acceptable. Congress should reiterate its rejection of the CTBT and insist that the U.S. alone set policy on nuclear testing.

A positive provision included in the FY 2013 NDAA was a restatement of policy under the Arms Control and Disarmament Act with respect to outer space. That provision explicitly states:

No action shall be taken that would obligate the United States to reduce or limit the Armed Forces or armaments of the United States in outer space in a militarily significant manner, except pursuant to the treaty-making power of the President set forth in Article II, Section 2, Clause II of the Constitution or unless authorized by the enactment of further affirmative legislation by the Congress of the United States.²⁹

The provision further requires briefings, updates, and notifications on negotiations involving binding international agreements relating to this matter. Congress should adopt it as a standard provision in all treaties that could impact U.S. foreign and defense policy that are under negotiation or under consideration for signature or ratification.

12. Expanded Use of State Defense Forces: Improved Domestic Response

State militias have helped to defend the United States since the Revolutionary War. Today, 23 states and territories have organized militias, most commonly known as State Defense Forces (SDFs). SDFs provide governors with a cost-effective, vital force multiplier and resource, especially if state National Guard units are deployed out of state. SDFs are underfunded and undersupported. Some states that are at high risk of natural or man-made disasters, or of terrorist attacks, have not created SDFs. The U.S., as well as individual states, can no longer afford to sideline these security assets.

State Defense Forces have proven vital to homeland security and emergency response. After 9/11,

the New York Guard, the New York Naval Militia, and the New Jersey Naval Militia were activated to assist in response measures, recovery efforts, and critical infrastructure security. An estimated 2,274 SDF personnel participated in support or recovery efforts after Hurricane Katrina. They assisted directly with recovery efforts or stayed in their states to fill the roles of the state National Guard units that were deployed to assist in the recovery. Most recently in the response to Superstorm Sandy, both New York and New Jersey used their SDFs extensively.

Expansion and enhancement of SDFs remains vital to homeland security. To further such efforts, the NDAA should:

- **Promote the creation of SDFs in high-risk states.** Only 23 states and territories have SDFs. The hesitation of many governors makes little sense given that SDFs offer a low-cost force multiplier for homeland security efforts. The high-risk states would benefit significantly from creating SDFs for disaster recovery and response efforts.
- **Create state standards and clarify federal regulation.** Clarifying federal regulation would provide a clearer picture of the powers and mission of SDFs. Creating state standards for tactics, techniques, and organization based on the needs of each individual state would strengthen and enhance SDFs.
- **Incorporate SDFs into state and national emergency management plans.** The states, the Defense Department, and the Department of Homeland Security should ensure that SDFs are incorporated into existing and future emergency management plans and exercises. Including SDFs will help to ensure that all state and national actors in emergency response know their respective roles.
- **Permit SDFs to train with the National Guard.** While SDFs and the National Guard differ in their overall missions, they share emergency management responsibilities in their respective

28. Baker Spring, "U.S. Should Reject Ratification of the Comprehensive Test Ban Treaty," Heritage Foundation *WebMemo* No. 3272, May 26, 2011, <http://www.heritage.org/research/reports/2011/05/us-should-reject-ratification-of-the-comprehensive-test-ban-treaty>.

29. H.R. 4310, National Defense Authorization Act for Fiscal Year 2013, p. 243, <http://www.gpo.gov/fdsys/pkg/BILLS-112hr4310enr/pdf/BILLS-112hr4310enr.pdf> (accessed February 10, 2014).

states. SDFs training alongside the state National Guards would be an effective use of resources and provide the specialized training needed to strengthen the SDFs. SDFs will be a significantly greater asset to their states if they are more professionally trained and equipped.

- **Encourage greater state support and federal in-kind support.** While SDFs are a low-cost resource, the size and scope of their functionality is hindered by insufficient support and resources. To increase the quality and capability of SDFs, states need to provide adequate support and resources. While SDFs should remain funded solely by the states, these forces would benefit greatly from receiving federal in-kind support from the Defense Department.

There are clear historical, legal, and practical justifications for strengthening the State Defense Forces. Since the country's founding, militias have played a vital role in fulfilling the constitutional duty of providing for the common defense. SDFs continue to provide critical manpower at minimal cost.

Conclusion

In the upcoming NDAA process, focusing on the priorities outlined above will benefit U.S. national security. While these priorities alone will not solve all problems or repel all threats that the U.S. will face, they are essential and warrant special attention by policymakers.