

Statement on Signing the National Defense Authorization Act for Fiscal Year 2020
December 20, 2019

Today, I have signed into law S. 1790, the "National Defense Authorization Act for Fiscal Year 2020" (the "Act"). The Act authorizes fiscal year 2020 appropriations for Department of Defense (DOD) national security programs, provides vital equipment modernization for our military branches, a well deserved pay raise for our service members, 12 weeks of paid parental leave to all Federal civilian employees, and, most significantly, authorizes the creation of the 6th Branch of the Armed Services, the United States Space Force as an Armed Force within the Department of the Air Force. I applaud both the Senate and House Armed Services Committees for their work on the bill and the leadership of both chambers for securing its passage. I note, however, that the Act includes several provisions that raise constitutional concerns.

Several provisions of the Act, including sections 1254, 1273, 1698(a), and 2810, purport to restrict the President's authority to manage personnel, materiel, and logistical matters in the manner the President believes to be necessary or advisable for the successful conduct of military missions and foreign affairs. While I share the objectives of the Congress with respect to maintaining the strength and security of the United States, my Administration will implement these provisions consistent with the President's authority as Commander in Chief and as the sole representative of the Nation in foreign affairs.

Other provisions of the Act, including sections 1216, 1231, 1234(a), 1242, 1258(a), 2863(a)(2), 3534, 3541, 3543(d), 3551(c)(6), (8), and (11), 6701, 7124, 7125, 7402, 7412(b)(1)(B), and 7426, purport to dictate the position of the United States in external military and foreign affairs. My Administration will treat these provisions consistent with the President's exclusive constitutional authorities as Commander in Chief and as the sole representative of the Nation in foreign affairs, including the authorities to determine the terms upon which recognition is given to foreign sovereigns, to receive foreign representatives, and to conduct the Nation's diplomacy.

Some provisions of the Act in particular, including sections 1222(a), 1234(a), 1237(b), 1686(a), and 6704, purport to require that the Congress receive a certification, notification, or report before the President directs certain military or diplomatic actions. Section 1234(a) of the Act, for example, purports to require congressional notification before providing Russia with a notice of intent to withdraw from the Open Skies Treaty. I reiterate the longstanding understanding of the executive branch that these types of provisions encompass only actions for which such advance certification or notification is feasible and consistent with the President's exclusive constitutional authorities as Commander in Chief and as the sole representative of the Nation in foreign affairs.

I note also the understanding of the executive branch that the definition of the "exclusive economic zone" in section 3532(3) of the Act is provided for purposes of the Maritime SAFE Act only (Division C, title 35, subtitle C) and does not purport to alter the definition of the United States' exclusive economic zone for all other purposes, including those set forth in Department of State Public Notice 2237 published in the *Federal Register*, Vol. 60, No. 163, August 23, 1995, pages 43,825–43,829.

Sections 1042 and 1043 of the Act purport to restrict transfers of detainees held at United States Naval Station, Guantánamo Bay. I fully intend to keep that detention facility open and to use it, as necessary or appropriate, for detention operations. Consistent with the statements I have issued in signing previous National Defense Authorization Acts, I reiterate the longstanding

position of the executive branch that, under certain circumstances, restrictions on the President's authority to transfer detainees violates constitutional separation-of-powers principles, including the President's constitutional authority as Commander in Chief.

Other provisions of the Act present concerns under the Constitution's Appointments Clause and the separation of powers.

First, section 953(b)(1) of the Act provides that the incumbent Commander of the Air Force Space Command (Commander/AFSC) may serve in the new office of Chief of Space Operations (CSO) for a term of 4 years without another appointment by the President that would be subject to the advice and consent of the Senate. This provision would raise Appointments Clause concerns if understood to allow the incumbent Commander/AFSC to accede automatically to the new office. My Administration will therefore construe section 953(b) to require either the President alone or the Secretary of Defense to appoint the Commander/AFSC as CSO. Although my Administration believes the Congress should continue to require that permanent leaders of each Armed Force be presidentially appointed and Senate-confirmed, we respect the Congress's decision to permit appointment of the CSO by a constitutional alternative method during this transitional period.

Additionally, for a 1-year period following enactment of the Act, section 953(b)(2) would authorize the Secretary of Defense to permit the CSO to serve concurrently as the Commander of the United States Space Command (Commander/USSC) without further appointment. The Secretary's exercise of that authority could displace the incumbent Commander/AFSC, however, who currently serves as Commander/USSC pursuant to an appointment by the President, with Senate confirmation, and who is thus removable only by the President. My Administration will apply section 953(b)(2) consistent with the President's removal authority over officials who exercise executive authority.

Second, section 509(a) of the Act purports to condition the authority of the Secretary of Defense to increase the retired grade of a military officer on the advice and consent of the Senate. As applied to any retired military officer, living or dead, this provision violates the separation of powers by giving the Senate a role in an executive decision that the Constitution does not explicitly allocate to the Senate. My Administration will accordingly treat the purported requirement of Senate confirmation as ineffective.

Third, section 6306 of the Act requires the Director of National Intelligence to establish a "Supply Chain and Counterintelligence Task Force" responsible for standardizing the sharing of national security information within the executive branch. The Task Force will consist of representatives of various agencies, but section 6306 does not specify the manner of their selection. To avoid Appointments Clause concerns, my Administration will construe this provision as providing for the Director of National Intelligence, a department head, to approve selections to the Task Force.

Fourth, similar to section 739 of the Act of last year's National Defense Authorization Act, section 733 deepens existing violations of the Appointments Clause, the Incompatibility Clause, and the separation of powers contained within the statute establishing the Henry M. Jackson Foundation for the Advancement of Military Medicine. I reiterate the statement I provided on August 13, 2018, regarding the parallel provision in the 2019 Act.

Fifth, section 3203 of the Act imposes a deadline on the President's nomination of a new member to the Defense Nuclear Facilities Safety Board for Senate confirmation. If the President misses the deadline, the provision requires periodic reports to the Senate explaining why and setting forth a plan to expedite the nomination. This interference with the President's determination regarding whom to nominate for an office exceeds Congress's permissible role

under the Appointments Clause. I will continue to strive to nominate officers for Senate confirmation in a timely fashion but will treat section 3203 as advisory.

Sixth, section 1034(a) of the Act, authorizing the designation of a Senior Technical Authority for each naval vessel class, may allow the exercise of significant governmental authority by a person not appointed as an officer. To comply with the Appointments Clause, my Administration will ensure that an individual serves as a Senior Technical Authority only with the approval of the Secretary of Defense.

Seventh, several provisions, including sections 1639, 1735, 1738, 6741, and 7221 of the Act, purport to establish, reauthorize or add to the authorities of hybrid commissions or boards comprising both executive branch and legislative branch appointees. Because these commissions include members appointed by the legislative branch, under the separation of powers they cannot be executive branch entities, which must be subject to the supervision of the President under Article II. My Administration, accordingly, will treat the commissions as legislative branch entities, separate from the executive branch. The executive branch members of these Commissions will remain accountable to the President in the exercise of their statutory responsibilities.

A number of provisions of the Act, including sections 1236(b)(5), 1261, 1264, 1277, 1285, 1644, 1650, 1686(b), 1691, 1711, 1722, 1744, 1753(a)(3), 3134(b)(2)(A), 3202(c), 5102(b), 5501, 3554(b)(1)(A) and (c)(1), 5502(b), 5511, 5502(b)(3)–(4), 5709(a) and (c), 5713, 5714, 5715, 5721, 5722(d)(1), 5304(b), 5602(b)(3)–(4) and (c)(1), 6310(a), 6315(b)(1), 6507(c)(1)(B), 6603(b), 6604(a) and (b), 6705, 6716, 6718(a), 6719, 6729(b), 6741, and 7221(e), purport to mandate or regulate the dissemination of information that may be protected by executive privilege, including by interfering with Presidential control of the process for making a determination that information is protected. My Administration will treat these provisions consistent with the President's constitutional authority to control information, the disclosure of which could impair national security, foreign relations, law enforcement, or the performance of the President's constitutional duties.

A number of other provisions of the Act, including sections 231(e)(2), 739(g)(2)(B)(v), 800(f)(2)(D), 1246(b)(5), 1260C(b)(2)(B), 1260E(b)(6), 5705, 6712(c)(1)(B), 6728(4), and 7145(2), purport to require the President or executive branch officials under the President's supervision to recommend certain legislative measures to the Congress. My Administration will treat these provisions consistent with Article II, section 3 of the Constitution, which provides the President the discretion to recommend to the Congress only "such Measures as he shall judge necessary and expedient."

Finally, section 633(c) of the Act purports to condition the authority of the Secretary of Defense to consolidate military exchanges and commissaries on notification by the Committees on Armed Services of both houses that they have received and accepted a Comptroller General report. This condition is an impermissible form of congressional aggrandizement in the execution of the laws other than by the enactment of a statute. Out of a spirit of comity, my Administration will wait a reasonable period of time to receive this notification but is not legally bound to do so.

DONALD J. TRUMP

The White House,
December 20, 2019.

NOTE: S. 1790, approved December 20, was assigned Public Law No. 116–92. The statement referred to Commander of Air Force Space Command General John W. "Jay" Raymond. An original was not available for verification of the content of this statement.

Categories: Bill Signings and Vetoes : National Defense Authorization Act for Fiscal Year 2020, signing statement.

Names: Raymond, John W. "Jay".

Subjects: Air Force, Department of the : Space Force, U.S., establishment; Armed Forces, U.S. : Funding; Congress : House of Representatives :: Armed Services Committee; Congress : Senate :: Armed Services Committee; Congress : Senate :: Presidential nominations, confirmation process; Cuba : Guantanamo Bay, U.S. Naval Base :: Detention of alleged terrorists; Defense, Department of : Secretary; Government organization and employees : Paid parental leave; Intelligence, Office of the Director of National; Legislation, enacted : National Defense Authorization Act for Fiscal Year 2020; Presidency, U.S. : Constitutional role and powers.

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