SEC. ___. AUTHORITY TO USE OPERATION AND MAINTENANCE FUNDS FOR CYBER OPERATIONS-PECULIAR CAPABILITY DEVELOPMENT PROJECTS

(a) IN GENERAL.—Subchapter I of chapter 134 of title 10, United States Code, is amended by inserting after section 2243 the following new section:

"§2243a. Authority to use operation and maintenance funds for cyber operations-peculiar capability development projects.

"The Secretary concerned may spend from appropriations available for operation and maintenance amounts necessary to carry out cyber operations-peculiar capability development projects costing not more than $3,000,000.".

(b) TABLE OF SECTIONS AMENDMENT.—The table of sections at the beginning of such subchapter is amended by inserting after the item relating to section 2243 the following new item:

"2243a. Authority to use operation and maintenance funds for cyber operations-peculiar capability development projects.".

Section-by-Section Analysis

This proposal would allow the Secretaries of military departments to use money appropriated for Operation and Maintenance (O&M) to develop cyber operations-peculiar capabilities up to $3,000,000. The Department of Defense (DoD) could use its O&M funds for rapid creation, testing, fielding, and operation of cyber capabilities that would be developed and used within the one year appropriation period.

Cyberspace threats are a continuing concern for the DoD. While the services are working to develop agile teams to respond to cyberspace threats and opportunities, cyber capability development is hamstrung by an acquisition funding process that is often incompatible with real-time operations and innovation. Cyber threats and opportunities must be addressed quickly; however, to address these threats, current law often requires coordinated use of up to three different types of funding: Research Development Testing and Evaluation (RDT&E), O&M, and Procurement. Additionally, the appropriate type of funds for any given project is not always clear, and coordinated use of multiple types of funds can lead to bureaucratic requirements and reviews that ultimately hamper cyber capability development within operationally relevant timeframes.

Cyber operations-peculiar capabilities are often urgently needed in hours to days for both offensive and defensive purposes. These types of capabilities can be fleeting in nature and often do not have a useful lifecycle of more than a few months after creation. Due to their short life-cycle and operational nature, funding these types of cyber capabilities with O&M funds could be determined to be appropriate. Additionally, using O&M funds increases operational flexibility and reduces planning and budgeting overhead.

Because creation of these types of cyber capabilities can include generation of new applications and tools, the use of RDT&E funding could be determined to be more appropriate in some situations. Unfortunately, the planning and programming timeline for RDT&E funds can make use of RDT&E funds to develop and field a new capability in days or weeks impossible. Moreover, operational units requiring rapid cyber capability development generally have primarily O&M funds available and must coordinate with research labs for developmental work. Such coordination takes time and may delay operations.

Finally, if a cyber operations-peculiar capability is considered to be an investment, then the use of procurement funds is required. Generally, capabilities expected to last more than a year and cost in excess of $250,000 are considered "investments" and funded with procurement funds. Investments are the costs that result in the acquisition of or additions to end items. However, unlike traditional investment items, low-cost cyber capabilities are often created and become obsolete within a one-year period. They may or may not require maintenance and they are often not incorporated into a weapon system. For all these reasons, low-cost cyber capabilities are more properly accounted as O&M expenses.

Contributing to the difficulty of determining appropriate funds for cyber-capability development is a fundamental terminology difference between fiscal law and cyberspace operations. For fiscal law purposes, "development" is the "systematic use of the knowledge and understanding gained from research, for the production of useful materials, devices, systems, or methods, including the design and development of prototypes and processes." However, software developers call all creation of code "development" whether it falls within the fiscal law definition or not. This terminology difference often creates confusion and complicates the fiscal analysis necessary to determine proper funds for cyber operations-peculiar capability development.

The fiscal gray area between situations where it is appropriate to use different types of funds causes delays and places artificial limitations on cyber operators' ability to quickly meet cyber needs. For example, current Air Force real-time operations and innovation guidance permits the use of O&M funds in certain situations where a capability "enhances and/or is linked to an existing operational system, platform[,] or capability." This limitation is intended solely to ensure that spending of O&M funds is appropriate as the modifications are considered maintenance of an existing system. Artificial limitations such as this reduce otherwise responsive and creative efforts to address real-world threats or to develop exploits of adversary vulnerabilities.

Moreover, the DoD has recently increased its use of Other Transaction Authorities (OTA) to acquire innovative technologies from non-traditional sources. Through OTA agreements, the DoD has been able to acquire innovative technologies in a fraction of the time generally necessary for traditional government acquisitions. However, the services do not agree whether and in what circumstances O&M can be used to fund activities under OTA agreements. For these reasons, operational commanders are often not able to use OTA agreements for rapid prototyping efforts with immediate operational benefits. This proposal would permit use of O&M to fund OTA agreements for cyber operations-peculiar capabilities up to $3,000,000.

Current law also creates an environment where development is halted before a capability is ready for transition to an operational user. For example, where a DoD laboratory has completed a prototype but there is no existing acquisition program available to fund the final stages of development and transition. This problem is known colloquially as the "valley of death." For small-scale cyber capabilities, often the technology could be transitioned directly from the developing DoD laboratory to the warfighter in the field if operational commanders were able to dedicate O&M funds to the final testing and transition of the capability. Accordingly, while there are many contributing factors to the technology transition problem, permitting operational commanders to dedicate O&M funds to transition promising low-cost cyber operations-peculiar capabilities needed for a rapid response would be beneficial.

This proposal would address the above concerns by permitting the use of O&M funds for the development of cyber operations-peculiar capabilities up to $3,000,000. The language of this proposal is based on a similar exception permitting the use of O&M funds for minor military construction projects under section 2805(c) of title 10, United States Code. Additionally, this proposal would increase efficiency by decreasing complex funding coordination between units and decreasing artificial limitations on cyberspace innovation. Permitting the use of O&M funds for low-cost cyber capabilities would increase operational flexibility as commanders could more efficiently re-prioritize funding as needs or opportunities arise and provide operational commanders the ability to commit O&M funds to promising technologies.

Note: This proposal uses the term "cyber operations-peculiar" consistent with the use of that term in Fiscal Year 2016 National Defense Authorization Act Section 807.

Budget Implications: The resources impacted are reflected in the table below and are included within the Fiscal Year (FY) 2021 President's Budget request.

RESOURCE IMPACT ($MILLIONS)									
Program	**FY 2021**	**FY 2022**	**FY 2023**	**FY 2024**	**FY 2025**	**Appropriation**	**Budget Activity**	**BLI/SAG**	**Program Element (for all RDT&E programs)**
Air Force	20	21	22	23	24	Air Force Operation and Maintenance	01	01050000 015E	N/A

Army	20	20	20	20	20	Army Operation and Maintenance	01	151	N/A
Navy	3	3	3	3	3	Navy Operation and Maintenance	01	1CCY	N/A
Marine Corps	3	3	3	3	3	USMC Operation and Maintenance	01	1CCY	N/A
Total	46	47	48	49	50				

Changes to Existing Law: This proposal would add a new section to chapter 134 of title 10, United States Code, the full text of which is shown in the legislative language above.