Congress Passes Too Much Acquisition Legislation

*by Robert Antonio, Owner of Wifcon.com*

*Our recommendations contemplate Congress confining its dictates to fundamental matters*. Under our recommendations, *the regulatory system will assume the responsibility of amplifying congressional direction* and of creating such restrictions or safeguards as may apply only to some agencies or that prove essential only for limited periods. This approach provides the *best balance of congressional control and executive efficiency*. It minimizes the burden on a busy Congress. It also recognizes that, when feasible, administrative action by regulation is quicker, more specific, and more readily adaptable to necessary change. Such latitude is essential to the use of procurement techniques which best ensure the success of a Government program. (emphasis added)

The Commission on Government Procurement, December 1972

In 1972, the Commission on Government Procurement wrote that Congress should limit its acquisition legislation to fundamental acquisition matters and let the Executive Branch implement its policy through specific acquisition regulation. If Congress had listened, it would be spending less time on passing legislation, increasing its oversight of the acquisition process, and the FAR Councils would be performing their regulatory duty to implement Congress's acquisition policies. Unfortunately, Congress didn't listen.

Today, Congress doesn't deal with fundamental acquisition matters, it deals with acquisition minutiae and details--especially when it comes to the Department of Defense (DoD). Someone thinks of an idea and before you know it it's a legislative requirement. Apparently, no thought is too small for another bit of defense acquisition legislation. For the most part, Congress meddles in the acquisition process through the House and Senate Armed Services Committees. These committees propose acquisition legislation in their annual National Defense Authorization Acts (NDAA) with most of it in Title VIII of the NDAAs. Title VIII is usually labeled: *Acquisition Policy, Acquisition Management, and Related Matters*.

**Too Much Acquisition Legislation**

In the past 17 years, Congress has passed over 700 sections of legislation that deal with defense and governmentwide acquisition in Title VIII of the NDAAs. What's worse is that the pace of Congress's acquisition legislation has exploded in the past 3 years with 238 more sections of legislation in Title VIII. Table 1 below provides you with the numbers.

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| **Table 1: Title VIII Sections for Each NDAA By Fiscal Year** | | |
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| [NDAA for Fiscal Year](http://www.wifcon.com/legislat.htm) | Number of Sections in Title VIII | Number of Sections Requiring Reports, Assessments, Studies, Sense of Congress, etc., Included in Title VIII |
|  |  |  |
| 2018 | 73 | 5 |
| 2017 | 88 | 4 |
| 2016 | 77 | 3 |
| 2015 | 37 | 1 |
| 2014 | 13 | 1 |
| 2013 | 43 | 3 |
| 2012 | 45 | 1 |
| 2011 | 50 | 2 |
| 2010 | 29 | 4 |
| 2009 | 49 | 8 |
| 2008 | 52 | 4 |
| 2007 | 32 | 5 |
| 2006 | 30 | 5 |
| 2005 | 30 | 0 |
| 2004 | 33 | 2 |
| 2003 | 26 | 2 |
| 2002 | 18 | 2 |
|  |  |  |
| 17 Fiscal Years | 725 total (43 average) | 52 total (3 average) |

Table 1 shows the number of sections of legislation in Title VIII of each NDAA since FY 2002. As shown, there are 17 NDAAs with 725 sections for an average of about 43 sections a year. The right hand column lists those sections from the middle column that require reports, studies, assessments, etc. I found 52 of those sections for all 17 years. If you click the link at the top of first column, you will be able to see my analysis of the 17 NDAAs since 2002.

To give you a better idea of the legislation I am writing about, take a look at the Title VIII sections in the [NDAA for FY 2018](http://www.wifcon.com/dodauth_18.htm). There are 73 of them. For example, there is *Section 803. Performance of Incurred Cost Audits* whichis lengthy. Then there is *SEC. 815. Limitation on Unilateral Definitization*. Its lengthy too. Other sections may be as lengthy or may simply change words in existing law. An example of a section requiring a study and report can be seen in [*Section 814*](http://www.wifcon.com/dodauth18/dod18_814.htm)*. Comptroller General Report on Health and Safety Records* which requires the Government Accountability Office (GAO) to do a study. GAO lives off of these sections.

Now, sit back and read the names of the 73 sections in the NDAA for FY 2018. Do you see a cohesive plan for acquisition or just a potpourri of junk? I see the latter. Is Congress improving defense and governmentwide acquisition by passing 725 pieces of this mostly incoherent junk? Again, my view is that they are not.

**There's More Legislation in Other Titles**

I wish I could tell you that the annual additions to defense acquisition legislation is limited to Title VIII but it isn't. When I do my annual NDAA analysis, I try to go through the entire NDAA to see if there are any other acquisition sections from other NDAA Titles. Sometimes, I'm too busy with Title VIII and I don't search for legislation in other Titles. That may account for the 0s in the middle column of Table 2 on the next page. Additionally, I am selective when I add non-Title VIII sections because some involve an individual acquisition, program, or simply fulfill a constituent need. I rarely include any sections like that. The best way to picture Table 2 is that the total number of sections of legislation listed is the minimum. There is more but I just didn't include them.

|  |  |  |
| --- | --- | --- |
| **Table 2: Acquisition Sections in Other NDAA Titles By Fiscal Year** | | |
|  | | |
| [NDAA for Fiscal Year](http://www.wifcon.com/legislat.htm) | Number of Sections Identified and Selected from Other NDAA Titles | Number of Sections Requiring Reports, Assessments, Studies, Sense of Congress, etc., Included in Other Titles |
|  |  |  |
| 2018 | 21 | 4 |
| 2017 | 0 | 0 |
| 2016 | 0 | 0 |
| 2015 | 1 | 1 |
| 2014 | 8 | 1 |
| 2013 | 37 | 0 |
| 2012 | 8 | 1 |
| 2011 | 2 | 1 |
| 2010 | 7 | 0 |
| 2009 | 8 | 4 |
| 2008 | 12 | 2 |
| 2007 | 8 | 2 |
| 2006 | 15 | 2 |
| 2005 | 11 | 2 |
| 2004 | 19 | 1 |
| 2003 | 9 | 0 |
| 2002 | 0 | 0 |
|  |  |  |
| 17 Fiscal Years | 166 total (10 average) | 19 total (1 average) |

Table 2 is set up in a manner similar to Table 1. The difference is that it lists the numbers of the sections of legislation that I found in Titles, other than Title VIII of the NDAAs. If we add the 166 pieces of sections of legislation in Table 2 to the 725 sections of legislation in Table 1, we are up to 891 sections of legislation. Remember, that is the minimum.

**Legislative Provisions Not Adopted**

If you follow my annual NDAA analysis, you know that I use the [Conference Committee reports](https://www.congress.gov/115/crpt/hrpt404/CRPT-115hrpt404.pdf) to provide an NDAA's legislative history. The legislative history in the Conference Reports are in the part called: *Joint Explanatory Statement of the Committee on Conference* (Statement). It may differ in name from year to year but it always will be very similar.

Each year, if I can find them, I try to add the Legislative Proposals Not Adopted (LPNA) at the end of each fiscal year's Title VIII. My purpose is to show you what sections were not approved by the Conference Committee and not passed by Congress. LPNAs are just what they sound like--the sections of legislation that the Conference Committee deleted from further consideration. That sounds simple enough; deleted is deleted, dead is dead. Well not quite. Think of LPNAs as potential zombie legislation. They die in conference but no one lopped off their head to keep them down. They have to be kicked bit to see if they really are dead or not. Since I am experienced with zombie legislation, I will show you how to identify if they are dead or not.

The LPNAs for Title VIII in this FY's [House Conference Report 115-404](https://www.congress.gov/115/crpt/hrpt404/CRPT-115hrpt404.pdf), caught my eye. Perhaps, because there are quite a few LPNAs or because the Conference Committee added more *directions* and *expectations* in the LPNAs. You can find the LPNAs and the text from them [here](http://www.wifcon.com/dodauth18/dod18_LPNA.htm). In the left hand column of LPNAs that I analyzed, I italicized the sections that make these LPNAs zombie legislation. Take a look at some examples of the language from the Conference Committee LPNAs:

* The conferees *direct* the 809 Panel to review the amount of reimbursable bid and proposal costs paid by the Department of Defense and make recommendations as part of its current activities.
* The conferees *direct* the Secretary of Defense to undertake an analysis and provide a one-time report to the congressional defense committees describing the cases in which the Department of Defense should recognize nontraditional contractors, current approaches for doing so, and recommendations for improvements to streamline access to commercial business entities, including through the defense industrial base, in support of defense technology needs.
* The conferees *expect* the Secretary of Defense, when promulgating regulations in accordance with section 876 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328), to identify subcategories in facilities-related services, knowledge-based services, construction services, medical services, or transportation services in which there are significant numbers of commercial services providers able to meet the requirements of the Department of Defense. (emphasis added)

The above *directions* and *expectation* never became law. However, they do have some effect since they were approved by the Senate and the House. Not every LPNA has these directions and expectations. Those that don't are dead--at least until the next NDAA. Now, let's take a brief look at the legislative process and see how zombie legislation is made.

The House and Senate each introduce and pass their version of an NDAA. Since there always are differences between the two bills, each House calls for a conference and appoints conferees. The conferees hold a conference to iron out differences and submit a Conference Report. For the bill, which is one part of the Conference Report, to move onto the President for signature into law, the Senate and House must vote on and approve the Conference Report.

The directions and expectation that I bulleted above are not law but both Houses of Congress approved them in their vote on the conference report. There you are, zombie legislation--the living dead. Dead but with a bite. Are the Section 809 panel and the Secretary of Defense feeling lucky? Are they going to tell Congress to take a hike? No, they're going to do what Congress directed of expects of them as explained in the LPNAs.

**Amend, Amend, and Amend**

Remember the saying, If at first you don't succeed, try, try again? I don't know if there is such a saying for Congress but I think one could go like this: If your first NDAA section of legislation makes a mess of defense acquisition, amend it, amend it, again. Since the NDAA process is an annual event and since our Representatives and Senators are mere mortals, mistakes in the legislative process are made. In addition to possible mistakes, the amount of legislation that becomes law each year should lead us to believe that a new NDAA will amend a previous NDAA. If you analyze NDAAs each year, as I do, you notice these amendments to prior NDAAs. As part of this article, I did another brief analysis.

Before I get to that analysis, if you don't already know, defense acquisition law is included in Title 10 of the U. S. Code. At times, the NDAA sections state that they are amending a previous NDAA while at other times they state they are directly amending Title 10. Eventually, whatever the NDAA sections state in acquisition law, Title 10 will be amended or increased in size if they deal with defense acquisition. You can view the U. S. Code at the [Office of The Law Revision Counsel](http://uscode.house.gov/browse.xhtml), United States Code.

As I was analyzing the NDAA for FY 2018, I wondered how often an NDAA section actually states that it is amending an earlier NDAA section. This was easy pickings. Table 3 is on the next page.

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| --- | --- | --- | --- | --- |
| **Table 3: NDAA Sections from Title VIII That State They**  **Change Earlier NDAA Sections** | | | | |
|  | | | | |
| FY 2018 | FY 2017 | FY 2016 | FY 2015 | FY 2014 |
|  |  |  |  |  |
| 804 | 801 | 802 | 811 | 802 |
| 807 | 809 | 803 | 812 | 814 |
| 810 | 814 | 815 | 813 | 832 |
| 811 | 815 | 821 | 8153 |  |
| 812 | 818 | 8221 | 817 |  |
| 813 | 819 | 829 | 818 |  |
| 819 | 823 | 830 | 821 |  |
| 822 | 826 | 861 | 855 |  |
| 824 | 833 | 871 |  |  |
| 825 | 849 | 872 |  |  |
| 826 | 862 | 883 |  |  |
| 836 | 863 | 885 |  |  |
| 861 | 864 | 8862 |  |  |
| 865 | 891 | 892 |  |  |
| 866 | 893 |  |  |  |
| 882 | 896 |  |  |  |
| 883 | 897 |  |  |  |
| 884 | 899(a) |  |  |  |
|  |  |  |  |  |
| 1 At least as early as 2016, the Weapons System Acquisition Reform Act of 2009 (WSARA) was being amended by the NDAAs. With the exception of the NDAA for FY 2015, each NDAA from FY 2018 to 2014 had subtitles on Defense Weapons Systems. Any changes to WSARA contains this note.  2 Section 886 of the NDAA for FY 2016 was a triple-header because it stated that it amended 3 separate NDAAs.  3 This was a change to the Clinger-Cohen Act (P. L. 104-106) which although part of an NDAA was not part of Title VIII. | | | | |

Table 3 shows the NDAA sections in each of the last 5 NDAAs that state it is amending an earlier NDAA section. I prepared Table 3 on a whim knowing it wasn't scientific. However, I wanted to stress that with nearly 900 sections of acquisition law in 17 years, Congress figuratively is kicking rubble into dust.

**Final Thoughts**

I've treated you to a potpourri of junk legislation, zombie legislation, and changing legislation that figuratively is turning rubble into dust. How can one not be sarcastic about this acquisition legislation?

Some of you may say that the FAR Councils are not doing their job. That's true, there has been only one Federal Acquisition Circular (FAC) issued since last January and that was to remove something that the previous Administration did. Today, there are 3 NDAAs waiting for regulations to implement their sections--that's somewhere around 250 new pieces of legislation waiting for the implementing regulations to be disgorged. What a mess. Just imagine what happens when the regulatory cork is removed.

What I have shown needs something drastic to be done. My recommendations below will never be done but I can dream. You will notice that I add "assistance" in the formation of committees and subcommittees. Why not? Assistance rules are a mess too.

In this order, my recommendations are:

1. The Senate and House of Representatives must declare a moratorium on all and any acquisition legislation immediately.
2. The Senate and House of Representatives must review the jurisdiction statement of all of their committees and the power to deal with acquisition legislation must be removed from all committees.
3. The Senate and House of Representatives must create a Committee on Contracting and Assistance in each of their Houses. These 2 Committees must be given sole jurisdiction to introduce and report on acquisition legislation and must be structured in a manner similar to that below. I've provided a basic jurisdiction statement in parentheses:

Committee on Contracting and Assistance (Sole jurisdiction over federal contracting and assistance issues.)

* Subcommittee on Defense Contracting and Assistance: (Sole jurisdiction over defense contracting and assistance issues.)
* Subcommittee on Civilian Agency and Congressional Agency Contracting and Assistance: (Sole jurisdiction over civilian and congressional agency contracting and assistance issues.)
* Subcommittee on Small Business Contracting and Assistance Issues: (Sole jurisdiction over small business contracting and assistance issues.)
* Subcommittee on the Contracting and Assistance Workforce: (Sole jurisdiction over contracting and assistance workforce issues.)
* Subcommittee on Streamlining Acquisition and Assistance Laws: (Sole jurisdiction over current contracting and assistance laws with the goal of: Identifying current laws governing federal contracting and assistance and streamlining and eliminating unnecessary and conflicting legislation.)

1. The Senate and House of Representatives must limit debate on any legislation reported out of the Committee on Contracting and Assistance. The limitation should prevent members from proposing amendments that add new sections to the bill when it is under debate.
2. Whenever the Senate and House of Representatives appoint conferees to a Conference Committee to settle differences on a contracting or assistance bill, the Senate and House of Representatives must instruct conferees that they may not report zombie legislation out of Committee. They must be instructed that if any section is not approved in conference it is dead and no directives and expectations or anything similar to that is allowed.

I could go on but that is enough for now. Nothing is going to get done to eliminate the annual potpourri of junk legislation and zombie legislation in the NDAAs. And that is truly sad and disheartening.

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