



## **RSC Policy Brief: National Defense Authorization Act of 2008 Veto**

*January 15, 2008*

**In light of the President's veto of H.R. 1585, the National Defense Authorization Act of 2008, the RSC has prepared the following policy brief on the provisions in the bill that led to the veto and the possible responses that Congress is considering.**

**Background:** Prior to the passage of the Foreign Sovereign Immunities Act (FSIA) in 1976, foreign nations were immune to civil suits by individual U.S. citizens. According to CRS, Congress first amended FSIA to allow U.S. victims of terrorism to bring civil suits against certain nations associated with state-organized terrorism in 1996. Since that time courts have passed numerous default judgments against nations that refused to appear in court (such as, Cuba, Iran, Sudan, and Syria), which were never collected. While Congress has attempted to facilitate the collection of judgments against terror-sponsoring nations with moderate success, neither the Clinton nor the G.W. Bush administrations have fully supported attempts to collect judgments against foreign states. Thus, it has been traditionally difficult for claimants receiving judgments under the FSIA amendments to receive awards from foreign states, even if those nations hold assets in U.S. markets.

In an attempt to make it easier for victims of foreign terrorism to collect judgments against sovereign states, an amendment to H.R. 1585, the FY 2008 National Defense Authorization Act (NDAA), was passed on the floor of the Senate and included in the final Conference Report of the bill which was sent to the President on December 14, 2007. The amendment inserted a new section into the bill (Section 1083) that would create a "terrorist state" exception to sovereign immunity and create a cause of action under FSIA. The amendment would have allowed U.S. civil suits against any foreign state that has committed acts of terrorism and the cause of action expansion would have given courts the authority to freeze assets of accused foreign nations while court proceedings transpired. The final Conference Report passed the House by a vote of [370—49](#) and the Senate by a vote of [90—3](#). Each vote was roundly supported by Republican Members in both chambers.

Although the Conference Report passed Congress with solid bipartisan support, the Bush Administration expressed concerns over Section 1083 and, on December 28, 2007, the White House announced that the President would veto the bill. The Administration expressed concerns it shared with the current government of Iraq that the amendment would expose the Iraqi government to billions of dollars in judgments stemming from acts of terrorism perpetrated by Saddam Hussein's regime. The President's senior officials warned that suits brought by former prisoners of war under the provisions of Section 1083 could freeze up to \$30 billion dollars in assets belonging to the democratically elected government in Baghdad. Specifically, the White House stated that "particular provisions included in the bill risk imposing financially devastating hardship on Iraq that will unacceptably interfere with the political and economic progress everyone agrees is critically important to bringing our troops home."

According to the Administration, the provisions of Section 1083 would "allow plaintiffs' lawyers pursuing Iraq for Saddam-era acts of terrorism to freeze Iraq's assets in the amount of damages claimed in their lawsuits, and would permit the relitigation of billions of dollars of lawsuits against Iraq that have already been dismissed by our courts." Therefore, under the new provisions, any assets belonging to foreign nations accused of acts of terrorism would be frozen in the amount sought in the initial claim as soon as a suit is brought against the state—regardless of the validity or eventual outcome of the case. The White House and the Iraqi government both argue that Iraqi assets in the U.S., mostly from the Development Fund for Iraq and the Central Bank of Iraq, are critical to the current effort to rebuild Iraq and continue the fight against Al Qaeda and other militant groups in the region. As such, the Administration contends that Section 1083 would "imperil billions of dollars of Iraqi assets at a crucial juncture in that Nation's reconstruction efforts and undermine the foreign policy and commercial interests of the United States."

The White House has also listed additional concerns that the current provisions in the NDAA would:

- "Permit the freezing of assets in commercial entities in which Iraq has an interest, potentially exposing partnerships between United States businesses and Iraqi national enterprises to attachment. Iraq would likely take its future business elsewhere;
- "Overturn prior litigation victories for the new, democratically elected Government of Iraq in lawsuits for Saddam-era acts and allow lawyers to reopen and expand those cases;
- "Authorize punitive damages against the new, democratically elected Government of Iraq for Saddam-era conduct and eliminate Iraq's ability to assert standard legal defenses normally available to defendants in United States courts; and
- "Hold the democratically elected Government of Iraq, a friend and ally of the United States, liable in U.S. Courts for the crimes and atrocities of the Saddam Hussein regime."

**Pocket Veto Controversy:** Since the Congress was out of session when the Administration announced its veto, the President planned to use the constitutionally provided "pocket veto" to block the bill. The Constitution dictates that a bill that has been passed in both chambers of

Congress and is sent to the President will become law if it is not signed into law or vetoed and returned to the Congress within ten days. However, if Congress prevents the return of the bill by adjourning before the ten day period has passed, the legislation will not become law if it is not signed ([Article 1, Section 7, Clause 2](#)). Unlike a normal presidential veto, a pocket veto cannot be overridden by a two-thirds majority in each chamber of Congress. Thus, if the bill was blocked by a pocket veto, a new bill would have to be passed.

However, there has been significant debate over whether President Bush's veto of H.R. 1585 was indeed a constitutionally authorized pocket veto. Congressional Democrats have contended that while the House was in recess over the Christmas break, the Senate met in a series of pro forma sessions and both chamber's clerks were instructed to receive messages from the White House in order to receive a veto. In addition, there exists a longstanding controversy over whether a President may use a pocket veto between sessions of the same Congress. The legislative branch has contended that a pocket veto may only be applied every two years, during the break between one Congress and the next.

For its part, the Administration has contended that since the bill originated in the House, which did not meet in any form over the recess, the bill was sent back to the House where it was not received. However, the White House also returned the bill to the Clerk of the House along with a [Memorandum of Disapproval](#), which is uncommon in the case of pocket vetoes. To clarify the Administration's position and explain why the bill was returned to the House even though a pocket veto was exercised, the President stated that:

In addition to withholding my signature and thereby invoking my constitutional power to 'pocket veto' bills during an adjournment of the Congress, I am also sending H.R. 1585 to the Clerk of the House of Representatives, along with this memorandum setting forth my objections, to avoid unnecessary litigation about the non-enactment of the bill that results from my withholding approval and to leave no doubt that the bill is being vetoed.

Despite the President's claim that the bill was pocket vetoed, House Democratic leadership is still considering a vote to override the veto. The vote would likely be called in order to bolster the claim that pocket vetoes may only be used during two-year breaks between Congresses and would likely fail. If, however, a veto override were to pass both chambers with more than two-thirds of the vote, the controversy regarding whether or not H.R. 1585 was pocket vetoed would probably have to be decided by the courts.

**Possible Courses of Action:** At this point, the Congress may do one of three things with H.R. 1585: it may refer the bill back to the Armed Services Committee for debate regarding a compromise that would allow the Administration to sign the bill; it could bring the bill to the floor and attempt to override the veto; or, it could table or postpone proceedings on the bill and try to reach a compromise with the White House so that an acceptable form of the bill is passed and signed shortly after the Senate returns on January 22, 2007.

According to Congress Daily, sending the bill back to the committee would be the “likely course of action.” The Democrats have hinted that, though they disagree with the President’s assertion that the bill was pocket vetoed, they are interested in finding a compromise and getting the NDAA passed and signed as soon as possible. The bill could be referred back to the Armed Services Committee where the bill’s controversial provisions could be corrected.

Democratic leadership may also choose to vote on a veto override to reassert their position on mid-Congress pocket vetoes and force Republicans to vote against a bill that they supported one month ago. In that case, it is likely that Republicans would vote against the override and the Democrats would fall short of the two-thirds needed to beat the veto. If that were to happen the Administration and Congress would then have to work out an acceptable compromise. The likelihood of holding a veto override vote depends on the Democrat leadership’s willingness to delay passage of the NDAA in order to make a constitutional point regarding the President’s pocket veto.

Finally, the House could table the bill or postpone taking action on the bill until a date certain and work with the Administration to fix the problems with Section 1083 so the bill could be passed and signed when the Senate returns next week. This scenario would be likely if the Democrats were interested in punting the issue until the Senate is back in session. Tabling or postponing any action would allow the Armed Services Committee to work on new language and the Democrats could still potentially pass the bill by the end of January, which they have stated is their intention.

No matter what the final scenario may be, the House is set to act on the bill Today, January 15, 2008. As the House Democratic leadership decides how to proceed, the Armed Services Committee is currently working on new NDAA language that would be acceptable to the White House. While the Administration would like to strip Section 1083 completely, or at least be given the authority to waive certain nations from liability, the Congress might advocate a smaller change that limits liens against Iraqi assets but still eliminates immunity for foreign states in cases of terrorism. A compromise will probably look like some amalgamation of these two positions or a complete stripping of Section 1083.

While the bill waits for further action, a portion of a 3.5% pay raise for active duty service members and other benefit increases and bonuses for veterans in Iraq and Afghanistan will be put on hold. However, the pay increase will likely be applied retroactively and the vast majority of the Pentagon’s program funding was already made into law in the Defense appropriations bill on November 13, 2007.

For further information on the issue of sovereign immunity and the President’s veto of H.R. 1585 see:

- [\*The RSC’s original Legislative Bulletin on the Conference Report to H.R. 1585\*](#)
- [\*White House Fact Sheet: National Defense Authorization Act Section 1083: A Danger to Iraq’s Progress\*](#)
- [\*White House Memorandum of Disapproval\*](#)
- [\*CRS Report Defense: FY2008 Authorization and Appropriation\*](#)

➤ [CRS Report: Suits Against Terrorist States By Victims of Terrorism](#)

**RSC Staff Contact:** Andy Koenig, [andy.koenig@mail.house.gov](mailto:andy.koenig@mail.house.gov), (202) 226-9717

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