

Legislative Bulletin.....October 8, 2009

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Conference Report to H.R. 2647—Fiscal Year 2010 National Defense Authorization Act

Conference Report to H.R. 2647—Fiscal Year 2010 National Defense Authorization Act (*Skelton, D-MO*)

Order of Business: The bill is scheduled to be considered on Thursday, October 8, 2009, under a closed rule. The rule for consideration of the conference report to accompany H.R. 1585 ([H.Res.888](#)) waives all points of order against the conference report and against its consideration.

Summary: The conference report to H.R. 2647 authorizes \$550.2 billion (same as President’s request) for Department of Defense (DoD) routine defense spending and \$130 billion to fund Fiscal Year 2010 war cost (total \$680.2 billion) in Iraq, Afghanistan, and other theaters in the Global War on Terrorism. Specifically, the report authorize \$560 million for alternative engines for the F-35 fighters and a 3.4 percent pay raise for troops, which is half a percent higher than the administration’s request. Finally, the bill contains a \$1.2 billion cut to missile defense and contains the Matthew Sheppard Hate Crimes Prevention Act. Provisions of note are as follows:

- ***Hate Crimes:*** The conference report includes the Matthew Sheppard and James Byrd Jr. Hate Crimes Prevention Act (H.R. 1913), which passed the House by a vote of [249-175](#) earlier this year. Some conservatives have expressed concern that in addition to concerns with expanding Hate crimes to include another protected class, the issue has nothing to do with the issue of authorizing programs to provide for the national defense and attaching the two items was done for political purposes (See below for additional Details on this provision).
- ***Guantanamo Bay:*** The report prohibits the President from releasing GTMO detainees into the United States, and the transfer of detainees held at Guantánamo Bay to the United States until the president provides a “comprehensive disposition plan” to Congress at least 45 days prior to the transfer of any detainee and addresses the risks associated with an action.
- ***Afghanistan:*** The report authorizes \$1.3 billion for the Commanders Emergency Response Program (CERP) critical to implementing counterinsurgency operations and authorizes \$7.4 billion for the Afghan National Security Forces Fund (ANSFF) to increase the size of their Army.

- **North Korea:** The conference report contains no authorizations for the disarmament of the North Korean nuclear weapons program because of their withdrawal from Six Party talks and lack of progress on denuclearization.
- **F-22 Raptor:** The legislation contains *no funding* for procurement of additional F-22s (House version included \$368.8 million toward the purchase of 12 F-22s in fiscal year 2011.) According to the committee, the F-22 provides over 95,000 direct and indirect jobs at a time when our economy is struggling through recession. Additionally, the conference report requires the Secretary of the Air Force to report with a plan for preserving tooling associated with production and sustainment of the F-22 and provide a report on the potential costs, benefits, and strategic implications for selling F-22s to other nations.
- **Joint Strike Fighter (F-35):** The conference report authorizes \$560 million to pay for a second engine for the F-35 Joint Strike Fighter produced by General Electric Co. and Rolls Royce. The engine is currently built solely by Pratt & Whitney. The report also authorizes \$6 billion for the purchase of 30 F-35s (House authorized 28) which is more than twice the number that will be purchased this year.
- **Presidential Helicopter & C-17:** The conference report eliminates funding for the C-17 transport plane and delays Helicopter purchases and places them under new contracting requirements.
- **Littoral Combat Ship:** The report includes \$2.2 billion in research and development for submarines, destroyers, surface warfare vessels, amphibious vehicles, and Littoral Combat Ships (LCS), which the Navy touts as part of its “next-generation” fleet of wartime vessels because of its agility and relatively small size. Additionally, the bill authorizes the Secretary of Navy to block-buy procurement contract for 10 ships over the next 5 years in a “winner-take all” competition between the two shipbuilding teams.
- **Military Pay Raise:** The bill provides a 3.4 percent pay raise for troops – one half a percent higher than the administration’s request.
- **Active-Duty Increases:** Authorizes 30,000 additional active-duty personnel for the Army, 8,100 additional active-duty personnel for the Marine Corps, about 2,744 additional active-duty personnel for the Navy, and 14,650 additional active-duty personnel for the Air Force. This is a total increase of active duty strength by 55,227 over Fiscal Year 2009 levels.
- **TRICARE:** expands coverage to reserve component members and their families from 90 to 180 days prior to mobilization and provides TRICARE Standard coverage for certain members of the Retired Reserve who are qualified for a non-regular retirement but are not yet age 60 also known as “grey area retirees.”
- **Earmarks:** The committee report contains approximately 404 individual earmarks totaling at least \$1.745 billion based on estimates compiled by RSC staff. These requests range from approximately \$240,000 to \$105 million.

- **Missile Defense Cuts:** Contains the administration's request of \$9.3 billion for missile defense programs, which is \$1.2 billion below FY09 spending levels. The report also requires an assessment and plan for the Ground-based Midcourse Defense system and authorizes funds for alternative missile defenses in Europe - provided that the Secretary of Defense certifies the operational-effectiveness and cost-effectiveness of the alternative in protecting Europe and the U.S. Just last month, President Obama announced his Administration is abandoning the proposed ground-based missile defense site in Europe. Some conservatives believe this program had the effect of deterring Iran from pursuing its nuclear ambitions, because it would take away their ability to coerce us by holding us and our allies at risk of a long-range nuke attack.
- **Limit on Public-Private Competition:** The report limits public-private competition for Department of Defense contracts and establishes a 24-month time limitation on public-private competitions. Some conservatives may be concerned that the conference report limits (A-76) public-private competition for Department of Defense contracts. Some conservatives may be concerned because public-private competition has historically shown lowered contracting costs while increasing efficiency.
- **Future Combat Systems (FCS):** The conference report fully funds \$2.45 billion authorization for the communications network and the spin out equipment sets
- **Davis-Bacon:** While the conference report does not require that wages on Guam be paid at the same wage rates currently paid in Hawaii, the legislation still contains Davis-Bacon requirements. Specifically, the Davis-Bacon Act requires that each federal government contract worth over \$2,000 for the construction, alteration, or repair of public buildings or public works (including airports and public housing) set the minimum wages to be paid to laborers and mechanics employed under the contract at no less than the **locally prevailing wages** paid on projects of a similar character.
- **Spending Levels:** Some conservatives may be concerned that the bill does not adequately increase defense spending - the net effect is less than 2% real growth after accounting for inflation.

See Below For More Details on Hate Crimes and other potential concerns

Authorization Highlights: This authorization measure sets the spending levels for all DoD programs and sets military strength levels. What follows are highlights of authorization levels of the three divisions (Dept. of Defense, Military Construction, and Dept. of Energy & Others) in the bill.

Division A = Department of Defense Authorizations

Division B = Military Construction Authorizations

Division C = Department of Energy National Security Authorizations and Other Authorizations

Division D = Funding Tables

Division E = Mathew Sheppard and James Byrd Junior Hate Crimes Act

Division A - Department of Defense Authorizations

Division A—Procurement

- **Army.** Aircraft--\$5.11 billion; Missiles--\$1.37 billion; Weapons and Tracked Combat Vehicles--\$2.45 billion; Ammunition--\$2.1 billion; Other Procurement--\$9.45 billion.
- **Navy.** Aircraft--\$18.42 billion; Weapons (including missiles and torpedoes)--\$3.45 billion; Shipbuilding and Conversion--\$13.8 billion; Other Procurement--\$5.61 billion; Ammunition (Navy and Marine Corps)--\$814 million.
- **Marine Corps.** \$1.6 billion
- **Air Force.** Aircraft--\$11.22 billion; Ammunition--\$822 million; Missiles--\$6.03 billion; Other Procurement--\$17.13 billion.
- **Defense-Wide Activities.** \$4.1 billion.
- **National Guard Reserve Equipment:** \$600 million
- **Mine Resistant Ambush Vehicle Protection Fund:** \$600 million.

Division A—Research, Development, Test, and Evaluation

- **Army.** \$10.68 billion
- **Navy.** \$19.6 billion
- **Air Force.** \$28.4 billion
- **Defense-Wide Activities.** \$20.6 billion (\$190.8 million reserved for Operational Test & Evaluation, Defense-Wide).

Division A—Funding for Operations and Maintenance

<i>Army</i>	<i>\$31.26 billion</i>
<i>Navy</i>	<i>\$35.04 billion</i>
<i>Marine Corps</i>	<i>\$5.54 billion</i>
<i>Air Force</i>	<i>\$34.53 billion</i>
<i>Defense-Wide Activities</i>	<i>\$28.32 billion</i>
<i>Army Reserve</i>	<i>\$2.62 billion</i>
<i>Naval Reserve</i>	<i>\$1.27 billion</i>
<i>Marine Corps Reserve</i>	<i>\$229 million</i>
<i>Air Force Reserve</i>	<i>\$3 billion</i>
<i>Army National Guard</i>	<i>\$6.26 billion</i>
<i>Air National Guard</i>	<i>\$5.9 billion</i>
<i>U.S. Court of Appeals for the Armed Forces</i>	<i>\$13.9 million</i>
<i>Acquisition Development Workforce Fund</i>	<i>\$100 million</i>
<i>Army Environmental Restoration</i>	<i>\$416 million</i>
<i>Navy Environmental Restoration</i>	<i>\$286 million</i>
<i>Air Force Environmental Restoration</i>	<i>\$494 million</i>
<i>Defense-wide Environmental Restoration</i>	<i>\$11 million</i>
<i>Formerly Used Defense Sites Environmental Restoration</i>	<i>\$267 million</i>
<i>Overseas Humanitarian, Disaster, and Civics Programs</i>	<i>\$109 million</i>
<i>Cooperative Threat Reduction Programs</i>	<i>\$424 million</i>

Division A—Military Personnel Authorization Levels

Authorized personnel levels as of September 30, 2010:

<i>Army</i>	<i>547,400</i>
<i>Navy</i>	<i>328,800</i>
<i>Marine Corps</i>	<i>202,100</i>

<i>Air Force</i>	<i>331,700</i>
<i>Army National Guard, Selected Reserve</i>	<i>358,200</i>
<i>Army Reserve, Selected Reserve</i>	<i>205,000</i>
<i>Navy Reserve, Selected Reserve</i>	<i>65,500</i>
<i>Marine Corps Reserve, Selected Reserve</i>	<i>39,600</i>
<i>Air National Guard Reserve, Selected Reserve</i>	<i>106,700</i>
<i>Air Force Reserve, Selected Reserve</i>	<i>69,500</i>
<i>Coast Guard Reserve, Selected Reserve</i>	<i>10,000</i>
<i>Army National Guard, Full-Time Duty</i>	<i>32,060</i>
<i>Army Reserve, Full-Time Duty</i>	<i>16,261</i>
<i>Navy Reserve, Full-Time Duty</i>	<i>10,818</i>
<i>Marine Corps Reserve, Full-Time Duty</i>	<i>2,261</i>
<i>Air National Guard, Full-Time Duty</i>	<i>14,555</i>
<i>Air Force Reserve, Full-Time Duty</i>	<i>2,896</i>
<i>Army National Guard, Dual-Status Technicians</i>	<i>8,395</i>
<i>Army Reserve, Dual-Status Technicians</i>	<i>27,210</i>
<i>Air National Guard, Dual-Status Technicians</i>	<i>22,313</i>
<i>Air Force Reserve, Dual-Status Technicians</i>	<i>10,417</i>
<i>Army Reserve, Non-Dual-Status Technicians</i>	<i>No more than 595</i>
<i>Army National Guard, Non-Dual-Status Technicians</i>	<i>No more than 1600</i>
<i>Air Force Reserve, Non-Dual-Status Technicians</i>	<i>No more than 90</i>
<i>Air National Guard, Non-Dual-Status Technicians</i>	<i>No more than 350</i>
<i>Total Authorized Personnel Level</i>	<i>2,411,826</i>

Maximum numbers of reservists who may be serving at any time on full-time operational support duty:

- Army National Guard: 17,000
- Army Reserve: 13,000
- Naval Reserve: 6,200
- Marine Corps Reserve: 3,000
- Air National Guard: 16,000
- Air Force Reserve: 14,000

Authorization of Appropriations for Military Personnel: \$136,016,281,000

Division A—Cooperative Threat Reduction with States of the Former Soviet Union

From funds allocated for operation and maintenance above:

- **Strategic Offensive Arms Elimination in Russia.** \$66.4 million
- **Strategic Nuclear Arms Elimination in Ukraine.** \$6.8 million
- **Nuclear Weapons Storage Security in Russia.** \$15.1 million
- **Nuclear Weapons Transportation Security in Russia.** \$46 million
- **Weapons of Mass Destruction Proliferation Prevention in the Former Soviet Union.** \$90.1 million
- **Biological Weapons Proliferation Prevention in the Former Soviet Union.** \$152.1 million
- **Defense and Military Contacts.** \$5.0 million
- **Chemical Weapons Destruction.** \$1 million
- **New Cooperative Threat Reduction Initiatives.** \$29 million

Division A—Other Authorizations

- **Defense Working Capital Funds.** \$141.4 million
- **Defense Working Capital Fund Defense Commissary.** \$1.3 billion
- **National Defense Sealift Fund.** \$1.7 billion
- **Defense Health Program.** \$27.04 billion
- **Chemical Agents and Munitions Destruction.** \$1.56 billion
- **Defense Wide Drug Interdiction.** \$1.05 billion
- **Defense Inspector General.** \$278.2 million
- **Armed Forces Retirement Home.** \$134 million
- **National Defense Stockpile.** Authorizes \$41.2 million from the National Defense Stockpile Transaction Fund for the operation and maintenance of the National Defense Stockpile for FY 2010. Permits the use of additional funds for “extraordinary or emergency conditions” 45 days after a notification to Congress.

Division B - Military Construction Authorizations

Division B-MilCon

- **Army.** \$4.51 billion
- **Navy.** \$4.23 billion
- **Air Force.** \$1.98 billion
- **NATO Security Investment Program.** \$197.4 million
- **Army National Guard.** \$582 million
- **Army Reserve.** \$432 million
- **Naval and Marine Corps Reserve.** \$125.9 million
- **Air National Guard.** \$364.2 million
- **Air Force Reserve.** \$112 million

Division C - Department of Energy National Security Authorizations and Other Authorizations

Division C—Department of Energy National Security Programs

- **Weapons Activities.** \$6.43 billion
- **Defense Nuclear Nonproliferation.** \$2.2 billion
- **Naval Reactors.** \$1 billion
- **Office of Administrator for Nuclear Security.** \$420.8 million
- **Defense Environmental Cleanup.** \$5.5 billion
- **Other Defense Activities for National Security.** \$852.5 million
- **Defense Nuclear Waste Disposal.** \$98.4 million
- **Energy Security and Assurance Programs.** \$6.2 million

Division D—Maritime Activities

- **Operations and Training Activities.** \$152.9 million
- **U.S. Flag Merchant Fleet.** \$174 million
- **Disposal of Obsolete Vessels.** \$15 million

Division E - Matthew Sheppard and James Byrd, Jr. Hate Crimes Prevention Act

Key Differences from the House-passed bill (H.R. 1913):

- Includes a provision that proponents claim addresses constitutional concerns that were raised in the House debate. The section states that “Nothing...shall be construed or applied in a manner that infringes on any rights under the first amendment...or substantially burdens any exercise of religion...if such exercise of religion, speech, expression, or association was not intended to plan or prepare for an act of physical violence; or incite an imminent act of physical violence against another.”

Note: Since this disclaimer states the obvious, namely that the First Amendment is still in effect and that the bill does not prohibit any activities protected by the Constitution, the disclaimer has the appearance of strengthening free speech while not substantively providing any additional protections. However, this does little to protect religious leaders promoting traditional morality who could be made subject to investigation. As the Minority states in their views in the Committee report on H.R. 1913, “Ultimately, a pastor’s sermon concerning religious beliefs and teachings could be considered to cause violence and will be punished or at least investigated.”

- Adds a section that prohibits attacks on U.S. servicemen on account of service. Simple assault would result in a fine of not less than \$500 and not more than \$10,000 and imprisonment for not more than 2 years. The section increases the penalty depending on the severity of the crime.
- Adds a reporting requirement on mandatory minimum sentencing. No later than one year after enactment, the U.S. Sentencing Commission shall submit to the Committees on the Judiciary in the House and Senate a report on mandatory minimum sentencing.

The bill would make certain “hate crimes” new federal offenses – including crimes motivated by “sexual orientation and gender identity” (not defined in the bill). The bill would also create two new federal grant programs to assist state and local governments in investigating and prosecuting hate crimes, and require expanded data collection and reporting for hate crimes, among other provisions. The specific provisions of the bill are as follows:

- Defines “hate crime” as having the meaning in 28 U.S.C. 994 (within the Violent Crime Control and Law Enforcement Act of 1994; P.L. 103-322):

“a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.”

Note: The terms sexual orientation and disability are not explicitly defined in the bill. The term gender identity is defined as “***actual or perceived gender-related characteristics***” which is so vague that it could be interpreted in many ways.

- Authorizes the U.S. Attorney General (AG), at the request of any state, local, or tribal law enforcement agency, to provide technical, forensic, prosecutorial, or any other type of

assistance in the investigation and prosecution of any violent felony that is motivated by “prejudice based on the actual or perceived race, color, religion, national origin, gender, **sexual orientation, gender identity, or disability** of the victim or is a **violation of the state, local, or tribal hate crime laws.**” (emphasis added)

Thus, this provision provides federal assistance for any violent felony based on the federal definition of hate crimes, as well as any violation based on any one of the state hate crime definitions. At present, 45 states and the District of Columbia have some variation of hate crimes laws.

- Requires the AG to give priority to crimes committed by offenders who have committed crimes in more than one state, and to rural jurisdictions that have “difficulty covering the extraordinary expenses” (not defined) relating to the investigation or prosecution of the hate crime.
- **Creates new federal grant program.** Authorizes the AG to award federal grants to state, local, and Indian law enforcement agencies for “extraordinary expenses” (not defined) associated with the investigation and prosecution of hate crimes.
- Requires the Office of Justice Programs (under the Department of Justice – DoJ) to work closely with grantees to “ensure that the concerns and needs of all affected parties, including community groups and schools, colleges, and universities, are addressed through the local infrastructure developed under the grants.”
- Stipulates grant application requirements, including a statement from potential grantees on the “extraordinary purpose” (not defined) of the grant and a certification that the government entity lacks the resources to investigate or prosecute hate crimes. The AG is required to approve or deny the grant application within 180 business days receipt of the application, and provide a report to Congress detailing all grant applications and awards. Authorizes \$5 million to be appropriated for FY2010, FY2011 and FY2012.
- **Creates new federal grant program.** Authorizes the Office of Justice Programs to award grants to state, local, and tribal governments for programs designed to combat hate crimes committed by juveniles – including programs to train local law enforcement officers in “identifying, investigating, prosecuting, and preventing hate crimes.” Authorizes **such sums as may be necessary** to be appropriated to carry out this provision. (emphasis added)
- Authorizes such sums as may be necessary (to the Treasury Department and DoJ) to increase the number of personnel to prevent and respond to alleged violations of hate crimes (18 U.S.C. 249), as expanded under this bill.
- Makes certain hate crimes new federal offenses and subject to certain maximum prison sentences and fines:
 - whoever causes or attempts to cause bodily injury to a person because of actual or perceived race, color, religion, or national origin, will be sentenced to a prison term of up to 10 years, fined, or both; and
 - if the offense results in death or includes kidnapping or attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or attempted murder, the offender may receive up to a life sentence in prison.

- Makes certain hate crimes new federal offenses and subject to certain maximum prison sentences and fines *in instances involving interstate commerce* (where the defendant has crossed a state or national border, or uses a weapon that has crossed such border, in conjunction with the offense):
 - whoever causes or attempts to cause bodily injury to a person because of actual or perceived religion, national origin, gender, ***sexual orientation, gender identity or disability***, will be sentenced to a prison term of up to 10 years, fined, or both; and
 - if the offense results in death or includes kidnapping or attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or attempted murder, the offender may receive up to a life-sentence in prison. (emphasis added)

- Stipulates that no prosecution may be undertaken by the U.S. unless certified in writing by the AG or appropriate designee that:
 - a) the certifying individual has reasonable cause to believe that bias (against one of the above mentioned categories) was a motivating factor underlying the conduct of the defendant; and
 - b) state or local law enforcement officials have been consulted and determined that:
 - 1) the state does not have jurisdiction or does not intend to exercise jurisdiction,
 - 2) the state has requested that the federal government assume jurisdiction,
 - 3) the verdict or sentence obtained (based on the state charges) “***left demonstratively unvindicated the federal interest in eradicating bias-motivated violence.***” (emphasis added), or
 - 4) a prosecution is in the public interest and necessary to secure justice.

- ***Defines “gender identity” to mean “actual or perceived gender-related characteristics.”*** The definition of “gender identity” includes the word “gender” and also states that the meaning could be “actual” or “perceived.” As such, it is not clear from this “definition” what the bill authors intend for gender identity to mean or how it should be construed in law. (emphasis added)

- Includes a severability clause, stating that if one part or provision of the Act is found unconstitutional, the remaining provisions will not be affected.

Additional Background: Following a prolonged public debate regarding “hate crimes” in the 1980s, and specifically focusing on the question of whether incidents of violent crime motivated by specific hate toward one group was on the rise or not, Congress passed the Hate Crimes Statistics Act in 1990. This Act required the Attorney General to collect data “about the crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity” for certain violent crimes. Congress amended this law in 1994 to include “disability” as well, and required the AG to publish data annually. The AG tasked the FBI with compiling and publishing this information as part of the Uniform Crime Report (UCR) program, and hate crime statistics have been compiled, based on information voluntarily submitted by the states, since 1991.

In 1994, Congress defined “hate crime” (see Summary for definition) and required the U.S. Sentencing Commission to create guidelines to provide sentencing enhancements for hate crimes. Since then, several other federal laws have been enacted that relate to or expand federal hate crime law, including the Violence Against Women Act and the Church Arson Prevention Act. In addition, Congress provided funding for hate crimes prevention in the 2001 passage of No Child Left Behind, and has appropriated funding to provide anti-hate crime training to state and local law enforcement agencies.

Possible Conservative Concerns: As noted in the Summary, sexual orientation and disability are not defined in the bill or in current law. Gender identity is defined so vaguely as to have little meaning. Within legislation that expands federal powers and provides federal grant money to investigate and prosecute state and local violent crimes, some conservatives may be concerned by the nondescript bill language and terminology.

In addition, as noted above, those entities that have been subject to prosecution and threats under state hate crime laws (typically religious leaders promoting traditional morality) may be subject to potential criminal liability under this bill, as prosecutors blur the line between what constitutes a “hate crime” and what they *deem* hate speech (see Free Speech section below).

Examples of free speech prosecuted under hate crime laws:

- In Philadelphia, 11 Christians were arrested and jailed overnight in 2004 for singing and preaching in a public park at a homosexual street festival. Five of them were bound over and charged with five felonies and three misdemeanors, totaling a possible 47 years in jail. These charges, based on Pennsylvania's "hate crimes" law, hung over them for months until a judge finally dismissed them. (*The Philadelphia Inquirer, February 13, 2005*).
- In Canada, a newspaper publisher and a man who placed a newspaper ad faced jail and were fined \$4,500 each, merely for running an ad containing references to several Bible verses regarding homosexuality. (*WorldNetDaily, February 6, 2000*).
- A pastor in New York saw his billboard with a Bible verse on it taken down under pressure from city officials, who cited "hate crime" rhetoric. (*The New York Post, March 12, 2000*).
- The San Francisco Board of Supervisors approved a resolution urging local media to decline to run advertisements by pro-family groups that offered hope for change to homosexuals. A liberal court then winked at this egregious violation of the First Amendment. (*The San Francisco Examiner, October 20, 1998*).

Equal Justice:

“Equal justice under law” is one of America’s most firmly embedded legal principles. In fact, these exact words are etched in the stone above the main entrance to the U.S. Supreme Court building. The U.S. Declaration of Independence begins with the words, “We hold these truths to be self-evident, *that all men are created equal*, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.” The Fourteenth Amendment contains the “Equal Protection Clause” which provides that “no state shall... deny to any person within its jurisdiction the equal protection of the laws.”

Some conservatives may be concerned that any expansion of “hate crimes” would erode the equal justice principle and its practice in U.S. courtrooms – since violent crimes deemed motivated by the specific type of hatred defined in this bill would merit additional federal penalties and

significantly more federal involvement and resources in investigating and prosecuting these crimes. The degree of justice served, and corresponding punishment for criminals, will depend on whether the victim is within one of the protected groups under this bill. Two identical violent crimes of murder – one a “random” act of violence and another “hate- motivated” act of violence – will be provided unequal treatment and unequal punishment.

Federalism:

The principle of federalism states that power not expressly provided to the federal government by the U.S. Constitution are reserved for the states. The Tenth Amendment states, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” As noted above, this bill would expand the federal government’s involvement in, and provide significant federal resources for, crimes otherwise under the jurisdiction of state and local governments. More specifically, the bill’s provisions would federalize each and every state and local crime, so long as there exists the possibility that the crime was motivated by “hate,” as defined under this bill. Some conservatives may be concerned by this significant federal encroachment of state laws and prerogatives.

Free Speech & Religious Liberties:

The First Amendment establishes that Congress “shall make no law... abridging the freedom of speech...”. The nature of “hate crime” legislation is to require law enforcement officials to try to ascertain the specific thoughts and motivations that a perpetrator may have had while committing a violent crime, in order to stiffen the penalty for the underlying offense. Current federal law allows an individual to be prosecuted as an “accessory” to a crime, or if the individual somehow “incited” violence. State hate crime laws have been used in several instances to harass, arrest, and/or silence non-violent protests, public broadcasts and media events and displays, and other instances where individuals were lawfully exercising protected First Amendment free speech privileges. Some conservatives may be concerned that empowering the federal government, and disparate state and local governments via new federal grants, to pursue “hate crimes” may have the effect of silencing or restricting free speech.

Cost to Taxpayers: CBO estimate for the conference report is unavailable. However, CBO estimated that House-passed H.R. 2647 “would authorize appropriations totaling \$681 billion for fiscal year 2010 for the military functions of the Department of Defense (DoD), for certain activities of the Department of Energy (DOE), and for other purposes. That total includes \$130 billion for the cost of overseas contingency operations, primarily in Iraq and Afghanistan.”

Committee Action: H.R. 2647 passed the full House on June 25, 2009, by a vote of [389-22-1](#), and was received in the Senate on July 7, 2009. On July 23, 2009, the bill passed the Senate with an amendment by Unanimous Consent. On October 7, 2009, House and Senate conferees filed the Conference Report to Accompany H.R. 2647.

Administration Position: While a Statement of Administration Policy (SAP) is not available at press time, the Obama Administration has criticized the inclusion of a second-engine program for the F-35 and officials have threatened a veto of the bill over the issue. President Obama called the engine program one of the “unnecessary defense programs that do nothing to keep us safe but rather prevent us from spending money on what does keep us safe.”

Does the Bill Expand the Size and Scope of the Federal Government?: Yes, the bill creates several new programs within the Department of Defense.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: According to CBO, some provisions of House-passed version of H.R. 2647 “contain several provisions that would benefit state and local governments. Some of those provisions would authorize aid for certain local schools that serve dependents of defense personnel. Any costs to those governments would be incurred voluntarily as a condition of receiving federal assistance.”

Constitutional Authority: Armed Services [Committee Report 111-166](#), finds constitutional authority in Article I, Section 8, but does not cite a specific clause. House Rule XIII, Section d (1), requires that all committee reports contain “a statement citing the *specific* powers granted to Congress in the Constitution to enact the law proposed by the bill or joint resolution.” [*emphasis added*]

Article I, Section 8, Clause 1 grants Congress the power to “provide for the common Defense and general welfare of the United States.” Article I, Section 8, Clauses 12 through 16 grant Congress the power “To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval forces; To provide for calling forth the Militia to execute the Laws of the Unions, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia and for governing such Part of them as may be employed in the Service of the United States...” In addition, Article I, Section 8, Clause 17 provides that Congress shall have the power “To exercise exclusive Legislation in all Cases whatsoever...over all Places purchased by the Consent of the Legislature of the state in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.”

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits (House Rule XXI, Clause 9): Yes. The House Armed Services Committee in House Report 111-166, which accompanied H.R. 2647, contained approximately 651 individual earmarks totaling at least \$3.14 billion based on estimates by CRS.

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