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The Honorable Mac Thornberry
Chairman
Committee on the Armed Services
U.S. House of Representatives
Washington, DC 20515

The Honorable John McCain
Chairman
Committee on the Armed Services
United States Senate
Washington, DC 20510

Dear Chairman Thornberry and Chairman McCain:

This letter presents the views of the Department of Justice on constitutional issues raised by H.R. 2810, the "National Defense Authorization Act for Fiscal Year 2018," as passed by the House of Representatives. As we explain below, we object to a number of provisions that raise constitutional concerns.

1. Section 1232: Sovereignty over Crimea

Section 1232 would contravene the President's exclusive recognition authority and should be eliminated. Section 1232(a) would prohibit the use of any fiscal year 2018 funds "to implement any activity that recognizes the sovereignty of the Russian Federation over Crimea." Section 1232(b) would permit the Secretary of Defense, with the concurrence of the Secretary of State, to waive this restriction if (1) the Secretary of Defense determined that doing so would be "in the national security interest of the United States" and (2) the Secretary of Defense notified certain congressional committees of this waiver "at the time the waiver is invoked."

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 recently 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.* Therefore, the 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 Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182, 185–86 (1996) ("Congress cannot . . . burden or infringe the President's exercise of a core constitutional power by attaching conditions precedent to the exercise of that power."). Therefore, section 1232 would be unconstitutional, and we strongly urge that it be deleted.

2. Section 921: Transfer of Principal Deputy Under Secretary to Under Secretary of Defense for Acquisition and Sustainment; Transfer of Deputy Chief Management Officer to Chief Management Officer

Section 921(b) would violate the Appointments Clause — by authorizing the incumbents of two current offices each to assume a new office without further appointment — and therefore should be deleted. Section 921(b)(1) would provide that the current Principal Deputy Under Secretary of Defense for Acquisition, Technology, and Logistics at the Department of Defense may assume the newly created office of Under Secretary of Defense for Acquisition and Sustainment when it comes into existence on February 1, 2018. Section 921(b)(2) similarly would provide that the current Deputy Chief Management Officer may assume the newly created office of Chief Management Officer at the Department of Defense when that office comes into existence on February 1, 2018.

The Congress may add germane duties to an existing office without triggering the requirements of the Appointments Clause, *see Shoemaker v. United States*, 147 U.S. 282, 301 (1893), and may, in some circumstances, terminate one office and establish another, to be held by the same officer, if the new office has the same (and perhaps some additional) responsibilities, *see Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Supervision*, 732 F. Supp. 1183, 1193 (D.D.C.), *appeal dismissed as moot*, 903 F.2d 837 (D.C. Cir. 1990). But the transfers authorized here could not be justified upon those grounds, as they would do more than assign additional germane duties to those officials' current offices. The transfers would move them up a supervisory level, increasing both their level of responsibility and their pay. And because the provision would not abolish the current offices, the transfers could not be characterized as Congress's simultaneously terminating and re-creating certain offices and authorizing the incumbents to continue serving in the new offices.

Therefore, section 921(b) should be deleted. The initial occupants of the two new offices should be appointed in the manner provided for all subsequent appointments: by the President with the advice and consent of the Senate.

3. Sections 1241–1248: Intermediate-Range Nuclear Forces ("INF") Treaty Preservation Act of 2017

The Intermediate-Range Nuclear Forces ("INF") Treaty Preservation Act of 2017 (title XII, subtitle E) would include several statements of policy and a conditional directive to consider the Russian Federation in violation of the INF Treaty. *Id.* secs. 1243(a)(1)–(2), 1245(a), 1247(c). It also would include a determination that "the United States is legally entitled to suspend the operation of the INF Treaty in whole or in part for so long as the Russian Federation continues to be in material breach." *Id.* sec. 1243(a)(2). These provisions would intrude on the President's

constitutional authorities to determine whether to take responsive diplomatic action against a treaty partner that may be in violation of its obligations under the treaty and to determine whether to suspend or terminate the treaty in response to that possible breach. They should be eliminated or converted to expressions of the sense of Congress.

As a corollary of his exclusive foreign relations authority, and of "his constitutional responsibility to 'take Care' that the laws are faithfully executed," the President is responsible for interpreting and executing treaties. *Constitutionality of Legislative Provision Regarding ABM Treaty*, 20 Op. O.L.C. 246, 248 (1996) ("*ABM Treaty*") (quoting U.S. Const. art. II, § 3), https://www.justice.gov/file/20011/download; *see also Constitutionality of the Rohrabacher Amendment*, 25 Op. O.L.C. 161, 166 (2001) ("*Rohrabacher Amendment*"), https://www.justice.gov/file/19201/download; *United States v. The Amistad*, 40 U.S. (15 Pet.) 518, 571–72 (1841) (stating that the President's duty to execute treaties "is, if possible, more imperative" than his duty to execute statutes, "since the execution of treaties being connected with public and foreign relations, is devolved upon the executive branch"). The responsibility for the execution of treaties "necessarily includes the power to determine whether, and how far, the treaty remains in force," which in turn includes the authority to determine whether a treaty partner's "actions do or do not constitute compliance with [the treaty's] terms," *ABM Treaty*, 20 Op. O.L.C. at 249, and whether "to place the United States in breach of a treaty or even to terminate it, should the President find it advisable," *Rohrabacher Amendment*, 25 Op. O.L.C. at 166. The Restatement (Third) of Foreign Relations Law confirms this view: "Under the law of the United States, the President has the power

> "(a) to suspend or terminate an [international] agreement in accordance with its terms;
>
> "(b) to make the determination that would justify the United States in terminating or suspending an agreement because of its violation by another party or because of supervening events, and to proceed to terminate or suspend the agreement on behalf of the United States; or
>
> "(c) to elect in a particular case not to suspend or terminate an agreement."

Restatement (Third) of the Foreign Relations Law of the United States § 339 (1987); *see Charlton v. Kelly*, 229 U.S. 447, 473 (1913) (observing that one party's breach of a treaty obligation makes the treaty "voidable, not void," at the election of the other party).

To be sure, the Congress may "*abrogate* treaties" as a matter of domestic law. *Rohrabacher Amendment*, 25 Op. O.L.C. at 169 & n.16 (emphasis in original); *see La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 460 (1899) ("It has been adjudged that Congress by legislation, and so far as the people and authorities of the United States are

concerned, could abrogate a treaty made between this country and another country."); *United States v. Stuart*, 489 U.S. 353, 375 (1989) (Scalia, J., concurring in the judgment) ("[I]f Congress does not like the interpretation [of] a treaty [that] has been given by the courts or by the President, it may abrogate or amend it as a matter of internal law by simply enacting inconsistent legislation."). But the Congress may not constrain the President's discretion in determining what responsive action to take on the international plane, such as whether to suspend or terminate a treaty as a matter of international law. "Under United States law, the President has exclusive authority to determine the existence of a material breach by another party and to decide whether to invoke the breach as a ground for terminating or suspending the agreement." Restatement (Third) of the Foreign Relations Law of the United States § 335 cmt. b (1987); *see also* Louis Henkin, *Foreign Affairs and the Constitution*, 211–14 (2d ed. 1996); H. Jefferson Powell, *The President's Authority Over Foreign Affairs: An Executive Branch Perspective*, 67 Geo. Wash. L. Rev. 527, 562–63 (1999).

Accordingly, the declarations in paragraphs (1) and (2) of section 1243(a) — that it is "the policy of the United States" that the Russian Federation is in violation of the INF Treaty, and that the United States is legally entitled to suspend the INF Treaty as long as the Russian Federation remains in breach — would be unconstitutional as applied to presidential determinations whether to take responsive diplomatic action against the Russian Federation and whether to suspend or terminate the INF Treaty. The President must be free to make his own interpretations of the treaty, and his own assessments of Russian compliance, in the course of determining what actions to take on the international plane. The declaration in section 1245(a) that certain Russian actions "constitute a material breach" would for the same reason be unconstitutional, at least insofar as it purported to bind the President's discretion in interpreting the treaty. Each of these three provisions should be deleted or converted to expressions of the sense of Congress.

Finally, section 1247(c) would direct that "the United States Government shall consider" the Russian Federation to be in violation of the INF Treaty "for purposes of all policies and decisions," if the President, with the concurrence of the Secretary of State, the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and the Director of National Intelligence, were to determine

> (1) that the RS-26 ballistic missile is covered under the New START Treaty; and
>
> (2) that the Russian Federation has not agreed both (a) that the RS-26 ballistic missile is limited under the New START Treaty central limits and (b) that it will exhibit its RS-26 ballistic missile system.

Directing a determination of Russian breach "for purposes of all policies and decisions" of the U.S. Government would be again an unconstitutional attempt to govern presidential

determinations whether to take responsive diplomatic action against the Russian Federation and whether to suspend or terminate the INF Treaty. The Congress may not dictate a decisional process for the President by imposing on the President the Congress's own assessment of Russian compliance with a different treaty. Nor may the Congress make the President's assessment depend upon his subordinates' concurrence. Section 1247(c) should be deleted.

4. Sections 1022, 1024, 1034–1035, 1233, 1684–1686, 1689: Command and Control of the Armed Forces

A number of provisions in H.R. 2810 would restrict the President's ability to assign personnel to particular military functions or would direct the deployment, use, or control of military personnel or materiel on a tactical level. These provisions would contravene the President's constitutional authority as Commander in Chief and should be eliminated or made non-binding.

a. Sections 1035(a)(3) and (4) would prohibit the expenditure of funds by the Secretary of the Navy to "make any reductions to manning levels with respect to any AVENGER-class mine countermeasures ship" or "any SEA DRAGON (MH–53) helicopter." These provisions would contravene the President's indefeasible authority as Commander in Chief "to make the choice of the particular personnel who are to exercise operational and tactical command functions over the U.S. Armed Forces." *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182, 185 (1995) ("*U.N. Tactical Control*"), https://www.justice.gov/file/20051/download; *see also* Statement to the U.S. House of Representatives (June 26, 1860), *in* 7 *A Compilation of the Messages and Papers of the President* 3128, 3129 (James A. Richardson ed., 1897) (statement of President James Buchanan on signing legislation that seemed to direct the appointment of a captain in the Army Corps of Engineers as chief engineer of the Washington Aqueduct that "I deemed it impossible that Congress could have intended to interfere with the clear right of the President to command the Army and to order its officers to any duty he might deem most expedient for the public interest"); *Memorial of Captain Meigs*, 9 Op. Att'y Gen. 462, 468 (July 31, 1860) (Black, A.G.) (advising the President regarding the same legislation that "[a]s commander-in-chief of the army it is your right to decide according to your own judgment what officer shall perform any particular duty, and as the supreme executive magistrate you have power of appointment"). Both paragraphs (3) and (4) should be excised from section 1035(a).

b. Certain other provisions of H.R. 2810 purport to direct the deployment, use, or control of military personnel or materiel on a tactical level, in contravention of 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." *U.N. Tactical Control*, 20 Op. O.L.C. at 185; *see 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."). These provisions should be revised to give the relevant commanding officers discretion not to use the personnel or materiel in the manner directed:

- The prohibition in section 1034(a)(1) on expenditure of funds by the Department of Defense to "place in storage" any "U-2 or RQ-4 aircraft" should be eliminated.

- The prohibitions in section 1035(a)(1) and (2) on expenditure of funds by the Secretary of the Navy to "transfer" or "place in storage" any "AVENGER-class mine countermeasures ship" or "SEA DRAGON (MH–53) helicopter," respectively, should be eliminated.

- The directives in section 1233(b) to implement a policy to deter Russian aggression through, *inter alia*, "[i]ncreased United States presence in Europe through additional permanently stationed forces" (subsection (b)(2)(A)) and "[i]ncreased United States prepositioned military equipment to include logistics enablers and a division headquarters" (subsection (b)(2)(C)) should be converted to expressions of the sense of Congress.

- Section 1254, requiring the Secretary of Defense, in coordination with the Secretary of State, to "develop and implement a strategy to increase conventional precision strike weapon stockpiles in the United States European Command's areas of responsibility," including "necessary increases in the quantities of such stockpiles that the Secretary determines will enhance deterrence and warfighting capability of the North Atlantic Treaty Organization forces," should be eliminated or made hortatory by changing each instance of "shall" to "should."

- Section 1685(c), requiring the Director of the Missile Defense Agency, "not later than 270 days after the date of the enactment of this Act, [to] conduct a test to evaluate and demonstrate, if technologically feasible, the capability to defeat a simple intercontinental ballistic missile threat using the standard missile 3 block IIA missile interceptor," should be eliminated or made hortatory by converting "shall" to "should."

- Section 1686, requiring the Secretary to "continue the . . . deployment of anti-air warfare capabilities at each Aegis Ashore site in Romania and Poland," should be eliminated or made hortatory by changing each instance of "shall" to "should."

c. Finally, section 1022 would continue in place the general prohibition on the use of appropriated funds by the Department of Defense "to transfer, release, or assist in the transfer or

release to or within the United States, its territories, or possessions of Khalid Sheikh Mohammed or any other detainee" who has been held at Guantanamo on or after June 24, 2009, and is neither a U.S. citizen nor a member of the U.S. armed forces. Section 1024 would prohibit the use of funds to transfer Guantanamo detainees to Libya, Somalia, Syria, or Yemen and does not include an exception for when a court might order the release of a detainee to any of these countries. We have 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; *see also, e.g.*, Statement on Signing the National Defense Authorization Act for Fiscal Year 2016, 2015 Daily Comp. Pres. Doc. No. 00843, at 2 (Nov. 25, 2015) ("Under certain circumstances, the provisions in this bill concerning detainee transfers would violate constitutional separation of powers principles."), https://www.gpo.gov/fdsys/pkg/DCPD-201500843/pdf/DCPD-201500843.pdf. Both these provisions should be eliminated.

5. Section 1618: Requirement that Secretary of Defense Negotiate International Agreements on Global Positioning System

Section 1618(a)(4)(B) would interfere with the President's constitutional authority to conduct diplomacy by requiring the Secretary of Defense to develop and implement a plan to "negotiate other potential agreements relating to the enhancement of positioning, navigation, and timing." *See United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) ("[The President] alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."); *Earth Island Inst. v. Christopher*, 6 F.3d 648, 652–53 (9th Cir. 1993) ("Congress may not require the Executive to "initiate discussions with foreign nations" or "orde[r] the Executive to negotiate and enter into treaties" or other types of international agreements."). This provision should be made discretionary by inserting "as appropriate" after "agreements."

6. Section 1681: Appointment of the Director of the Missile Defense Agency

Section 1681 would give the Director of the Missile Defense Agency a six-year term but would not say who would appoint the Director. When a statute does not specify the method of appointing an officer, the constitutional default is appointment by the President with the advice and consent of the Senate. *Promotions of Judge Advocates General Under Section 543 of the National Defense Authorization Act for Fiscal Year 2008*, 32 Op. O.L.C. 70, 74 (2008), https://www.justice.gov/file/482141/download; *Designation of Acting Director of the Office of*

Management and Budget, 27 Op. O.L.C. 121, 123 n.4 (2003), https://www.justice.gov/file/18951/download; *Promotion of Army Officers*, 30 Op. Att'y Gen. 177, 179 (1913). Under existing law, the President might have authority, without a new appointment, to assign a military officer with existing, germane duties to serve as Director under the authority of 10 U.S.C. § 601 or under his authority as Commander in Chief. *Cf. Shoemaker v. United States*, 147 U.S. 282, 301 (1893) (ruling that Congress may assign germane duties to an existing office without implicating the Appointments Clause). The Secretary of Defense may also have such authority under other statutes. *See, e.g.*, 10 U.S.C. § 113(b). If the law is to be changed and an appointment required, we recommend specifying who will appoint the Director of the Missile Defense Agency — the President, with the advice and consent of the Senate; the President alone; or the Secretary of Defense — rather than leaving the question in any kind of doubt.

7. Section 1278: Conditioning Presidential Action on a Report by the Comptroller General

Section 1278(a) would prohibit the President from exercising his authority under section 516 of the Foreign Assistance Act (22 U.S.C. § 2321j) to transfer "excess defense articles that are high mobility multi-purpose wheeled vehicles" to a foreign country until "30 days after the date on which the Comptroller General . . . has submitted" a report specified in section 1278(b). Section 1278(c) would authorize the President to waive this restriction only if the President determined that the transfer would be in the national interest of the United States and he notified the Congress 30 days prior to the waiver. These two provisions would violate the anti-aggrandizement principle of the separation of powers and should be eliminated.

"Once 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' that complies with the bicameralism and presentment requirements of Article I of the Constitution." *Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986); *cf. INS v. Chadha*, 462 U.S. 919, 951–52 (1983) (explaining bicameralism and presentment restrictions on legislative power). Accordingly, it would unconstitutionally aggrandize the Congress to vest "a congressional agent" — such as the Comptroller General, *see Bowsher*, 478 U.S. at 728 (noting that the Comptroller General is "removable only at the initiative of Congress") — "with the power to exercise policy-making control over the post-enactment decisions of executive officials," such as by delaying presidential action until the Comptroller General issues a report. *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 171 (1996) (citing *Bowsher*), https://www.justice.gov/file/20061/download.

The aggrandizement here would not be eliminated by the availability of the waiver in subsection (c). Even with the waiver authority, the Comptroller General's failure to submit the report in subsection (b) still would trigger a statutory requirement that the President notify the Congress and then wait 30 days before transferring excess defense articles that are high mobility

multi-purpose wheeled vehicles. The anti-aggrandizement principle prohibits any "*formal or direct* self-aggrandizement," "no matter how limited the power thereby seized by Congress." *Separation of Powers*, 20 Op. O.L.C. at 132 (citing *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 826–27 (D.C. Cir. 1993)) (emphasis in original).

8. Section 562: Award of Medals "at the Behest of" Congress

Section 562 would direct the Secretary of Defense to award, "at the behest of and on behalf of Congress, a Congressional Defense Service Medal." If this provision permitted Congress as a body without presentment to the President, or individual members or committees of Congress, to require the Secretary to award the medal to groups of Congress's choosing, it would also raise separation of powers concerns under *Chadha* and *Bowsher*. Under those cases, Congress may not limit the President's exercise of executive power by requiring the approval of committees or members of Congress prior to a particular executive action. We recommend deleting "at the behest of" to clarify that the Secretary, rather than Congress, would determine awardees subject to the criteria in section 562.

9. Section 1661: Requirement that Nuclear Weapons Council Report to the Congressional Defense Committees on Effect of Bills Passed by a Single House of Congress

Section 1661 would amend 10 U.S.C. § 179(f) to require the Nuclear Weapons Council to notify the congressional defense committees "[i]f a House of Congress adopts a bill authorizing or appropriating funds for the Department of Defense that, as determined by the Council, provides funds in an amount that will result in a delay in the nuclear certification or delivery of F-35A dual-capable aircraft." H.R. 2810, sec. 1661, § 179(f)(6). This provision would give each chamber of Congress the authority to direct executive action — a report to the congressional defense committees — through means other than bicameralism and presentment. *See INS v. Chadha*, 462 U.S. 919, 951 (1983) ("[T]he prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."); *Bowsher v. Synar*, 478 U.S. 714, 726–27 (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."). Section 1661 should be deleted.

We recognize that each house of Congress has inherent authority to conduct hearings and issue subpoenas compelling the attendance of witnesses and the production of documents, without the enactment of legislation. *See McGrain v. Daugherty*, 273 U.S. 135, 174–75 (1927). However, this bill would not merely require the Nuclear Weapons Council to produce information for the Congress that the Council had readily at hand. It would require the Council to monitor the bills passed by each house of Congress on an ongoing basis, analyze the

budgetary effects of these bills, and notify the congressional defense committees whenever it determined that one of these bills would result in a delay in the nuclear certification or delivery of F-35A dual-capable aircraft. Moreover, this obligation would not be limited to a single triggering event, as in the case of a subpoena, and would continue indefinitely, beyond the current Congress, unlike a subpoena. Thus, amended 10 U.S.C. § 179(f)(6) would empower the houses of Congress to compel responsive action by the Executive beyond what they ordinarily might be able to compel through the exercise of their inherent subpoena authority. Thus, the imposition of this kind of ongoing monitoring and reporting obligation would appear legislative "in law and fact," *Chadha*, 462 U.S. at 952, requiring the full Congress, acting through Article I, Section 7, to impose it, and not individual houses of Congress, acting on their own.

10. Sections 1688 and 1697: Required Submission of Reports to Congress "Without Change"

Both section 1688(b)(3)(A) and section 1697(c) would require the President's agents in the Executive Branch to submit to congressional committees reports they receive from their subordinates "without change." One necessary element of the President's duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, is the supervision of executive branch communications with Congress — among other reasons, to prevent the disclosure of privileged information. "For decades, the Executive Branch has consistently objected to direct reporting requirements similar to the one[s] at issue here on the ground that such requirements infringe upon the President's constitutional supervisory authority over Executive Branch subordinates and information." *Constitutionality of the Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007*, 32 Op. O.L.C. 27, 28 (2008), https://www.justice.gov/file/477336/download; *see also Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress*, 6 Op. O.L.C. 632–33 (1982) (statutory "requirement that subordinate officials within the Executive Branch submit reports directly to Congress, without any prior review by their superiors, would greatly impair the right of the President to exercise his constitutionally based right to control the Executive Branch"), https://www.justice.gov/file/23216/download. The phrase "without change" should be excised from both provisions.

11. Section 523: Prohibiting Distribution of Intimate Visual Images

Sections 523 would raise First Amendment concerns by proscribing the distribution of certain intimate visual images. We recommend limiting the scope of section 523 to the distribution of images with "a reasonably direct and palpable connection" to "the military mission or military environment." *United States v. Wilcox*, 66 M.J. 442, 449 (C.A.A.F. 2008).

Section 523(a) would add an article 117a to the Uniform Code of Military Justice ("UCMJ") (10 U.S.C. § 917a) prohibiting persons covered by the UCMJ from engaging in the

"wrongful broadcast or distribution" of certain "intimate visual images" of others. An "intimate visual image" would include any photograph, video, film, or recording that "depicts" "the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple." 10 U.S.C. § 917a(b)(3)–(4). A person would violate article 117a by distributing such images where (1) the depicted person is identifiable, the distribution is made without the depicted person's consent, the distributor or broadcaster knows or reasonably should know that the images were made in circumstances in which the depicted person retained a reasonable expectation of privacy, and the distributor or broadcaster knows or reasonably should know that the distribution of the images is likely to cause reputational or other harm to the depicted person. H.R. 2810, sec. 523(a), § 917a(a)(1)–(3).

Section 523 would be constitutionally unproblematic in a range of applications that have a direct and palpable connection to the military mission or military environment. "While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections." *Parker v. Levy*, 417 U.S. 733, 758 (1974). Permissible applications of the provisions proposed in this bill likely include, for example, where the intimate visual images are of other members of the military; where the distributors or broadcasters explicitly identify themselves as members of the military in connection with the broadcast or distribution; or even where the images dishonor or disgrace servicemembers personally. *See United States v. Blair*, 67 M.J. 566, 571 (C.G. Ct. Crim. App. 2008) (upholding the discharge of a Coast Guard member who posted Ku Klux Klan recruitment fliers in a men's bathroom while off base on government business, explaining that "the potential effects . . . of [the accused's] conduct on the Coast Guard's reputation outweigh[ed] [his] interest in his right to speak out while on government business [off base]"); *United States v. Hartwig*, 39 M.J. 125, 128–29 (C.M.A. 1994) (affirming conviction for sending a private letter that "posed a clear and present danger to the Army's ability to effectively accomplish its mission"; explaining that the Congress may prohibit "private or unofficial conduct by an officer which 'compromise[s]' the person's standing as an officer 'and br[ings] scandal or reproach upon the service'" (quoting *Smith v. Whitney*, 116 U.S. 167, 185 (1886))). "There is a wide range of the conduct of military personnel to which" the bill "may be applied without infringement of the First Amendment." *Parker*, 417 U.S. at 760. Thus, the bill would not likely be unconstitutionally overbroad.

At the same time, the First Amendment does not give the military free license to regulate all protected speech, especially speech "on issues of social and political concern, which has been recognized as 'the core of what the First Amendment is designed to protect.'" *United States v. Wilcox*, 66 M.J. 442, 449 (C.A.A.F. 2008) (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003)). Section 523 would advance significant governmental and societal interests in protecting the privacy of intimate visual images, and the Supreme Court has recognized those interests as in certain circumstances as a legitimate basis for restricting protected speech. *See, e.g.*, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 489–91 (1975); *Bartnicki v. Vopper*, 531 U.S. 514, 533 (2001).

But the Supreme Court has pointedly reserved the question whether, and under what standards or conditions, the government could constitutionally prohibit the disclosure of truthful private information. *See, e.g.*, *Cox*, 420 U.S. at 491; *Bartnicki*, 531 U.S. at 533; *The Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989); *Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7 (1967).

To avoid First Amendment concerns, we recommend limiting section 523 to the distribution of visual images with "a reasonably direct and palpable connection" to "the military mission or military environment." *Wilcox*, 66 M.J. at 449.

12. Sections 1639, 1655, 1681, and 1699A: Mandated Legislative Recommendations

Sections 1639(b), 1655(b)(4), 1681(b)(2)(A)(ii), and 1699A(c) each would require executive branch officials under plenary presidential supervision to recommend legislative measures to the Congress, in contravention of 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), https://www.justice.gov/opinion/file/929881/download. We recommend making each of these provisions non-binding:

a. Section 1639(b) would require the Director of the National Geospatial-Intelligence Agency to submit to congressional committees "a report on the authorities necessary to conduct commercial activities relating to geospatial intelligence that the Director determines necessary to engage" in various projects. We recommend inserting "as appropriate" after "report."

b. Section 1655(b)(4) would require the Secretary of Defense to submit to congressional committees a report containing an "[i]dentification of any updates to statutory authorities needed as a result of any decision to terminate the dual-hat arrangement" regarding the Command of the U.S. Cyber Command. We recommend inserting "and appropriate" after "needed."

c. As added by section 1681(a)(1), 10 U.S.C. § 239a(b)(2)(A)(ii) would require the Secretary of Defense to include with the defense budget materials for each of fiscal years 2019 through 2023 "the specific identification, as a budgetary line item, for the funding under" a new unified major force program for missile defense and defeat programs. We recommend inserting "if appropriate" after "for the funding."

d. Finally, section 1699A(c)(2) would require the Secretary of Defense to submit to congressional committees a report that included "the identification of any legislative action or administrative action required to provide the Secretary with specific additional authorities required to fully implement" a specified pilot program. We recommend inserting "appropriate" before "legislative action."

13. Sections 1651–1652: Mandated Disclosure of National Security Information

As currently phrased, section 1651 and 1652 would require the Secretary of Defense to give notice of events (cyber operations) whose very happening constitutes sensitive national security information. In practice, Presidents have tried whenever possible to provide information to the Congress that will assist it in the performance of its legislative duties; nevertheless, "Presidents since George Washington have determined on occasion, albeit very rarely, that it was necessary to withhold from Congress, if only for a limited period of time, extremely sensitive information with respect to national defense and foreign affairs." *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 94–95 (1998). Sections 1651 and 1652 would deny the President the "'opportunity for [the] constructive *modus vivendi*, which positively promotes the functioning of our system,'" *Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. O.L.C. 481, 487 (quoting *United States v. AT&T Co.*, 567 F.2d 121, 130 (D.C. Cir. 1977)), whereby the President may balance the Congress's legitimate need for information to enable it to fulfill its legislative responsibility to create and fund a system of national defense against his responsibility as Commander in Chief to withhold information whose disclosure would threaten that same national defense. To that extent, the provisions are unconstitutional and should be eliminated or made hortatory, as follows (insertions in *italics*; deletions in ~~strikeout~~):

a. Section 1651(a) should be amended to provide that "the Secretary [of Defense] ~~shall~~ *should* promptly submit" written notice of "any sensitive military cyber operation." H.R. 2810, sec. 1651(a), § 130j(a).

b. Section 1651(a) also should be amended to provide that "the Secretary ~~shall~~ *should* promptly submit to the congressional defense committees notice in writing of . . . [t]he use as a weapon of any cyber capability that has been approved for such use under international law by a military department no later than 48 hours following such use." *Id.* § 130k(a).

c. Finally, 10 U.S.C. § 484(b)(1), as added by section 1652(a)(2), should be amended to require the Secretary's quarterly briefings to include "[a]n update, set forth separately for each geographic and functional command, that describes the operations carried out by the command and, *if appropriate,* any hostile cyber activity directed at the command."

14. Section 2828: Mandated Land Conveyance with Use Conditions

Section 2828 by its literal terms would require the Utah State University Research Foundation to accept a conveyance of land from the Secretary of Agriculture and use that land only for purposes specified by the statute. A forced conveyance of land to a State entity, such as the Utah State University Research Foundation (*see* http://www.usurf.usu.edu/), with

requirements to use that land in a certain manner, could violate the anti-commandeering principle as well as more general principles of State sovereignty embodied in the Tenth Amendment. *See New York v. United States*, 505 U.S. 144 (1992) (striking down law that required States either to take title to radioactive waste or to regulate disposal of that waste in accordance with Federal directives); *cf. Printz v. United States*, 521 U.S. 898, 935 (1997) (the Federal government "may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program"). We assume that the intent of Congress is not to force this conveyance on an unwilling recipient. Therefore, we recommend revising section 2828(a) to say that "the Secretary shall *offer to* convey" the land to the Utah State University Research Foundation.

15. Section 1073: Cybersecurity Assistance for the House of Representatives

Section 1073 would require the head of any agency, including executive and military departments, to "begin to provide appropriate assistance" within 24 hours of a request for assistance by the Speaker of the House in response to a cybersecurity incident, H.R. 2810 EH, sec. 1073(a)(1), "notwithstanding any other provision of law or any rule, regulation, or executive order," *id.* sec. 1073(a). "After initiating assistance under this section, the head of the department or establishment shall continue providing assistance until the Speaker (or Speaker's designee) notifies the head of the department or establishment that the cybersecurity incident has terminated and that it is no longer necessary for the department or establishment to provide post-incident assistance." *Id.* sec. 1073(c)(1).

If section 1073 were understood to give an executive agency under presidential supervision no choice but to respond to the Speaker's request for cybersecurity assistance, and no choice but to continue to provide that assistance, it would unconstitutionally aggrandize the Speaker of the House by empowering him to direct the administration of the Executive Branch and override lawful orders by the President. *See The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 171 (1996) (noting that, under *Bowsher v. Synar*, 478 U.S. 714 (1986), it is unconstitutional to "vest[] in a congressional agent . . . the power to exercise policy-making control over the post-enactment decisions of executive officials"); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 827 (D.C. Cir. 1993) ("The Court recalled that the Framers recognized that 'power is of an encroaching nature,' *The Federalist* No. 48, at 332 (J. Madison) (J. Cooke ed. 1961), and therefore the Constitution imposes a structural ban on legislative intrusions into other governmental functions." (citing *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 273 (1991)).

To avoid this serious separation of powers concern, we would construe the directive in section 1073(a)(1) to "provide *appropriate* assistance" on request by the Speaker as affording the executive agency in question the discretion to decline the request, including pursuant to

presidential orders. To avoid the same concern, we recommend that "appropriate" be inserted before the second appearance of "assistance" in section 1073(c)(1), so as to clarify that the Executive could prioritize unforeseen cybersecurity events or developments that might arise after initiating the provision of "appropriate assistance" under section 1073(a)(1). Without this latter change, we would consider the word "appropriate" in section 1073(a)(1) to modify all references to "assistance" in section 1073 after the Executive decides to provide it, and so would not understand section 1073(c)(1) to prevent the reallocation of executive branch resources in response to evolving cybersecurity events.

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,

Stephen E. Boyd
Assistant Attorney General

cc: The Honorable Adam Smith
Ranking Member
Committee on the Armed Services
U.S. House of Representatives

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