



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 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 ("the Department") on constitutional issues raised by H.R. 2810, the "National Defense Authorization Act for Fiscal Year 2018," as amended and passed by the Senate. The Department of Justice objects to a number of provisions in the bill that raise constitutional concerns.

1. Section 1242: Sovereignty over Crimea

Section 1242 of the bill would contravene the President's exclusive recognition authority and should be deleted. It would extend for another fiscal year section 1234 of the National Defense Authorization Act ("NDAA") for Fiscal Year ("FY") 2017, Pub. L. No. 114-328 (Dec. 23, 2016), which purports to prohibit the Department of Defense from using funds to recognize Russian sovereignty over Crimea. Section 1234(b) of the FY 2017 NDAA permits the Secretary of Defense, with the concurrence of the Secretary of State, to waive this restriction 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 "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 upon 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 1242 would be unconstitutional and we strongly urge that it be deleted.

2. Section 901: Transfer of Deputy Chief Management Officer to Chief Management Officer

Section 901(e) of the bill would authorize the incumbent Deputy Chief Management Officer to serve in the office of Chief Management Officer (“CMO”), effective February 1, 2018. The office of CMO would be created effective February 1, 2018, and henceforth would be filled by presidential appointment with the advice and consent of the Senate. H.R. 2810, sec. 901(a)(1), § 132a(a). Permitting the current Deputy CMO to serve as the CMO without further appointment would violate the Appointments Clause. Therefore, section 901(e) would be unconstitutional and should be deleted.

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). But the transfer here could not be justified on this ground. The transfer would do more than assign additional germane duties to the office of Deputy CMO — it would move the Deputy up a supervisory level, increasing both the level of responsibility and the pay. The Deputy CMO would no longer “assist[] the Deputy Secretary of Defense in the Deputy Secretary’s capacity as Chief Management Officer of the Department of Defense.” 10 U.S.C. § 132a(b) (current). Rather, the Deputy CMO, now as CMO, would answer directly to the Secretary of Defense, H.R. 2810, sec. 901(a)(1), § 132a(b), with “authority to direct the Secretaries of the military departments and the heads of all other elements of the Department with regard to matters for which the Chief Management Officer has responsibility,” *id.* § 132a(b)(6), and would “take[] precedence in the Department of Defense after the Secretary of Defense and the Deputy Secretary of Defense,” *id.* § 132a(c).

In some circumstances, the Congress also may 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 here, the Congress would be creating a new position with significant additional responsibilities and itself appointing an official to that position. The transfer could not be justified on this ground, either.

In order for the incumbent Deputy CMO to serve as CMO, he would require a new appointment in a manner consistent with the Appointments Clause. We recommend deleting section 901(e).

3. Section 1621: Demonstration of Cyber Capabilities to Adversaries

Section 1621(d) of the bill would infringe on the President's exclusive constitutional authorities to command the military, to conduct foreign relations, and to protect sensitive national security information. It would provide that "the United States shall develop and demonstrate, or otherwise make known to adversaries of the existence of, cyber capabilities to impose costs on any foreign power targeting the United States or United States persons with a cyber attack or malicious cyber activity described in subsection (a)." Section 1621(d) should be deleted.

While the Congress has broad authority to regulate the structure and composition of the military, the Constitution commits to the President alone the responsibility to command the military forces that the Congress has created. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring). "Through, or under, his orders, therefore, all military operations in times of peace, as well as war, are conducted. He has within his control the disposition of the troops, the direction of the vessels of war and the planning and execution of campaigns." 3 Westel Woodbury Willoughby, *The Constitutional Law of the United States* 1566 (1929). We have interpreted that authority, as a general matter, to extend to tactical military decisions about how best to deploy military personnel and equipment. For example, "[a]lthough Congress may decide on the weapons for which it will appropriate funds for acquisition, it may not determine how weapons in the nation's arsenal are to be used." Memorandum to Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Defense Department Letter on Landmines* (Sept. 8, 1997). "[I]t is for the President alone, as Commander in Chief, to decide whether, how, and in what circumstances the Armed Forces are to make best use of" their resources. Memorandum for Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, from Randolph D. Moss, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: S. 495*, at 2 (Apr. 17, 1997). Requiring the President to make information about the Nation's cyber capabilities known to its adversaries could undermine the President's ability to take advantage of surprise or to delay any revelation of our capabilities until an advantageous point in time. This interference with the President's tactical judgment as Commander in Chief renders section 1621(d) unconstitutional.

Moreover, section 1621(d) would contravene the President's constitutional "authority to classify and control access to information bearing on national security." *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988). It would require disclosure of sensitive information about our cyber capabilities, which the President might determine "must be kept secret if their full military advantage is to be exploited in the national interests." *United States v. Reynolds*, 345 U.S. 1, 10 (1953). Finally, requiring the President to communicate our cyber capabilities to our adversaries would impinge on the President's "basic authority to conduct the Nation's diplomatic relations." *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 *3 (Sept. 19, 2011) (“OSTP”), <https://www.justice.gov/file/18346/download> (quoting *Constitutionality of Section 7054 of the Fiscal Year 2009 Department of State, Foreign Operations, and Related Programs Appropriations Act*, 33 Op. O.L.C. __, at *4 (June 1, 2009), <https://www.justice.gov/file/18496/download>).

For all of these reasons, we recommend deleting section 1621(d).

4. **Section 1046: Minimum “Manning Levels” for AVENGER-Class Mine Countermeasures Ships or SEA DRAGON Helicopter Squadrons or Detachments**

Section 1046 of the bill would continue in force the prohibition in section 1045(a) of the NDAA for FY 2017, Pub. L. No. 114-328, on the use of funds to make any reductions to manning levels with respect to any AVENGER-class mine countermeasures ship or any SEA DRAGON helicopter squadron or detachment. This prohibition 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 (1996), and should therefore be deleted.

Presidents have asserted this authority since at least 1860, when President James Buchanan, upon signing an appropriations bill, objected to a rider that would have conditioned the availability of \$500,000 for the construction of the Washington Aqueduct on assigning a named captain in the Army Corps of Engineers to supervise the construction. President Buchanan “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” and accordingly declared his intention to treat the spending condition as merely expressing the Congress’s “preference for the work.” 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). Attorney General Jeremiah S. Black confirmed this position a month later, advising the President 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.” *Memorial of Captain Meigs*, 9 Op. Att’y Gen. 462, 468 (July 31, 1860). Section 1046 would contravene this same right and should be deleted.

5. **Section 1011: Advance Reporting of Military Action to Protect Human Health and Welfare**

Section 1011 of the bill would continue to require a report fifteen days in advance of using funds for counter-drug and counterterrorism operations in Colombia, including “[t]o protect human health and welfare in emergency circumstances, including the undertaking of rescue operations.” H.R. 2810, sec. 1011(b)(2), § 1021(a)(2)(A). This waiting period would

violate the President's constitutional authority as Commander in Chief to take immediate action to protect national security and should be eliminated.

The longstanding position of the Executive Branch is to interpret such requirements as applying only where advance notice is feasible and consistent with the President's constitutional authority and duty to protect national security. *See, e.g.,* Statement on Signing the Military Construction Appropriations Act, 2000 (Aug. 17, 1999) (President Clinton) ("The Congress has again included a provision (section 113) that requires the Secretary of Defense to give 30 days advance notice to certain congressional committees of any proposed military exercise involving construction costs anticipated to exceed \$100,000. In approving H.R. 2465, I wish to reiterate an understanding, expressed by Presidents Reagan and Bush when they signed Military Construction Appropriations Acts containing a similar provision, that this section encompasses only exercises for which providing 30 days advance notice is feasible and consistent with my constitutional authority and duty to protect national security."). The fifteen-day waiting period in section 1011 would be unconstitutional in applications in which it prevented the President from using his constitutional authority as Commander in Chief to respond immediately to a threat to human health and welfare, including by conducting a rescue operation.

6. Section 6201: Conduct of Diplomacy

Section 6201 of the bill would interfere with the President's exclusive authority to conduct diplomacy by purporting to dictate the position of the United States in diplomatic endeavors. We recommend that this provision be made hortatory or precatory. Absent these changes, we would treat the provisions in a manner consistent with the President's constitutional authority to conduct diplomacy.

Section 6201(a) would require the Secretary of Defense and the Secretary of State to "develop a strategy for advancing defense cooperation between the United States and India." Section 6201(c) would require the Secretary of Defense and Secretary of State to "make the designation required by subsection (a)(1)(B) of section 1292 of the National Defense Authorization Act for Fiscal Year 2017." That provision states that the "Secretary of Defense and Secretary of State should jointly take such actions as may be necessary to . . . designate an individual within the executive branch . . . to reinforce and ensure . . . the success of the Framework for the United States-India Defense Relationship; and . . . to help resolve remaining issues impeding United States-India defense trade, security cooperation, and co-production and co-development opportunities." Section 6201(c)(2) would further provide that the individual designated "shall promote United States defense trade with India for the benefit of job creation and commercial competitiveness in the United States."

These provisions would interfere with the President's exclusive constitutional authority to determine the time, scope, and objectives of international negotiations. *See OSTP* at *4. Congress may not require the Executive to "initiate discussions with foreign nations" or "orde[r]

the Executive to negotiate and enter into treaties,” or prevent him from doing the same. *Earth Island Inst. v. Christopher*, 6 F.3d 648, 652–53 (9th Cir. 1993).

We recommend that these provisions be made hortatory or precatory, e.g., by changing “shall” in relevant places to “should.” Absent these changes, the Executive Branch would treat the provisions in a manner consistent with the President’s constitutional authority to conduct diplomacy. We also note that the section 1292 of the National Defense Authorization Act for Fiscal Year 2017 uses “should” rather than “shall.” Subsections (b)(1)(A) and (c)(1) of the section 6201 is therefore inaccurate in stating that section 1292 “require[s]” certain actions.

7. Sections 1031 and 1033: Restrictions on Transfer of Guantanamo Detainees

The continuing restrictions on transfer of Guantanamo detainees to the United States or to certain countries in sections 1031 and 1033 of the bill would in certain circumstances contravene the President’s authority as Commander in Chief. We repeatedly have objected to such provisions upon 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. *See, 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 provisions should be deleted.

8. Section 1637: Comments of Military Advisors on Plan for Missile Warning System

Section 1637(c)(2) of the bill would require the Secretary of the Air Force to submit to the congressional defense committees a plan for a missile warning system along with the “comments” of certain military advisors on that plan, “if any.” These “comments” would be predecisional, deliberative materials subject to executive privilege. We recommend making the requirement to disclose any such “comments” precatory or discretionary, so that the President and his subordinates in the Executive Branch might “take cognizance of [the] implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of” Congress in obtaining this confidential information. *United States v. AT&T Co.*, 56 F.2d 121, 127 (D.C. Cir. 1977).

The deliberative process component of executive privilege “reaches beyond conversations with the President to protect other communications among executive branch officials ‘crucial to the fulfillment of the unique role and responsibilities of the executive branch.’” *Comm. on Oversight & Gov’t Reform v. Lynch*, 156 F. Supp. 3d 101, 109 (D.D.C. 2016) (quoting *In re Sealed Case*, 121 F.3d 729, 736–37 (D.C. Cir. 1997)); *see also Executive*

Privilege: The Withholding of Information by the Executive (S. 1125): Hearing Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary, 92d Cong. 420, 423 (1971) (statement of William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Department of Justice) (observing that "Congress has recognized the validity of claims of executive privilege," as applied to both "conversations with the President" and "decisionmaking at a high governmental level," because of the "necessity of safeguarding frank internal advice within the Executive Branch"). Because they are subject to executive privilege, the Congress may not compel the President or his subordinates in the Executive Branch to disclose these "comments" without first giving them the opportunity to balance the "executive interest in nondisclosure" against "the specific, articulated need related to the effective performance by the [Legislative Branch] of [its] constitutionally assigned functions." *Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. O.L.C. 481, 486, 487 (1982).

Therefore, we recommend making section 1637(c)(2) precatory or discretionary by changing "if any" to "if appropriate."

9. Section 6005: Office of Special Counsel Reauthorization

Section 6005 of the bill would reauthorize the Office of Special Counsel, the office charged with investigating employee whistleblower complaints, with most of its current structure and authorities. In particular, section 6005 would reauthorize protection of the Special Counsel, the officer who heads the Office of Special Counsel, who is "appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years," 5 U.S.C. § 1211(b), and cannot be removed by the President except "for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1211(a). We wish to reiterate our longstanding position that this protection from removal is unconstitutional and should be remedied by removing the Special Counsel's tenure protection. Additionally, section 6005 grants the Office of Special Counsel broad access to agency information. We would treat this provision in a manner consistent with the President's constitutional authority to control the dissemination of information protected by executive privilege within the Executive Branch.

a. Tenure Protection. Section 6005(n) would authorize the appropriation of funds to the Office of Special Counsel for fiscal years 2017 through 2022, without altering the structure of the Office or the process for appointment and removal of the Special Counsel.

Since the Office of Special Counsel was created, the Department has repeatedly expressed the view that it is constitutionally infirm because the President must have the authority to remove at will the head of an agency exercising largely executive functions. See Memorandum for John R. Bolton, Assistant Attorney General, Office of Legislative and Intergovernmental Affairs, from Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 4033, the "Whistleblower Protection Act of 1986"* at 3 (Feb. 11, 1986); Letter for Abraham Ribicoff, Chairman of the Senate Committee on Governmental

Affairs, from John Harmon, Assistant Attorney General, Office of Legal Counsel 6 (June 14, 1978). That removal restriction presents a particularly serious constitutional question, given that the Office of Special Counsel is headed by a single individual rather than a multi-person board. We have objected to bills that would impose restrictions on the President's power to remove the single-member heads of other agencies, such as the Social Security Administration. See, e.g., Memorandum for Lloyd N. Cutler, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Social Security Administration Independence Act* at 2 (July 29, 1994).

In a different context, the Supreme Court has upheld tenure protection for officers who execute the laws and do not serve on multi-member commissions. In *Morrison v. Olson*, the Supreme Court held that the President's removal authority may be circumscribed as to inferior officers who exercise a limited range of executive functions. 487 U.S. 654, 689-90 (1988). But principal officers like the Special Counsel, who perform executive functions with broad authority and long tenure, do not fall within the holding of *Morrison*. See *The President's Authority to Remove the Chairman of the Consumer Product Safety Commission*, 25 Op. O.L.C. 171, 172 (2001) (explaining that the Court in *Morrison* upheld the limitation on removal "only because the inferior officer involved performed a narrow, sharply limited, and highly unusual role that addressed the difficult issue of investigating the conduct of high-ranking Executive Branch officials"). See also *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 169 (1996); *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 253 (1989).

Congress should therefore eliminate the statutory restriction on the President's authority to remove the Special Counsel, either by deleting the second-to-last sentence of 5 U.S.C. § 1211(b) altogether (in which case the President would have the implicit power to remove the Special Counsel at will) or by deleting from the end of that sentence the words "only for inefficiency, neglect of duty, or malfeasance in office" and inserting in their place the words "at will."

b. Access to Privileged Information. Section 6005(b) would raise constitutional concerns by granting the Office of Special Counsel "timely access" to information that may be protected by executive privilege.

Section 6005(b) would revise the powers and authorities of the Office of Special Counsel to give the Office, subject to certain narrow limitations, "timely access to all records, data, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable agency that relate to an investigation, review, or inquiry conducted under—(I) section 1213, 1214, 1215, or 1216 of [title 5]; or (II) section 4324(a) of title 38." H.R. 2810 EAS/PAP, sec. 6005(b), § 1212(b)(5)(A)(i). Section 6005(b) would also, again subject to certain limitations, "require, during an investigation, review, or inquiry of an agency, the agency to provide to the Special Counsel any record or other information that relates to an investigation,

review, or inquiry conducted under—section 1213, 1214, 1215, or 1216 of [title 5]; or (II) section 4324(a) of title 38.” H.R. 2810 EAS/PAP, sec. 6005(b), § 1212(b)(5)(A)(iii). Section 6005(b) would also amend 5 U.S.C. 1212(b) to provide that “[a] claim of common law privilege by an agency, or an officer or employee of an agency, shall not prevent the Special Counsel from obtaining any material described in subparagraph (A)(i) with respect to the agency.” H.R. 2810 EAS/PAP, sec. 6005(b), § 1212(b)(5)(C)(i).

The reference to “common law privilege” may cover privileges that are components of executive privilege, such as the attorney-client and deliberative process privileges. If amended 5 U.S.C. § 1212 prohibited agency heads from withholding information that is potentially subject to executive privilege, it 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 “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”); *Authority of Agency Officials to Prohibit Employees From Providing Information to Congress*, 28 Op. O.L.C. 79, 80-81 (2004) (noting that this position is “not limited to classified information, but extend[s] to all deliberative process or other information protected by executive privilege” and explaining that Congress may not “act to prohibit the supervision [by the President] of the disclosure of any privileged information, be it classified, deliberative process or other privileged material”); *see also United States v. Nixon*, 418 U.S. 683, 705 (1974) (recognizing executive privilege and observing that “the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties”).

Consistent with the longstanding view of the Executive Branch, we would treat amended 5 U.S.C. § 1212 in a manner consistent with the President’s constitutional authority to control the dissemination of classified material and other information protected by executive privilege within the Executive Branch.

10. Sections 521 and 532: Prohibiting Distribution of Intimate Visual Images

Sections 521 and 532 of the bill would raise First Amendment concerns by proscribing the distribution of certain intimate visual images. While section 521 is capable of a construction that avoids this concern, we recommend limiting the scope of section 532 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 521 would require amending the Manual for Courts-Martial to include “distribution of a visual depiction of the private area of a person or of sexually explicit conduct involving a person” as an enumerated offense under article 134 of the Uniform Code of Military Justice (“UCMJ”) (10 U.S.C. § 934). The offense would consist of “the distribution of a visual depiction of the private area of a person or of sexually explicit conduct involving a person that

was — (1) photographed, videotaped, filmed, or recorded by any means with the consent of such person; and (2) distributed by another person who knew or should have known that the depicted person did not consent to such distribution.” H.R. 2810, sec. 521(a). Section 521(b) would define the “private area” as in UCMJ article 120c(d) (10 U.S.C. § 920c(d)): “the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple.”

Section 532(a) would add an article 117a to the 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), (7). A person would violate article 117a by distributing such images where the depicted person was identifiable, the distribution was made without the depicted person’s consent, the distributor or broadcaster knew or reasonably should have known that the images were made in circumstances in which the depicted person retained a reasonable expectation of privacy, and the distributor or broadcaster knew or reasonably should have known that the distribution of the images was likely to cause reputational or other harm to the depicted person. H.R. 2810, sec. 532(a), § 917a(a)(1)–(3).

Sections 521 and 532 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, when the intimate visual images are of other members of the military; when the distributors or broadcasters explicitly identify themselves as members of the military in connection with the broadcast or distribution; or even when 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 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)). The provisions 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 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*, 532 U.S. 514, 532–33 (2001). But the Supreme Court has pointedly reserved the question whether, and if so 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*, 532 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 532 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. We note that such a limitation is already implicit in section 521. Section 521 proposes to add an enumerated offense to the Manual for Courts-Martial to implement article 134 of the UCMJ, and article 134’s “reach is limited to conduct that is ‘directly and palpably — as distinguished from indirectly and remotely — prejudicial to good order and discipline.’” *Parker*, 417 U.S. at 753 (quoting *United States v. Sadinsky*, 14 U.S.C.M.A. 563, 565, 34 C.M.R. 343, 345 (1964)). Thus, it should not be necessary to revise section 521 in order to harmonize application of article 134 with the First Amendment.

11. Sections 511, 516, 882, and 11007: Mandated Legislative Recommendations by the Secretary of Defense

Four provisions of H.R. 2810 would require the Secretary of Defense to recommend legislative measures, 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 hortatory or precatory.

a. Section 511(1) would amend section 515(b) of the NDAA for FY 2016 to require the Secretary of Defense to assess the recommendation of the Military Compensation and Retirement Modernization Commission regarding consolidation of statutory authorities by which members of the reserve components of the Armed Forces may be ordered to perform duty. If the Secretary preferred a different approach, section 511(1) would require the Secretary to submit a draft of “legislation implementing the alternate approach by April 30, 2019.” We recommend inserting “if appropriate” after “legislation.”

b. Section 516 would require the Secretary of Defense to submit to certain congressional committees a report that included various recommendations for “[m]echaniams” to improve the career management of regular and reserve officers. H.R. 2810, sec. 516(a), (b)(1)–(7). Section 516(c) would provide that “[i]f any recommendation of the Secretary in the report required by subsection (a) requires legislative or administrative action for implementation, the report shall include a proposal for legislative action, or a description of administrative action, as applicable, to implement such recommendation.” *Id.* sec. 516(c). We recommend changing “shall” to “should.”

c. Section 882(a)(1) and (a)(3)(B) would require the Secretary of Defense to “task” the Defense Innovation Board to conduct a study that “produce[s] specific and detailed recommendations for any legislation, including the amendment or repeal of regulations,” that the Board determines necessary to meet a number of goals set forth in the provision. The Secretary of Defense would be required to submit this report to the congressional defense committees. H.R. 2810, sec. 882(b)(2). We recommend inserting “if appropriate” after “any legislation.”

d. Section 11007(b)(3) would require the Secretary of Defense to include in a report on recent hurricane damage to Defense Department property “[a] request for funding to initiate the repair and replacement of damaged facilities and assets, including necessary upgrades to existing facilities to make them compliant with current hurricane standards, and to cover any unfunded requirements for military construction at affected military installations.” We recommend inserting “if appropriate” after “request for funding.”

12. Section 2823: Mandated Land Conveyance with Use Conditions

Section 2823 of the bill could be read to compel the Wyoming Department of State Parks and Cultural Resources to accept a conveyance of certain Federal military facilities and use them as a historical site. To avoid Tenth Amendment concerns and fulfill what we believe is the true intent of the provision, we recommend revising section 2823(b) to refer to the conveyance as “authorized” rather than “required.”

Section 2823(b) would direct the Secretary of the Air Force “to ensure that the conveyances *required* in subsection (a) are carried out in accordance with applicable treaties” (emphasis added). However, section 2823(a) would not require the conveyance, but authorize it, providing that the Secretary “may” convey certain land to the Wyoming Department of State Parks and Cultural Resources “for the purpose of establishing a historical site allowing for the preservation, protection, and interpretation of the facilities.” Were section 2823(a) understood to require conveyance of the specified facilities to an element of the State of Wyoming without its consent, with use conditions attached, it 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”). It seems unlikely that this is the intent of the provision, given the permissive language in subsection (a). Nevertheless, to eliminate any confusion, we recommend changing “required” to “authorized” in section 2823(b).

13. Sections 1089 and 1094: Mandated Disclosure of National Security Information

Certain provisions of H.R. 2810 could unconstitutionally intrude on the President’s authority to control the dissemination of national security information. *See Dep’t of Navy v. Egan*, 484 U.S. 518, 527 (1988) (The President’s “authority to classify and control access to information bearing on national security . . . flows primarily from th[e] constitutional investment of [the Commander in Chief] power in the President” and the “authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief”); *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”).

Section 1089 would require the Secretary of Defense to declassify certain documents regarding servicemembers’ exposure to toxic substances, H.R. 2810 EAS/PAP, sec. 1089(a), unless the Secretary determined that declassification “would *materially and immediately* threaten the security of the United States.” *Id.* sec. 1089(c) (emphasis added). To accord with the full extent of the President’s constitutional authority, we recommend that the exception be broadened by eliminating “materially and immediately.”

Section 1094 would, among other things, require the Director of the Office of Management and Budget to maintain a list of information regarding federal government technology projects designed to improve cybersecurity and to publish that list “on a public website in a manner that is, to the greatest extent possible, consistent with applicable law on the protection of classified information, sources, and methods.” *Id.* sec. 1094(b)(7)(A)(ii). We would understand “law” here to include executive orders whereby the President exercises his constitutional authority to determine when it is appropriate to disclose classified information, but we recommend eliminating “to the greatest extent possible” to clarify that publishing the list would not be required any time it would be inconsistent “with applicable law on the protection of classified information, sources, and methods.”

14. Section 1035: Denial of Judicial Review of Claims by Guantanamo Detainees Transferred to the United States for Medical Treatment

Section 1035 of the bill would permit the temporary transfer of Guantanamo detainees to the United States for medical treatment, while restricting the claims they may bring while in the

United States. Courts likely would construe such a provision, if enacted, to permit judicial review of any colorable constitutional claims.

Section 1035 would provide, in part, that a detainee brought to the United States for medical treatment “shall not be permitted to avail himself of any right, privilege, or benefit of any law of the United States beyond those available to individuals detained at” Guantanamo. H.R. 2810, sec. 1035(d)(3). It would specify further that no court “shall have jurisdiction to hear or consider any claim or action against the United States . . . arising from or relating to any aspect of the detention, transfer, treatment, or conditions of confinement of an individual transferred under this section” — except for habeas petitions for release from custody. *Id.* sec. 1035(f).

These provisions present some litigation risk. Any alien brought to the United States would have a greater claim to constitutional protections than would aliens detained at Guantanamo Bay. *See generally United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). If an alien brought to the United States were held to possess constitutional rights, courts would be reluctant to construe statutes to bar judicial review of any such constitutional claims, *see, e.g., Webster v. Doe*, 486 U.S. 592, 603 (1988) (stating that “serious constitutional question . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim”), and may conclude that they have jurisdiction to hear certain constitutional claims brought by detainees that the courts may not have heard had the detainees remained in Guantanamo, *cf. Wang v. Reno*, 837 F. Supp. 1506, 1550 (N.D. Cal. 1993) (allowing an individual brought to the United States pursuant to 18 U.S.C. § 3508 to bring a substantive due process claim). We do not suggest any changes to the proposed text but advise that courts would be likely to construe such a provision, if enacted, to permit judicial review of colorable constitutional claims.

15. Section 1635: Actions to Bring the Russian Federation Back into Compliance with the INF Treaty

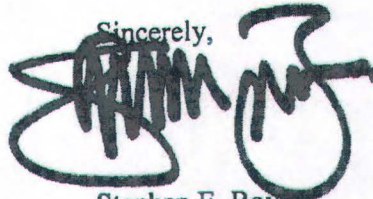
Section 1635 of the bill would set forth a putative “policy of the United States that, for so long as the Russian Federation remains in noncompliance with the INF Treaty, the United States should take actions to bring the Russian Federation back into compliance, including” the two measures specified in paragraphs (1) and (2). We would not understand the statement that “the Russian Federation remains in noncompliance with the INF Treaty” to bind the Executive (or the Judiciary) in the performance of its exclusive constitutional functions. “[I]nsofar 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.” *Constitutionality of the Rohrabacher Amendment*, 24 Op. O.L.C. 161, 170 (2001). The Congress “has no constitutional power whatever to insist, through legislation, that the other branches advocate or adopt Congress’s preferred construction of [treaties].” *Id.* at 169–70. Thus, the President would retain his “exclusive authority to determine the existence of a material breach by another party and to

The Honorable Mac Thornberry
The Honorable John McCain
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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).

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,

A handwritten signature in black ink, appearing to read 'STEVEN BOYD', written in a stylized, cursive script.

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