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Small Bird Leads To Big Trouble For Final NDAA



By [Daniel Wilson](#)

Law360, Nashville (September 22, 2016, 11:26 PM EDT) -- While the Senate will likely stay in session next week to tie up loose ends before breaking until the election, one issue the chamber isn't expected to resolve is the final outcome of the 2017 National Defense Authorization Act, with one small bird proving to be a very large obstacle.

Lawmakers concluded this week that a compromise between House and Senate versions of the NDAA will have to wait until the post-election lame duck session in November, due mainly to a small, feathered stumbling block: the greater sage-grouse, which the House version of the bill would block from being listed under the Endangered Species Act, or ESA, until at least 2025.

"If it [the sage-grouse exclusion] were included, the president would veto [the bill], and I'm not sure we could override a veto," Senate Armed Services Committee Chairman John McCain, R-Ariz., told reporters on Tuesday, describing the holdup as "incredibly frustrating."

Both the Senate and the House have already passed their own versions of the NDAA, the annual bill that sets out budget authority and policy priorities for the [U.S. Department of Defense](#) and some peripheral defense programs, and as is standard, negotiators from both the House and Senate Armed Services committees have been engaged in negotiations to come up with a final bicameral compromise bill.

Despite having to resolve a number of differences between the two versions of the bill, negotiators had initially been upbeat about their chances of ironing out any disagreements and coming up with a final compromise before leaving Washington for a lengthy pre-election recess to campaign, but the dispute over the sage-grouse eventually proved too much to overcome.

Although not officially listed under the ESA, the sage-grouse's numbers have dwindled over time, and the [U.S. Department of the Interior](#) has [put in place](#) a conservation plan covering the bird's habitat — which stretches across parts of 11 western states — in an effort to increase its population, ahead of revisiting a possible ESA listing in several years' time.

The bird's habitat includes several oil, gas and coal fields; land used for wind farms and livestock grazing; and several military bases where training is carried out, and the DOI plan has caused considerable debate in Congress and led to a [number of lawsuits](#).

The friction between lawmakers on the Armed Services committees has been particularly sharp because of the perception from some that the ESA exclusion measure is inapposite to a defense bill, not actually intended to protect military interests, but petroleum interests.

"This is not about military installations," Rep. Jackie Speier, D-Calif., said in a markup of the House bill in April. "This is about oil."

Of course, with a bill as sweeping as the NDAA, the sage-grouse is not the only point of distinction between the House and Senate, with the use of overseas contingency operations, or OCO, marking another difference that will have to be resolved.

A plan in the 2016 NDAA to use extensive amounts of OCO funding — meant to pay for war-related operations and unexpected costs — to fill perceived gaps in the base-level DOD budget saw President Barack Obama [veto an initial version](#) of the bill. OCO funding is not included in the typical federal budget caps, and the White House dismissed the move at the time as a "budget gimmick."

But although lawmakers' OCO requests this year are more modest than last year, the House has once again gotten the White House's dander up, proposing to use \$18 billion in OCO funds to supplement the base budget in its [\\$610.5 billion bill](#), a move not included in the \$602 billion [Senate bill](#), which hews closer to the 2017 presidential budget request.

That House plan would also result in OCO funds running out in April, requiring President Hillary Clinton or Donald Trump to ask for supplemental funding, an approach the White House in a May veto threat called "dangerous" and "wasteful," once again trotting out the "gimmick" line.

Another key point of difference is the extent of proposed reforms to the Pentagon's management and acquisition systems, with the Senate suggesting several large, radical changes against the House's more modest suggestions, which build on previous NDAAs.

The Senate bill, for instance, seeks to make over the Office of the Undersecretary of Defense for Acquisition, Technology and Logistics, or ATL, splitting the undersecretary's role into two — undersecretaries for research and engineering, and management support — alongside a new position of assistant secretary in charge of acquisition policy and oversight.

The Pentagon has argued that the ATL proposal would be counterproductive, undermining recent progress made to improve its acquisition system, also lumping in the ATL change as part of a broader criticism over unwarranted "micromanagement" in both the Senate and House bills across acquisition, personnel and health care policy.

Another Senate acquisition clause would effectively penalize services for using cost-plus contracts instead of fixed-price deals — a move intended to shift risk from the military to contractors — while several clauses aim to significantly overhaul the U.S. Government Accountability's bid protest system. The overhaul, which has [raised concerns](#) among defense contractors, is intended to curb purportedly frivolous bid protests and reduce contracting delays, according to Senate Armed Services Committee leaders.

Those changes would include scrapping the GAO's authority over protests related to DOD task orders, which would instead be reviewed by a DOD-specific ombudsman, and moving to a "loser pays" system for protests — at least for larger protesters — replacing the current system where each side pays their own costs.

Also, incumbent contractors awarded bridge contracts to fill in gaps while they protest a successor contract would have their contract pay held in escrow, money that would instead go to the successful bidder if the incumbent loses the protest.

Although House lawmakers have expressed a willingness to explore possible bid protest changes, their bill instead calls for an independent audit before making any change to the system, with their more modest proposed acquisition changes including proposals intended mainly to spur more companies to work with the Pentagon, such as offering more flexibility around the retention of intellectual property.

The House bill also includes clauses that would exclude defense contractors from the contentious ["Fair Pay and Safe Workplaces"](#) rule, requiring companies to disclose violations of certain federal labor laws when bidding on federal contracts, and that would affirm religiously affiliated defense contractors must be able to compete for contracts equally with secular contractors.

The [White House](#) and congressional Democrats have slammed both proposals, describing the former as an "injustice to workers" and the latter as an attempted end run around a 2014 executive action [barring federal contractors](#) from discriminating against employees for their gender or sexual identity.

Other doctrinal differences between the bills include gaps on personnel matters, with the House for instance seeking to fund about 20,000 more active duty troops and 25,000 more reserves than the Senate, and pushing for a 2.1 percent pay raise against the 1.6 percent put forward by the Senate, matching the presidential request.

Despite asking for additional troops, however, the House bill breaks with the Senate on whether women should be required to register for the draft. In line with a recent DOD directive opening up front-line combat positions to women, the Senate bill would require young women to register for draft eligibility, while the House bill would not.

Sen. Ben Sasse, R-Neb., a Senate opponent of the proposal, argued earlier in September that the move was not meant as a practical aid to help military end strength, but as an effort to "[run] up the score in unnecessary and divisive culture wars."

--Editing by Philip Shea and Jill Coffey.

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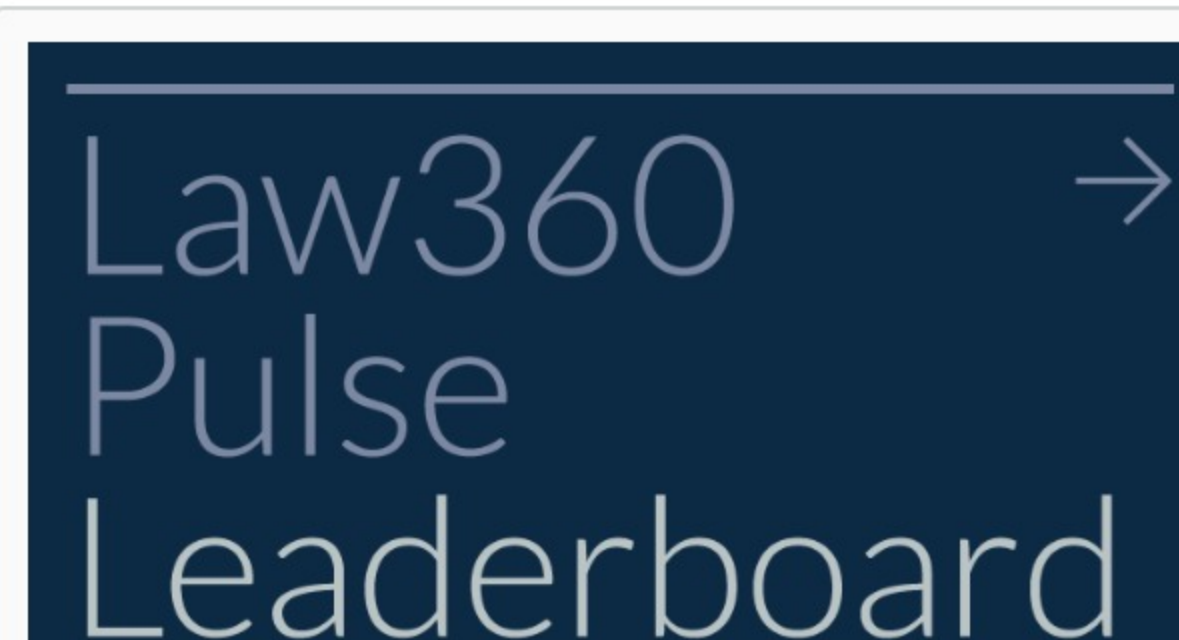
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