U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUL 17 2017

The Honorable Lamar Smith
Chairman
Committee on Science, Space, and Technology
U.S. House of Representatives
Washington, DC 20515

The Honorable Eddie Bernice Johnson
Ranking Member
Committee on Science, Space, and Technology
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Smith and Ranking Member Johnson:

The Department of Justice wishes to notify Congress of several constitutional concerns with H.R. 2809, the American Space Commerce Free Enterprise Act of 2017, as ordered reported by the Committee on Science, Space, and Technology.

1. Authority Over Foreign Affairs

Section 2(b) and section 3, proposed 51 U.S.C. § 80111, could interfere with the President's authority over foreign affairs.

- Section 2(b) would purport to establish that it is the policy of the United States that, among other things, "United States citizens and entities are free to explore and use space, including the utilization of outer space and resources contained therein, without conditions or limitations," and that "this freedom is only to be limited when necessary to assure United States national security interests are met and to authorize and supervise nongovernmental space activities to assure such activities are carried out in conformity with the international obligations of the United States under the Outer Space Treaty."

- Proposed section 80111 would require the President to "ensure that United States entity exploration and use of outer space . . . is secure from acts of foreign aggression and foreign harmful interference and is given due regard." It would also require the President to "uphold the ownership rights of space objects" of U.S. entities and give certified space objects "the full protection of the United States."

To the extent that these provisions are intended to limit the position that the President would take in international negotiations on outer space issues, they would interfere with the President's "exclusive authority 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. __, at *4 (Sept. 19, 2011) (quotation marks omitted). To address this concern, section 2 should be made precatory (e.g., by changing "It is the policy" to "It should be the policy"). In the absence of such a change, we would treat section 2 as non-binding to the extent of any interference with the President's constitutional prerogatives.

2. Interpretation of Treaties

Several provisions of the bill would purport to intrude on the power of the President to interpret treaties.

- Section 2(b)(3) would establish that it is the policy of the United States that, "to the maximum extent practicable, the Federal Government shall interpret and fulfill its international obligations to minimize regulations and limitations on the freedom of United States non-governmental entities to explore and use space."

- Section 3, proposed 51 U.S.C. § 80103(c)(2), would impose the requirement that the Secretary of Commerce determine whether applications for certifications of certain space activities are consistent with U.S. international obligations. In making that determination, the Secretary would be required to follow the following limitations: "The Federal Government shall interpret and fulfill its international obligations under the Outer Space Treaty in a manner that minimizes regulations and limitations on the freedom of United States nongovernmental entities to explore and use space"; "The Federal Government shall interpret and fulfill its international obligations under the Outer Space Treaty in a manner that promotes free enterprise in outer space"; "The Federal Government shall not presume all obligations of the United States under the Outer Space Treaty are obligations to be imputed upon United States nongovernmental entities"; and "Guidelines promulgated by the Committee on Space Research may not be considered international obligations of the United States."

- Section 3, proposed 51 U.S.C. § 80103(c)(3), would require the Secretary to presume that attestations made by applications are "sufficient to meet the international obligations of the United States pertaining to nongovernmental entities of the United States under the Outer Space Treaty addressed by such attestation" and that "reasonably commercially available efforts are sufficient to be in conformity with the international obligations of the United States pertaining to nongovernmental entities of the United States under the Outer Space Treaty."

- Section 5, proposed 51 U.S.C. § 80306, would require the President to "interpret and fulfill international obligations, including under the covered treaties on outer space, to

> minimize regulations and limitations on the freedom of United States nongovernmental entities to explore and use space."

Outside of litigation, the "function of interpreting treaties belongs *only* to the Executive." *Constitutionality of the Rohrabacher Amendment*, 24 Op. O.L.C. 161, 170 (2001); *see also id.* at 169 ("And insofar as Congress is seeking to direct the Executive Branch to advocate *Congress's* interpretation of the treaty, it is *usurping* a constitutional power that does not belong to it."). Congress "has no constitutional power whatever to insist, through legislation, that the other branches advocate or adopt Congress's preferred construction of them." *Id.* at 169-70. Thus, we recommend that these provisions be made precatory to reflect the President's role in treaty interpretation.

3. Authority Over Classified Information

Section 4(c) (proposed 51 U.S.C. §§ 80202(b)(2)(B)(ii)(I)(bb) & 80202(c)(4)(A)(ii)) would intrude on the President's authority over classified information. Proposed section 80202(b)(2)(B)(ii)(I)(bb) would require the Secretary of Commerce to provide an applicant, to the maximum extent possible, all classified information included in a rationale to deny an application for a permit to operate a space-based remote sensing system for which the applicant has the required security clearance. Proposed section 80202(c)(4)(A)(ii) would impose the same requirement when the Secretary imposes conditions on the grant of a permit.

These provisions would unconstitutionally intrude on the President's authority to control the dissemination of classified material and other information protected by executive privilege within the Executive Branch. *See Access to Classified Information*, 20 Op. O.L.C. 402, 404 (1996) (stating our Office's position "that 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"). Thus, we recommend these provisions be made precatory, perhaps by clarifying that the Secretary should provide the information where appropriate or consistent with the protection of national security.

4. Authority as Commander in Chief

Section 4(c), proposed 51 U.S.C. § 80202(c), could intrude on the President's authority as commander in chief. Section 80202(c) would allow the Secretary to deny or condition a permit for a space-based remote sensing system only where there is clear and convincing evidence of a significant threat to national security. Proposed § 80202(c)(1). It would define a significant threat to national security as one that is imminent and "cannot practicably be mitigated through changes to Federal Government activities or operations." Proposed § 80202(c)(2).

These limits do not provide for circumstances in which there are threats that are not imminent but are nevertheless believed by the President, as Commander in Chief, to be necessary to address. There may also be circumstances in which the changes to Federal Government activities and operations would themselves pose risks to national security that the President

would consider unacceptable, or where the risk associated with granting the permit is so high that the President believes it must be mitigated even though evidence supporting the risk is less than clear and convincing. Moreover, this restriction on the Executive Branch's ability to deny permits would appear to apply even during periods of armed conflict or war. In such circumstances, this restriction would interfere with the President's authority as Commander in Chief. A major object of the Commander in Chief Clause is "to vest in the President the supreme command over all the military forces,--such supreme and undivided command as would be necessary to the prosecution of a successful war." *United States v. Sweeny*, 157 U.S. 281, 284 (1895); *see also Duncan v. Kahanamoku*, 327 U.S. 304, 336 (1946) (Stone, C.J., concurring) ("The executive has broad discretion in determining when the public emergency is such as to give rise to the necessity" for emergency measures). 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." *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850). Attorney General (later Justice) Robert Jackson explained that "the President's responsibility as Commander in Chief embraces the authority to command and direct the armed forces in their immediate movements and operations designed to protect the security and effectuate the defense of the United States. . . . (T)his authority undoubtedly includes the power to dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country." *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 61-62 (1941). We thus recommend that this provision be revised to allow the denial of a permit where the activities would pose a threat to national security, without otherwise defining or limiting how the Executive Branch assesses that threat.

Thank you for the opportunity to present our views. Please do not hesitate to contact this office if we may be of further assistance on this legislation. 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,

Samuel R. Ramer
Acting Assistant Attorney General