U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

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The Honorable James Inhofe
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on S. 1790, the "National Defense Authorization Act for Fiscal Year 2020," as engrossed by the Senate. Many provisions of this bill raise constitutional concerns, relating to (1) the President's constitutional authorities as Commander in Chief and as the sole representative of the Nation in foreign relations; (2) the constitutional process for appointing federal officers; (3) the President's constitutional authority to control the dissemination of privileged information; (4) the President's constitutional authority to recommend such legislative measures as he deems necessary and expedient; and (5) the practice of authorizing commissions comprising both executive and congressional appointees. Below we recommend changes to address these concerns.

1. Military and Foreign Affairs

a. Tactical Use of Military Personnel and Materiel

Certain provisions of the bill would restrict the President's constitutional authority to deploy military personnel or materiel at a tactical level. The Department recommends that these provisions either not be included in the conference agreement or made precatory—for example by changing "shall" to "should."

These provisions include:

• Section 332(2), which would amend section 323(c) of the National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, to provide that "the Secretary of the Navy shall ensure that the U.S.S. Shiloh (CG–67) is assigned a homeport in the United States by not later than September 30, 2023." We recommend that "shall" in this provision be changed to "should."

• Section 1221(f) would add a subsection (n) to section 1209 of the National Defense Authorization Act for Fiscal Year 2015 providing that "[n]one of the funds authorized" for assistance under section 1209(a) "may be obligated or

expended" until 30 days after the Secretary of Defense submits a report with further details about the plan for assisting vetted members of the Syrian opposition. We recommend that the "may" in new subsection (n) be changed to "should."

• Section 1222(a), which would extend through December 31, 2021, the authority in section 1236(a) of the National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, to provide assistance to Iraqi security forces, but would retain the restriction in section 1236(b) that, "not more than 25 percent of such funds may be obligated or expended until not later than 15 days after" the Secretary of Defense submits a report to Congress on various elements of the plan for doing so. This is potentially duplicative of the limitation in section 1222(c) mentioned below. We recommend that the restriction in section 1236(b) not be included in the conference agreement or, at a minimum, that the "may" in section 1236(b) be changed to "should."

• Section 1222(c), which would provide that "not more than $375,000,000 may be obligated or expended" for military assistance to Iraqi security forces until the Secretary of Defense submits a report to Congress with further details of the plan. This is potentially duplicative of the section 1236(b) restriction mentioned above. We recommend deleting this provision or, at a minimum, changing the "may" in section 1222(c) to "should."

• Section 1232, which would provide that, in the event the President withdraws the United States from the North Atlantic Treaty, for the next year "no funds authorized to be appropriated by this Act may be obligated, expended, or reprogrammed for the withdrawal of the United States Armed Forces from Europe." We recommend that the "may" in section 1232 be changed to "shall."

• Section 1233, which would extend for an additional year the limitation in section 1232(a) of the National Defense Authorization Act for Fiscal Year 2017 ("NDAA for FY 2017"), Pub. L. No. 114-328, providing that "[n]one of the funds authorized to be appropriated for fiscal year 2017 for the Department of Defense may be used for any bilateral military-to-military cooperation between the Governments of the United States and the Russian Federation," until the Secretary of Defense certifies to Congress, among other things, that "the Russian Federation has ceased its occupation of Ukrainian territory and its aggressive activities that threaten the sovereignty and territorial integrity of Ukraine and members of the North Atlantic Treaty Organization." Section 1232(c) of the NDAA for FY 2017 provides that the Secretary may waive the certification requirement only if the Secretary notifies Congress that the waiver is in the national security interest of

the United States, describes the national security interest covered by the waiver, and explains to Congress why he could not make the certifications in section 1232(a). We recommend that "may" in section 1232(a) of the NDAA for FY 2017 be changed to "should." In addition, as a technical correction, section 1233 of this bill should say "Section 1232(a)," not "Subsection (a)."

• Section 1251, which would provide that "[n]one of the funds authorized to be appropriated by this Act may be used to reduce the total number of members of the Armed Forces in the territory of the Republic of Korea below 28,500," unless the Secretary of Defense certifies to the congressional defense committees at least 90 days in advance that "[s]uch a reduction is in the national security interest of the United States and will not significantly undermine the security of United States allies in the region," that the "reduction is commensurate with a reduction in the threat posed" by conventional forces of North Korea, and that he has "appropriately consulted with allies of the United States." We recommend that "may" in this provision be changed to "should."

• Section 1664(a), which would provide that no funds authorized or otherwise appropriated to the Department of Defense for Fiscal Year 2020 "shall be obligated or expended" for "(1) reducing, or preparing to reduce, the responsiveness or alert level of the intercontinental ballistic missiles of the United States; or (2) reducing, or preparing to reduce, the quantity of deployed intercontinental ballistic missiles of the United States to a number less than 400." We recommend that "shall" in this provision be changed to "should."

In certain circumstances, the application of these provisions would contravene the President's indefeasible authority as Commander in Chief "to make and to implement the decisions that he deems necessary or advisable for the successful conduct of military missions in the field." *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182, 185 (1986) ("*U.N. Tactical Control*"); *see also Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.").

The President's constitutional authority to deploy personnel and materiel cannot be conditioned, as certain of the provisions above purport to do, on certifications or waivers made by subordinate Executive Branch officials. *See Acquisition of Naval and Air Bases in Exchange for Over-age Destroyers*, 39 Op. Att'y Gen. 484, 490 (1940) ("*Over-age Destroyers*"). And even assuming that the President could direct the exercise of the certification and waiver authorities by the Secretary of Defense, the certification requirements would still unduly constrain the President's discretion as Commander in Chief. *See U.N. Tactical Control*, 20 Op.

O.L.C. at 185–87 ("It might be argued that [a provision denying the use of appropriated funds to place U.S. armed forces under U.N. tactical control] does not impose a significant constraint on the President's constitutional authority because it grants the President the authority to waive the prohibition whenever he deems it in the 'national security interest' of the United States to do so . . . . Congress cannot, however, burden or infringe the President's exercise of a core constitutional power by attaching conditions precedent to the exercise of that power."). Furthermore, certain of the conditions effectively require advance notice to Congress of military operations, which will not always be feasible or consistent with the President's prerogatives as Commander in Chief. *See, e.g.*, Statement on Signing the National Defense Authorization Act for Fiscal Year 2018, Daily Comp. Pres. Doc. No. DCPD201700906 (Dec. 12, 2017) (Pres. Trump) ("Certain other provisions of the bill . . . purport to require that the Congress receive advance notice before the President directs certain military actions. I reiterate the longstanding understanding of the executive branch that these types of provisions encompass only military actions for which such advance notice is feasible and consistent with the President's constitutional authority and duty as Commander in Chief to protect the national security of the United States.").

The fact that many of these provisions, as well as numerous other provisions throughout this bill, take the form of limitations on the use of appropriated funds—rather than outright prohibitions on presidential action—does not alleviate the constitutional difficulty. As a general matter, Congress may not use its power of the purse to restrict the President's constitutional authorities in cases where Congress lacks the power to regulate directly the President's use of such authorities. *See U.N. Tactical Control*, 20 Op. O.L.C. at 187–88, 188 nn. 7–8 (collecting authorities).

b. Conduct of Diplomacy

Certain provisions in the bill would dictate the terms of the President's diplomatic interactions with foreign countries. The Department recommends that these provisions be made precatory—for example, by changing "shall" to "should."

These provisions include:

- Section 6201(a)(2), which would provide that "[i]t is the policy of the United States" that "an attack on the armed forces, public vessels, or aircraft of the Republic of the Philippines in the Pacific, including the South China Sea, would trigger the mutual defense obligations of the United States under Article IV of the Mutual Defense Treaty between the Republic of the Philippines and the United States of America, done at Washington August 30, 1951, 'to meet common dangers in accordance with its constitutional processes.'" We recommend that "[i]t is the policy" be changed to "[i]t should be the policy."

the appropriate congressional committees a report on such agreement" that includes certain elements.

Section 10701(b)(2) would additionally require that any cybersecurity agreement negotiated with Russia using Department of Defense funds be conducted in accordance with section 1232 of the National Defense Authorization Act for Fiscal Year 2017, discussed above, which purports to prohibit the use of Department of Defense funds "for any bilateral military-to-military cooperation between the Governments of the United States and the Russian Federation" until the Secretary of Defense certifies to Congress that Russia has ceased its occupation of Ukrainian territory and is abiding by the terms of the Minsk Protocols. The Secretary may waive the certification requirement only if he notifies Congress that the waiver is in the national security interest of the United States, describes the national security interest covered by the waiver, and explains to Congress why he could not make the required certifications.

Section 10701 would interfere in multiple respects with the President's constitutional authority to represent the United States in foreign affairs, and with his constitutional authority as Commander in Chief.

First, while section 10701(b)(1) would allow the President to enter into a cybersecurity agreement with Russia through the Department of the Defense, it would effectively disallow the President from using other agents, such as the Secretary of State, from doing the same. The President may not be restricted in his choice of agents to exercise his exclusive authority to negotiate international agreements. *OSTP*, 35 Op. O.L.C. __, at *4 ("This core presidential power over the conduct of diplomacy includes the exclusive authority to determine . . . the individuals who will represent the United States in those contexts." (internal quotation marks omitted))).

Second, the restriction on "enter[ing] into" a cybersecurity agreement with the Russian Federation is ambiguous as to its scope. If the act of "enter[ing] into" an international agreement were understood to encompass the acts of negotiating and finalizing the text of such an agreement, section 10701(b)(1) would also contravene the President's "exclusive constitutional authority to determine the time, scope, and objectives of international negotiations." *OSTP*, 35 Op. O.L.C. __, at *4. The President alone has the authority to negotiate and finalize such agreements as he sees fit, whether or not such an agreement is a sole executive agreement or would require the approval of the Senate (for treaties) or of Congress (for congressional-executive agreements). *See Over-age Destroyers*, 39 Op. Att'y Gen. at 485–86.

Third, even if "enter into" were understood to refer solely to the act of causing an agreement in question to enter into force, Congress may not restrict the President's "enter[ing] into" or "implement[ing]" an executive agreement when it constitutes the exercise of one of his exclusive Article II authorities. Restatement (Third) of the Foreign Relations Law of the United

States, at 159, § 303(4) ("[T]he President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution."). "Repel[ing] sudden attacks"—as many cybersecurity agreements would be designed to address—lies at the core of the President's exclusive authority as Commander in Chief. 2 Max Farrand, *The Records of the Federal Convention* 318 (rev. ed. 1986) (Madison and Gerry). Joint commitments to deploy government resources, military and otherwise, for protection against sudden cybersecurity attacks would fall squarely within the President's exclusive authorities to command the armed forces and conduct foreign policy for the defense of the Nation. *See U.N. Tactical Control*, 20 Op. O.L.C. at 185; *Timely Notification*, 10 Op. O.L.C. at 159–60. The President also has exclusive Article II powers over the control and dissemination of national security information, including information relating to cybersecurity. *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988); *see Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 97 (1998) ("*Classified Disclosures*"). Thus, if funding for cybersecurity were available in accounts other than those of the Department of Defense, the President would not need congressional authorization to use those funds to enter into or implement cybersecurity agreements as they relate to repelling sudden attacks or disseminating national security information, nor could Congress restrict the President in doing so.

Congress accordingly may not require the Director of National Intelligence ("DNI") to report to Congress on the nature of these agreements as a precondition to entering into or implementing them, much less require the President to wait thirty days after the DNI makes the report. Furthermore, certain of the information to be included in the report, such as "[t]he nature of any intelligence to be shared pursuant to the agreement," S. 1790, sec. 10701(c)(2)), would be "information bearing on national security," access to which is controlled by the President "as head of the Executive Branch and as Commander in Chief." *Egan*, 484 U.S. at 527. Congress may not mandate the disclosure of such information.

Finally, by restricting military-to-military contact or cooperation, including during wartime, the provisions of the National Defense Authorization Acts for Fiscal Years 2017 and 2018 that section 10701(b)(2) incorporates by reference infringe upon the President's constitutional authorities to command the armed forces and conduct diplomacy.

d. Recognition of Foreign Territorial Sovereignty

Section 1231(a), as amended by section 6231, would prohibit the use of any Fiscal Year 2020 funds made available for the Department of Defense "to implement any activity that recognizes the sovereignty of the Russian Federation over Crimea" and would further provide that "the Department [of Defense] may not otherwise implement any such activity." Section 1231(b) would permit the Secretary of Defense, with the concurrence of the Secretary of State, to waive this restriction only if (1) the Secretary of Defense determines that doing so would be "in

the national security interest of the United States" and (2) the Secretary of Defense notifies certain congressional committees of this waiver "on the date on which the waiver is invoked."

These provisions would be unconstitutional. The President's constitutional authority to conduct foreign relations affords him the exclusive responsibility to recognize the legitimacy and territorial bounds of foreign sovereign nations, as affirmed in *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2087 (2015). "The formal act of recognition is an executive power that Congress may not qualify." *Id.* Congress may not condition the President's authority to determine which nation possesses sovereign authority over Crimea on a determination that doing so would be "in the national security interest," much less such a determination by a subordinate official in the Executive Branch. *See U.N. Tactical Control*, 20 Op. O.L.C. at 185–86 ("Congress cannot . . . burden or infringe the President's exercise of a core constitutional power by attaching conditions precedent to the exercise of that power."). And the waiver exception for when recognition of Russian sovereignty over Crimea would be "in the national security interest of the United States" would not be sufficiently broad to cover all circumstances in which the President might find such recognition to be appropriate. *See, e.g.*, *United States v. Belmont*, 301 U.S. 324, 326–27, 330 (1937) (finding that it was "within the competence of the President" to recognize the Soviet government in exchange for the assignment to the United States of claims due the Soviet Union for amounts owed by U.S. nationals); *United States v. Pink*, 315 U.S. 203, 222–23 (1942) (same).

The Department recommends that sections 1231 and 6231 not be included in the conference agreement.

e. Travel by Foreign Diplomats in the United States

Section 10705 would require the Secretary of State to "ensure" that the Russian Federation provides notice at least two business days in advance of all travel by accredited diplomatic and consular personnel that is subject to the requirements of section 502 of the Intelligence Authorization Act for Fiscal Year 2017 (Pub. L. No. 115-31, div. N, § 502, 131 Stat. 135, 825 (2017), *codified at* 22 U.S.C. § 254a note), which is all such travel within the United States. This provision would contravene the President's exclusive authority under Article II, Section 3 of the Constitution to "receive Ambassadors and other public Ministers," by restricting the President's authority to determine the "status and movement" of foreign diplomats while they are in this country. See Memorandum for the Attorney General, from Larry A. Hammond, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Speeding the Departure of Iranian Diplomatic Personnel* at 3 (Dec. 31, 1979) ("It seems clear that the status and movement of foreign diplomatic personnel in this country are matters committed to executive discretion, without participation by Congress or the judiciary."); *cf. Presidential Power to Expel Diplomatic Personnel from the United States*, 4A Op. O.L.C. 207, 208–09 (1980). The Department recommends that section 10705 not be included in the conference agreement.

2. Appointment of Officers

a. Retired Military Officers

Section 506(a)(2) would amend 10 U.S.C. § 1370(f)(5) to provide as follows:

> If the retired grade of an officer is proposed to be increased through the reopening of the determination or certification of officer's retired grade, the increase in the retired grade shall be made by the Secretary of Defense, ***by and with the advice and consent of the Senate***.

(Emphasis added). The Department recommends that section 506(a)(2) be revised by striking "by and with the advice and consent of the Senate" from the proposed amendment.

As applied to both living and deceased retired military officers, the amendment in section 506(a)(2) would be unconstitutional. A living retired military officer still holds an office for Appointments Clause purposes; he or she remains subject to recall for active duty. *See* 10 U.S.C. § 688. Promoting a living retired officer to a higher grade thus would constitute an appointment and would have to be done in one of the four ways permitted by the Appointments Clause: by the President with the advice and consent of the Senate, by the President alone, by a court of law, or by the head of a department. U.S. Const. art. II, § 2, cl. 2. Appointment by a department head with the advice and consent of the Senate is not among these methods. *See Silver v. U.S. Postal Serv.*, 951 F.2d 1033, 1037 (9th Cir. 1991) ("While Congress is afforded significant discretion to fashion appointments within the constraints of the Constitution, the boundaries outlined in the Appointments Clause cannot be transgressed.").

In contrast, as applied posthumously to deceased military officers, the amendment in section 506(a)(2) would not implicate the Appointments Clause. It would merely bestow an honor on the deceased officer. But it would nonetheless violate the anti-aggrandizement principle of the separation of powers by giving the Senate a role in an executive decision about advancing a deceased officer on the retired list that the Constitution does not explicitly allocate to the Senate via Article II of the Constitution. *See* U.S. Const. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); *Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986) ("[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation."). For this reason also, then, the Secretary of Defense alone should have authority to increase the grade of a retired military officer.

b. Commander of the United States Space Force

1. Section 1604(b)(1) would add a new 10 U.S.C. § 9063, establishing a United States Space Force in the Air Force. New section 9063(b) would provide that the Commander of this

new United States Space Force (Commander/USSF) is to be appointed by the President under 10 U.S.C. § 601. New section 9063(c) would further provide that the Secretary of Defense may authorize the Commander/USSF to serve concurrently as the Commander of the United States Space Command ("Commander/USSPACECOM") under 10 U.S.C. § 169, for one year after enactment. *See* 10 U.S.C. § 169(c)(1) ("The commander [of the space command] shall be appointed to that grade by the President, by and with the advice and consent of the Senate, for service in that position.").

The U.S. Space Command was established on August 29, 2019, and General John W. Raymond was appointed by the President as its first Commander. General Raymond also serves concurrently as the Commander of Air Force Space Command ("Commander/AFSPC"). *See* Remarks by President Trump at Event Establishing the U.S. Space Command (Aug. 29, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-event-establishing-u-s-space-command/. However, this newly established USSPACECOM is not the USSPACECOM anticipated by 10 U.S.C. § 169; that USSPACECOM was to be a subordinate command under U.S. Strategic Command. Instead, the newly established USSPACECOM is a combatant command. There are thus two distinct entities implicated by the name USSPACECOM—one, a combatant command that has already been established, and the other a subordinate command to be established under 10 U.S.C. § 169(c)(1).

Separately, section 1611(a) of S. 1790 would repeal 10 U.S.C. § 169, creating some confusion as to the effect of the new 10 U.S.C. § 9063(c), which would continue to authorize the Commander/USSF to serve concurrently as the Commander of the USSPACECOM that was to have been established under the repealed 10 U.S.C. § 169. If proposed 10 U.S.C. § 9063(c) were understood, in light of this repeal, as allowing the Secretary of Defense to authorize the officer appointed as Commander/USSF to serve concurrently as the Commander of the USSPACECOM established on August 29, and the Secretary were to make this authorization, the President's appointment of a new Commander/USSF would effectively oust the incumbent Commander/ USSPACECOM, General Raymond. The President would not have the option of appointing a different person as Commander/USSF while allowing General Raymond to continue to serve as Commander/USSPACECOM. This would impair the President's exclusive removal authority. *Myers v. United States*, 272 U.S. 52, 163 (1926). In that application, proposed 10 U.S.C. § 9063(c) would be unconstitutional.

In addition to the foregoing, section 1604(b)(2) of S. 1790 would provide that "[t]he individual serving as Commander of the Air Force Space Command as of the date of the enactment of this Act may serve as the Commander of the United States Space Force . . . without further appointment." As noted above, General Raymond already serves as the Commander/ AFSPC. If, under section 1604(b)(2), General Raymond were to serve as Commander/USSF in the year following enactment, proposed 10 U.S.C. § 9063(c) would be superfluous, again if it were understood as permitting the Commander/USSF to serve concurrently as Commander of the

USSPACECOM established on August 29. General Raymond is already the Commander of that USSPACECOM.

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For these reasons, the Department recommends that proposed 10 U.S.C. § 9063(c) not be included in the conference agreement.

c. Council of Directors of the Henry M. Jackson Foundation for the Advancement of Military Medicine

Section 722 would continue an existing violation of the Appointments Clause and the separation of powers in 10 U.S.C. § 178, the federal statute establishing the Henry M. Jackson Foundation for the Advancement of Military Medicine. It would also introduce a new violation. We recommend amending the process for appointing the Council of Directors that heads the Foundation.

The Foundation is a nonprofit corporation charged with supporting research in military medicine, including through "medical research and education projects" carried out "under cooperative arrangements with the Uniformed Services University of the Health Sciences" (the federal medical school). 10 U.S.C. § 178(b)(1). Under 10 U.S.C. § 178(c)(1), the Foundation is led by a Council of Directors comprising eleven members. Four members of Congress and the Dean of the Uniformed Services University serve as ex officio Directors. Under current law, those five ex officio Directors appoint the six remaining Directors. Section 722 of the bill would revise the method for appointing these six additional Directors, providing that, at the expiration of the term of one of the current six additional Directors, a new Director shall be appointed by all "the members currently serving on the Council," including the ex officio Directors and the Director whose term is expiring.

The Foundation is a government entity for separation of powers purposes. Although the organic statute declares that the Foundation "shall not for any purpose be an agency or instrumentality of the United States Government," 10 U.S.C. § 178(a), such a statutory "disclaimer of . . . governmental status" does not control for constitutional purposes, *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1233 (2015). The "practical reality" is that the Foundation "is not an autonomous private enterprise." *Id.* at 1232–33. The Foundation is effectively controlled by the governmental actors who dictate the membership of the Council of Directors. *See* 10 U.S.C. § 178(c)(1); *cf. Ass'n of Am. R.R.*, 135 S. Ct. at 1231 (majority of Amtrak's board is appointed and removable by the President). Its mission, supporting the military medical community, is defined by governmental policy goals set forth in federal law. *See* § 178(b), (g); *cf. Ass'n of Am. R.R.*, 135 S. Ct. at 1232 ("rather than advancing its own private economic interests, Amtrak is required to pursue numerous, additional goals defined by

statute"). And it is required to report annually to the President of the United States on its activities. *See* § 178(i); *cf. Ass'n of Am. R.R.*, 135 S. Ct. at 1232 ("Amtrak must submit numerous annual reports to Congress and the President[.]"). The Foundation may lack some of the qualities of entities previously determined to be governmental despite a contrary statutory declaration, *cf. Ass'n of Am. R.R.*, 135 S. Ct. at 1232 (describing Amtrak's federal subsidies and inspector general), but it "was created by the Government, is controlled by the Government, and operates for the Government's benefit," *id.* Therefore, it serves as a "governmental entity for purposes of the Constitution's separation of powers provisions." *Id.* at 1233; *see also The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 147 (1996) ("*Separation of Powers*").

Under the Appointments Clause, the Directors of the Foundation qualify as Officers of the United States because they exercise "'significant authority pursuant to the laws of the United States'" and "occupy . . . 'continuing' position[s] established by law." *Lucia*, 138 S. Ct. at 2051 (quoting *Germaine*, 99 U.S. at 511; *Buckley*, 424 U.S. at 126). The Directors exercise "significant authority" because they hold "power lawfully conferred by the government to bind" the Foundation "for the public benefit." *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 87 (2007); *see also Ass'n of Am. R.R.*, 135 S. Ct. at 1235 (Alito, J., concurring) (positing that "those who run" a government entity are officers). The Foundation, of which the Directors are the ultimate governing authority, *see* 10 U.S.C. § 178(c)–(d); is authorized by law to enter contracts and cooperative agreements, make grants, obtain patents and licenses, and take other binding actions in pursuit of its mission, *see* 10 U.S.C. § 178(g). As for the other key criterion of officer status, the Directors hold "continuing" office for four-year terms, *id.* § 178(c)(2), rather than serving "on a temporary, episodic basis," *Freytag v. Comm'r*, 501 U.S. 868, 881 (1991).

Because the Directors are officers of the United States for purposes of the Appointments Clause, members of Congress may not serve as Directors ex officio, *see* U.S. Const. art. I, § 6, cl. 2 (Incompatibility Clause), nor may they appoint the additional six Directors, *see Buckley*, 424 U.S. at 127. Furthermore, with the possible exception of the Dean, the Directors do not appear to be accountable to any other officers in the Executive Branch, including even the President, and thus should be considered principal officers, who must be appointed by the President with the advice and consent of the Senate ("PAS"). *See Edmond v. United States*, 520 U.S. 651, 662–63 (1997). None is appointed in this manner.

The Department of Justice reached similar conclusions when Congress passed legislation that established the Foundation in 1983. The Department concluded that the Foundation would be a federal entity for constitutional purposes and that the role of members of Congress in overseeing the Foundation and appointing the other directors would be unconstitutional. *See* Memorandum for Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re:*

S. 653, 98th Cong., 1st Sess., "The Foundation for the Advancement of Military Medicine Act of 1983" (May 19, 1983). President Reagan nevertheless signed the legislation on the understanding that the constitutional defects would be remedied later. *See Statement on Signing the Foundation for the Advancement of Military Medicine Act of 1983* (May 27, 1983), 1 Pub. Papers of Pres. Ronald Reagan 782, 782 (1983) ("[T]he sponsors of the legislation have agreed to give full and fair consideration to constitutional concerns").

Those defects have not been fixed, however, and section 722 would continue, and extend, them by allowing all current members of the Council, including the four members of Congress serving ex officio, to appoint a new Director whenever the term of one of the six non-ex officio Directors is expiring. To address these concerns, the Department recommends that the Foundation's Council of Directors be restructured to eliminate the seats reserved for members of Congress and to vest the power to appoint all of the Directors in the President, with the advice and consent of the Senate.

d. Chair of Interagency Working Group on IUU Fishing

Section 8551(a) would establish a collaborative interagency working group on maritime security and IUU ["illegal, unreported, and unregulated"] fishing, whose responsibilities would include "establishing standards for information sharing related to maritime enforcement," S. 1790, sec. 8551(c)(3), "developing a strategy to determine how military assets and intelligence can contribute to enforcement strategies to combat IUU fishing," *id.* sec. 8551(c)(4), "supporting the adoption and implementation of the Port State Measures Agreement in relevant countries and assessing the capacity and training needs in such countries," *id.* sec. 8551(c)(6); and "enhancing cooperation with partner governments to combat IUU fishing," *id.* sec. 8551(c)(8).

These continuing responsibilities to set policy and facilitate diplomatic interaction with foreign governments likely constitute the exercise of "'significant authority pursuant to the laws of the United States,'" requiring that the members of the working group be selected in accordance with the Appointments Clause. *Lucia*, 138 S. Ct. at 2051 (quoting *Germaine*, 99 U.S. at 511; *Buckley*, 424 U.S. at 126; *see also Officers of the United States*, 31 Op. O.L.C. at 87–93).

Section 8551(b)(1) would provide that this working group shall be chaired by an individual "who shall rotate between the Coast Guard, the Department of State, and the National Oceanographic and Atmospheric Administration." The remaining members of the working group, including two deputy chairs, would come from various executive agencies and would either "be appointed by their respective agency heads" or by the President, both methods of appointment that conform to the Appointments Clause.

To ensure full compliance with the Appointments Clause, the Department recommends that similar language be added to section 8551(b)(1), clarifying the method of appointment of the Chair:

> The members of the Working Group shall be composed of—(1) 1 chair, who shall rotate between the Coast Guard, the Department of State, and the National Oceanographic and Atmospheric Administration on a 3-year term *and shall be appointed by the [President/respective agency head]* . . . .

3. Dissemination of Privileged Information

a. Restrictions on Granting or Denying Security Clearances

Section 9311 would add a new section 801A to the National Security Act that imposes certain restrictions on Executive Branch determinations "regarding eligibility for access to classified information." S. 1790, sec. 9311(c)(1), § 801A(b). In certain applications, these restrictions may contravene the President's exclusive constitutional authority "to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information." *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) (noting that this authority "exists quite apart from any explicit congressional grant"). The Department recommends that section 9311 not be included in the conference agreement.

Of particular concern, subsection (b)(4) of the proposed section 801A would prohibit an access determination that "violate[s] section 3001(j)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. § 3341(j)(1))." Section 3001(j)(1) purports to prohibit, among other things, an Executive Branch supervisor from revoking the security clearance of an employee because he made an unauthorized disclosure of classified information to another member of the Executive Branch, such as an Inspector General. But "the President's roles as Commander in Chief, head of the Executive Branch, and sole organ of the Nation in its external relations require that he have ultimate and unimpeded authority over the collection, retention and dissemination of intelligence and other national security information in the Executive Branch." *Access to Classified Information*, 20 Op. O.L.C. 402, 404 (1996) (quoting Brief for the Appellees at 42, *Am. Foreign Serv. Ass'n v. Garfinkel*, 488 U.S. 923 (1988) (No. 87-2127)). This authority necessarily extends to supervising Executive Branch employees in their dissemination of national security information within the Executive Branch. "Congress may not, for example, provide Executive Branch employees with independent authority to countermand or evade the President's determinations as to when it is lawful and appropriate to disclose classified information." *The Department of Defense's Authority to Conduct Background Investigations for Its Personnel*, 42 Op. O.L.C. __, at *9-10 (Feb. 7, 2018) (quoting *Applicability of the Foreign*

Intelligence Surveillance Act's Notification Provision to Security Clearance Adjudications by the Department of Justice Access Review Committee, 35 Op. O.L.C. __, at *8 (June 3, 2011)).

b. Reports on Investigations into Unauthorized Disclosures of Classified Information

Section 10719 would require reports regarding ongoing investigations into unauthorized disclosures of classified information. The Department recommends that it not be included in the conference agreement.

Section 10719(a) would create a new section 1105 of the National Security Act of 1947 providing:

> Not less frequently than once every 6 months, the Assistant Attorney General for National Security of the Department of Justice, in consultation with the Director of the Federal Bureau of Investigation, shall submit to the congressional intelligence committees, the Committee on the Judiciary of the Senate, and the Committee on the Judiciary of the House of Representatives a report on the status of each referral made to the Department of Justice from any element of the intelligence community regarding an unauthorized disclosure of classified information made during the most recent 365-day period or any referral that has not yet been closed, regardless of the date the referral was made.

S. 1790, sec. 10719(a), § 1105(c)(1). This report would be required to include certain details about ongoing investigations, such as "whether the alleged unauthorized disclosure described in the referral was substantiated by the Department of Justice," *id.* § 1105(c)(2)(B), "the highest level of classification of the information that was revealed in the unauthorized disclosure," *id.* § 1105(c)(2)(C), and "whether an open criminal investigation related to the referral is active," *id.* § 1105(c)(2)(D). The definition of an "unauthorized public disclosure of classified information" in new section 1105(a)(4) does not align with Intelligence Community Directive 701, https://www.dni.gov/files/documents/ICD/10-3-17_Atch1_ICD-701-Unauthorized-Disclosures_17-00047_U_SIGNED.pdf, and the intended meaning of a "substantiated" unauthorized disclosure is unclear.

The information required to be reported necessarily would reveal information about ongoing criminal investigations. Section 10719 would require reporting on active investigations and whether there has been attribution. Disclosure of this information would damage ongoing investigations and contravene the law enforcement component of executive privilege, which permits the President to protect investigative files from disclosure. *See Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 75–78 (1986); *Assertion of Executive Privilege in Response to*

Congressional Demands for Law Enforcement Files, 6 Op. O.L.C. 31, 35 (1982). Furthermore, the existence of a referral would confirm that the information in an article is actual intelligence community information. Many referrals contain specific compartmentalized information requiring special authorizations for anyone reading the information. Requiring public disclosure of these prospectuses would unconstitutionally interfere with the President's control over national security information. *See Egan*, 484 U.S. at 527; *Access to Classified Information*, 20 Op. O.L.C. 402, 404 (1996).

In addition to these constitutional concerns, we note that statistics about "open investigations" tend to be misleading since investigators sometimes open multiple investigations based on a single referral, or a single investigation based upon multiple referrals. The Department typically reveals only the total number of unauthorized disclosure referrals it receives annually, without further information. Moreover, the provision would apply both to "formal" and "informal" inquiries. If required to brief all investigative activity, regardless of investigative stage, the Assistant Attorney General and the Director of the FBI would need to expend the same resources reporting leads of little or no ultimate value as they would spend reporting fully predicated and Department-authorized investigations.

c. Miscellaneous Reporting Requirements or Restrictions on the Use of Privileged Information

A number of other provisions of the bill would intrude on the President's constitutional prerogative to control the dissemination of privileged information—either by requiring reports without adequate room to engage in the constitutionally required accommodation process regarding the disclosure of privileged information, *see United States v. AT&T Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977) (doctrine of executive privilege includes "an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation"), or by imposing directives or restrictions on the Executive's use of privileged information. The Department recommends that these and similar provisions above be made precatory—for example, by changing uses of the mandatory terms "shall" or "may not" to the precatory terms "should" or "should not."

These provisions include:

- Section 1053, which would extend a requirement in section 1057 of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, to report detailed information on civilian casualties in connection with military operations.

- Sections 9102(b)(3) and 10102(b)(3), which would provide that "[t]he President shall not publicly disclose the classified Schedule of Authorizations" accompanying those divisions except in certain circumstances.

• Section 10310(a), which would provide that "[a]n officer of an element of the intelligence community who has been nominated by the President for a position that requires the advice and consent of the Senate may not make a classification decision with respect to information related to such officer's nomination."

• Section 10315(b)(1), which would provide that "the Director of National Intelligence shall submit to the congressional intelligence committees . . . all nonpublicly available policies issued by the Director of National Intelligence for the intelligence community."

• Section 10603(b), which would provide that the Security Executive Agent "shall . . . establish," among other things, a "policy and implementation plan for the issuance of interim security clearances," a "policy and implementation plan to ensure contractors are treated consistently in the security clearance process across agencies and departments of the United States," and a "strategy and implementation plan that . . . provides for periodic reinvestigations as part of a security clearance determination only on an as-needed, risk-based basis."

• Section 10604(b), which would provide that the Security, Suitability, and Credentialing Performance Accountability Council "shall reform the security clearance process with the objective that, by December 31, 2021, 90 percent of all determinations, other than determinations regarding populations identified under section 10603(b)(3)(C), regarding—(1) security clearances—(A) at the secret level are issued in 30 days or fewer; and (B) at the top secret level are issued in 90 days or fewer; and (2) reciprocity of security clearances at the same level are recognized in 2 weeks or fewer."

• Section 10707(b), which would provide that the "Director of National Intelligence shall submit to the appropriate committees of Congress a report on Iranian support of proxy forces in Syria and Lebanon," including many details enumerated in subsection (c).

• Section 10708(a), which would provide that the "Director of National Intelligence shall submit to Congress a report describing Iranian expenditures" on certain specific "military and terrorist activities."

• Section 10717(b), which would provide that the "Director of National Intelligence shall submit" to Congress a report including "[a]ny strategy used by . . . a country of special concern to use foreign investment to target the acquisition of critical technologies, critical materials, or critical infrastructure," as well as

"[a]ny economic espionage efforts directed at the United States by a foreign country."

• Section 10720(b), which would provide that the "Director of National Intelligence . . . shall submit" to Congress notice of any designation of a U.S. foreign intelligence officer in a foreign country or any foreign intelligence officer in a U.S. post as persona non grata.

The President's constitutional prerogative to control the dissemination of privileged information includes determining when to withhold and when to disclose information that falls within one of the components of executive privilege, as well as to whom to disclose such information. One component of executive privilege implicated by many provisions in this bill is "information bearing on national security." *Egan*, 484 U.S. at 527. The President's authority to control access to national security information "flows primarily from th[e] constitutional investment of [the Commander in Chief] power in the President" and his position "as head of the Executive Branch and as Commander in Chief." *Id.*; *see Classified Disclosures*, 22 Op. O.L.C. at 97 ("[S]ince the Washington Administration, Presidents and their senior advisers have repeatedly concluded that our constitutional system grants the executive branch authority to control the disposition of secret information."); *Access to Classified Information*, 20 Op. O.L.C. at 404 ("[A] congressional enactment would be unconstitutional if it were interpreted to divest the President of his control over national security information in the Executive Branch" (internal quotation marks omitted)).

Other components of executive privilege implicated by provisions in the bill are "documents and information relating to diplomatic communications," *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. O.L.C. 253, 269 (1996), and law enforcement information contained in investigative files, *see Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 117 (1984) (Since the early part of the 19th century, Presidents have steadfastly protected the confidentiality and integrity of investigative files from untimely, inappropriate, or uncontrollable access by the other branches, particularly the legislature."); *Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files*, 6 Op. O.L.C. 31, 32–33 (1982) (same concerning civil law enforcement files of the Environmental Protection Agency).

4. Legislative Recommendations

A number of provisions in the bill would require the Secretary of Defense to recommend legislative measures. The Department recommends that these and similar provisions be made precatory—for example, by changing the term "shall" to "should" or by inserting "as appropriate" after the legislative recommendation requirement.

These provisions include:

• Section 529, which would provide that the Joint Service Committee on Military Justice "shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report setting forth recommendations for legislative and administrative action required to establish a separate punitive article in chapter 4 of title 10, United States Code (the Uniform Code of Military Justice), on sexual harassment."

• Section 10605(b), which would provide that the Chairman of the Security, Suitability, and Credentialing Performance Accountability Council "shall submit to the appropriate congressional committees such recommendations as the Chairman may have for revising the authorities of the Security Exchange Agent."

• Section 10712(b) and (c)(1), which would provide that the Secretary of Homeland Security "shall submit to the appropriate committees of Congress . . . [a]n analysis of whether the Under Secretary [for Intelligence and Analysis] has the legal and policy authority necessary to organize and lead the Homeland Security Intelligence Enterprise" as well as "a description of . . . the legal and policy changes necessary to effectively coordinate, organize, and lead intelligence activities of the Department of Homeland Security."

• Section 10727(b)(1) and (b)(2)(C), which would provide that "the Director of National Intelligence . . . shall submit" to Congress a report that includes "identification of any legislative action the Director determines necessary to establish and carry out" a student loan-forgiveness program in the intelligence community.

• Section 10730(4), which would provide that "the Director of the Federal Bureau of Investigation shall provide to the congressional intelligence committees a briefing" that includes "[w]hether the Director recommends any legislative actions" to improve the current policy on providing residence in the United States to foreign individuals who cooperate in counterintelligence or other national security-related investigations.

These provisions would contravene the President's constitutional authority to "recommend to [Congress's] Consideration such Measures *as he shall judge* necessary and expedient." U.S. Const. art. II, § 3 (emphasis added); *see also Application of the Recommendations Clause to Section 802 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003*, 40 Op. O.L.C. __ (Aug. 25, 2016).

5. Hybrid Commissions

a. In the Executive Branch

Section 1042(a) would extend the National Security Commission on Artificial Intelligence, an advisory commission established "in the executive branch" by section 1051 of the National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232. This entity is tasked by section 1051(b)–(c) of that Act with preparing reports and recommendations for the Executive Branch and Congress on how to use artificial intelligence, machine learning, and associated technologies to address the national security and defense needs of the United States. Section 1042(a) would amend section 1051(e) of the National Defense Authorization Act for Fiscal Year 2019 to provide that "[t]he Commission shall terminate on March 1, 2021" instead of on October 1, 2020. Section 1051(a)(4)(A) of the National Defense Authorization Act for Fiscal Year 2019 purports to require twelve of the fifteen members of the Commission to be appointed by members of Congress.

The inclusion of individuals appointed by members of Congress on a commission located in the Executive Branch violates the anti-aggrandizement principle of the separation of powers. *See Separation of Powers*, 20 Op. O.L.C. at 131. On signing the National Defense Authorization Act for Fiscal Year 2019, the President noted this constitutional difficulty, explaining that the "legislative branch appointees preclude [the Commission], under the separation of powers, from being located in the executive branch." Statement on Signing the John S. McCain National Defense Authorization Act for Fiscal Year 2019 at 2, Daily Comp. Pres. Doc. No. DCPD201800533 (Aug. 13, 2018).

The Department recommends that section 1042 of this bill include an amendment to section 1051 of the National Defense Authorization Act for Fiscal Year 2019 eliminating the requirement that the National Security Commission on Artificial Intelligence be established "in the executive branch."

b. In the Legislative Branch or Elsewhere

Three other provisions of the bill would extend or establish hybrid commissions without clear indication of where among the three branches of the federal government these commissions would be located:

- Section 1085(a) would extend the National Commission on Military Aviation Safety established by section 1087 of the National Defense Authorization Act for Fiscal Year 2019. This entity has four commissioners appointed by the President and four commissioners appointed by members of Congress. Its purpose is to

examine and report to the President and Congress on recommendations regarding certain United States military aviation mishaps.

• Section 1639 would extend the Cyberspace Solarium Commission established by section 1652 of the National Defense Authorization Act for Fiscal Year 2019. This entity has four ex officio commissioners from the Executive Branch and ten commissioners appointed by members of Congress. Its purpose is to examine and report to Congress on a strategic approach to defending the United States in cyberspace against cyberattacks of significant consequences.

• Section 6821 would establish a Commission on Synthetic Opioid Trafficking. This entity would have five ex officio commissioners from the Executive Branch and eight commissioners appointed by members of Congress. Its purpose would be to develop and report to Congress on a strategic approach to combating the flow of synthetic opioids into the United States.

Unlike section 1051 of the National Defense Authorization Act for Fiscal Year 2019, which established the National Security Commission on Artificial Intelligence discussed above, these provisions do not specify that the three commissions are to be located in any particular federal government branch.

The Department has cautioned that any commission with members from both the legislative and executive branches "tends to erode the structural separation of powers." *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 251 (1989); *see also, e.g.*, Memorandum for the Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Congressional Incursions into Areas of Executive Responsibility* at 3–4 (Oct. 31, 1984) (describing the Department of Justice's repeated "strong[]" opposition to congressional creation of commissions with legislative and executive branch appointees as "inconsistent with the tripartite system of government established by the Framers of our Constitution" (internal quotation marks omitted)). To relieve this concern, the Department would view the three commissions above as Legislative Branch entities. However, because the Legislative Branch may not assume Executive Branch functions, and because members of Congress may not appoint Officers of the United States for purposes of the Appointments Clause, the commissions must be limited to "advisory, investigative, informative, or ceremonial functions and may not perform regulatory, enforcement, or other executive responsibilities." *Common Legislative Encroachments*, 13 Op. O.L.C. at 251; *see also Constitutionality of the Ronald Reagan Centennial Commission Act of 2009*, 33 Op. O.L.C. __, *3 (Apr. 21, 2009) (identifying constitutional concerns with legislative involvement in hybrid commissions with responsibilities that "extend beyond providing advice or recommendations to the Executive Branch, or participating in ceremonial activities, to exercising operational control over a statutorily prescribed national commemoration").

The Department would construe the authorities of these three commissions, and the artificial intelligence commission, consistently with the separation of powers and the Appointments Clause, such that any policy recommendations issued by the two commissions would not bind the Executive Branch. Further, any executive branch officer or employee serving on such a commission would need to conduct commission operations as a representative of his or her executive agency and maintain the confidentiality of executive branch information.

The practical operation of these hybrid commissions consequently poses certain constitutional difficulties. To avoid separation of powers concerns, the Department would advise executive agencies to treat demands for Executive Branch resources and information as non-binding and would advise the President that he maintains ultimate control over the dissemination of any privileged information. The Department further recommends deleting section 6821(e), related to the Commission on Synthetic Opioid Trafficking, which purports to regulate who may receive access to classified information that the commission receives. It is for the President as Commander in Chief, not Congress through legislation, to determine who may have access to national security information. *Egan*, 484 U.S. at 527.

Thank you for the opportunity to present our views. We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Prim F. Escalona
Principal Deputy Assistant Attorney General

cc: The Honorable Jack Reed
Ranking Member
Committee on Armed Services
United States Senate

The Honorable Adam Smith
Chairman
Committee on Armed Services
U.S. House of Representatives

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

NOV 27 2019

The Honorable Adam Smith
Chairman
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 2500, the "National Defense Authorization Act for Fiscal Year 2020," as engrossed by the House. Many provisions of this bill raise constitutional concerns. Below we recommend changes to address these concerns.

1. Military and Foreign Affairs

a. Tactical Use of Military Personnel and Materiel

Certain provisions of the bill would restrict the President's constitutional authority to deploy military personnel or materiel at a tactical level. The Department recommends that these provisions either not be included in the conference agreement or made precatory—for example, by changing "shall" to "should."

These provisions include

- Section 129(a), which would provide that "[n]one of the funds authorized to be appropriated by this Act or otherwise made available for fiscal year 2020 for the Air Force may be obligated or expended to retire, divest, realign, or place in storage or on backup aircraft inventory status, or prepare to retire, divest, realign, or place in storage or on backup aircraft inventory status, any RC–26B aircraft" until sixty days after the Secretary of Defense has made certain certifications. We recommend amending the mandate that "[n]one of the funds . . . may be obligated or expended" to the precatory suggestion that "[n]one of the funds . . . should be obligated or expended" for such purposes.

- Section 1044(a), which would amend section 1059(a) of the National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, to provide, in a

new paragraph (3), that, "[n]ot later than 30 days before the deployment of any member of the Armed Forces or unit of the Armed Forces to the southern land border of the United States in support [of] United States Customs and Border Protection pursuant to this section or any other provision of law, the Secretary of Defense shall provide to the Committees on Armed Forces of the Senate and House of Representatives notice of such deployment." We recommend changing "shall provide" to "should provide" (and inserting "of" after "in support").

- Section 1221(a), which would further prohibit obligation of more than 70 percent of the amounts made available for assistance to Iraqi security forces, using Fiscal Year 2020 funds until the Secretary of Defense submits a report to Congress with further details of the plan required by section 1236(b) of the National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291. We recommend that this restriction be made precatory by changing "not more than 70 percent may be obligated" to "not more than 70 percent should be obligated."

- Section 1222(a), which would extend the authorization in section 1209(a) of the National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, to provide military assistance to "appropriately vetted" members of the Syrian opposition, but would amend section 1209(b) to condition that authorization on providing a report to Congress fifteen days in advance of "each instance" of the provision of such assistance. We recommend not including this subsection, or at a minimum replacing "shall submit" with "should submit" in amended section 1209(b).

- Section 1222(a)(4), which would amend section 1209(f) of the National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-29, to restrict the type of weapons that may be provided to appropriately vetted elements of the Syrian opposition for defending the Syrian people from the Islamic State of Iraq and the Levant and for protecting the United States and the Syrian people from terrorists. We recommend not including this paragraph, or at a minimum replacing "may only provide" with "should only provide."

- Section 1232, which would extend for an additional year the prohibition in section 1232(a) of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, on expenditure of funds by the Department of Defense for "any bilateral military-to-military cooperation between the Governments of the United States and the Russian Federation," until the Secretary of Defense certifies to Congress that, among other things, "the Russian Federation has

ceased its occupation of Ukrainian territory and its aggressive activities that threaten the sovereignty and territorial integrity of Ukraine and members of the North Atlantic Treaty Organization." The Secretary may waive the certification requirement only if the Secretary notifies Congress that the waiver is in the national security interest of the United States, describes the national security interest covered by the waiver, and explains to Congress why he could not make the certifications in section 1232(a). We recommend replacing "may be used" with "should be used" in section 1232(a) of the National Defense Authorization Act for Fiscal Year 2017.

- Section 1243, which would provide that "[n]one of the funds authorized to be appropriated by this Act may be used to reduce the total number of members of the Armed Forces serving on active duty who are deployed to South Korea below 28,500 unless the Secretary of Defense first certifies to the congressional defense committees" that the reduction is in the national security interest and that he has "appropriately consulted" with U.S. allies, including Korea and Japan. We recommend amending the mandate that "[n]one of the funds . . . may be used" to the precatory suggestion that "[n]one of the funds . . . should be used" unless the Secretary of Defense has made the recommended certification.

- Section 1270J(b), which would provide that "[n]one of the funds authorized to be appropriated by this Act or otherwise made available for the Department of Defense for fiscal year 2020 may be made available for the . . . deployment of a United States shorter- or intermediate-range ground launched ballistic or cruise missile system with a range between 500 and 5,500 kilometers" until certain conditions are met, including that the Administration submit "a detailed diplomatic proposal for negotiating an agreement to obtain the strategic stability benefits of the INF Treaty" (subsection (b)(1)(A)) and produce an agreement with a NATO or Indo-Pacific ally committing to allow deployment of a ballistic or cruise missile system on its own territory (subsection (b)(2)). We recommend amending the mandate that "[n]one of the funds . . . may be made available" to the precatory phrase, "[n]one of the funds . . . should be made available."

- Section 1270N, which would provide that, "[f]or the two-year period beginning on the date of the enactment of this Act, the Department of Defense may not provide in-flight refueling pursuant to section 2342 of title 10, United States Code, or any other applicable statutory authority to non-United States aircraft that engage in hostilities in the ongoing civil war in Yemen unless and until a declaration of war or a specific statutory authorization for such use of United

States Armed Forces has been enacted." We recommend changing the phrase "may not" to "should not."

- Section 1646, which would provide that "[n]one of the funds authorized to be appropriated by this Act or otherwise made available for fiscal year 2020 for the Department of Defense may be used to deploy the W76–2 low-yield warhead." We recommend amending the mandate that "[n]one of the funds . . . may be used" to the precatory phrase, "[n]one of the funds . . . should be used."

In certain circumstances, the application of these provisions would contravene the President's indefeasible authority as Commander in Chief "to make and to implement the decisions that he deems necessary or advisable for the successful conduct of military missions in the field." *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182, 185 (1986) ("*U.N. Tactical Control*"); *see also Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.").

The President's constitutional authority to deploy personnel and materiel cannot be conditioned, as certain of the provisions above purport to do, on certifications or waivers made by subordinate Executive Branch officials. *See Acquisition of Naval and Air Bases in Exchange for Over-age Destroyers*, 39 Op. Att'y Gen. 484, 490 (1940). And even assuming that the President could direct the exercise of the certification and waiver authorities by the Secretary of Defense, the certification requirements would still unduly constrain the President's discretion as Commander in Chief. *See U.N. Tactical Control*, 20 Op. O.L.C. at 185–87 ("It might be argued that [a provision denying the use of appropriated funds to place U.S. armed forces under U.N. tactical control] does not impose a significant constraint on the President's constitutional authority because it grants the President the authority to waive the prohibition whenever he deems it in the 'national security interest' of the United States to do so . . . . Congress cannot, however, burden or infringe the President's exercise of a core constitutional power by attaching conditions precedent to the exercise of that power."). Furthermore, certain of the conditions effectively require advance notice to Congress of military operations, which will not always be feasible or consistent with the President's prerogatives as Commander in Chief. *See, e.g.*, Statement on Signing the National Defense Authorization Act for Fiscal Year 2018, Daily Comp. Pres. Doc. No. DCPD201700906 (Dec. 12, 2017) (Pres. Trump) ("Certain other provisions of the bill . . . purport to require that the Congress receive advance notice before the President directs certain military actions. I reiterate the longstanding understanding of the executive branch that these types of provisions encompass only military actions for which such advance notice is feasible and consistent with the President's constitutional authority and duty as Commander in Chief to protect the national security of the United States.").

The fact that many of these provisions, as well as numerous other provisions throughout this bill, take the form of limitations on the use of appropriated funds—rather than outright prohibitions on presidential action—does not diminish their unconstitutionality. As a general matter, Congress may not use its power of the purse to restrict the President's constitutional authorities in cases where Congress lacks the power to regulate directly the President's use of such authorities. *See U.N. Tactical Control*, 20 Op. O.L.C. at 187–88, 188 nn. 7–8 (collecting authorities).

b. Disposition of Law of War Detainees

Section 1032 would prohibit the Department of Defense ("DOD") from expending funds until December 31, 2020 to transfer Guantanamo detainees to certain countries. The provision provides no exception for instances when a court might grant a petition for a writ of habeas corpus and order the release of a detainee.

Section 1033(a)(1) would prohibit DOD from expending funds until December 31, 2020 to "detain or provide assistance relating to the detention of any individual" at Guantanamo Bay pursuant to the law of war or a proceeding under 10 U.S.C. ch. 47A. Section 1033(a)(2) would prohibit DOD from expending funds until December 31, 2020 to "transfer or provide assistance relating to the transfer of any individual" at Guantanamo Bay pursuant to the law of war or a proceeding under 10 U.S.C. ch. 47A. Section 1033(b) would provide an exception to these prohibitions limited to "an individual who is or was detained pursuant to the law of war or a Military Commissions Act proceeding on or after May 2, 2018."

The Executive Branch has objected repeatedly to such provisions on the ground that restricting the transfer of detainees in the context of an ongoing armed conflict may interfere with the Executive Branch's ability to determine the appropriate disposition of detainees and to make important foreign policy and national security determinations regarding whether and under what circumstances such transfers should occur. In certain circumstances, such provisions would interfere with the President's constitutional "authority to make and to implement the decisions that he deems necessary or advisable for the successful conduct of military missions in the field." *U.N. Tactical Control*, 20 Op. O.L.C. at 185. Additionally, section 1032 could in some circumstances interfere with the ability to transfer a detainee who has been granted a writ of habeas corpus.

The Department recommends that sections 1032 and 1033 not be included in the conference agreement.

c. Recognition of Territorial Sovereignty

Section 1233(a) would prohibit DOD from using any Fiscal Year 2020 funds "to implement any activity that recognizes the sovereignty of Russia over Crimea." Section 1233(b) would permit the Secretary of Defense, with the concurrence of the Secretary of State, to waive this restriction only if (1) the Secretary of Defense determines that doing so would be "in the national security interest of the United States" and (2) the Secretary of Defense notifies certain congressional committees of this waiver "at the time the waiver is invoked."

These provisions would be unconstitutional. The President's constitutional authority to conduct foreign relations affords him the exclusive responsibility to recognize the legitimacy and territorial bounds of foreign sovereign nations, as affirmed in *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2087 (2015). "The formal act of recognition is an executive power that Congress may not qualify." *Id.* Congress may not condition the President's authority to determine which nation possesses sovereign authority over Crimea on a determination that doing so would be "in the national security interest," much less such a determination by a subordinate official in the Executive Branch. *See U.N. Tactical Control*, 20 Op. O.L.C. at 185–86 ("Congress cannot . . . burden or infringe the President's exercise of a core constitutional power by attaching conditions precedent to the exercise of that power."). And the waiver exception for when recognition of Russian sovereignty over Crimea would be "in the national security interest of the United States" would not be broad enough to cover all circumstances in which the President might find such recognition to be appropriate. *See, e.g., United States v. Belmont*, 301 U.S. 324, 326–27, 330 (1937) (finding that it was "within the competence of the President" to recognize the Soviet government in exchange for the assignment to the United States of claims due the Soviet Union for amounts owed by American nationals); *United States v. Pink*, 315 U.S. 203, 222–23 (1942) (same).

The Department recommends that section 1233 not be included in the conference agreement.

d. Conduct of Diplomacy

Certain provisions in the bill would dictate the terms of the President's diplomatic interactions with foreign countries. The Department recommends that these provisions be made precatory—for example, by changing "shall" to "should."

These provisions include

- Section 1099Z-4, which would add a section 73(a) to the Bretton Woods Agreements Act (22 U.S.C. §§ 286 *et seq.*) providing that "[t]he Secretary of the Treasury shall instruct the United States Executive Director at the international

financial institutions (as defined under section 1701(c) of the International Financial Institutions Act) to use the voice and vote of the United States to oppose the provision of financial assistance to a foreign government, other than assistance to support basic human needs, if the President determines that, in the year preceding consideration of approval of such assistance, the government has knowingly failed to prevent the provision of financial services to, or freeze the funds, financial assets, and economic resources of, a person described under subparagraphs (A) through (E) of section 7(2) of the Otto Warmbier North Korea Nuclear Sanctions Act of 2019." We recommend that "shall" in this provision be changed to "should."

- Section 1218, which would provide that "[a]s part of any activities of the Department of Defense relating to the ongoing peace process in Afghanistan, the Secretary of Defense, in coordination with the Secretary of State, shall seek to ensure the meaningful participation of Afghan women in that process in a manner consistent with the Women, Peace, and Security Act of 2017 (22 U.S.C. 2152j et seq.), including through advocacy for the inclusion of Afghan women leaders in ongoing and future negotiations to end the conflict in Afghanistan." We recommend that "shall" in this provision be changed to "should."

- Section 1254, which would provide that "[i]t is the policy of the United States to develop, implement, and sustain a credible deterrent against aggression and long-term strategic competition by the Government of Russia in order to enhance regional and global security and stability." We recommend that "[i]t is the policy" in this provision be changed to "[i]t should be the policy."

- Section 1260A(b), which would provide that "[i]t is the policy of the United States," among other things, "to remain a member in good standing of NATO" and "to reject any efforts to withdraw the United States from NATO." We recommend that "[i]t is the policy" in this provision be changed to "[i]t should be the policy."

- Section 1297A(b), which would provide that "[i]t is the policy of the United States," among other things, to "combat any means by which al-Shabaab obtains funding through illicit trafficking" and to "notify countries receiving United States security assistance which are identified by the Secretary of State or Secretary of Defense as major components of illicit trafficking routes that finance al-Shabaab, that continued assistance may depend on the full implementation of the obligations of such country to enforce as fully as possibly all restrictions against such trafficking." We recommend that "[i]t is the policy"

in this provision be changed to "[i]t should be the policy." As a technical correction, we also recommend that "possibly" be changed to "possible."

Dictating particular diplomatic policies that the President must or must not pursue would violate the exclusivity of the "power of the President as the sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). The imposition of such requirements would contravene the President's constitutional "authority to represent the United States and to pursue its interests outside the borders of the country," *The President's Compliance with the 'Timely Notification' Requirement of Section 501(b) of the National Security Act*, 10 Op. O.L.C. 159, 160 (1986), and "to determine the time, scope, and objectives of international negotiations," *Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011*, 35 Op. O.L.C. __, *4 (Sept. 19, 2011) ("*OSTP*") (internal quotation marks omitted). *See also Earth Island Inst. v. Christopher*, 6 F.3d 648, 652–53 (9th Cir. 1993) (Congress may not require the Executive Branch to "initiate discussions with foreign nations" or "orde[r] the Executive to negotiate and enter into treaties.").

e. Withdrawal from Treaties

Certain provisions of the bill purport to restrict the President's authority to withdraw from a treaty. The Department recommends that these provisions not be included in the conference agreement:

- Section 1231(c), which would prohibit the use of funds by the Department of Defense in Fiscal Year 2020 to "suspend, terminate, or withdraw the United States from the Open Skies Treaty" (subsection (c)(1)), unless the Secretaries of State and Defense certify to Congress that Russia is in material breach of its obligations under this treaty or that withdrawing from the treaty would be in the national security interest (subsection (c)(2)).

- Section 1240A(b), which would prohibit the use of funds by the Department of Defense in Fiscal Year 2020 "to take any action to withdraw the United States from the New START Treaty, unless the President determines and so informs the appropriate congressional committees that Russia is in material breach of the Treaty."

- Section 1260A(c), a provision within the "NATO Support Act," which would prohibit the use of any funds "to take any action to withdraw the United States from the North Atlantic Treaty, done at Washington, DC on April 4, 1949, between the United States of America and the other founding members of the North Atlantic Treaty Organization."

It is well understood that "[a]ttention to the observance of treaties is an executive responsibility," *International Load Line Convention*, 40 Op. Att'y Gen. 119, 123 (1941), and that "treaty termination is part of the Executive power, as are the negotiation, ratification and interpretation of treaties," Memorandum for the Honorable Cyrus Vance, Secretary of State, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Reservation to SALT II Conditioning Termination on Senate Approval* at 4 n.4 (Nov. 13, 1979) (emphasis in original). "That authority is not conferred by and cannot be limited by Congress." *Id.*; *see also* Alexander Hamilton, Pacificus No. 1 (June 29, 1793), in 7 *The Works of Alexander Hamilton* 76, 83 (John C. Hamilton ed., 1851) ("[T]reaties can only be made by the president and senate jointly; but their activity may be continued or suspended by the President alone."); Louis Henkin, *Foreign Affairs and the United States Constitution* 214 (2d ed. 1996) ("At the end of the twentieth century, it is apparently accepted that the President has authority under the Constitution to denounce or otherwise terminate a treaty, whether such action on behalf of the United States is permissible under international law or would put the United States in violation."). We are aware of no legal precedent holding that Congress may prevent the President from withdrawing the United States from a treaty, *cf. Goldwater v. Carter*, 617 F.2d 697, 699–708 (D.C. Cir. 1979) (en banc; per curiam) ("[W]e think it not without significance that out of all the historical precedents brought to our attention, in no situation has a treaty been continued in force over the opposition of the President."), *vacated on other grounds*, 444 U.S. 996 (1979). We regard the absence of any historical precedent of this nature as significant evidence that Congress may not restrict the President in this manner. *See Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015) (putting "'significant weight upon historical practice,'" including the absence of a particular practice, in concluding that the President had exclusive constitutional to recognize foreign governments (quoting *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014))).

Although sections 1231 and 1240A(b) would restrict only Department of Defense funds and would not prevent the President from using other funds or agencies to withdraw from these treaties, Congress may not limit the President's choice of agents to represent the United States in international engagements. *OSTP*, 35 Op. O.L.C. __, at *4 ("This core presidential power over the conduct of diplomacy includes the exclusive authority to determine the time, scope, and objectives of international negotiations and the individuals who will represent the United States in those contexts." (internal quotation marks and citations omitted)).

f. Reception of Diplomats

Certain provisions would in certain applications intrude on the President's exclusive authority to receive foreign diplomats. The Department recommends revising these provisions so that they more fully accommodate the President's reception authority.

These provisions include

- Section 1270R, which would provide that "the President shall impose the sanctions described in subsection (b)," including ineligibility for admission to the United States, on each person listed in State Department reports submitted to Congress under section 1287 of the National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, and section 7019(d) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2019, Pub. L. No. 116-6, div. F. These persons include senior government officials engaged in narcotics trafficking and illegal campaign finance in Central America. *See, e.g.*, Pub L. No. 115-232, § 1287(b)(1) ("The report . . . shall include . . . the names of senior government officials in Honduras, Guatemala, and El Salvador who are known to have committed or facilitated acts of grand corruption or narcotics trafficking[.]"), (b)(2) ("The report . . . the names of elected officials in Honduras, Guatemala and El Salvador who are known to have received campaign funds that are the proceeds of narco-trafficking or other illicit activities in the last 2 years[.]").

- Section 1292, which would provide that "[t]he President shall impose sanctions," including ineligibility for admission to the United States, on any foreign person that the President determines "is a current or former senior official of the military or security forces of Burma who knowingly" perpetrated human rights abuses, took "significant steps to impede investigations or prosecutions of" those abuses, or provided resources to support such activity.

- Section 1296A(a), which would provide that "the sanctions described in subsection (b)," which include ineligibility for admission to the United States, "shall be imposed" on "each foreign person listed in the report described in section 1281(a)(2)." (The bill does not include section 1281(a)(2), however, so the foreign persons to whom this provision would apply are uncertain.)

The President has plenary authority to "receive Ambassadors and other public Ministers." U.S. Const. art. II, § 3. Insofar as the application of these provisions would render inadmissible a foreign official whom the President wished to receive as a diplomatic agent, the provisions would interfere with the President's exercise of his exclusive reception authority. The limited waiver conditions applicable to these provisions are insufficiently broad to accommodate the full exercise of the President's authority to receive diplomats.

In particular, section 1292(f)(1) would allow the President to waive sanctions on a case-by-case basis if he determines that such waiver is "in the national interest of the United States." Standing alone, we would construe this waiver provision as sufficiently broad to accommodate the President's reception authority. But section 1292(f)(2) additionally would require that the President, "not later than the date on which such waiver will take effect, submit[] to the [relevant

congressional] committees notice of and justification for such waiver." Because the constitutional authority to receive foreign officials and representatives resides solely with the President—and may be exercised in emergency circumstances—Congress cannot require that the President provide advance notice of, or a justification for, his reception decisions. The Department recommends not including section 1292(f)(2) so that the provision would fully accommodate the President's reception authority.

Section 1296A(b)(3), in contrast, would allow the President to "waive the application of this section with respect to a foreign person who is A-1 visa eligible and who is present in or seeking admission into the United States for purposes of official business," if the President determines that such waiver is "in the national security interest of the United States." This waiver authority would not be broad enough to encompass all reasons for which the President might wish to receive a foreign government minister or diplomat. A-1 visas generally are reserved for certain high-ranking government officials, such as a head of state or ambassador. A-2 visas are for other foreign government officials and G-1, G-2, and G-3 visas are for those traveling to represent their governments at a designated international organization. *See* https://travel.state.gov/content/travel/en/us-visas/other-visa-categories/visas-diplomats.html. In contrast, the President's reception authority extends to "'all possible diplomatic agents which any foreign power may accredit to the United States.'" *Presidential Power Concerning Diplomatic Agents and Staff of the Iranian Mission*, 4A Op. O.L.C. 174, 180 (1980) (quoting *Ambassadors and Other Public Ministers of the United States*, 7 Op. Atty. Gen. 186, 209 (1855)). The Department therefore recommends revising this provision to permit waiver "with respect to a foreign person ~~who is A-1 visa eligible and~~ who is present in or seeking admission into the United States for purposes of official foreign government business," if the President determines that the waiver is "in the ~~national security~~ interest of the United States."

Finally, section 1270R(c) would allow the President to waive sanctions "if the President determines that such waiver would be in the national security interests of the United States." For the reasons stated, the Department recommends not including "national security" in this sentence.

2. Appointment of Officers

Section 560C would mandate the appointment of graduates of the military service academies as officers. The Department recommends that section 560C not be included in the conference agreement.

Three subsections of section 560C would be problematic:

- Section 560C(a) would amend 10 U.S.C. § 7453(b) to make it mandatory, by replacing "may" with "shall": "Notwithstanding any other provision of law, a

cadet who completes the prescribed course of instruction ~~may~~ **shall**, upon graduation, be appointed a second lieutenant in the Regular Army under section 531 of this title."

- Section 560C(b) would amend 10 U.S.C. 8467 to include a new subsection (b) that is mandatory: "Notwithstanding any other provision of law, a midshipman who completes the prescribed course of instruction ***shall***, upon graduation, be appointed an ensign in the Regular Navy or a second lieutenant in the Marine Corps under section 531 of this title" (emphasis added).

- Section 560C(c) would amend 10 U.S.C. § 9453(b) to make it mandatory, by replacing "may" with "shall": "Notwithstanding any other provision of law, a cadet who completes the prescribed course of instruction ~~may~~ **shall**, upon graduation, be appointed a second lieutenant in the Regular Air Force under section 531 of this title."

These provisions all would violate the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. Under the Appointments Clause, only the President, a department head, or a court of law may appoint an Officer of the United States. Congress may not through legislation dictate the appointment of an officer.

3. Dissemination of Privileged Information

A number of provisions of the bill would intrude on the President's constitutional prerogative to control the dissemination of privileged information—either by requiring reports without adequate room to engage in the constitutionally required accommodation process regarding the disclosure of privileged information, *see United States v. AT&T Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977) (doctrine of executive privilege includes "an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation"), or by imposing directives or restrictions on the Executive's use of privileged information. The Department recommends that these requirements and restrictions be made precatory—for example, by changing "shall" to "should."

The problematic provisions include

- Section 1235(b)(5), which would provide that the Secretary of Defense "shall submit" to Congress a report that includes "[t]he status of all consultations with allies pertaining to the INF Treaty and the threat posed by Russian forces that are noncompliant with the obligations of such treaty." We recommend that "shall" be changed to "should."

- Section 1240A(d)(3), which would provide that the Secretary of State "shall provide" to Congress a briefing on diplomatic communications regarding the New START Treaty, including "[t]he dates, locations, discussion topics, agenda, outcomes, and Russian interlocutors involved in those discussions" (subsection (d)(3)(B)) and "[w]hether an offer of extension of the Treaty for any length of time, or to negotiate a new agreement, has been offered by either side" (subsection (d)(3)(E)). We recommend that "shall" in section 1240A(d)(3) be changed to "should."

- Section 1296(a), which would provide that "the Director of National Intelligence shall submit" to Congress a report that includes "a determination and presentation of evidence with respect to the advance knowledge and role of any current or former official of the Government of Saudi Arabia or any current or former senior Saudi political figure over the directing, ordering, or tampering of evidence in the killing of Washington Post columnist Jamal Khashoggi" and "a list of foreign persons that the Director of National Intelligence has high confidence" participated in the killing of Jamal Khashoggi. We recommend that "shall" in section 1296(a) be changed to "should."

The President's constitutional prerogative to control the dissemination of privileged information includes determining when to withhold and when to disclose information that falls within one of the components of executive privilege, as well as to whom to disclose such information. One component of executive privilege implicated by many provisions in this bill is "information bearing on national security." *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President's authority to control access to national security information "flows primarily from th[e] constitutional investment of [the Commander in Chief] power in the President" and his position "as head of the Executive Branch and as Commander in Chief." *Id.*; *see Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 97 (1998) ("[S]ince the Washington Administration, Presidents and their senior advisers have repeatedly concluded that our constitutional system grants the executive branch authority to control the disposition of secret information."); *Access to Classified Information*, 20 Op. O.L.C. 402, 404 (1996) ("[A] congressional enactment would be unconstitutional if it were interpreted to divest the President of his control over national security information in the Executive Branch" (internal quotation marks omitted)).

Other components of executive privilege implicated by provisions in the bill are "documents and information relating to diplomatic communications," *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. O.L.C. 253, 269 (1996), and law enforcement information contained in investigative files, *see Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 117 (1984)

("Since the early part of the 19th century, Presidents have steadfastly protected the confidentiality and integrity of investigative files from untimely, inappropriate, or uncontrollable access by the other branches, particularly the legislature."); *Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files*, 6 Op. O.L.C. 31, 32–33 (1982) (same, concerning civil law enforcement files of the Environmental Protection Agency).

4. Legislative Recommendations

A number of other provisions in the bill would require the Secretary of Defense to recommend legislative measures. The Department recommends that these and similar provisions be made precatory—for example, by changing "shall" to "should."

These provisions include

- Section 569(d), providing that the Secretary of Defense "shall submit a report to Congress" that includes "[r]ecommendations for legislation to improve the long-term effectiveness of TAP [Transition Assistance Program] and the well-being of veterans" (subsection (d)(7)). We recommend that "shall" in this provision be changed to "should."

- Section 570F(f), providing that the Secretaries of Defense, Veterans Affairs, and Labor "shall submit a report to Congress" that includes "recommendations for legislation" regarding a pilot program to assist servicemembers participating in TAP that is mandated by section 570F(a). We recommend that "shall" in subsection (f) be changed to "should."

- Section 724(g)(2), providing that the Chief of the National Guard Bureau "shall submit" a report to Congress (subparagraph (A)) that includes "[a] recommendation as to whether the pilot program [to prevent suicide by members of the National Guard] should be extended or made permanent" (subparagraph (B)(v)). We recommend that ", as appropriate" be inserted after "recommendation" in subsection (B)(v).

These provisions would contravene the President's constitutional authority to "recommend to [Congress's] Consideration such Measures *as he shall judge* necessary and expedient." U.S. Const. art. II, § 3 (emphasis added); *see also Application of the Recommendations Clause to Section 802 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003*, 40 Op. O.L.C. __ (Aug. 25, 2016).

5. Advisory Commissions with Members from both the Legislative and Executive Branches

a. In the Executive Branch

Two provisions of the bill would establish or extend advisory commissions "in the executive branch" that have members from both Congress and the Executive Branch. But hybrid commissions, with members from two branches of government, raise numerous constitutional separation of powers concerns. In particular, the inclusion of individuals appointed by members of Congress on a commission "in the executive branch" violates the anti-aggrandizement principle of the separation of powers. *See The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 131 (1996); *Bowsher v. Synar*, 478 U.S. 714, 733 (1986) ("[O]nce Congress makes its choice in enacting legislation, its participation ends."); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 827 (D.C. Cir. 1993) (explaining that it is unconstitutional for Congress to place agents within an entity exercising executive powers, even when the agents' role is purely advisory); *see also* Presidential Statement on Signing the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Daily Comp. Pres. Doc. No. DCPD201800533, at 2 (Aug. 13, 2018) ("[L]egislative branch appointees preclude [the Commission], under the separation of powers, from being located in the executive branch."

To avoid violating the separation of powers, the Department recommends that the phrase "in the executive branch" not be included in the conference agreement where it appears in the relevant language. Further, to the extent that provisions establishing commissions with members from both the Legislative and Executive Branches remain in the bill, the Department would treat such commissions to be legislative entities, authorized only to perform non-executive duties.

The two provisions establishing commissions "in the executive branch" are—

- Section 240(a), which would establish "in the executive branch" the National Security Commission on Defense Research At Historically Black Colleges and Universities and Other Minority Institutions. This entity would comprise three commissioners appointed by members of the Executive Branch and eight commissioners appointed by members of Congress. Its purpose would to be review and report to the President and Congress on the state of defense research at historically black colleges and universities and other institutions of higher education at which at least 50 percent of the students are from ethnic groups underrepresented in the fields of science and engineering.

- Section 1083, which would extend the National Security Commission on Artificial Intelligence, an advisory commission established "in the executive branch" by section 1051 of the National Defense Authorization Act for Fiscal

Year 2019, Pub. L. No. 115-232. This entity is tasked by section 1051(b) and (c) of that Act with preparing reports and recommendations for the Executive Branch and Congress on how to use artificial intelligence, machine learning, and associated technologies to address the national security and defense needs of the United States. Section 1083 would amend section 1051(e) of the National Defense Authorization Act for Fiscal Year 2019 to provide that the Commission shall terminate "on March 1, 2021" instead of on October 1, 2020. Section 1051(a)(4)(A) of the National Defense Authorization Act for Fiscal Year 2019 purports to require twelve of the fifteen members of the Commission to be appointed by members of Congress.

b. In the Legislative Branch or Elsewhere

One provision of the bill would reestablish a hybrid advisory commission in "the legislative branch." Three other provisions of the bill would extend or establish hybrid advisory commissions without clear indication of where among the three branches of the federal government these commissions would be located. These provisions are—

- Section 899G, which would reestablish "in the legislative branch" the Commission on Wartime Contracting, originally created by section 841(a) of the National Defense Authorization Act for Fiscal Year 2008. This entity has two commissioners appointed by the President and six commissioners appointed by members of Congress. Its purpose is to examine and report to Congress on federal agency contracting in Iraq and Afghanistan.

- Section 1084(a), which would extend the National Commission on Military Aviation Safety established by section 1087 of the National Defense Authorization Act for Fiscal Year 2019. This entity has four commissioners appointed by the President and four commissioners appointed by members of Congress. Its purpose is to examine and report to the President and Congress on recommendations regarding certain United States military aviation mishaps.

- Section 1626, which would extend the Cyberspace Solarium Commission established by section 1652 of the National Defense Authorization Act for Fiscal Year 2019. This entity has four ex officio commissioners from the Executive Branch and ten commissioners appointed by members of Congress. Its purpose is to examine and report to Congress on a strategic approach to defending the United States in cyberspace against cyberattacks of significant consequences.

- Section 1721, which would establish a Commission on Synthetic Opioid Trafficking. This entity would have seven ex officio commissioners from the Executive Branch and eight commissioners appointed by members of Congress. Its purpose would be to develop and report to Congress on a strategic approach to combating the flow of synthetic opioids into the United States.

Sections 1084(a), 1626, and 1721 do not specify that the commissions are to be located in any particular federal government branch.

The Department has cautioned that any commission with members from both the legislative and executive branches "tends to erode the structural separation of powers." *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 251 (1989) ("*Common Legislative Encroachments*"); *see also, e.g.*, Memorandum for the Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Congressional Incursions into Areas of Executive Responsibility* at 4 (Oct. 31, 1984) (describing the Department of Justice's repeated "strong[]" opposition to congressional creation of commissions with legislative and executive branch appointees as "inconsistent with the tripartite system of government established by the Framers of our Constitution" (internal quotation marks omitted)). To relieve this concern, the Department would view the three branchless commissions listed above as legislative branch entities. However, because the Legislative Branch may not assume executive branch functions, and because members of Congress may not appoint Officers of the United States for purposes of the Appointments Clause, the commissions must be limited to "advisory, investigative, informative, or ceremonial functions and may not perform regulatory, enforcement, or other executive responsibilities." *Common Legislative Encroachments*, 13 Op. O.L.C. at 249; *see also Constitutionality of the Ronald Reagan Centennial Commission Act of 2009*, 33 Op. O.L.C. __, *3 (Apr. 21, 2009) (identifying constitutional concerns with legislative involvement in hybrid commissions with responsibilities that "extend beyond providing advice or recommendations to the Executive Branch, or participating in ceremonial activities, to exercising operational control over a statutorily prescribed national commemoration").

The Department would construe the authorities of all six of the commissions described above consistently with separation of powers and Appointments Clause principles, such that any policy recommendations issued by the commissions would not bind the Executive Branch. Further, any executive branch officer or employee serving on such a commission would need to conduct commission operations as a representative of his or her executive agency and maintain the confidentiality of executive branch information.

The practical operation of these hybrid commissions consequently poses certain constitutional difficulties. To avoid separation of powers concerns, the Department would advise executive agencies to treat demands for Executive Branch resources and information as non-binding and would advise the President that he maintains ultimate control over the dissemination

of any privileged information. The Department further recommends not including section 1721(e) related to the Commission on Synthetic Opioid Trafficking, which purports to regulate who may receive access to classified information that the commission receives. It is for the President as Commander in Chief, not Congress through legislation, to determine who may have access to national security information. *Egan*, 484 U.S. at 527.

Thank you for the opportunity to present our views. We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Prim Escalona

Prim F. Escalona
Principal Deputy Assistant Attorney General

cc: The Honorable Mac Thornberry
Ranking Member
Committee on Armed Services
U.S. House of Representatives

The Honorable James Inhofe
Chairman
Committee on Armed Services
United States Senate

The Honorable Jack Reed
Ranking Member
Committee on Armed Services
United States Senate