Section-by-Section Analysis

DIVISION A—DEPARTMENT OF DEFENSE AUTHORIZATIONS

TITLE I—PROCUREMENT

Subtitle A—Authorization of Appropriations

Sections 101 through 104 provide procurement authorization for the Military Departments and for Defense-wide Activities in amounts equal to the budget authority included in the President's Budget for fiscal year 2007.

Subtitle B—Multi-Year Contract Authorizations

Sections 111 through 113 provide authority for multi-year contracts for Army, Navy, and Air Force programs.

Subtitle C—Navy Programs

Section 121 would increase the limitation on the total cost of procurement for the GEORGE H. W. BUSH (CVN 77) from $5.357 billion to $6.057 billion. Absent this increase the contractor will not be able to deliver a mission-capable ship.

Section 122 of the National Defense Authorization Act for Fiscal Year (FY) 1998 imposed an original limitation on the total cost of procurement for the CVN 77 of $4.6 billion; authorized the Secretary of the Navy to adjust the cost limitation under certain circumstances; and required the Secretary to notify Congress annually of any adjustments made to the limitation. The Navy last adjusted the cost limitation to $5.357 billion in 2005, notifying Congress with the report submitted with the President's Budget for FY 2006.

The $700 million cost increase is the result of factors not covered by the Secretary's existing adjustment authority, including the costs of increased labor hours to construct the ship (including rising health care costs), increased material costs, and the anticipated costs required to cover the Federal government's contractual liability to the point of total assumption by the shipbuilder, Northrop Grumman Newport News. As a result, the cost limitation for the CVN 77 must be raised to $6.057 billion to provide for these increased costs.

Cost Implications: Absent an increase in the cost cap, funds requested in FY 2007 and FY 2008 cannot be spent.

Section 122. Because Congress denied a winner-take-all acquisition strategy in the Fiscal Year (FY) 2005 Defense Emergency Supplemental Act and FY 2006 National Defense Authorization Act for the DD(X), the Department of Defense proposes a "dual lead ship"

strategy which would maximize competitive pressure and keep design efforts on track. This section would provide authority to enter into construction of the first two DD(X)s based on funding over two years from the Shipbuilding and Conversion, Navy (SCN) appropriation.

Split funding in FY 2007 and FY 2008 would synchronize the construction of both lead ships in the same fiscal year without creating an unaffordable spike in the SCN account. A critical aspect of the Department's acquisition plan is that both shipyards be positioned on a fair and equal footing. If one shipyard started construction first, that yard would have both a real and perceived competitive and technical advantage for several years over the follow yard. Additionally, the follow shipyard would have little incentive to provide design products in timely manner to the lead yard. Split funding the first two ships would not set a precedent for future funding of additional next generation destroyers and the Navy has budgeted for funds adequate to fully fund follow ships.

Section 123 would prevent delays associated with reprogramming funds and allow the Navy to make unanticipated and emergent maintenance, repair, or mission essential modernization in a cost-effective and expeditious manner. Specifically, this section would allow the Secretary of Defense to transfer funds from the Shipbuilding and Conversion, Navy; Other Procurement, Navy; and Operations and Maintenance, Navy appropriations accounts to the original Shipbuilding and Conversion, Navy (SCN) account to finance a particular submarine Engineered Refueling Overhaul (ERO) or conversion project or aircraft carrier Refueling Complex Overhaul (RCOH) project.

Under existing law, the SCN account funds submarine EROs and conversions as well as aircraft carrier RCOHs through line items, which specify the funds available to accomplish the planned work. As a result, there may be insufficient funds to cover unanticipated repairs or mission-essential modernization work. This situation would force the Navy to suspend work until it could reprogram other funds to finance the repairs. Reprogramming actions that require Congressional notice can take up to six months for transmittal to the Congressional defense committees. Then, once at Congress, there is a 30-day wait period. This lengthy reprogramming process may result in the submarine or aircraft carrier waiting in the shipyard for several months until the Congressional notice and wait period has passed. This situation can result in an operational impact because of the delay in the return of the submarine or aircraft carrier to the fleet and in a cost impact because each month of delay costs up to $4 million.

In May 2003, the Navy narrowly averted this situation with the USS ALBUQUERQUE (SSN 706). During sea trials as part of her overhaul, the secondary propulsion motor hydraulic hoist cylinder failed. This $2 million repair caused the USS ALBUQUERQUE to be re-docked. The Navy avoided a time-consuming reprogramming only because the Portsmouth Naval Shipyard's outstanding performance of the overhaul left them with unexpended SCN funds. Another example pertains to the USS BREMERTON (SSN 698), currently undergoing ERO at Pearl Harbor Naval Shipyard. Upon initial inspection of its hydraulic system, significant contamination was discovered necessitating an extensive, unplanned flushing and repair effort estimated at $24 million.

An example of this situation with a carrier refueling complex overhaul occurred during the early stages of the RCOH of the USS NIMITZ (CVN 68). During an open and inspect work item on turbine generators, it was discovered that all turbine generator rotors had to be replaced, at $1 million per rotor and a total cost of $8 million. The impact was early expenditure of Emergent and Supplemental (E&S) funds, which are designed to cover all within-scope growth for the entire 36-month availability. Early expenditures of these funds reduces the allowable spend rate over the remainder of the availability, making it more difficult to complete all additional planned growth work with remaining funds. This section would have provided the flexibility to minimize the impact of this unanticipated repair on the overall RCOH. A further example of emergent repair is the failure of a generator on the USS EISENHOWER (CVN 69) late in the RCOH that had a repair effort estimated at $7 million. In these cases, the Navy has taken extraordinary measures to defer work to post-overhaul periods in order to complete the overhauls with requisite testing and certifications. Deferrals result in the Fleet absorbing the cost of the work and impacting the ships' post-overhaul schedules.

SCN availabilities currently in progress include seven submarine EROs, three SSGN conversions, and one aircraft carrier RCOH. The Future Years Defense Program includes six more EROs and one RCOH (plus AP for two later RCOHs). The Navy's nuclear submarines and aircraft carriers are critical and essential parts of the Global War against Terror. Delays in submarine or aircraft carrier maintenance and repair, or the inability to install mission essential modernization, would gravely impair the ability to accomplish their crucial mission in defense of our nation.

Cost Implications: This section would allow flexibility in funding EROs and RCOHs by increasing the SCN account while decreasing other appropriations. Because this section addresses unforeseen repairs and mission-essential modernization, the Department of Defense cannot estimate in advance the precise amount of any future increase.

Section 124. Section 126 of the National Defense Authorization Act for Fiscal Year 2006 (Public Law 109-163), amended section 5062 of title 10, United States Code, to require the Navy to maintain no fewer than 12 operational aircraft carriers. It also authorized not more than $288 million for repair and maintenance to extend the life of the USS JOHN F. KENNEDY (CV 67). This section would eliminate the requirement for a minimum of 12 carriers and fulfill a recommendation of the Quadrennial Defense Review.

The Quadrennial Defense Review's recommendation, as approved by the Secretary of Defense, calls for the Navy to maintain only 11 operational aircraft carriers. Likewise, the President's Budget for Fiscal Year (FY) 2007 reflects the existence of only 11 carriers.

Cost Implications: This section would result in a cost savings of $2.084 billion through FY 2011.

TITLE II—RESEARCH, DEVELOPMENT, TEST, AND EVALUATION

Subtitle A—Authorization of Appropriations

Section 201 provides for the authorization of Military Departments and Defense-wide research, development, test, and evaluation appropriations in amounts equal to the budget authority included in the President's Budget for fiscal year 2007.

Subtitle B—Missile Defense Programs

Section 211 would extend authority through Fiscal Year 2008 (FY) for the Department of Defense to use Research, Development, Test and Evaluation (RDT&E) funding to develop and field ballistic missile defense capabilities into future years.

In December 2002, the President directed the Department of Defense (DoD) to field a missile defense capability, beginning in 2004, and continuously to improve on that capability over time. The Department executes that direction through the Missile Defense Agency (MDA). The MDA uses an evolutionary, capability-based acquisition approach to field Ballistic Missile Defense System (BMDS) capabilities and improve those capabilities through the spiral development, and the subsequent fielding, of incremental upgrades to individual BMDS elements and components.

The MDA is funded almost entirely by Defense-wide RDT&E funds. In section 231 of the Ronald W. Reagan National Defense Authorization Act for FY 2005 and section 233 of the National Defense Authorization Act for FY 2006, Congress has supported the President's directive by authorizing the RDT&E funds appropriated to the MDA to be used for fielding purposes since fielding requires a range of activities that cross traditional fiscal lines. Examples of necessary expenses related to fielding that go beyond RDT&E include, but are not limited to, Military Construction (for buildings, facilities and improvements necessary to field missile defenses) and Operation and Maintenance (for operating and sustaining the fielded system).

The need for this legislation flows from the DoD's evolutionary approach to the development and fielding of missile defenses. There is no final or fixed missile defense architecture. Rather, the composition of missile defenses, including the number, type, and location of fielded elements and components, will change over time to meet changing threats and to take advantage of technological developments. By authorizing the MDA to use RDT&E funds for fielding purposes, Congress has provided the Director the flexibility to employ innovative technologies and capabilities across the entire spectrum of agency activities (research, development, construction, test and evaluation, fielding, and operational support).

In requesting this continued authority, the MDA has considered section 223a of title 10, United States Code (enacted in section 223 of the National Defense Authorization Act for FY 2004), which requires the Secretary of Defense to submit with the annual budget request the potential dates that individual missile defense program elements will be available for fielding, and the estimated dates that the elements will be transferred to a Military Department. As a general principle, procurement and other non-RDT&E functions should be carried out by the Military Departments.

A more flexible approach is required for BMDS development. Since research, development, test and evaluation of BMDS elements and components must continue, some number of BMDS elements and components will remain a part of the BMDS test bed even after being fielded as part of the initial capability. As a result, there may not be a clean break between development and initial operational use. Similarly, there may not be a clean break between the MDA's need to continue development while at the same time working with a Military Department to start integration of individual elements or components into the Military Department's budget and, at the appropriate time, its force structure. Elements and components will need to be evaluated and transfers to a Military Department planned on an individual basis within the context of concurrently developing and operating a single BMDS. The length of time that shared responsibilities may be necessary will be tailored to each element or component.

The essential advantage offered by this approach is that the Secretary of Defense will meet emerging challenges and field militarily useful capabilities within the shortest possible times. This legislation is necessary to fully realize those advantages by providing the MDA with the funding flexibility it needs to use its RDT&E appropriation to develop, test, construct, field, and support BMDS elements and components that are not ready for transfer, but which have a militarily-useful capability and should be fielded as components of a layered missile defense while development continues. This would allow the MDA to take full advantage of the spiral development and capabilities-based acquisition approach.

Section 212. Section 212(c) of the National Defense Authorization Act for Fiscal Year 2000 requires the Secretary of Defense to certify annually the stability of the technology base when the science and technology (S&T) budget is not increased by at least two percent per year above the rate of inflation over the budget for that program from the previous fiscal year. This section would eliminate the requirement. This section also would eliminate the requirement for the Defense Science Board to submit a report to the Secretary and Congress assessing the impact on defense technology and national defense.

The language was written to address inadequate S&T funding but is no longer necessary. The Fiscal Year (FY) 2000 S&T budget was $7.8 billion. Since then, the S&T budget has increased over 25 percent, adjusted for inflation, with an FY 2007 funding request of $11.1 billion. In addition, yearly comparisons under the current language are subject to annual budgetary perturbations, as they use the prior year as a baseline. A more important metric is long-term stability, level of effort funding. In addition, the FY 2007 S&T budget represents the largest request, in constant dollars, since the initiation of the current budget process in 1962.

The Defense Science Board report is unnecessary. During budgetary deliberations, the Secretary considers the competing demands across the Department and determines the proper balance among near- and long-term priorities.

Subtitle C—Other Matters

Section 221 would extend by five years the Defense Advanced Research Project Agency's (DARPA) authority to award prizes for outstanding technical accomplishments; the authority will otherwise expire on September 30th, 2007.

DARPA has used its prize authority for "inducement prizes." This involves offering a prize to whomever first achieves a clear and specific technical challenge. By publicizing an exciting challenge while forgoing the usual process of soliciting proposals and administering contracts, prizes stimulate broad technical progress in a field. Most importantly, prizes attract new ideas, talent and organizations to a technical area, in many cases people who would not ordinarily deal with the Department of the Defense (DoD) nor the administrative requirements of government contracting. By paying only for results, not attempts, prizes attract more investment to an area than the purse offered. And prizes can excite great interest in a technical field among educators and students. Two famous prizes were the British prize for measuring longitude at sea and the prize Lindbergh won for his flight across the Atlantic. Both were won by "outsiders" using highly unconventional approaches.

To date, DARPA has conducted two "Grand Challenges", offering prizes for a completely autonomous ground vehicle that can travel roughly 150 miles across rugged desert terrain along a prescribed route in under 10 hours. The goal was to attract new talent, ideas and attention to the problem of autonomous ground vehicles; such technology would have great value in a conflict like that in Iraq. While no one collected the $1 million prize of the first Grand Challenge in March 2004, it generated great excitement. There were 106 initial entries, and the 15 teams finally competing came from companies, universities and even a high school. At least 20 noteworthy technologies were identified. The second Grand Challenge in October 2005, with a $2 million prize, attracted even wider attention, with 195 initial entries. Twenty-three teams, 14 of them from universities, qualified to compete on the 132-mile route, which included a treacherous mountain pass. Five vehicles completed the course; the fastest won the prize with an average speed of over 19 miles per hour. One of the finishing teams was fielded by a small insurance company from Louisiana. Twenty-two of the vehicles went further than furthest vehicle did in 2004. Clearly, the prize competition drove enormous technical progress in the 19 months between the two events. The Grand Challenge and the Ansari X-Prize have helped revitalize interest in prize competitions; the National Aeronautics and Space Administration has begun to sponsor them as well now.

This section would extend the authority for another five years. It would preserve an important tool for DARPA to use to reach new performers. It would also preserve a powerful way to promote interest in DoD's science and engineering challenges among students.

TITLE III—OPERATION AND MAINTENANCE

Subtitle A—Authorization of Appropriations

Section 301 provides for authorization of the operation and maintenance appropriations of the Military Departments and Defense-wide activities in amounts equal to the budget authority included in the President's Budget for fiscal year 2007.

Section 302 authorizes appropriations for the Defense Working Capital Funds and the National Defense Sealift Fund in amounts equal to the budget authority included in the President's Budget for fiscal year 2007.

Section 303 authorizes appropriations for other Department of Defense Programs for the Defense Health Program; for Chemical Agents and Munitions Destruction, Defense; for Drug Interdiction and Counter-drug Activities, Defense-Wide; and for the Defense Inspector General in amounts equal to the budget authority included in the President's Budget for fiscal year 2007.

Subtitle B—Environmental Provisions

Section 311 would allow cooperative agreements entered into for environmental restoration at defense facilities to extend beyond the present two-year limitation when the agreements are funded out of either the Department of Defense Base Closure Account 1990 or the Department of Defense Base Closure Account 2005 established by sections 2906 or 2906A of the Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101–510; 10 U.S.C. 2687 note).

Under 10 U.S.C. 2701(d), the Department of Defense has authority to enter into reimbursable agreements with other Federal agencies, state or local governments, Indian tribes, or nonprofit conservation organizations to assist the Department in carrying out its environmental restoration responsibilities under the Defense Environmental Restoration Program. Cooperative agreements entered into under the authority of 10 U.S.C. 2701(d) are not actually funded by operation and maintenance (O&M) appropriations. They are paid out of funds from either the Environmental Restoration Account (ERA) or one of the two base closure accounts. These three accounts do not expire as do O&M accounts (although, in the case of the ERA, the funds take on the character of the account they are transferred into, usually an O&M account). The impact of this is that, for ERA funded agreements, paragraph (2) of section 2701(d) extends what normally would be a one-year agreement (using O&M-characterized ERA funds) into a two-year agreement; for agreements funded using the base closure accounts, paragraph (2) limits what would be indefinitely funded agreements to only two years. The impact on the base closure accounts was not intended when paragraph (2) was enacted. This section would correct this over-extension of the language of 10 U.S.C. 2701(d)(2) and return the flexibility necessary for proper functioning of the Base Closure and Realignment program.

Section 312 would authorize the Secretary of Defense to reimburse the Moses Lake Wellfield Superfund Site Special Account within the Hazardous Substance Superfund established by section 9507 of the Internal Revenue Code of 1986 for costs incurred by the United States Environmental Protection Agency (EPA) in overseeing a remedial investigation/feasibility study under CERCLA being performed by the Department of Defense under the Defense Environmental Restoration Program at the Former Larson Air Force Base.

The Army and the EPA entered into an interagency agreement on March 2, 1999 covering the Army's performance of a remedial investigation/feasibility study at the Former

Larson Air Force Base. Under the terms of the agreement, the Army agreed to make a formal request for authorization and appropriations to provide reimbursement of the EPA's oversight costs if costs could not be recovered from other potentially responsible parties. To date, no costs have been recovered.

On January 6, 2005, the EPA presented a bill to the Army for its oversight costs incurred from April 1, 2003 to March 31, 2004:

Bill No. 102605T020 (January 6, 2005) $111,114.03

In the Conference Report accompanying the National Defense Authorization Act for Fiscal Year 2001 (H. Rept. 106-945, at page 761), the Conference Committee directed "the Department of Defense and the military departments to continue to seek congressional authorization prior to reimbursing EPA for any oversight costs incurred at environmental restoration sites where DOD or the military departments have incurred liability under CERCLA."

This section would authorize the Army to reimburse EPA $111,114.03 in oversight costs.

Section 313 would clarify the application of the conformity provisions of the Clean Air Act to avoid unnecessarily restricting the flexibility of Department of Defense (DoD), State, and Federal regulators to accommodate new or realigned military readiness activities into applicable air pollution control schemes. This section would maintain the DoD's obligation to conform its military readiness activities to applicable State Implementation Plans (SIPs), but would give the DoD three years to demonstrate conformity. The three-year extension could be particularly important for new weapon system beddowns or base realignments in recently designated nonattainment areas for either the new 8-hour Ozone or fine particulate (PM2.5) standards. The applicable SIPs for these recently designated nonattainment areas may lack the full range of options normally relied upon to demonstrate that military readiness activities conform, or they may lack the required Environmental Protection Agency approval, or both. In addition, under the requirements of current law, it is becoming increasingly difficult to base military aircraft near developed areas.

Section 314 addresses application of the Solid Waste Disposal Act (SWDA) (also known as the Resource Conservation and Recovery Act (RCRA)) and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) to military readiness activities.

Subsection (a)(1) would exclude military munitions, including unexploded ordnance, and the constituents thereof from the definition of "solid waste" under the SWDA when the Department of Defense (DoD) deposits such items on an operational range incident to normal use, and such items remain thereon. Subsection (a)(2) provides that the exclusion in subsection (a)(1) does not apply to certain listed activities or circumstances such as traditional waste management activities like burial or land-filling, migration off an operational range, or firing off range. Subsection (a)(2) additionally provides that the exclusion in subsection (a)(1) ceases to apply once the operational range on which the items were deposited ceases to be an operational

range. Subsection (a)(3) explicitly preserves the authority of federal, state, interstate, and local regulatory authorities to determine when, after an operational range ceases to be an operational range, these items become a hazardous waste subject to the Act.

Subsection (b)(1) would exclude from the definition of "release" under CERCLA the presence of military munitions, including unexploded ordnance, and the constituents thereof, that the DoD deposited incidental to normal use on an operational range and that remain thereon. Subsection (b)(2) provides that the exclusion in subsection (b)(1) does not apply to certain listed activities or circumstances, such as migration off an operational range or firing off range.

Subsection (b)(2) additionally provides that the exclusion in subsection (b)(1) ceases to apply once the operational range on which the items were deposited ceases to be an operational range. Subsection (b)(3) explicitly preserves the President's authority to address an imminent and substantial endangerment to the public health, welfare, or the environment under section 106(a) of CERCLA.

Subsection (c) provides definitions of terms, including incorporating by reference terms already defined in title 10, United States Code.

Subsection (d) reaffirms that the exclusions set forth in subsections (a)(1) and (b)(1) do not apply once the operational range ceases to be an operational range.

Subsection (e) reaffirms the DoD's authority to protect the environment, safety, and health on operational ranges.

As noted above and reiterated in subsection (d), this section would have no effect on the legal requirements applicable to military munitions, including unexploded ordnance, or the constituents thereof, once the range on which they were deposited ceases to be an operational range. These provisions would restrict the application of certain authorities under CERCLA and RCRA for covered munitions while those ranges remain operational. Application of those same authorities when the range ceases to be an operational range is not affected by these two provisions. Nor would this section place any restriction on the applicability of the Safe Drinking Water Act on or off of an operational range. Nothing in this section affects a private party's right of action against the United States or any of its agencies to recover costs expended in the clean up of military munitions, including unexploded ordnance, and the constituents thereof, that are present on property formerly operated (directly or through a contractor) or formerly owned by the United States.

Section 315. The Toxic Substances Control Act (Public Law 94-469 (1976)) (TSCA) prohibits importing polychlorinated biphenals (PCBs). The Environmental Protection Agency (EPA) Administrator, however, may grant a waiver of this prohibition. A waiver may only last for up to one year.

The Defense Logistics Agency (DLA) -- the Department of Defense's property disposal agent – has encountered problems in the disposal of PCBs. For instance, DLA could not find a

means for in-country disposal of material owned by U.S. forces in Japan. Although a one-year waiver was eventually obtained, it took approximately two years to obtain it as the EPA uses notice-and-comment rulemaking. DLA anticipates future waivers for various foreign countries will be required.

Notwithstanding the processing time associated with a waiver, DLA may encounter situations where a one-year exemption period may be too short. This section only allows the EPA Administrator the flexibility to grant, in appropriate cases, exemptions for up to three years. It neither changes the public comment process and other TSCA procedures, nor the person and agency which may grant the exemption.

Subtitle C—Workplace and Depot Issues

Section 321 would make permanent the exclusion of work performed by non-Federal personnel at designated Centers of Industrial and Technical Excellence from the 50 percent limitation on contracting for depot maintenance (10 U.S.C. 2466(a)) if the personnel performing the work are provided by private industry or other entities outside the Department of Defense pursuant to a public-private partnership. Currently, the exemption is limited to funds made available in fiscal years 2003 through 2009.

Placing limits on the exemption inhibits private industry interest in establishing public-private partnerships that, by their nature, are most effective on a long-term basis. The existing time limitation seriously impedes the ability of both public and private sector parties to achieve the benefits of this authority. The time limitation also discourages starting any efforts because of the potential adverse impact when the authority expires, and prevents any significant and often necessary capital investments, the expense of which is normally amortized over longer periods.

Making the exclusion permanent would provide for the insertion into the depots of new and advanced technologies with associated workloads. It also would enable Federal Government personnel to work side-by-side with their contractor counterpart to gain additional skills, and provide for the long-term viability of the depots.

Subtitle D—Outsourcing

Section 331 would allow a military department to contract for security-guard services at installations being realigned, for a period not to exceed one year, in order to safely relocate munitions and associated equipment as well as high-value items located in temporary storage areas. Existing law only permits the provision of contract services at bases that are being closed, and then only through local governments. This section would allow for the utilization of security guards during periods of peak risk requiring security augmentation—for instance, during the large-scale movement of weapons from storage areas.

At closing installations, there generally are sufficient personnel during the drawdown to allow some to be detailed into such temporary security functions. At a realigning installation, there is no such pool of personnel to draw from. Because the military security forces are

currently in particularly high demand for deployment and may remain so during the implementation of the 2005 round of base closures and realignments, and because munitions relocations and storage of high-value items in temporary locations are particularly security-intensive events, it is critical that this temporary authority be provided to ensure the safe and secure movement of munitions and high value items.

Cost Implications: Each security guard would cost about $80,000 for one year. The total cost of any contracts would be based on the number of risk events that require security augmentation and the specific level of augmentation at each location. Since this is a base closure workload, the use of base closure funding is anticipated.

Section 332. Subparagraph (l)(2)(A) in 44903 of title 49, United States Code, exempts passengers and property from the requirements of Chapter 449 of title 49, United States Code, carried by aircraft employed to provide charter transportation to members of the armed forces. The amendments proposed in this section would expand the scope of this exemption to include all cargo aircraft chartered by the Department of Defense, and eliminate overlapping and limiting provisions in other statutes.

As written, the property exempted is limited to what is carried on passenger flights and does not address all cargo aircraft chartered by the armed forces. The intent of the exemption is to facilitate the ability of the Department of Defense to carry out its duties related to national defense by not subjecting chartered aircraft to security requirements intended for commercial and civil operations. The need for this exemption applies equally to aircraft chartered by the Department of Defense to transport cargo or a combination of cargo and passengers. In addition, the passenger manifest requirements exempt from oversight in Chapter 449 are also contained in section 1221 of title 8, United States Code. The exemption from one but not the other manifesting requirement significantly diminishes the value of the exemption with no resulting benefit to the Department of Defense or the other involved agencies.

As the security protections contained in Chapter 449 of title 49, United States Code, may be applied in some cases to enhance the existing Department of Defense programs to protect the safety and security of air carriers and passengers flying under contract with the Department, new subparagraph 44903(l)(2)(C) would allow the Secretary of Defense to apply those portions of the law that could be utilized without impacting mission effectiveness. The subparagraph would also encourage the Secretary of Homeland Security and the Secretary of Transportation to design their programs, where possible, to be interoperable with Department of Defense systems and programs. Such cooperation would prevent duplication of effort where not needed because of mission requirements.

Section 333. In subsection (a), the Department of Defense proposes adding a new paragraph to section 332(b) of the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (the NDAA for FY 2003) to provide much-needed coverage for "increased performance" of security-guard functions that is not addressed by the current law, but is important to help fight the Global War on Terrorism. First, the Department urges Congress to consider authority that the Department could use to replace security-guard personnel deploying

in support of a contingency operation, thus maintaining home station security. Second, the Department urges Congress to consider authorizing a period of performance immediately prior to, and after, a deployment, to allow for replacement during pre-deployment training and post-deployment leave/recovery. Deployments increasingly result in shortfalls of security-guard personnel at home stations. Thus, it is essential that the Department be authorized to contract for the full spectrum of security guard functions in those circumstances, and not just in the event that security requirements have increased since 9/11.

In subsection (b), the Department proposes an amendment to section 332(c) of the NDAA for FY 2003, as amended, that would extend the temporary authority to contract for increased performance of security-guard functions. This amendment would ensure that the authority would remain available without interruption through FY 2008. An extension would allow the Department to respond flexibly to urgent and emerging requirements, given the present and projected demands of the Global War on Terrorism.

Section 334 would provide an exception to the prohibition in section 2465 of title 10, United States Code, on the use of funds appropriated to the Department of Defense for the purpose of entering into a contract for the performance of firefighting functions on any military installation or facility. The limited exception would authorize contractor performance of firefighting functions to respond to wildland fires, nonstructural fires that occur on wildlands such as ranges and forests, on military installations.

The exception would provide greater flexibility in accomplishing wildland firefighting and conducting hazardous fuels treatments, such as prescribed fire and mechanical treatments, under approved plans and conditions, to reduce or eliminate the reliance on members of the armed forces to respond to such fires, and permit needed supplementation of the civilian workforce for wildland firefighting. This exception would provide authority currently available to other Federal agencies with land management responsibilities, such as the U.S. Forest Service and Bureau of Land Management.

The Army has experienced problems with obtaining and utilizing necessary personnel for wildland fire fighting and prescribed burning on several military installations. Civilian employees available on these installations to perform these critical functions are often not sufficient, and the current statute restricts alternative manning for these functions.

Wildland fires are often managed by the environmental or public works departments, rather than installation firefighting activities. Environmental and public works departments rely on contractor labor to perform their functions. The current statutory restriction presents unique problems for these departments when controlling wildland fires. For example, under the current law a forester who is contracted to supplement the environmental staff and is well trained in wildland fire management and control may be restricted in responding to and controlling a wildland fire when it occurs. A very limited exception, as provided in this amendment, would provide clear authority to use contractor personnel in this critical area.

Section 335 would provide the Secretary of Defense the flexibility to determine whether an operational support mission can be conducted as a civil operation in compliance with the Federal Aviation Regulations. The applicable part of the current definition of public aircraft under 49 U.S.C. 40102 is expanded to include such operational missions. These could include flights involving activities such as parachute training, carriage of sling loads, or target towing. Section 40125 of title 49 is also amended to reference such missions. The Department of Defense (DoD) currently has the authority to determine when chartered transportation is a civil or public aircraft operation through a designation under section 40125(c)(1)(C). With these amendments, DoD would be able to do the same for operational support. If the Secretary does not designate an aircraft chartered to provide operational support as being in the national interest (and thus a public aircraft operation), such operation would be a civil operation and must comply with applicable FAA civil safety regulations. A technical correction is also included to correct cross references in section 40125 to the definitions provision.

Subtitle E—Other Matters

Section 341 would allow the Department of Defense to use Operation and Maintenance (O&M) funds on Performance Based Logistics (PBL) contracts to finance both expense and investment costs associated with the implementation of engineering changes that result in a reduction of operation and maintenance costs. This change would permit the military departments to realize the full benefits of PBL contracts.

A PBL contract in its purest form specifies a level of performance that a contractor must meet at a fixed price. The PBL provider is contractually bound to deliver this specific performance outcome, not a particular number or type(s) of parts or repairs. The contractor must manage the effort necessary to mitigate obsolescence and provide technology insertion as required to meet the specified level of performance. Incentives exist for the contractor to invest in reliability growth initiatives. For example, subject to the government's approval of form, fit, and function changes, the contractor may choose to make and implement engineering changes that are traditionally considered investment costs. By making this investment, the contractor may not only increase its profits, but also drive down Operational and Support (O&S) costs. Driving down O&S costs through increased reliability improves readiness and availability. Therefore, the net result is that the government benefits because an item costs less to maintain and is more available to the warfighter. This strategy cannot be executed without the flexibility to use expense funds for efforts traditionally requiring investment funds. The ability of a contractor to execute under this strategy involves the execution and implementation of contractor-generated changes that would need to occur much more rapidly than the normal budgeting and appropriation process would allow.

To ensure the agency is properly using the authority under this section, the section would require the Secretary of the military department concerned to notify Congress that the procuring agency has demonstrated in a business case analysis that the proposed PBL contract's implementation of engineering changes would result in a reduction of O&M costs. Since agencies currently do not have the authority to execute a PBL contract as proposed, direct examples demonstrating the business case for this legislative change are not available. However,

one agency program has assembled a business case analysis based on the existence of this new authority.

In this example, the PBL contract supports the T-45 Engine - the F405-Rolls Royce-401. This engine is operating successfully under a PBL contract requiring a specific level of engine availability, reliability and performance. This type of contract arrangement is commonly known as a "Power-By-the-Hour (PBtH)" type of contract. However, the F405 engine has a tendency to surge during critical flight phases. These engine surges result in mission aborts, maintenance actions, and, occasionally, the shutdown and re-start of single-engine training aircraft in flight by student pilots in order to clear the surge. Technology has now advanced and a solution is available to prevent the occurrence of these engine surge events. This solution also has logistical benefits (*i.e.*, increased service life of the engine, Mean Time Between Repair (MBTR), and "Time on Wing" (Mean Time Between Removals)) that would yield cost savings to both the contractor and the government. The analysis indicates that by using the PBL strategy and shifting risk of performance to the contractor, the required reliability improvements would be borne by the contractor and at the original negotiated price. As the contractor is responsible for the support, he also determines when and at what value any investments would be made, relieving the military departments of the burden of forecasting and budgeting for investment funds. The chart below shows the benefits derived from use of an O&M-funded PBL contract that provides those reliability improvements without specific service investments.

Cost Comparisons	**Traditional**	**PBL (PBtH)**
Annual Repair Costs	$63.5M	$59.9M
Average Engine Life ("Time on Wing")	2000 hrs	4000 hrs
Average Cost Per Engine	$31,750	$14,975
Additional Improvements via PBL:		
Mean Time Between Repair (MBTR)	500 hrs	1800 hrs
Fuel Control Reliability	-	3.5x increase

Using traditional repair methodologies involving engineering changes requiring investment funds would require an initial investment of $384 million and yield a $92 million Life Cycle cost savings. By contrast, using O&M funds on a PBL contract and shifting responsibility for reliability improvements and concomitant investments to a contractor would require a Non Recurring Engineering cost of $87 million and yield a $131 million Life Cycle cost savings. The payback period for the PBL method is four years shorter than the traditional method.

Funding modernization efforts via the traditional approach in a procurement appropriation would require fully-funding the retrofit item up front. Relying upon a contractor in a PBL environment would provide the advantages of using O&M funds, reducing large up-front investments (procurement funding), and reducing overall operations costs while improving reliability.

In summary, this section would provide the funding flexibility necessary to use PBL contracts as an integrated performance package designed to optimize system readiness and meet performance goals. Unlike other logistics-type contracts, performance-based strategies buy performance/outcomes (*e.g.*, availability, reliability, Ready-for-Training, sortie completion rate), not products or services. Providing the PBL funding flexibility contemplated by this section would allow for the leveraging of contractor resources to improve reliability and availability, while supporting cost-wise readiness initiatives. Without the proposed funding flexibility to carry out the PBL contractor's recommendations, delays would occur, affecting cost and war fighting readiness.

Cost Implications: This section is cost positive. It would provide the Secretary with the flexibility to apply logistical benefits to incorporate an engineering change more efficiently, resulting in accelerated incorporation rates, reduced costs, and increased system availability and capability for the warfighter.

TITLE IV—MILITARY PERSONNEL AUTHORIZATIONS

Subtitle A—Active Forces

Section 401 prescribes the personnel strengths for the active forces in the numbers provided for by the budget authority and appropriations requested for the Department of Defense in the President's Budget for fiscal year 2007.

Subtitle B—Reserve Forces

Section 411 prescribes the strengths for the selected Reserve of each reserve component of the Armed Forces in the numbers provided for by the budget authority and appropriations requested for the Department of Defense in the President's budget for fiscal year 2007.

Section 412 prescribes the end strengths for reserve component members on full-time active duty or full-time National Guard duty for the purpose of administering the reserve forces for fiscal year 2007.

Section 413 prescribes the end strengths for dual-status technicians of the reserve components of the Army and Air Force for fiscal year 2007.

Section 414 prescribes the maximum end strengths for non-dual status technicians of the reserve components of the Army and Air Force for fiscal year 2007.

Section 415 prescribes the maximum number of reserve component personnel who may be on active duty or full-time National Guard duty under section 115(b) of title 10, United States Code, during fiscal year 2007 to provide operational support.

Subtitle C—Authorization of Appropriations

Section 421 authorizes appropriations for fiscal year 2007 for the Armed Forces Retirement Home Trust Fund for the Armed Forces Retirement Home in an amount equal to the budget authority included in the President's Budget for fiscal year 2007.

TITLE V—MILITARY PERSONNEL POLICY

Subtitle A—Officer Personnel Policy

Section 501 would provide Secretaries of the military departments with the discretion to retire or separate from active duty chief warrant officers in the grade of CW4 who have twice failed to be promoted. This change would support the retention of highly experienced and qualified senior CW4's that the military departments need to meet their missions and would eliminate unnecessary board and administrative processing associated with selective continuation in current grade. It also would align CW4 non-selection management with that of Army lieutenant colonels and colonels who are not promoted to the next grade.

Current law requires the automatic retirement or separation of regular chief warrant officers who have twice failed to be promoted to the next higher regular warrant officer grade. To retain such officers, they must be selectively continued. This requires the Army to convene a selective continuation board after every promotion board to retain the CW4s that are non-selected.

The involuntary retirement of CW4's non-selected for promotion was not part of the original proposal by the Army Total Warrant Officer Study (implemented as part of the Warrant Officer Management Act in section 1112 of the National Defense Authorization Act for Fiscal Years 1992 and 1993, Public Law 102-190). By also establishing a new top warrant officer grade (CW5), the Warrant Officer Management Act unintentionally created a situation in which CW4's (the previous top Warrant grade) could be twice non-selected for promotion to CW5. A review of the legislative history provides no evidence that the involuntary retirement provision was meant to apply to CW4's.

The current involuntary retirement provision affects approximately 60-70 senior warrant officers in the grade of CW4 each year. Each of these warrant officers represents over 20 years of experience and, in some cases, several million dollars worth of training. For example, it initially costs $402,000 to $650,000 to train a warrant officer/Army aviator, depending on what type of airframe the individual will fly. When coupled with the professional development and training flight hours that these individuals receive over the course of a 20-year career, the investment by the Army in each CW4 could reach well over $3 million.

Subtitle B—Reserve Component Management

Section 511 would eliminate existing limitations on the authorized strengths of Navy and Marine Corps reserve flag and general officers. This change would not impact Marine Corps reserve general officer criteria; instead, it would place Navy reserve flag officer community criteria on the same legislative basis as other Reserve components.

Existing law provides for 48 Navy reserve flag officers; mandates a numerical boundary between the line and staff corps; and implements "quotas" for the staff corps flag officer allocation. Presently, the Department of the Navy is the only military department with its Reserve flag or general officer community strengths defined in law. This severely hampers the ability of the Department of the Navy to adapt its Navy reserve flag officer inventory to reflect evolving requirements more accurately and efficiently.

Section 512 would enhance the authority of the Department of Defense (DoD) to organize forces more efficiently and achieve Future Total Force integration between the Active Duty and Reserve Components. Specifically, the changes in this section would: (1) increase efficiency by allowing the Guard and Reserve to train and instruct other component members; (2) increase flexibility to use the Guard and Reserve to support certain operations or missions; and (3) increase component integration by clarifying the authority of dual-status National Guard commanders.

It is desirable for Active Guard and Reserve ("AGR") and Technician members of the National Guard and Reserve to be able to train members of all components. Currently, Titles 10 and 32, United States Code, limit the efficiencies that can be realized by restricting the employment of AGRs and Technicians to "organizing, administering, recruiting, instructing, or training" the reserve components. This section would expand the role of AGRs and Technicians so that they may instruct and train members of any other component, and also DoD civilian employees, DoD contractor personnel, and foreign military personnel (under the same authorities and restrictions applicable to active duty troops).

Members of the Reserve and National Guard need increased flexibility to support operations or missions assigned in whole or in part to the Air Force Reserve, or undertaken by the National Guard at the request of the President or Secretary of Defense. This section would facilitate the transformation of the National Guard and Reserve from a Cold War "strategic reserve" to a present day "operational reserve." An "operational reserve" actively supports on-going operational missions where appropriate, while also providing the additional reserve capacity needed to meet surge requirements or support wartime or contingency operations. It also allows greater flexibility to perform "reach-back" missions appropriately assigned to the reserve component, such as Predator or space operations that are ideally suited to a stable, experienced reserve unit. These amendments would make some distinctions between the duties that may be performed, in addition to their primary duties, by Reserve AGRs and Technicians, and those that may be performed by Guard AGRs and Technicians in Title 32 status. Generally, full-time Reserve personnel would be permitted to support Title 10 operational activities, while there would be no change in full-time Guard authorities regarding operational activities unless authorized by the President or the Secretary of Defense. With the exception of "recruiting," the amendments generally would provide for consistency between the types of primary duties that may be performed by AGRs and Technicians within a component (technicians would be able to provide administrative support to recruiting activities).

The amendments to sections 101, 12310, and 10216 of title 10, and sections 502 and 709 of title 32, would enhance the efficiencies realized by leveraging the experience, expertise and stability residing in the Reserve and National Guard AGR and Technician workforce.

This section would clarify the authority in section 325 of title 32 to permit, with Presidential authorization and Gubernatorial consent, any National Guard officer to retain his state commission in the National Guard while serving on active duty, thus possessing a dual status, state and federal. This would facilitate unity of effort in situations where Title 10 and Title 32 forces work together, for example in disaster relief operations, by allowing one dual status officer to command the Title 10 forces in his federal status and the Title 32 forces in his state status. This section would ensure that this authority is interpreted to allow increased, effective integration between the active and reserve components, including forces in Title 32 status.

This section would clarify that the Presidential authorization and Gubernatorial consent required for a National Guard officer on active duty to continue to exercise his state commission can be obtained in advance for purposes of establishing command succession in active duty and mixed component units.

This section also would clarify that an officer in dual-status, including a dual-status commander, retains full authority at all times to perform National Guard functions authorized by State law without violating the provisions of the Posse Comitatus Act (18 U.S.C. 1385).

Section 513 would lengthen the duration of service for members of the Selected Reserve and the Individual Ready Reserve involuntarily called to active duty from the existing maximum of 270 days to 365 days. The operational rotation cycles currently used by the Marine Corps and the Army relative to deployments for their active and Reserve components vary from six to 12 months "boots on the ground," which they deem to be the most efficient and effective length for tours of duty in their respective services. A maximum duration equal to 270 days does not readily support those cycles when pre-deployment training and post-deployment deactivation are taken into account. Expanding that duration to 365 days would facilitate greater "boots on the ground" time for Reserve component deployments.

This section also would allow the President to order reservists to active duty to provide assistance in serious natural or manmade disasters, accidents, or catastrophes. As is currently true with respect to active-duty military assistance in the event of attacks by terrorists or from weapons of mass destruction, this section would preclude the President from invoking this new form of assistance unless he has first determined that the response capabilities of local, state, and Federal civilian agencies have been, or will be, exceeded.

Modifying the maximum duration of service under this statute precipitates the need for the addition of a "fair treatment" provision. The possibility of multiple tours for the same reservists necessitates the insertion of fairness into the process of deciding who is involuntarily ordered to active duty under the statute.

Subtitle C—Education and Training

Section 521 would allow the Secretaries of the Army and Air Force to assign permanent professors at the United States Military and Air Force Academies, who also are military officers, to act in a command capacity outside of the academic realm of the Academy while they are on sabbatical. This change would provide "real world" operational experience that would benefit both the individual and the cadets when the instructors return to the Academy. This section also would allow operational units to tap into the academic expertise of the instructor. The Department of Defense estimates, based on sabbatical rotations, that only two or three professors would be eligible for this command experience each year.

This section would benefit the military departments by emphasizing force development through better integration of academic and operational environments.

Section 522 would increase, from 24 to 100, the number of cadets at the United States Military Academy who may participate in an exchange program with foreign military academies. The section would also increase, from 24 to 100, the number of students from foreign military academies who may receive instruction at the Academy while participating in the exchange program. The section would also modify the funding for the exchange program.

Currently section 4345(c)(3) of title 10, United States Code, provides that the Academy shall bear all costs of the exchange program from funds appropriated for the Academy and that expenditures in support of the exchange program may not exceed $120,000 during any fiscal year. This section would increase to $1,000,000 the amount of funds appropriated for the Academy that may be expended in support of the exchange program. The section would also authorize the Academy to use additional funds for the program that may be provided by the Department of Defense to support cultural immersion, regional awareness, or foreign language training initiatives.

Section 523 would authorize the Secretary of the Army to modify agreements entered into by cadets in the Reserve Officers' Training Corps who participate in the Guaranteed Reserve Forces Duty Scholarship Program under section 2107a of title 10, United States Code. To participate in the Program, cadets must agree to serve in a troop program unit (TPU) of the Army Reserve or Army National Guard for not less than eight years. Currently, the Secretary has limited authority to modify an agreement under section 2107a to permit a cadet at a military junior college to serve on active duty in lieu of service in a TPU.

This section would amend section 2107a to permit the Secretary to modify an agreement under section 2107a and permit a cadet or former cadet in the Guaranteed Reserve Forces Duty Scholarship Program to agree to serve on active duty in lieu of service in a TPU so that the cadet or former cadet can participate in the Armed Forces Health Professions Scholarship Program (HPSP) under subchapter I of chapter 105 of title 10. A member who participates in the HPSP must serve on active duty for a period of not less than one year for each year of participation in the program.

Section 524 would allow the employment of retired Reserve and National Guard members as Junior Reserve Officer Training Corps (JROTC) instructors. Existing law only allows the employment of active duty and retired regular officers and non-commissioned officers as JROTC instructors. This section also would decouple the salaries of these retired Reserve and National Guard members from their active duty pay and military retirement entitlements by allowing the military department concerned to determine their salaries. The Secretary concerned would reimburse the institution an amount determined by the military department.

These changes would expand significantly the pool of eligible JROTC instructors, ensuring the successful implementation of the Secretary of the Air Force's approved JROTC expansion of 201 units by Fiscal Year 2007. Allowing retired Guard and Reserve members to serve as JROTC instructors would ensure that the military departments maintain a qualified pool of applicants to fulfill current unit vacancies and future openings of new units. Decoupling salary from retired pay would allow retired Guard and Reserve members to serve as JROTC instructors prior to being eligible to draw retirement pay (at age 60).

Section 525 would change the frequency of the administration of the Service Academy Sexual Assault Survey and of the submission of academic program year (APY) reports from an annual to a biennial requirement. This section also would affirm the intent of Congress that the survey only be administered to cadets and midshipmen and that "violence" refers to sexual violence (*i.e.*, rape, sodomy, indecent assault, and attempts thereof).

Section 527 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136) requires the military service academies to conduct assessments to determine the effectiveness of the academies' policies, training, and procedures on sexual harassment and sexual violence to prevent criminal sexual harassment and sexual violence involving cadets and/or midshipmen for each of the 2004-2008 APYs. The Superintendent of each academy also must submit a report on sexual harassment and violence involving cadets and/or midshipmen for each of the APYs. The Secretaries of the military departments forward the reports to the Secretary of Defense for submission, with comments, to the House and Senate Armed Services Committees. The Department of Defense has conducted the surveys, and submitted to Congress the reports, for APY 2004 and 2005.

This proposed change in survey frequency addresses decreasing participation. Although the survey is congressionally-mandated, participation is strictly voluntary. Nearly one-quarter of U. S. Air Force Academy male and female cadets chose not to take the APY 2005 survey. Defense Manpower Data Center (DMDC) focus groups found that cadets and midshipmen felt they were over-surveyed on sexual harassment and sexual violence. Lower participation rates reduce the precision and validity of the survey data.

Biennial surveys also would strengthen trend analysis at the academies. DMDC's experience surveying samples of both active duty and Reserve component members shows that behavioral change is incremental and that attitudinal changes from year to year are usually small. Analyzing year-to-year changes would likely lead to over-interpretation and provide little added value. The sexual harassment and sexual assault surveys of active duty and Reserve component

members are conducted every four years. Collecting similar information from cadets and midshipmen every two years seems reasonable.

Section 526 would authorize the Secretary of Defense to enroll and create space, on a tuition-free basis, for a certain number of dependents of foreign military members who are assigned to the Supreme Headquarters Allied Powers Europe (SHAPE), in the Department of Defense (DoD) dependents' education system in Mons, Belgium.

Under existing law, the Secretary may create space for children of such foreign military members in DoD dependents schools pursuant to section 1404(d) of the Defense Dependents' Education Act of 1978 (20 U.S.C. 923(d)), only if they are enrolled on a tuition-paying basis. Under section 1404(c), the Secretary may issue a class waiver authorizing these students to enroll on space-available, tuition-free basis. However, because section 1404(c) is limited to space-available enrollments, the DoD could not create space (e.g., add teachers) and could permit enrollment only to the extent that space already exists.

For the U.S. to reinforce cultural ties with its allies, it is vital that the Secretary possess the authority to enroll dependents of foreign military members assigned to SHAPE on the same basis as the dependents of DoD sponsors, who must be provided educational services on a tuition-free basis. The SHAPE schools play an important role in validating the strong military relationship the United States maintains with the European Union. The United States is provided with at least $5 million in annual support by the SHAPE for support of the school and DoD personnel on this installation, direct costs normally funded by the DoD (e.g., child care center). Failure to enact this section would negatively affect U.S.-European relations.

Without this section, the DoD Mons School would begin the process of decreasing staff support to the school, thus reducing the opportunity for these foreign nation students to attend school. Families would be left with the option of enrolling students in the local Belgium School, returning dependents early, or paying our tuition (which is highly unlikely). Senior SHAPE staff contends this would adversely affect the recruitment and retention of foreign nation staffs.

Cost Implications: Each year, there are approximately 360 dependents of foreign military members and civilian employees assigned to SHAPE enrolled in DoDDS at SHAPE Elementary and SHAPE High School in Mons, Belgium. Using an average tuition rate of $15,000, this section would cost approximately $23.56 million from Fiscal Year (FY) 2007 through FY 2010. There is an average tuition increase of $400 per pupil per year. The cost estimate assumes that the DoD would continue to admit the same number of students.

RESOURCE REQUIREMENTS ($MILLIONS):

	FY2007	FY2008	FY2009	FY2010
Cost	5.68	5.82	5.96	6.1
Full-Time Employees (FTEs)	31	31	31	31

Subtitle D—Military Justice Matters

Section 531 would codify existing authority for the Air Force Office of Special Investigations (AFOSI) while also adding additional limited authority to make arrests on military installations. This section is not intended to increase or reduce the existing investigatory authority of the AFOSI.

Specifically, this section would codify and clarify the authority of the Secretary of the Air Force to issue regulations governing the AFOSI in its conduct of criminal investigations. It would recognize that the AFOSI is subject to the direction of the Secretary of the Air Force, both as to operations and as to its organizational structure, should the Secretary desire to make changes in assigned responsibilities or structure. This section also would provide that the AFOSI may be assigned other missions, in recognition of the fact it currently performs such other missions, *e.g.*, the Air Force counterintelligence mission and certain computer crimes missions for the Department of Defense (DoD).

Proposed section 8150 would conform to the requirement of 28 U.S.C. 533 which provides, in regard to the appointment by the Attorney General of criminal investigators, that section 533 "does not limit the authority of departments and agencies to investigate crimes against the United States when investigative jurisdiction has been assigned by law to such departments and agencies." This proposed section would clearly provide that the Air Force may investigate crimes against the United States involving the Department of the Air Force. Such crimes are primarily violations of the Uniform Code of Military Justice.

While this proposed section would not, and is not intended to, limit the authority of the Secretary of the Air Force to organize the Department of the Air Force as he determines necessary and desirable (under the authority, direction, and control of the Secretary of Defense), it would provide codified recognition of the permanent function performed by the AFOSI already recognized in law. This would clarify the authority of the AFOSI and allow it to better integrate into the Federal law enforcement system to the extent that its functions of investigating matters of concern to the Air Force are relevant to general Federal law enforcement. This increased integration would be particularly valuable in the area of counter-terrorism because of the significant presence of AFOSI's personnel in foreign locations and their ability to provide important support to the national effort against terrorism. Such personnel are already attached to Joint Terrorism Task Forces organized by the Department of Justice. Ensuring clarity of the mission and authority of the AFOSI can only promote its effectiveness in working with other federal agencies supporting the national law enforcement effort.

Proposed section 8151 would clarify that the AFOSI commander is authorized to issue credentials and badges to AFOSI personnel.

Proposed section 8152 would define who is an Air Force law enforcement officer. All special agents of the AFOSI and other Air Force personnel as designated by the Secretary of the Air Force would be law enforcement officers for purposes of this chapter. The salient purpose of this designation is for application of arrest authority under section 8153, which is subject to guidelines approved by the Secretary of Defense and the Attorney General. Consequently, any

additional personnel designated as law enforcement officers would only be able to effectively exercise their authority after appropriate amendment of the guidelines were approved by the Secretary of Defense and Attorney General. Such designation as law enforcement officers would apply only to this chapter and would not extend to other provisions of law such as personnel, retirement, etc.

Proposed section 8153 would grant to law enforcement officers in the Department of the Air Force, when exercised on a military installation, the same arrest authority available to other Federal law enforcement personnel. The authority, with the exception of the authority to carry firearms (which already exists but which would be repeated in this section), could only be exercised on a military installation or in hot pursuit therefrom. It would be limited to Air Force installations or those DoD facilities that are provided Air Force law enforcement support by direction of the Secretary of Defense (such facilities are generally wholly occupied by a Defense Agency, DoD Field Activity, or non-appropriated fund instrumentality such as the Army-Air Force Exchange Service, and, depending on the particular DoD Component, are assigned to one of the military departments for support purposes). Additionally, arrest authority could only be exercised in accordance with regulations issued by the Secretary of the Air Force and approved by the Secretary of Defense and the Attorney General. The section also would provide that the Air Force is not expected to operate incarceration facilities for civilians, but would turn over those arrested to civil authorities as soon as possible.

The Posse Comitatus Act, 18 U.S.C. 1385, prohibits the use of the Army or Air Force to execute the law except in "cases and under circumstances expressly authorized by the Constitution or Act of Congress." The courts have long recognized under the President's Constitutional authority as Commander-in-Chief a Military Purpose Doctrine permitting Army and Air Force personnel to engage in law enforcement activities on military installations even when those activities involve civilians. However, those responsible for law enforcement on military installations have lacked an important tool -- the ability to execute arrest and search warrants, which must be explicitly authorized by law. At present, military law enforcement officials must rely on a citizen's arrest authority. This legislation would remedy that deficiency and, to the extent there may be any question as to how the Posse Comitatus Act applies to such activities, would provide an explicit Congressional exception to that Act. This provision would promote effective law enforcement and promote security on Air Force or DoD installations and facilities, as well as reduce the burden of law enforcement on civilian law enforcement authorities. This section is not designed to enlarge the role of the Air Force in law enforcement, but to recognize the long-existing fact that the Air Force polices its own installations and should have the appropriate authority to do so.

Almost all Air Force installations are closed installations in that they are not open to the public and access can only be obtained through guarded entrances and for specifically authorized purposes. Nevertheless, they have large populations, including extensive housing areas and schools for dependents. Along with civilian dependents, large numbers of retired military personnel from all services and their dependents are welcome on Air Force installations to make use of commissaries, exchanges, medical facilities, and all forms of morale, welfare, and

recreation facilities. Authorized contractor personnel and other visitors also are permitted access to Air Force installations.

Air Force military criminal investigators have the authority to apprehend persons subject to the Uniform Code of Military Justice, but do not have arrest authority for any other persons (*i.e.*, civilians) on an Air Force installation. Currently, an Air Force law enforcement officer must either make a citizen's arrest or detain a person until the arrival of a local or Federal law enforcement officer who can make an arrest. If a local or Federal law enforcement officer is not reasonably available, which can often be the case for remote installations or minor offenses, the Air Force law enforcement officers have little choice but to release the individual. This is detrimental to the efficient and effective enforcement of the laws on Air Force installations and may leave the individual Air Force law enforcement officer open to unwarranted personal liability for having detained the individual. Since Air Force installations are policed by the Air Force, it is appropriate that its law enforcement personnel have authority similar to other law enforcement organizations. Elsewhere, law enforcement officers have arrest authority within their particular jurisdictions and beyond in the case of hot pursuit. The comparable jurisdiction for Air Force law enforcement officers is an Air Force installation.

Although 10 U.S.C. 9027 provides for civilian agents of the AFOSI to have limited authority to make arrests, it does not effectively address the current need for law enforcement and force protection on Air Force installations and creates, from a personnel management perspective, an artificial distinction between civilian and military members of the same organization. While it is the norm for AFOSI detachments on installations to have one or more civilian agents assigned, they are not necessarily on duty during the entire day. They may be deployed, on travel, off-duty, or otherwise unavailable for immediate response. This section is directed at force protection and the protection of military personnel and their dependents on Air Force installations. It would be in addition to section 9027 which applies both on and off the installation, not in place of it.

Proposed section 8154 would provide that this new chapter of title 10 is not to be construed to change requirements found in the Military Extraterritorial Jurisdiction Act, chapter 212 of title 18, United States Code.

Subtitle E—Officer Personnel Policy

Section 541 would allow the purchase and presentation of Medal of Honor Flags to all living Medal of Honor recipients or, if deceased, to their living primary next of kin. Existing law limits eligibility for the flag to persons awarded the Medal of Honor recipients after October 23, 2002. This change would allow the Nation to recognize the sacrifice of all uniformed members who were presented this valorous award and, at a minimum, still have a surviving primary next of kin. There would be no presentation if the primary next of kin also were deceased.

Cost Implications: The Department of Defense estimates that it would cost $240,000 in Fiscal Year 2007 to present Medal of Honor Flags to the primary next of kin of all deceased Medal of Honor recipients since World War I.

Subtitle F—Other Matters

Section 551 would allow the Secretary of Defense to designate who is authorized to administer the oath, and would expand the number of people eligible to administer the oath when the situation dictates.

Sections 502 and 1031 of title 10, United States Code, currently permit any commissioned officer of any component of an armed force to administer the oath. By contrast, section 936(b)(6) of title 10 provides that the authority to administer oaths includes "[a]ll other persons designated by regulations of the armed forces or by statute." This change would clarify any apparent contradictions between these sections of law.

Section 552 would provide for the status of general and flag officers assigned to certain positions within the Central Intelligence Agency (CIA) and the Office of the Director of National Intelligence (ODNI). They are consistent with the provisions that were formerly in place for certain officers assigned to the Office of the Director of Central Intelligence before being repealed by the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) (Public Law 108-458). They also are consistent with provisions provided in IRTPA for officers assigned as the Director of National Intelligence or as the Principal Deputy Director of National Intelligence (50 U.S.C. 403-3a)

This section would protect the officers and organizations concerned from perceptions of organizational conflicts of interest or inappropriate influence. It also would ensure an orderly budgeting process for CIA and ODNI personnel expenses and remove a disincentive for the Department of Defense to provide general and flag officers to serve in the covered positions. Reassignment decisions for these officers will be made in consultation with the Office of the DNI, the CIA, and, for Presidentially-appointed, Senate-confirmed positions, the President.

TITLE VI—COMPENSATION AND OTHER PERSONNEL BENEFITS

Subtitle A—Pay and Allowances

Section 601. Since the pay cap for Senior Executive Service personnel has been increased from Level III to Level II for those Departments that have an OMB-approved personnel evaluation system, it has had the unintended consequence that some senior general and flag officers will have basic pay rates that are less than some individuals that they supervise. This section would resolve the inequity. The pay increase would be effective beginning in Fiscal Year (FY) 2007.

Cost Implications: This section would cost an estimated $452,000 in FY 2007 and $2.398 million from FY 2007-2011. The monthly difference between Level III and Level II was calculated and multiplied by the number of O-10s that would be affected. An increase of three percent per year was used to convert 2005 pay levels to 2007-2011.

Subtitle B—Bonuses and Special and Incentive Pays

Section 611 would increase the maximum amount of the special pay for reserve health care professionals in critically short wartime specialties from $10,000 to $25,000.

Selected Reserve health care professionals have the same professional background; meet the same professional requirements; and have a similar likelihood of being deployed in support of the Global War on Terror and 21st century contingency operations as their active duty colleagues. However, retention incentives targeting Selected Reserve providers on active duty are much less than those for health care professionals.

Increased operating and personnel tempos associated with the Global War on Terror and Operations Iraqi Freedom, Enduring Freedom and Noble Eagle put intense pressure on the strength levels of these critically-needed health care specialties. This increase in special pay for Selected Reserve health care professionals in critically short wartime specialties would support efforts to meet vitally important retention goals.

Cost Implications: The funding for this section is discretionary; the budget submission would contain the funds to support the programs envisioned. All special pay bonus authorities must stay within the original appropriation and require no extra funds.

Section 612 would authorize an increase from $20,000 to $30,000 in the maximum Nuclear Career Accession Bonus that the Secretary of the Navy may pay to prospective nuclear officer candidates. This incentive program is a component of Nuclear Officer Incentive Pay.

The United States Naval Academy (USNA) and Naval Reserve Officer Training Corps (NROTC) have failed to meet Nuclear Officer accession goals in the recent past. In addition, the academic quality of USNA and NROTC Nuclear Officer accessions has been declining. A Lewin Group study shows that the accession bonus increases are sufficient to correct the recent declines.

This section would support the overarching Department of Defense Human Capital Strategy of producing personnel management efficiencies and promoting compensation policies and programs based on market place business practices.

Section 613 would extend for one year accession, conversion, and retention bonuses for military personnel possessing or acquiring critical skills, including occupations that are arduous or that feature extremely high training and replacement costs. It also would extend incentive pay for members in designated assignments. Experience shows that retention of members in critical skills would be unacceptably low without these incentives, which in turn would generate the substantially greater costs associated with recruiting and developing replacements. The Department of Defense and the Congress long have recognized the cost-effectiveness of financial incentives in supporting effective staffing in such critical military skills and assignments.

Section 614 would extend for one year, through December 31, 2007, accession and retention incentives for nuclear qualified officers. For an occupation that features extremely high training costs, these incentives help retain officers at a distinctly lower cost, which is far more cost-effective than recruiting and training new accessions. The Department of Defense and Congress have long recognized the prudence of these incentives in supporting effective staffing in this occupational area.

The Department of the Navy (DoN) has only met its submarine nuclear junior officer retention goal once in the past five years (2000-2004). Despite recent retention improvements, DoN missed the submarine junior officer retention goal again in Fiscal Year 2004. As well as facing junior officer retention difficulties, the submarine officer community is also short 370 control grade officers (O-4 through O-6), indicating a senior officer retention shortfall. These two shortfalls -- lower than required junior officer retention and mid- to senior-grade officer inventory shortages -- place at risk the community's ability to meet critical manning requirements.

The attraction of the civilian job market for nuclear-trained officers remains strong. These officers possess special skills as a result of expensive and lengthy Navy training. These officers come predominantly from the very top of their classes at many of the nation's best colleges and universities. As a result, these officers are highly sought after for positions in career fields both in and out of the nuclear power industry primarily due to their educational background and management experience.

The success of the Naval Nuclear Propulsion Program is a direct result of its superior personnel, rigorous selection and training, and the high standards that exceed those of any other nuclear program in the world. Maintaining this unparalleled record of safety and successful operations depends upon attracting and retaining the correct quantity and highest quality of officers in the Naval Nuclear Propulsion Program.

Section 615 would extend for one year, until December 31, 2007, accession and retention incentives for certain nurses, dentists and pharmacy officers. Experience shows that manning levels in the nursing, dental and pharmacy fields would be unacceptably low without these incentives, which in turn would generate substantially greater costs associated with recruiting and development of replacements. The Department of Defense and Congress have long recognized the prudence of these incentives in supporting effective personnel levels within these specialized fields.

Section 616 would extend critical recruiting and retention incentive programs for the Reserve components that are due to expire at the end of calendar year 2006. Absent these incentives, the Reserve components may experience more difficulty in meeting skilled manning and strength requirements.

The Reserve components rely heavily on their ability to recruit individuals with prior military service; approximately half of all accessions are former service members or members who are separating from active duty. This is a high-priority recruiting market for the Reserve

components because accessing individuals with prior military experience reduces training costs and retains a valuable, trained military asset. The Selected Reserve affiliation bonus and the prior service enlistment bonus provide important incentives to individuals with prior military service to serve in the Reserve components.

The special pay for enlisted members assigned to high priority units is an even more focused incentive because it specifically targets manning in units that have historically been understaffed.

The Selected Reserve reenlistment bonus is necessary to help the Reserve components maintain required manning levels in skill areas with critical shortages by retaining members who currently are serving in the Selected Reserve. With a smaller active duty force from which to recruit, the bonus becomes more critical to meeting manning requirements.

The Reserve components historically have found it challenging to meet the required manning in the health care professions. The incentive that targets health care professionals who possess a critically short skill is essential to meet required manning levels.

Extending the Ready Reserve enlistment and reenlistment bonus authorities would allow the Reserve components to target these bonuses at individuals who possess skills that are under-subscribed, but are critical in the event of mobilization.

Finally, the health professions loan repayment program has proven to be one of our most powerful recruiting tools for attracting young health professionals trained in specialty areas that are critically short in the Selected Reserve. Extending this authority is critical to the continued success of recruiting young, skilled health professionals into the Selected Reserve.

All of these bonuses and special pays provide an important array of incentives that are necessary for the Reserve components to meet manning requirements. Extending these authorities for another year would ensure the continuity of these programs.

Subtitle C—Retired Pay and Survivor Benefits

Section 621 would allow military spouses to qualify for the temporary continuation of the Basic Allowance for Housing (BAH) when their military spouse dies while serving on active duty. Currently, only non-military spouses qualify for the temporary continuation of BAH.

The definition of "dependent" in section 401(a) of title 37, United States Code, includes a military spouse. However, because military spouses earn basic pay and allowances (including BAH) in their own right, they are not entitled to increased BAH, or any other increased allowances, on account of a military spouse who is entitled to basic pay under section 204 of title 37.

When a military member dies, no distinction should be made between a military spouse and a non-military spouse because they both are facing the same situation -- loss of income from

the deceased spouse. This section would help the surviving military spouse during a difficult transition period. It also would be consistent with the intent of the law, which is to help surviving family members recover from the immediate financial hardship associated with losing a portion of the household's income. Furthermore, this change could encourage military spouses to continue their military service.

Cost Implications: This section would cost the Department of Defense an estimated $462,000 annually, as computed by multiplying the number of 2004 deaths (officer and enlisted) involving dual-military couples by the weighted average BAH rates for officer and enlisted personnel.

Section 622 would prohibit state courts from requiring immediate payment of retirement benefits from a property settlement in a divorce action when the affected servicemember, though eligible, has not yet retired.

Existing law prevents courts from forcing servicemembers to retire, but does not address when a distribution from retired pay could or should begin. Some states have mandated immediate payment of the value of a servicemember's pension pursuant to a divorce action even though the member remains on active duty and does not draw retirement pay. California courts, for example, require a servicemember who remains on active duty past retirement eligibility to pay the former spouse his future pension out of current income. *See, e.g.*, *Gillmore v. Gillmore*, 29 Cal. 3d 418; 629 P.2d 1 (1981). In that case, the Court reasoned that the employee-spouse, by postponing retirement, effectively deprived the non-employee spouse of her immediate enjoyment of an asset earned by the two of them during the marriage. Such holdings have become the norm in both community property and equitable distribution states. As a result, a retirement-eligible servicemember who otherwise would remain on active duty may have no choice but to retire in order to comply with the financial liabilities imposed by such courts. Forced retirement under such circumstances is unjust, unwarranted, and harmful to the security of the United States. As the Department of Defense (DoD) noted in its September 1999 report to the Committees on Armed Services of the Senate and the House of Representatives, "[to] provide for our national defense, the armed forces must be allowed to control when a member is permitted to retire." In that report DoD specifically recommended for the first time amending section 1408 of title 10, United States Code, to explicitly prohibit a court from requiring a member to begin payments of retirement benefits to a former spouse before the member actually retires.

Courts that require servicemembers who remain on active duty past retirement eligibility to pay their former spouses future, unreceived pensions out of current income ignore the fact that retirement-eligible members, unlike employee-spouses in the private sector, do not have sole control over the date of their retirement, but instead may be called upon to serve on active duty as long as it is in best interest of the national defense. This section would require servicemembers to pay a portion of their pensions only after they receive the pensions.

Section 623 would reduce the Department of Defense's (DoD's) accrual contributions into the Military Retirement Fund (MRF) and government contributions into the Medicare-Eligible Retiree Health Care Fund (MERHCF).

Specifically, this section would require the DoD to contribute into the MRF at the lower, more appropriate, part-time Normal Cost Percentage (NCP) rate (16.7 percent of basic pay in Fiscal Year (FY) 2005) for Reserve component members who are mobilized or on Active Duty for Special Work (ADSW). This would correct the excessive retirement accrual contributions the DoD currently must make to the MRF. Under existing law, when a Reserve component member is mobilized or on ADSW, the DoD must make accrual payments into the MRF at the full-time NCP rate (27.5 percent of basic pay in FY 2005). However, if the member serves until retirement, that member would receive a Reserve retirement annuity that would be lower than the retirement annuity for an active component member.

This section also would specifically exclude cadets and midshipmen from the end strength figures on which accrual payments to the MERHCF are based. Currently, the DoD is overpaying into the MERHCF because cadets and midshipmen do not receive service credit towards retirement while attending the academies. This change would be consistent with the treatment of cadets and midshipmen when calculating the amount of accrual contributions into the MRF.

In addition, this section would clarify section 1115 of title 10, United States Code, regarding the exclusion of any members who would be excluded for the active duty count by section 115(i) of title 10; it would not change the basis for what is being paid into the Fund. The computation for these payments currently excludes these individuals.

Finally, this section would change references in sections 1115, 1465, and 1466 of title 10 from the Ready Reserve to the Selected Reserve. Since the Ready Reserve includes members of the Individual Ready Reserve and Inactive National Guard, many of whom are simply subject to recall, MRF and MERHCF accrual rates are calculated to fund all estimated Reserve retirement costs through trust fund contributions made on behalf of only Selected Reserve members. Therefore, the changed references would create greater consistency with the actuarial calculations that set the accrual rates.

The DoD Office of the Actuary concurs with these proposed changes.

Cost Implications: This section would save the DoD $113 million in Fiscal Year 2007.

Subtitle D—Other Matters

Section 631 would treat members of the uniformed services hired as civilians by the Federal government while on terminal leave the same as members hired after they have retired for annual leave accrual purposes. Specifically, this section would provide that members hired while on terminal leave would have their uniformed service credited as if they had been hired after they had retired.

Section 5534a of title 5, United States Code, authorizes the hiring of military members who are in a terminal leave status into Federal civilian positions. Such individuals receive pay

for the civilian position as well as pay and allowances from the uniformed service for the unexpired portion of the terminal leave. The Department of Defense always has limited the leave accrual rate of such individuals to that of a military retiree in accordance with 5 U.S.C. 6303(a). Two compensation decisions by the Office of Personnel Management (OPM) (in 2000 and 2003) found that the claimants were entitled to full credit for their military service in determining leave accrual rates during the period of their civilian employment while on terminal leave (*i.e.*, prior to the effective date of their military retirement). Subsequent OPM guidance does not permit adjusting the employee's annual leave category upon their retirement from the military. OPM has opined that, once a leave accrual rate is established for the terminal leave period, it cannot be changed unless the employee has a break in service of more than three days.

As a result, a military retiree who comes to work for the Federal government while on military terminal leave normally will accrue civil service leave at twice the rate (eight hours per pay period vs. four hours) of a military retiree who comes to work after their terminal leave has ended. This section would treat all retired or soon-to-retire military members entering civilian service the same by treating those who come to work while on terminal leave exactly the same as those who come to work after their terminal leave ends.

Section 632 would provide a technical change to how the Department of Defense (DoD) is authorized to administer its Computer/Electronic Accommodations Program by allowing wounded service members the ability to keep assistive technology, assistive technology devices and assistive technology services once they separate from the Service. This would enhance their ability to transition to the civilian sector and improve coordination between DoD and Veterans Affairs programs.

Section 633 would make permanent the authority in section 2261 of title 10, United States Code, to expend appropriated funds to procure recognition items of nominal or modest value for recruitment or retention purposes and to present such items to members of the armed forces and to members of the families of members of the armed forces, and other individuals, recognized as providing support that substantially facilitates service in the armed forces.

Section 2261(c) states that the term "recognition item of nominal or modest value" means a "commemorative coin, medal, trophy, badge, flag, poster, painting, or other similar item that is valued at less than $50 per item and is designed to recognize or commemorate service in the armed forces."

Subsection (d) of section 2261 provides that the authority in the section expires on December 31, 2007. This amendment would strike subsection (d) to make the authority permanent.

TITLE VII—HEALTH CARE PROVISIONS

Subtitle A—TRICARE Program Improvements

Section 701 would add coverage of forensic examinations following sexual assaults and domestic as specific services included in the definition of medically necessary services.

The Department of Defense needs this legislative authority to affect a compassionate response for the victims of sexual assault and domestic violence and to avoid a re-victimization of the event by billing the victim for the forensic examination. Although these examinations usually occur in emergency rooms and, depending on the State, may be compensated by the individual State's Victim Compensation Funds, the procedures vary widely from hospital to hospital and from State to State. This section would allow the non-active duty beneficiaries freedom from an unexpected expense burdened with physical and emotional trauma. The actual cost of the forensic components of the exam is small.

Section 702 would authorize the Secretary of Defense to revise deductibles and charge annual enrollment fees under the TRICARE Standard/Extra option for working age military retirees and their dependants in order to reflect increases in health care costs since TRICARE Program cost sharing requirements and amounts were adopted in 1995.

TRICARE Program cost sharing requirements and amounts have not been adjusted for ten years, while virtually all other health care programs in the Nation have experienced cost increases shared by program sponsors and beneficiaries. At the time this provision was created in 1995, the beneficiary paid 27 percent of the cost share, but because no changes have been made in over 10 years their cost share has decreased to less than 12 percent. However, comparable other federal employees annual premium cost share, on average, continues to remain relatively steady at 28 percent. Furthermore, the provisions allow for a constant cost sharing relationship between the beneficiary and cost of health care by indexing future health cost changes to Federal Employee Health Benefits Program (FEHBP) premium changes. Without theses changes, the defense health budget will rise to 12 percent of the entire Department of Defense budget by 2015, jeopardizing resources better used to maintain readiness.

As a limitation on potential changes to TRICARE cost sharing, initial revisions under this section may not result in average annual per person out-of-pocket costs for affected beneficiaries in excess of the average annual per person out-of-pocket costs for similar beneficiaries applicable in Fiscal Year (FY) 1996, indexed to FY 2007 by the annual rate of change in the average premiums under the FEHBP. The final provision provides a trigger mechanism to score the savings as discretionary, as also proposed in the President's FY 2007 Budget in appropriation language.

Cost Implications: This section would save an estimated $11.2 billion from FY 2007-2011.

Subtitle B—Other Matters

Section 711 would change the current structure of Department of the Navy Bureau of Medicine and Surgery and the alignment of operations to maximize the integration of all health care services, streamline administrative functions, and broaden professional opportunities for the Dental Corps.

Specifically, this section would eliminate unnecessary requirements regarding the establishment and functions of a Dental Division within the Bureau of Medicine and Surgery in order to allow for the full integration of the Dental Corps and Dental Operations into the current Bureau headquarters personnel and healthcare operations staff. The Medical Corps, Nurse Corps, and Medical Service Corps components of the Bureau of Medicine and Surgery do not have similar requirements for separate respective divisions. This would allow the Bureau to reorganize its headquarters staff to better align with field activities where medical and dental treatment facilities have already been fully integrated.

Section 712 would set up a pilot program for Department of Defense (DoD) retirees under age 65 in lieu of TRICARE to give them the opportunity to take advantage of the tax savings provided through health savings accounts. The average military retiree has more than 20 years in retirement prior to becoming eligible for Medicare. This pilot program would not be available to active duty personnel and their families because it is critical that they be treated in the DoD health care system for readiness purposes. Under the Internal Revenue Code, taxpayers who rely on a high deductible health plan can deposit pre-tax dollars into a health savings account (HSA) and then use those funds, excluded from income tax, to pay qualified medical expenses.

The required "High Deductible Health Plan" (HDHP) must meet the requirements under the Internal Revenue Code; the following requirements are applicable for 2006:

- It must have a minimum deductible of $1,050 (self-only coverage) or $2,100 (family coverage), indexed annually;
- Annual out-of-pocket expenses (including deductibles and co-pays) cannot exceed $5,250 (self-only) or $10,500 (family), indexed annually; and
- All covered benefits under the plan must apply to the plan deductible, with the exception of preventive care services.

Members would pay 100 percent of the costs until their deductible is met, then the policy would pay benefits with the individual paying applicable co-payments or co-insurance amounts up to the out-of-pocket limit.

The Federal Employees Health Benefits Program already offers several HDPD options. Instead of duplicating the processes already undertaken by the Office of Personnel Management to set up such options, this legislation would allow military retirees under age 65 to opt into these plans. As with all HSAs under the Internal Revenue Code, participants may not keep other health care options – so those electing to participate in this pilot program would drop all other DoD coverage. The DoD, in conjunction with the Office of Personnel Management, would issue regulations to clarify implementation issues. Under no circumstances would retirees who did not use TRICARE for medical services for the two-year period ending September 30, 2005 be eligible as pilot participants. This would ensure that the pilot program is cost neutral and not covering those who chose to use other public and private insurance options.

Contributions to an HSA plan would be made by the DoD and the individual at the same rate and specifications as for civilian employees using these options.

Money withdrawn from an HSA would be tax-free if used for "qualified medical expenses" (as defined under section 213(d) of the Internal Revenue Code). This now includes over-the-counter drugs. Tax-free distributions could be taken for qualified medical expenses of the person covered by the high deductible plan, their spouse (even if not covered by the HDHP), and any dependent of the individual (even if not covered by the HDHP).

Accounts would be owned by the individual and be completely portable. Funds in the HSA would fully vest upon deposit. There are no "use it or lose it rules" like Flexible Spending Arrangements. Unspent balances in accounts remain in the account until spent. Accounts could grow through investment earnings, just like an Individual Retirement Account (IRA). The same investment options and investment limitations as IRAs would apply to HSAs. Any approved financial institution could be an HSA trustee or custodian, including banks, credit unions, and insurance companies.

If the pilot program is terminated, or if the participant leaves the HDHP plan, funds deposited in an HSA will remain in the individual's account and will automatically roll over from one year to the next. Funds in the HSA may be used for qualified medical expenses; however, an individual will no longer be eligible to make new contributions when not covered by a HDHP.

Cost Implications: This section would have no budget impact on the Defense Health Program because it is limited to those members who have used TRICARE in the past few years, as a pilot program it is limited in scope, and the cost to the government is estimated to be equal to that spent on the members currently.

TITLE VIII—ACQUISITION POLICY, ACQUISITION MANAGEMENT, AND RELATED MATTERS

Subtitle A—Acquisition Policy and Management

Section 801 would allow the Department of the Army to initiate a demonstration program using Reserve component members to perform test and evaluation of certain acquisition programs, including developmental testing, operational testing and new equipment training. Pay allowances and expenses for these members would be paid from previously appropriated multi-year research, development, testing, and evaluation funds and procurement funds, in an amount not to exceed $10 million a year.

The Department of the Army previously maintained a contingent of active component soldiers dedicated to supporting developmental training. These soldiers were returned to the operating force as a result of the 1997 Quadrennial Defense Review. The Department of the Army now relies almost exclusively on civilian contractors to test and evaluate developmental training. Given the very high cost of these contractors, however, the Department of the Army would prefer to use Reserve Component members for this function. Additionally, Reserve

Component members provide expertise into a program earlier in the development cycle, resulting in the earlier introduction of required engineering changes and reduced overall development costs and time.

Using multi-year research, development, testing, and evaluation funds and procurement funds to reimburse the pay, allowances, and expenses of Reserve Component members would be efficient and practical. In contrast, the existing financial arrangement at times is counter-productive. When Reserve Component personnel engage in testing and training, the personnel costs are paid from one-year Reserve Component personnel appropriations. When testing or training is accelerated or delayed into another fiscal year, Reserve Component units frequently must reprogram funds from other training or mission activities to cover these costs, with adverse impacts on unit training and readiness.

Section 802. If enacted, this section would allow the Department of Defense to guarantee higher minimum levels of business than are currently authorized by law to United States air carriers participating in the Civil Reserve Air Fleet. The Civil Reserve Air Fleet is made up of commercial civilian air carriers who volunteer on a yearly basis to make their aircraft available to the United States Armed Forces as part of the program in return for the Department's peacetime airlift business. No extra incentives or premiums are paid to the air carriers and no laws exist to compel their assistance or nationalization. Awarding sufficient guaranteed amounts of the Department's peacetime business has been an effective incentive to convince air carriers to commit airplanes to the Civil Reserve Air Fleet program.

Annually, the Department awards all of it known airlift requirements to the participating United States air carriers in proportion to the number of airplanes they commit to the program. This guaranteed amount of business is used by the air carriers to obtain financing for operations, improvements, and expansion of their fleet. As additional airlift requirements are identified throughout the year, these too are awarded under this contract to the carriers in proportion to their commitment to the program. This additional business, however, cannot be used to obtain financing because of its unpredictability.

Over the past 10 years the known requirements during peacetime have been approximately 320 million dollars annually and the additional business is approximately 300 million more annually. However, with fewer military personnel being based overseas, the predictable part of the Department's airlift requirements is decreasing. Although overall requirements will not likely decrease, the Department believes that the amount that can be guaranteed at contract award under current law will soon fall below a level that will induce the air carriers to commit enough aircraft to meet Civil Reserve Air Fleet requirements.

The section would authorize the Department of Defense to guarantee a minimum level of peacetime business for the Civil Reserve Air Fleet participants sufficient to induce the air carriers to commit a sufficient number of aircraft to the program to meet the Department's contingency transportation requirements. The guarantee, however, would not be based on known requirements at time of award. The minimum guarantee of business would be based on the Department's forecast needs for the next year, but capped at a maximum of eighty percent of

the historical levels of peacetime airlift expenditures. Although highly unlikely, any minimum business guarantee not met by the end of the contract period would result in a payment to the carriers of the remainder of that guarantee. The risk of having to pay the air carriers at the end of the year, in effect a subsidy, remains extremely low. That, however, is a small risk compared to the acquisition costs of other alternatives if the Department is unable to meet its wartime airlift requirements due to a lack of air carrier participation.

Cost Implications: As the section utilizes transportation funds already appropriated annually to the Services, there would be no impact on the budget. However, appropriated amounts would be committed sooner in the fiscal year than is currently the case. Because the maximum guarantee can be no more than eighty percent of peacetime business averages, no subsidy would be paid unless the Department's needs for commercial airlift were to fall drastically within a one-year period for unforeseeable reasons.

Section 803 would amend subsections (a)-(d) of section 806 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (10 U.S.C. 2302 note) (as added by section 811 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005) to clarify the rapid acquisition authority provided to the Secretary of Defense to respond to combat emergencies. Section 811 provided rapid acquisition authority for combat capability deficiencies that resulted in combat fatalities. This provision would expand the rapid acquisition authority to allow for acquiring services. It would allow use of the authority to address any deficiency that has resulted in combat casualties or fatalities. It would authorize the Secretary of Defense to delegate this authority to the Under Secretary of Defense (Acquisition, Technology & Logistics). It would also authorize the waiver of domestic source and domestic content restrictions that would inhibit the rapid acquisition of equipment needed by the warfighters.

This section also would adjust the notification requirement from reporting within 15 days after each determination made to reporting quarterly on the basis of each determination made.

Section 804. The National Defense Authorization Act for Fiscal Year 2004 established the authority (10 U.S.C. 167a) for the Secretary of Defense to authorize the commander of the unified combatant command with the mission for joint warfighting experimentation to develop and acquire certain defined equipment. This authority is scheduled to expire on September 30, 2006. This amendment would clarify the authority granted in the section to include the ability to expend operation and maintenance funds for the sustainment of equipment after its acquisition. Further, this amendment would delete the provision which terminates the Secretary's authority granted under the statute on September 30, 2006. Such deletion will allow the authority to be a continuing authority of the Secretary.

In application, as authorized by 10 U.S.C. 167a, the Secretary of Defense authorized the Commander, U.S. Joint Forces Command (USJFCOM), the authority to develop and acquire equipment supportive of the joint warfighter. Limited Acquisition Authority (LAA) allows USJFCOM (in its UCP 06 Joint Force Integrator role) to rapidly deliver critical operational capabilities to the joint warfighter by moving forward through the DoD procurement and fielding processes to quickly meet critical battle management command and control, intelligence,

communications or interoperability needs, as articulated by the joint warfighter. Specifically, USJFCOM has used the authority to identify critical needs for the support of forces in operations Enduring Freedom and Iraqi Freedom. To support the need to deliver supplies and equipment with precise accuracy in the remote areas of Afghanistan and Iraq, LAA was used to develop and acquire the Joint Precision Airdrop System. To aid in the defense against improvised explosive devices (IED), LAA was used to develop and acquire the Change Detection Workstation, which is used to identify area changes over time which might indicate IED activity. LAA is also being used to develop the Speech-to-Speech capability which will be used by the soldier on the ground to communicate in the language of the local population. The ability to identify and quickly respond to the warfighter's immediate needs has been invaluable in support of the Global War on Terrorism, and, in order to remain responsive to the warfighter's needs, the authority should be made permanent. This amendment allows the commander with the joint warfighting experimentation mission to provide for sustainment, which will allow for the adequate sustainment of equipment after development and acquisition until such time as the equipment becomes a program of record with full support from an appropriate executive agency.

Section 805 would bring the requirements for the procurement of ship critical safety items and related services in line with the requirements for aviation critical safety items. The requirements for aviation critical safety items, established in section 802 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136), are currently implemented in DOD 4140.1-R, Supply Chain Management, and DFARS Parts 209, 217 and 246. The Department of Defense (DoD) would establish similar regulations for ship critical safety items.

Ship critical safety items represent those parts whose failure would be potentially catastrophic or critical and whose risk of failure is unacceptable. Because of the extreme consequences of failure, rigorous evaluations are conducted on both the item design and required manufacturing processes to ensure safe and reliable parts can be repeatedly produced. Ship critical safety items include parts under the Naval Nuclear Propulsion Program, the Navy Level I and Submarine Safety (SUBSAFE) Programs, the Deep Submergence Systems Program, diving systems Scope of Certification, submarine Fly By Wire control systems, and propulsion shafts and propellers. These items are typically evaluated during the development of a system to determine the specific circumstances that would cause a failure as well as the effects of the failure on safety and performance. This is accomplished so design and manufacturing requirements, life and operational limits can be established. The process of first validating the design and manufacturing details of ship critical safety items and then confirming the manufacturing capability and controls of potential sources is essential to ensure operational safety and effectiveness.

DoD logistics management practices centralize management and acquisition of spare and repair parts. Accordingly, ship critical safety items may be purchased by DoD organizations other than the organization having knowledge of the item's design intent, criticality, limitations, and critical design or manufacturing characteristics. This section would rectify this situation by ensuring that parts essential for ship safety and related modifications, repair and overhaul of those parts are procured only from sources approved by the design control activity and in accordance with technical requirements established by the design control activity. This

legislative change would not unduly restrict competition because it would impose requirements on all potential suppliers of ship critical safety items that are identical or analogous to those required of the original item manufacturer.

Section 806 would allow the Department of Defense to maximize its efforts to close contracts. Section 804 of the National Defense Authorization Act for Fiscal Year 2004, as amended, permits the Department to close contracts entered into prior to October 1, 1996, provided the contracts are administratively complete and the financial account has an unreconciled balance, either positive or negative, that is less than $100,000. The Department has taken several significant actions to assure proper implementation of this authority. These actions were essential, but they delayed closing the contracts. This led to the proposed extension.

During the period of October 2004 through April 2005, the Department established a centralized database that identifies, tracks, and reports contracts potentially eligible for closeout under section 804. In May 2005, the Department issued specific procedures for implementing this authority for each potentially eligible contract. Under these procedures, for each potentially eligible contract, the contracting officer must affirm that the contract is administratively complete, and the accounting officials must affirm that the financial account has an unreconciled balance, either positive or negative, that is less than $100,000.

As of August 2005, the Department has identified approximately 8,823 contracts that are potentially eligible for closeout under the referenced authority. While the Department anticipates that the majority of eligible contracts will be closed by September 30, 2006, the proposed extension is needed to maximize the benefits of the referenced authority by allowing the Department a greater opportunity to find and close all eligible contracts.

Section 807 would remove the September 30, 2007 termination clause.

Termination of the Defense Acquisition Challenge Program would eliminate a program that helps to encourage small and medium business innovation in weapon system products and facilitates rapid adoption of near-term technologies by the warfighter.

Subtitle B—United States Defense Industrial Base Provisions

Section 811 would eliminate a burdensome and extraneous Congressional reporting requirement.

Section 813 of the National Defense Authorization Act for Fiscal Year 2004 directs the Secretary of Defense to establish a process to identify military system "essential items" and create a Military System Essential Item Breakout List. The law then requires the reporting of, among other items, information on the military systems represented; the military and commercial items on the list; and the use of foreign suppliers for the items on the list.

The Department of Defense (DoD) believes that section 813 should be repealed. The Department has produced the first annual report required by the law and finds the information to

be of limited utility for DoD procurement decisions. Complying with the law requires dedication of a significant amount of scarce resources, particularly in staff time to compile and analyze a vast amount of data, for little benefit.

The Departmental consensus, as reflected in the coordination for the annual report, is that the resources that are necessary to meet the requirements of the law could be directed toward other policy or acquisition-related activities that would better benefit the warfighter. The report to Congress notes that the Department finds the information not to be useful and recommends that Congress not use the data for its decision making.

Subtitle C—National Defense Stockpile

Section 821 would extend the authority of the Department of Defense to sell National Defense Stockpile (NDS) inventory.

Subsection (a). The current authorization to sell the commodities listed in section 3303(b) of the National Defense Authorization Act for Fiscal Year (FY) 1997, including germanium, expires at the end of FY 2006. It is anticipated that by the end of FY 2006 substantial quantities of germanium will remain in the NDS inventory, and there has been no identified defense need for NDS germanium. Extending this authorization would allow the sale of the remaining NDS germanium inventory.

Subsection (b). The current authorization to sell cobalt expires at the end of FY 2006. It is anticipated that by the end of FY 2006 substantial quantities of cobalt will remain in the NDS inventory, and there has been no identified defense need for NDS cobalt. Extending this authorization would allow the sale of the remaining NDS cobalt inventory.

Subsection (c). The NDS anticipates that under current market conditions, it will exceed its current authority before the end of FY 2007, which will require the Department of Defense to cease sales. If customers cannot rely on the Department to be a stable supplier of materials, they will go elsewhere, thereby jeopardizing the ability to achieve future revenue goals. Uncertainty in whether or not the Department will be able to remain in the market also will lead to market disruption and instability.

Subtitle D—Other Matters

Section 831 would establish the United States Court of Federal Claims as the exclusive federal court forum for bid protests.

Section 1491(b)(1) of title 28, United States Code, provided temporary concurrent federal jurisdiction between the U.S. Court of Federal Claims and the District Courts to hear pre-award or post-award bid protest matters. Section 12(d) of the Administrative Disputes Resolution Act of 1996 (Public Law 104-320) ("ADRA"), contained a sunset provision that terminated District Court jurisdiction to hear such bid protests under section 1491 as of January 1, 2001, leaving all ADRA bid protest cases under the jurisdiction of the Court of Federal Claims. Nonetheless,

independent federal jurisdiction over bid protests involving maritime contracts has been upheld by the District Courts under the Suits in Admiralty Act, 46 U.S.C. 741-752, as amended ("SAA"). As a result, federal jurisdiction to hear bid protest actions arising out of maritime contracts or prospective maritime contracts continues to exist in the U.S. District Courts rather than exclusively in the U.S. Court of Federal Claims.

Bid protest disputes are unique to government contract law and regulation and have no private maritime sector equivalent proceeding, which is a basis for the waiver of sovereign immunity under the SAA. Conversely, section 1491(b)(1) of title 28 is specifically directed to bid protest claims, and its provisions and limitations should be applied equally to all plaintiffs. Current practice now permits disappointed bidders to maintain a bid protest claim in the District Courts under a separate and unrelated statutory scheme (SAA), simply because the contract or prospective contract is maritime in nature.

The ADRA does not address maritime contracts. However, the ability to invoke admiralty jurisdiction in bid protest cases merely because the case involves a maritime contract evades Congressional intent under the sunset provision of the ADRA to prevent forum shopping among the District Courts and the Court of Federal Claims and to provide national uniformity in resolving federal bid solicitation disputes. 142 Cong. Rec. S11848-11850 (daily ed. Sept. 30, 1996) (statements of Sen. Cohen and Sen. Levin). Senator Levin, who together with Senator Grassley had introduced the ADRA legislation, specifically remarked that the Acquisition Law Advisory Panel had recommended that there should be only one forum for bid protests, and that forum should have jurisdiction to "consider all protests which can now be considered by the district courts and by the Court of Federal Claims." 142 Cong. Rec. S11849 (daily ed. Sept. 30, 1996). Senator Levin described the bid protest provision of the ADRA such that after the sunset provision took effect, "the jurisdiction of the district courts would terminate, and the Court of Federal Claims would exercise exclusive judicial jurisdiction over procurement protests." 142 Cong. Rec. S11849-11850. *See also* H.R. Conf. Rep. No. 104-841, at 10 (1996) ("It is the intention. . . to give the Court of Federal Claims exclusive jurisdiction over the full range of procurement protest cases previously subject to review in the federal district courts and the Court of Federal Claims").

The District Courts are vested with exclusive admiralty jurisdiction and are recognized as having the specific expertise in the unique area of maritime and admiralty law. However, government contract law has developed as a separate specialty practice its own right and bid protest disputes have been resolved in the federal courts largely by the Court of Federal Claims (formerly the U.S. Claims Court), rather than U.S. District Courts. Bid protests involve government procurement law and regulation, whether or not arising out of a maritime contract, and do not require the application of the expertise for which the District Courts are recognized in maritime matters.

For these reasons, exclusive federal court jurisdiction over the full range of bid protest disputes should be vested in the Court of Federal Claims under 28 U.S.C. 1491.

TITLE IX—DEPARTMENT OF DEFENSE ORGANIZATION AND MANAGEMENT

Subtitle A—General Department of Defense Management Matters

Section 901 would allow the Secretary of the Navy, not the President, to appoint officers to the United States Marine Band and United States Marine Drum and Bugle Corps.

This section would provide additional guidance concerning the appointment and promotion of officers in the Marine Band and Marine Drum and Bugle Corps. It would provide a consistent medium for appointments in the Marine Band and Marine Drum and Bugle Corps. Section 6222 of title 10, United States Code, currently mentions the director, assistant director, and other personnel of the Marine Band, but only provides guidance on the appointment and promotion of the director and assistant director of the Marine Band. These proposed changes would add guidance pertaining to the appointment of officers to the Band and Drum and Bugles Corps and allow the Secretary of the Navy to recommend the appointment of officers to these positions without board action based on their unique skill set and demonstrated leadership potential. This section would align the approval and appointment authorities by grade with other similar officer authorities in title 10 and would remove the legal requirement to designate the director and assistant director of the Marine Band, a designation that is an inherently administrative function.

In the past, nominations for these officers were accomplished utilizing the Presidential authority of Article II, Section 2, Clause II of the Constitution. This authority is reserved for use upon direction of the President of the United States. These proposed changes would permit the appointment of these officers, a recurring personnel action, without using the President's Constitutional authority.

Section 902 would eliminate the requirement for the Inspector General of the Department of Defense (DoD IG) to conduct installation visits that duplicate the installation visits conducted by the Inspectors General of the Army, Navy and Air Force (Service IGs) pursuant to section 1566(c)(1) of title 10, United States Code. Meanwhile, this section would retain the requirement for the DoD IG to provide Congress with an annual report consolidating, summarizing and independently assessing the results of the Service IG's reviews.

The DoD IG already has the statutory authority to conduct his own installation assessment visits throughout the DoD as he deems appropriate to augment those conducted by the Service IG's. Thus, there is no reason for the DoD IG to be required by law to conduct installation visits.

Subtitle B—Space Activities

Section 911 would extend through September 30, 2009, a pilot program that is determining the feasibility and desirability of providing space surveillance data support to non-United States Government entities. Extending the pilot program would enable the Department of

Defense (DoD) to develop the data necessary to determine whether to pursue permanent legislative authority or to terminate public dissemination of critical operational data to non-U.S. Government entities.

Section 913 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136) authorized the Secretary of Defense to carry out a three-year pilot program. The DoD is conducting the pilot program in three phases: (1) dual operations of a new Air Force Space Command (AFSPC) Space Track website with the extant (at the time) National Aeronautics and Space Administration Orbital Information Group (NASA OIG) website to provide the same Two Line Element sets (TLEs) and data products already provided through the NASA OIG; (2) operation of the AFSPC website without the NASA OIG website; and (3) advanced "for fee" services provided through the AFSPC website offering support and data products above and beyond those previously provided.

The pilot program is currently in phase 2. Once implemented, the AFSPC website, which replicated the NASA OIG, opened a virtual floodgate of interest from the general public (as indicated by the current total of approximately 13,000 users, compared to approximately 800 users of the NASA OIG site). At the same time, program managers began working through the following issues:

- Approval of accounts for all foreign accounts -- Program managers established a process with the Department of State (DoS) to screen account information through the DoS Excluded Parties List System (EPLS) website. Parties that are cleared through EPLS are cleared for account access. Parties that have "positive" hits are referred to DoS for their review.

- Redistribution of TLEs -- Program managers established a process for approval of non-United States Government entities to redistribute TLEs.

The pilot program was scheduled to begin in May 2004 and run for three years, ending on May 22, 2007. Due to various delays, the pilot program did not begin until January 3, 2005. To date, the DoD has devoted the majority of its effort to establishing administrative processes associated with account and redistribution approval. As a result, without an extension of the pilot program AFSPC will have insufficient time to enter and operate in phase 3 in order to fully accomplish the program's goals. In addition, the NASA OIG experienced a hard failure in February 2005, due to lack of maintenance and sustainment, and NASA decided not to expend the resources necessary to recover the website. As a result, only DoD is able to provide TLEs (positional data about satellite location) to customers that will ensure safe operations on orbit.

Extending the pilot program would allow for continuation of the current service and expansion to advanced support, as well as providing the necessary time to fully determine the feasibility and desirability of the service.

Section 912. The Commercial Space Transportation Competitiveness Act of 2000 authorized interagency funding of the Interagency Global Positioning System Executive Board

(IGEB). This section would make a technical amendment to the Act to reflect the subsequent disestablishment of the IGEB and its replacement by a new organizational structure.

Presidential Decision Directive NSTC-6 (*U.S. Global Positioning System Policy*) established the IGEB in 1996 as a permanent interagency Global Positioning System (GPS) executive board, jointly chaired by the Departments of Defense and Transportation, to manage GPS and U.S. Government GPS augmentations. Since the IGEB had members from both the Department of Defense (DoD) and civil agencies, and was created to protect the equities of both the DoD and civil users, it was appropriate that the cost of operating the IGEB be shared in an equitable fashion between the member organizations. Section 8 of the Commercial Space Transportation Competitiveness Act of 2000 provided express authority for the use of interagency funds to support the IGEB.

On December 8, 2004, the President published National Security Presidential Directive 39 (NSPD-39), *U.S. Space-Based Position, Navigation, and Timing Policy*. NSPD-39 replaced the IGEB with three new organizations also designed to increase interdepartmental transparency and coordination:

- National Space-Based Positioning, Navigation, and Timing Executive Committee, an interagency committee that manages the GPS and U.S. Government GPS augmentations (co-chaired by the Deputy Secretaries of the Department of Defense and the Department of Transportation).

- National Space-Based Positioning, Navigation, and Timing Coordination Office, which serves as the Secretariat of, and provides staff functions for, the Executive Committee.

- Space-Based Positioning, Navigation, and Timing Advisory Board, a Federal advisory committee comprised of experts from outside the U.S. Government to advise the Executive Committee.

This section would update the Commercial Space Transportation Competitiveness Act of 2000 to reflect the new organizational structure created by NSPD-39 and permit continued interagency funding for this activity.

Subtitle C—Intelligence-Related Matters

Section 921 would remove the current termination date of December 31, 2006 for initiating defense intelligence commercial activities under 10 U.S.C. 431. Under this statute, the Secretary of Defense, subject to the coordination requirements in subsection (b) of the statute, may authorize the conduct of commercial activities necessary to provide security for authorized intelligence collection activities abroad. When Congress enacted this provision in 1991, it included a "sunset" provision which has been extended a number of times, resulting in the current termination date of December 31, 2006. The Department of Defense's "commercial cover" activities constitute an established and valuable program. There is no longer a significant

purpose to be served by repeated Congressional extension of the program in two-year increments. Enactment of this section would remove the current termination date and extend authority for the program indefinitely.

Section 922 would update the definition of "combat support agency" in section 193 of title 10, United States Code, by changing "The Defense Communications Agency" to "The Defense Information Systems Agency." The Department of Defense officially renamed and rechartered the Defense Communications Agency as the Defense Information Systems Agency in June 1991 (Title 32 Code of Federal Regulations Part 362). This proposed correction would eliminate any continuing confusion between the retired agency name and the current name.

The agency has already made all changes in signage, stationery, and all other administrative matters, so the correction in the statutory listing would not result in any additional budgetary impact.

Section 923 would exempt from disclosure under the Freedom of Information Act (FOIA) certain information in the possession of the Department of Defense concerning weapons of mass destruction (WMD) which does not also meet the threshold for national security classification.

The exemption would be available to the Department for only the period of time the information remains sensitive. It would also require the Department to safeguard such information commensurate with its sensitivity, and it would preempt contrary State or local laws. It would also require the Department to take reasonable actions to ensure the information is also safeguarded by parties with whom it shares the information.

Individuals, corporations, universities, and State and local governments operate research programs, chemical plants, nuclear power stations, medical treatment facilities, and other activities that generate information that easily could assist a terrorist or other adversary to make or use a weapon of mass destruction. Such information created by or for the United States Government can be classified under current authorities, when appropriate, and certain unclassified information about U.S. Government programs may be properly withheld from disclosure under exemption (b)(2) of FOIA.

Exemption (b)(2), however, does not provide protection against release of unclassified information about non-U.S. Government facilities and activities that may be of significant value to terrorists or other adversaries seeking to attack U.S. interests by chemical, biological, radiological, or nuclear means. When in the Department of Defense's possession, in some cases, the information about non-U.S. Government facilities or activities will not fall within any current FOIA exemption, even though its release might create a risk to national security. This section would provide statutory protection against a requirement to release such information under FOIA and similar State and local laws, but for only that period of time the information remains sensitive.

Exemption (b)(4) does provide protection against release of information from non-U.S. Government facilities provided it is (1) confidential business information, (2) which is voluntarily provided to the government and (3) is customarily protected by the submitter. However, meeting this multi-tiered test is not always easily achieved.

Due to the uncertainties described above, a WMD withholding statute is warranted, but only one of limited scope and duration. The limitations are necessary because much of the information at issue is not under the control of the Department of Defense or any other Federal, State or local agency and thus may become public through other means. At such time, it would be unnecessary for the Department of Defense to continue to withhold and safeguard the same information.

Also, information such as security plans and inventories of specific private sector facilities would quickly become non-sensitive if, for example, the facility closed or the inventory was moved to another location. Again, continued withholding and safeguarding by the Department would be unnecessary.

Additionally, the narrow scope is necessary to ensure information necessary for disclosure and exchange for medical or public heath and safety reasons may be disclosed pursuant to existing law and regulation.

Section 924 would authorize the National Security Agency (NSA) to collect service charges for evaluating, certifying, or validating information assurance (IA) products under the National Information Assurance Program (NIAP) or successor program. The fees shall be set through a public rulemaking process and will be in accordance with OMB guidance in OMB Circular No. A-25.

NSA and the National Institute for Standards and Technology (NIST) formed the NIAP in order to promote information security in various ways, including the testing and certification of information assurance (IA) products. For commercial IA products, vendors initiate the certification process. Certification is voluntary for IA products that are acquired by United States Government (USG) civil agencies and non USG entities, but certification is mandatory for IA products to be used in all DoD information technology systems.

Certification testing is conducted by accredited commercial labs, and is overseen and validated by a USG employee or contractor. NIST accredits the commercial labs and charges the laboratories a fee for that service, as authorized under 15 U.S.C. 275a. The commercial labs charge the vendors a fee for testing and certification. NSA oversees and validates the commercial lab's testing and certification. NSA's cost for providing this service was $5 million in FY2005 and is expected to continue to rise sharply. NSA has no authority to charge a fee for this service. NSA's costs are funded from annual appropriations for DoD's Information Systems Security Program (ISSP).

Enactment of this section would shift the costs of validating the certification of commercial IA systems from DoD to the vendors, who will presumably pass it on to their

customers, who may be DoD components, other U.S. Government agencies, or non-U.S. Government entities. This change would ensure that the supply of validators in a rapidly expanding market for IA products is not constrained by the availability of ISSP appropriations. Conversely, it will ensure that funding for other ISSP activities is not eroded by increased costs for validations of certifications of commercial IA products.

This section is modeled on NIST's current authority at 15 U.S.C. 275a. Its language is intended to accommodate future changes in the NIAP testing and certification program.

TITLE X—GENERAL PROVISIONS

Subtitle A—Financial Matters

Section 1001 repeals the requirement for a separate budget request for procurement of reserve equipment.

Section 1002 repeals the requirement for a two-year budget cycle for the Department of Defense.

Section 1003 would create a statutory exception to the Miscellaneous Receipts Act by authorizing the Department of Defense (DoD) to accept and retain reimbursement from non-Federal sources for its conference costs. It would permit the DoD to accept reimbursement into its applicable appropriation or account from which its conference costs were paid. It also would allow the DoD to employ general business practices when conducting conferences and symposiums.

Currently, the miscellaneous receipts statute (31 U.S.C. 3302(b)) effectively prohibits the Department from collecting conference fees from individual conference participants to defray the costs of the conference. The statute requires these collections to be deposited into the general Treasury and *not* into any appropriation available to the DoD.

This section would provide the necessary authority for the DoD to collect conference fees from conference participants and use the amounts collected to pay the conference expenses (*e.g.*, commercial conference space, audiovisual support, educational materials, authorized refreshments, speakers' fees, advertising, etc.). It also would permit the Government to collect reasonable fees from vendors at Government exhibitions.

This section also would recognize the business practice of employing conference planners to orchestrate the conference—often at no additional cost to the Government. Conference planners are experts at conducting such events and, as such, are best able to minimize costs, while allowing DoD employees to focus on mission-related functions. When vendors participate in exhibitions, the conference planner can defray costs of the conference through exhibitor fees and advertising, thereby reducing the costs ultimately borne by the DoD through the reimbursement of employees' conference fees.

Costs Implications: This section would not create or change an entitlement or require funding in a Program Budget Decision. However, the provision may result in fees being credited to DoD appropriations or accounts, which, without this legislation, would have to be deposited into the Treasury as miscellaneous receipts.

Section 1004. Section 166 of title 10, United States Code, authorizes budget proposals to include joint exercises. Due to the difficulties in obtaining sufficient funds from all the Armed Forces for exercise participation in the year of execution because of competing real world demands, a mechanism is needed to allow the Chairman's joint exercise funds to be used to allow participation by units essential to the success of the exercise when funds programmed for that exercise from their Service may have been depleted by other higher priority events.

Flexibility for the Armed Forces and combatant commands to use funds from the Chairman's exercise program is needed, as long as the purpose is exercise related. Currently, the Chairman's exercise transportation funds can only be used for strategic sealift or airlift of equipment and forces; port handling; and inland transportation. This section would give authority to allow JCS exercise transportation funds to pay for self deploying watercraft owned by the Services, port support activity costs, and transportation/port handling costs for forces other than Surface Deployment and Distribution Command (SDDC) when SDDC is not the port operator. Other exercise related costs that these funds could cover are breakout and operation of prepositioned watercraft or lighterage for Joint Logistics Over The Shore exercises. Joint Staff exercise funding policy dates from the 1982 DOD Appropriations Bill. This bill transferred "transportation related funds from the individual military service appropriations to the JCS appropriation where they can be managed, supported, and defended by the Joint Chief of Staff." This section would allow greater flexibility as to the use of the funds and would allow the Chairman to maximize the limited funds available to him by allowing a merger with existing funds. By providing the minimum amount needed to cover the unit funding shortfalls for those units essential to the success of the exercise, the Chairman could ensure greater participation, more realistic planning, and better training exercises.

Cost Implications: This section would not increase costs. The Department of Defense anticipates that passage of this section would result in reduced costs for deployment, operation and employment of military department-owned watercraft in logistics over the shore exercises and other transportation/port operation related operations.

Section 1005 would authorize the Secretary of the Army, for a five-year period, to use the proceeds of sales of M109 howitzers under foreign military sales (FMS) procedures of the Arms Export Control Act to procure M109-based vehicles, including command and control vehicles and field artillery ammunition support vehicles.

Under the current procedure (22 U.S.C. 2761), when an item is sold from inventory and the item is not intended to be replaced, the proceeds of the sale from the FMS customer are deposited as provided in 10 U.S.C. 114(c)(2) to the Treasury as miscellaneous receipts as provided in 31 U.S.C. 3302(b). This proposed section would authorize the Secretary to retain the funds from the sales of M109 howitzers.

The Army has a critical requirement to provide additional vehicles from the M109 family. The temporary authority provided in this section would enable the Army to fill Active Army and National Guard critical artillery needs for M109-based vehicles, such as the Field Artillery Ammunition Support Vehicles and the Paladin Operations Center Vehicle.

Subtitle B—Naval Vessels and Shipyards

Section 1011 would allow the transfer of a specified number of ships to a particular nation without identification of the specific vessel (hull number, ship name).

Section 7037 of title 10, United States Code, requires legislative approval for the transfer to other nations of specific naval vessels exceeding 3,000 tons or that are less than 20-years-old. The legislative approval process typically begins two years or more prior to the actual decommissioning of the U.S. Navy vessel and ship transfer. Decommissioning plans frequently change as a result of changing operational commitments, material condition, and other factors. Linking a specific vessel to a specific country can result in a lost transfer opportunity if that vessel's decommissioning status changes and it must be replaced by another vessel of the same class as a transfer candidate.

This proposed change would better support the goal of affecting "hot" ship transfers (*i.e.*, transfers to the purchasing navy coincident with U.S. Navy decommissioning). Hot ship transfers reduce the cost of decommissioning preparation and lay-up for the U.S. Navy and may support a higher selling price for the ship as an "excess defense article." For the purchaser, a hot ship transfer is advantageous because it eliminates reactivation costs attributed to long post-decommissioning lay-up and because the ship transfer can be more quickly and economically realized.

The proposed change still would require the Congress to authorize the release of specific naval capability and technology to specific countries, but it would provide flexibility to best match available decommissioned ships to customer navies' requirements.

This section does not alter the effect of the Toxic Substances Control Act (or any other law) with regard to their applicability to the transfer of ships by the United States to foreign countries for military or humanitarian use. The laws and regulations that apply today would apply in the same manner if this section were enacted.

Cost Implications: While difficult to estimate, upcoming ship transfer candidates of DD-963, LHA-1, LPD-4, MHC-51 and FFG-7 classes are envisioned to generate hundreds of millions of dollars per year in additional industrial activity along with significant reimbursement to the Treasury for ship sale cost and elimination of U.S. Navy storage and disposal costs.

Subtitle C—Counter-Drug Activities

Section 1021 would extend current authorities for the Department of Defense to assist the counter-drug activities of any other department or agency of the Federal Government or of any State, local, or foreign law enforcement agency for five more years. This support has been key to our national drug strategy, and it will remain critical in the future to stem the flow of illicit drugs into our country.

Section 1022 seeks the continuation of authorities provided in the Ronald W. Reagan National Defense Authorization Act for Fiscal Year (FY) 2005 that allows the Department of Defense (DoD) to support a unified campaign against narcotics trafficking and activities by organizations designated as terrorist organizations; it also extends the increase in the troop cap provided for in FY 2005 and FY 2006 for an additional two years. These authorities provide the DoD the flexibility to use funds appropriated for counter-narcotics activity to support Colombian efforts against terrorist organizations intimately involved in narcotics activities. The proposed amendments would extend these authorities for an additional two years in order to provide support to the consolidation phase of Plan Colombia.

On November 22, 2004, the President of the United States, in a joint press conference in Cartegena with Colombian President Uribe, announced that the United States would continue to support the Government of Colombia in its campaign against narcoterrorism. This commitment was formalized in the Deputies Committee meeting of October 18, 2005, which directed continued support to Colombia at levels similar to FY 2005 and FY 2006.

Section 1021 of the Ronald W. Reagan National Defense Authorization Act (NDAA) for FY 2005 allows DoD funds used for assistance to Colombia to be used to "support a unified campaign … against terrorist organizations such as the FARC, ELN and AUC" in fiscal years 2005 and 2006. If the DoD seeks to continue to use DoD funds appropriated for counter-narcotics to assist the Colombian Military in conducting counter-terrorist activities the NDAA for FY 2007 must include language similar to that contained in section 1021 of the NDAA for FY 2005 covering funds for FY 2007 and beyond.

Further, this extension continues to provide the Command flexibility in supporting operations in Colombia while adhering to all of the other constraints, such as not allowing U.S. military personnel to participate in Colombian military combat operations. During FY 2005, the first year of implementation, the number of military personnel in Colombia never exceeded 538. Although the Command never reached the 800, it provided DoD the flexibility to increase as needed. U.S. Southern Command believes that continued flexibility is needed to ensure proper support to the Colombian military.

Section 1023 would extend current authority for 5 more years. The current authority expires at the end of Fiscal Year 2006. The updated section also expands the nature of support to include additional types of equipment and supplies that are essential for conducting counter-drug missions, and that will sustain and reinforce previously provided training and other support. These additional provisions will enable DoD-supported countries to successfully engage drug traffickers.

Current law authorizes the Department of Defense (DoD) to provide specific types of support, not to exceed $40 million during the fiscal years 2004 through 2006. Over the past few years this authorization enabled the DoD to successfully support interdiction efforts in Colombia and Peru, and to bolster nascent security efforts in Afghanistan. The requested authority doubles the DoD's funding to accommodate Afghanistan's acute requirements for equipment and maintenance, and adds fourteen countries to the list of countries eligible for support. These countries are situated either along key drug smuggling routes or are facing an increasing threat of narcoterrorism. Enhanced interdiction capabilities for the countries listed in this legislation are critical to U.S. efforts to stem the flow of illicit drugs, and to reduce the threat of narcoterrorism to struggling democracies.

Section 1024 would extend current authorities five more years. The current authority, which expires at the end of FY 2006, enables the Department of Defense to (DoD) assist the counter drug activities of any other department or agency of the Federal Government or of any State, local, or foreign law enforcement agency for any of the purposes set forth in the act. This support has been key to our national drug strategy, and it will remain critical in the future to stem the flow of illicit drugs into our country.

Subtitle D—Matters Related to Homeland Security

Section 1031 would expand the duties of the Weapons of Mass Destruction - Civil Support Teams to include preparing for and responding to the intentional or unintentional release of nuclear, biological, radiological, or toxic or poisonous chemical materials likely to result in catastrophic loss of life or property.

Currently, section 12310(c) of title 10, United States Code, limits the duties of the Civil Support Teams, normally operating under the authority of title 32, United States Code, to preparing for or responding to (a) the use of a weapon of mass destruction (as defined in section 12304(i)(2) of title 10); or (b) a terrorist attack or threatened terrorist attack that results, or could result, in a catastrophic loss of life or property.

This current limitation does not recognize the possibility that materials could be released as a result of a criminal or negligent act or a natural disaster - with the same resultant cost in loss of life or property - as well as the intentional act of a terrorist or a terrorist group.

This section would correct this limitation.

Section 1032. Section 1605 of the National Defense Authorization Act for Fiscal Year 1994 does not include new organizations and new responsibilities of existing organizations relevant to counterproliferation. The report it mandates cannot cover the activities that have emerged in related combating weapons of mass destruction (WMD) areas. The legislation has been overcome by events and the benefit of the annual report does not justify the cost of production.

Relevant new organizations that have been set up since 1994 chartering legislation for the Counterproliferation Program Review Committee (CPRC) include: the Department of Homeland Security (DHS), the Director National Intelligence, the National Counterproliferation Center (NCPC) and National Counter Terrorism Center (NCTC), and the Counterproliferation Technology Coordination Committee (CTCC). The latter is led by the National Security Council, Homeland Security Council and the Office of Science and Technology Policy (OSTP). Within the Department of Defense (DoD) there have been significant changes relevant to combating WMD responsibilities with the creation of the Assistant Secretary of Defense for Homeland Defense to coordinate between the DHS and the DoD. U.S. Northern Command (NORTHCOM) was established as a new regional combatant commander for the region of the United States. U.S. Strategic Command (STRATCOM) was assigned as lead combatant command for combating WMD. Strongly related science & technology programs in the Department of Energy (DOE) were transferred to the DHS.

Many interagency activities have been established to share information on development of capabilities to reduce the threat from the use of WMD.

The National Proliferation and Arms Control Technology Working Group (NPAC TWG) is an interagency group to share technology development information on technologies to better assess compliance with nonproliferation and arms control agreements.

* The Technology Support Working Group is a tri-department group (DoD, DOE and Department of State) to foster technology developments to counter terrorism threats.

* The CTCC was established to assess technology development activities across the U.S. government to identify capabilities and gaps in our technology development programs to counter the WMD threat.

Other specific interagency efforts are: the National Counterproliferation Committee, the National Counter Terrorism Committee, Management of Domestic Incidents, establishment of the Domestic Nuclear Defense Office (DNDO), the Proliferation Security Initiative, the 2004 National Critical Infrastructure Protection Research & Development Plan and the National Homeland Security Science & Technology Plan.

At the same time each department necessarily coordinates with appropriate other departments in investment planning for WMD threat reduction in order to leverage resources to more efficiently and effectively apply resources to improve capabilities.

Section 1033 would expand the operations of civil support teams (CSTs) staffed by members of the Active Guard and Reserve who serve on active duty under section 12301(d) of title 10, United States Code, or on full-time National Guard duty under section 502(f) of title 32.

This section would expand the emergencies that CSTs are authorized to "prepare for or respond to" to include the intentional or unintentional release of nuclear, biological, radiological, or toxic or poisonous chemical materials and, when authorized by the Secretary of Defense,

natural or manmade disasters. Currently, section 12310(c) of title 10 allows the use of CSTs solely in incidents involving the use of weapons of mass destruction (WMD) or terrorist attacks (either actual or threatened). Natural disasters, criminal acts, acts of negligence, and unforeseen accidents can result in the release of nuclear, biological, radiological, or toxic or poisonous chemical materials that having catastrophic impacts similar to a WMD or terrorist attack. CSTs, which are already trained and equipped to deal with those attacks, would be an invaluable asset in responding to other releases of hazardous materials. In addition, as demonstrated during the response to Hurricane Katrina, CSTs can be an important asset in responding to natural or man-made disasters. Because CSTs are a limited resource, however, their use for such disasters should be limited to catastrophic situations where the resources of State governments are overwhelmed, which is why this section would require that the employment of CSTs in those kinds of situations be authorized by the Secretary of Defense and performed in an active duty status if the activities are to be performed outside of the United States.

Currently, section 12310(c)(3) allows the use of CSTs only within the "geographical limits of the United States, its territories and possessions, the District of Columbia, and the Commonwealth of Puerto Rico." Weapons of mass destruction and terrorist attacks in neighboring countries, however, may possibly have catastrophic effects on U.S. territory. Therefore, permitting the use of CSTs across the United States' borders with Canada and Mexico would be greatly beneficial in detecting, deterring, defeating, or otherwise dealing with those types of incidents. As a result, this section would allow, with the approval of the Secretary of Defense and under the authority of Title 10, the use of CSTs in Canada and Mexico if appropriate authorities in those countries consent to the entry of any CST into their sovereign territory.

This section also would amend section 12310 to replace the use of the phrase "rapid assessment element team" with "civil support team." Inasmuch as these teams are now almost exclusively known as "weapons of mass destruction civil support teams," or simply "civil support teams," clarity and consistency favor updating section 12310 to reflect the more widely recognized name.

Finally, this section would define "United States" to comport with the definition in section 1403(c)(2) of the National Defense Authorization Act for Fiscal Year 2003 (Public Law 107-314; 116 Stat. 2676).

Subtitle E—Other Matters

Section 1041 would alter three sections of Title 10 to ensure the definition of "national security system" (NSS) is consistent with both the current definition of that phrase in the Federal Information Security Management Act of 2002 (FISMA) P.L. 107-347, Title III, Section 301, and the definition of "information technology" in 40 U.S.C. § 11101(6). The sections proposed for change are those dealing with: (1) "Defense business systems architecture, accountability, and modernization" (10 U.S.C. § 2222); (2) "Information technology: additional responsibilities of Chief Information Officers" (DoD CIOs, 10 U.S.C. § 2223); and (3) "Law inapplicable to the procurement of automatic data processing equipment and services for certain defense purposes"

(10 U.S.C. § 2315.) With respect to the proposed change to 10 U.S.C. § 2223(c), the new definition is consistent with both the current definition of that phrase in the FISMA and the related definition of "information technology" in the immediately previous paragraph (2) ["… definition in section 11101 of title 40…"] in the same section.

Since DoD's CIO also chairs the interagency Committee on National Security Systems (CNSS), updating Title 10 to reflect the most recent Congressional definition of NSS is appropriate in light of language in H.R. Report 107-787, issued to accompany H.R. 2458 (ultimately P.L. 107-347, 17 December 2002, which includes FISMA at Title III.) This Congressional Report states on Page 59 (in part):

"... in § 3537, FISMA places national security systems within the government-wide information security risk management framework of the legislation. The purpose of the section is to make clear that while agencies must manage national security systems consistent with applicable national security requirements (independent of OMB or NIST system requirements), they must also secure those systems with the same risk-based management approach and the same commitment to agency accountability applicable to all Federal agencies through provisions of the instant legislation …" {Emphasis added.} AND

"… FISMA's § 3532 replaces GISRA's "mission critical system" definition with a "national security system" definition that encompasses the two traditional components of national security-related systems … FISMA clearly requires agencies, as well as evaluators, to take all appropriate steps necessary to protect the security of national security systems..."

FISMA broadened the definition of "national security system" to include all systems used for classified data as well as those operated "by a contractor of an agency, or other organization on behalf of the agency." 40 U.S.C. § 11101(6)'s definition of "information technology" currently includes certain contractor-provided systems: "…if the equipment is used by the executive agency directly or is used by a contractor under a contract with the executive agency that requires the use-- (i) of that equipment; or (ii) of that equipment to a significant extent in the performance of a service or the furnishing of a product…" and existing FISMA implementation directives already encompass Departmental oversight and management of systems provided by contractors and outside organizations.

This more expansive definition of NSS is critical to ensuring that the fullest scope of systems are considered for supervision and protection, including classified systems and systems under third-party control. As is noted in the "Cons" section of this package, there are other older sections of the U.S. Code that also need to have their references to NSS terminology updated. For example, 29 U.S.C. § 794d (in Title 29. Labor, Chapter 16. Vocational Rehabilitation and Other Rehabilitation Services, Rights and Advocacy, § 794d is titled "Electronic and information technology") under paragraph (a), "Requirements for Federal departments and agencies" subparagraph (5) states: "(5) Exemption for national security systems. This section shall not apply to national security systems, as that term is defined in section 5142 of the Clinger-Cohen Act of 1996 (40 U.S.C. 1452) [40 U.S.C. § 11103]."

Sections 2222, 2223 and 2315 of title 10, United States Code, were last amended before the enactment of FISMA and have not been changed to incorporate the language in the new NSS definition. The new definition is used, however, in Homeland Security Presidential Directive (HSPD) 12 dated August 27, 2004, is used in National Institute of Standards and Technology publications, and is implied in the Committee on National Security Systems (CNSS) Directive 502 dated December 16, 2004, since FISMA in its entirety is cited as a reference. Harmonizing the definition of NSS throughout Title 10 would provide a clear statutory link to the most recent statutory language signed into law.

Changes to the references will have no budgetary impact. Many security organizations within the Department of Defense are already proceeding under the new definition.

Section 1042 would provide Combatant Commands (COCOMs) with the necessary flexibility and responsiveness to tailor their respective rewards programs to address the varying environments and requirements within their particular Area of Responsibilities. Geographic dispersion of units and location of COCOM Headquarters influence the timeliness of rewards approval and payment. Timeliness in payment of rewards for strategic-level targets correlates directly to the willingness of the local population to incur considerable risk to life and family by providing valuable information leading to the capture of High Value Individuals and weapons caches.

The proposed amendment would address these concerns by delegating approval authority to subcombatant commanders (e.g., the Commander, Multi National Forces - Iraq). A designated Under Secretary of Defense would review those rewards proposed by the subordinate commanders.

Increasing the local commander's reward authority will facilitate the acquisition of information leading to high value weapons systems such as Man-Portable Air Defense Systems (MANPADS). For instance, the black-market price for MANPADS exceeds the current maximum reward amount of $2,500 which the local commander can authorize. The current system requiring the local commander to request authorization for a larger reward amount causes unnecessary delays in the issuing of rewards. This has proven to be a hindrance in the prosecution of the DoD Rewards Program. Increasing the local commander's reward amount authority will create a greater incentive to the local populace to provide information leading to the capture of these weapon systems.

Providing the name of the reward recipient as part of the Annual Report to Congress creates an unnecessary threat to that person's safety. Terrorist reprisals against named personnel in the Annual Report would be detrimental to the DoD Rewards Program and serve as a major hindrance in the Global War on Terrorism. The reward recipient's information will be maintained within the Department of Defense.

Section 1043 would amend the authority of the Office of Economic Adjustment (OEA), Department of Defense, to allow it to directly award grants, conclude cooperative agreements, and execute contracts for research and technical assistance in order to more effectively and

efficiently carry out its program of community adjustment and economic diversification assistance under title 10, United States Code, and Executive Order 12788, as amended.

Executive Order 12788 directs the OEA to undertake actions in support of the Defense Economic Adjustment Program. Under 10 U.S.C. 2391, the OEA can supplement funds available under Federal programs administered by other Federal agencies in order to assist State and local governments in planning or carrying out defense community adjustment and economic diversification. OEA can only enter into agreements with, and transfer funds to, other Federal agencies in order to carry out research and technical assistance activities in support of its program authorities under title 10 and requirements arising through implementation of the Defense Economic Adjustment Program (DEAP) under Executive Order. Transferring funds to other Federal agencies contributes to more costly and less effective program delivery due to fees charged by those agencies and the 9+ month period it takes, on average, to meet that agency's program requirements. For example, OEA would no longer need to work through third parties, paying an additional 3-5 percent "administration fee" and waiting for up to one year prior to obtaining this support on behalf of the DEAP.

Section 1044 would clarify that the Federal government has a civil cause of action under the Lanham Act for false or misleading representations of fact or false or misleading descriptions of fact when products are advertised or promoted

The Lanham Act (i.e., the Federal Trademark Law) was first passed in 1946 (15 U.S.C. 1051 et seq.). Section 43(a) of that Act (15 U.S.C. 1125(a)) has become a Federal remedy for false and misleading advertising and other unfair competition acts, and also serves as an anti-fraud law. The Department of Defense (DoD) is vitally concerned that the federal courts' approach to standing in false advertising claims under the Act may deprive the DoD of an important potential recourse in protecting its personnel against false or misleading advertisement, especially in regard to critical safety products.

Although a literal reading of 15 U.S.C. 1125 (a)(1) appears to provide standing to consumers, the courts deny standing for consumers to sue under the Act for "false or misleading description of fact, or false or misleading representation of fact." The federal courts of appeals consistently limit standing to plaintiffs alleging competitive injury in actions for false or misleading advertising brought under 15 U.S.C. 1125(a)(1)(B), although the standing issue has not been addressed in the context of a Government plaintiff. In addition, suing for false advertising in a state court, as suggested by the case law as an alternative to a Lanham Act suit, is not an available option for the United States.

Where the Courts have limited standing to a person "in commercial competition with" the defendant because the cause of action is statutorily derived, such finding can easily be extended to also eliminate standing for owners of trademarks such as Underwriters' Laboratories, Inc. and the United States, which have not granted the defendant permission to use their marks, but would never actually be "in commercial competition with" the defendant offender. Thus, this section includes clarification that the United States has standing as the owner of trademarks.

Concern about Government standing to bring false advertising actions for injunctive relief under section 1125(a) has arisen during the Department of the Navy's (DON's) efforts to curtail misleading advertising by several companies with respect to military specification compliance. These companies state in their internet advertising and product labeling that their aqueous film-forming foams ("AFFF," a fire suppressing agent) comply with military specification MIL-F-24385, which prescribes the stringent performance requirements for all AFFF used by the DoD. A key requirement of MIL-F-24385 is that the AFFF must be fully compatible with all other qualified AFFF so that different manufacturers' products can be mixed without risk of reduced performance. The companies in question have never submitted their products for qualification to the Qualified Products List (QPL) for AFFF under MIL-F-24385. Qualification is required before a manufacturer may represent that the product meets the military specification (see DOD 4120.24-M at AP2.7.2), and, in this case, is vital to ensure compliance with the compatibility requirement for AFFF. Furthermore, the companies have not provided the Navy with any test results or reports evidencing compliance with the specification. In short, the Navy has no way of knowing whether the non-QPL AFFF products possess the characteristics required for DoD use; therefore, the products may not be used aboard Navy vessels or at Navy facilities. In addition to the risk of inadequate effectiveness of the unqualified product itself, there is the added risk that the products in question could be mixed with qualified AFFF in shipboard AFFF tanks in reliance on the misleading labeling, thereby contaminating the proven products. The use of unqualified AFFF presents an unacceptable risk to the safety of Navy personnel, property, and vessels.

To date, the Navy has found and removed one manufacturer's unqualified AFFF from three of its ships and one shore facility after it was purchased in reliance upon the manufacturer's misleading advertising and labeling. That company has refused to change the advertising or labeling, even after receiving several DON notices informing it of the violation. The risk of further purchases remains as long as these companies continue their advertising and labeling practices. In addition, the risk is exacerbated because AFFF is often purchased by very decentralized purchasers that are most likely not aware of warning notices, including contractors and individual ship supply officers.

Other potential remedies would not adequately address the problem of false or misleading advertisement of products as meeting DoD specifications or unauthorized use or misuse of the DoD's trademarks of military specifications and qualified products lists.

There are other examples of such misleading advertising: (1) seven different companies who were not approved for listing on the Qualified Manufacturers List (QML) advertised in their literature and labeling that their hybrid microcircuits complied with MIL-PRF-38534, FSC 5962, and MIL-STD-883; (2) a company was advertising that its bearings used in military aircraft were fully-qualified to Military Specification MIL-B-81820 when, in fact, it was not qualified and had never been submitted for qualification; and (3) a company named itself 901D and operated a web site with that name because the applicable military specification was MIL-S-901D, which specifies requirements for shock tests, high-impact shipboard machinery, equipment and systems. This last company freely admitted and even advertised "901D derives its name from the U.S. military standard, MIL-S-901D, which requires commercial off the shelf (COTS)

hardware to keep performing under extreme situations experienced during combat." Not only was this company implying that its products were qualified under the military specification, but this company also was implying that the DoD had endorsed its products (such endorsements are prohibited by law).

The circumstances of these cases demonstrate that clearly established Government standing to bring false advertising claims under the Lanham Act would benefit the Government in certain instances. Such standing would fill a gap in Federal agencies' ability to protect them from false advertising and labeling by vendors, especially with low dollar value products and when safety is at issue. Moreover, the increasingly diversified purchasing of low dollar value COTS products underscores the need for this legislative proposal.

TITLE XI—CIVILIAN PERSONNEL MATTERS

Section 1101 would treat certain noncareer Senior Executive Service (SES) members and chiefs of mission similar to career SES and Senior Foreign Service (SFS) members when they are appointed by the President, and confirmed by the Senate, to a civilian, non-SES or SFS position in the Executive Branch, or appointed to a non-SES or SFS position where pay is set by, or equal to one of the levels of, the Executive Schedule. Under existing law, career SES and SFS members may elect to continue to have provisions of the SES or SFS system related to pay, performance awards, awarding of rank, severance pay, leave and retirement apply after their appointment. This section would allow noncareer SES members and chiefs of mission who have served in a noncareer SES or chief of mission position for at least 180 days to make the same election with respect to pay, leave and retirement (noncareer SES members currently are not eligible for bonuses, performance awards, awards of rank or severance pay).

Currently, noncareer SES members and chiefs of mission who have served in Executive Branch agencies and subsequently assume PAS positions often take a pay cut, at the same time they are asked to assume positions of substantially greater responsibility. SES members are paid on a banded schedule ranging from $107,550 to $149,200 (without a certified performance appraisal system) or from $107,550 to $162,100 (with a certified performance appraisal system). Chiefs of Mission, pursuant to section 401 of the Foreign Service Act (22 U.S.C. 3961), receive a salary, as determined by the President, at one of the annual rates payable for levels II through V of the Executive (EX) Schedule (EX), a non-banded pay schedule with five levels (Level I, $180,100; Level II, $162,100; Level III, $149,200; Level IV, $140,300; and Level V, $131,400). Those serving in PAS positions are also paid according to the EX. Therefore, when a noncareer SES member earning a basic salary above $140,300 moves into a Level IV or V position in the EX, that person would take a pay cut. Similarly, when a chief of mission moves from a higher EX level rate of pay to a lower, statutorily designated, rate of pay for his new PAS position (e.g., an Assistant Secretary position, which by statute is set at level IV of the EX), he also would take a pay cut.

Although this happens rarely in the Departments of Defense (where it occurred only six times from Fiscal Year (FY) 2003-2005) and State, and would affect only a small number of individuals during any Administration, the pay cuts could be significant: they could be as great

as $8,900 at the maximum SES pay rate under a non-certified performance appraisal plan or as great as $30,700 under a certified performance appraisal plan. For example, the two individuals affected in the Department of Defense in FY 2005 had their pay reduced from the highest level of the SES pay band ($149,200) to EX-IV, resulting in an annual loss in salary of $8,900.

Cost Implications: Since this section would affect only a few individuals each year, the annual costs to the Department of Defense would be negligible. The estimated cost of this section for the first year would be less than $50,000, based on two individuals, with a combined maximum salary difference of $35,600 (the difference between the maximum SES rate of $149,200 and the EX V rate of $131,400 for each person).

Section 1102 would allow the Department of Defense to provide full replacement value coverage through a contract with the transportation provider for household goods of civilian employees of the Department being transported at government expense.

Currently, many agencies do not pay their employees for loss and damage beyond a depreciated amount as set forth in the various agencies claims service implementing regulations. Items less than 6 months old are not depreciated; however, older items can depreciate rapidly with residual values as little as 25 percent, regardless of condition prior to shipment. The claims service regulations generally apply common law damage principles to claims filed by employees for personal property losses. The Department of Defense settles employee claims for household goods shipment loss or damage directly with the employee in a similar fashion to that provided to military members. Service members, however, may receive full replacement coverage for their household goods shipments under contracts awarded by the Department under existing authority.

The use of full replacement value instead of fair market value is a more appropriate method for compensating personnel for loss or damage to their personal property as recognized by the enactment of this section for military personnel. When the Department of Defense first submitted the proposal which resulted in section 2636a, the cost estimates submitted in support of the legislation included the ability to provide full replacement value coverage for civilian employees as well. Rather than provide separate contracts and disparate treatment for civilian employees compared to military personnel, the Department desires to make a technical correction to allow the provision of full replacement value coverage for all household goods movements pursuant to contracts with the Department, civilian or military.

In the private sector, the Department of Transportation's Surface Transportation Board (STB) has reviewed use of full replacement value coverage in household goods transportation tariffs. The Household Goods Carriers' Bureau Committee requested elimination of a depreciated value option commonly made available to the general shipping public. The request sought to substitute the depreciated value provision with an option whereby the shipper could obtain "full value protection" for the shipped goods, meaning the carrier would be liable either for the replacement value of the lost or damaged goods (up to a pre-declared value of the shipment) or for restoring damaged goods to their prior condition (at the carrier's option). The STB authorized inclusion in the tariff of a provision substantially similar to the provision being

considered by the Department of Defense. The STB noted that "…few shippers of household goods chose depreciated value option." The STB further concluded that in view of the lack of shipper support for the depreciated value option, and the fact that it is often ineffective in providing depreciated value coverage, they did not believe it was necessary for carriers to continue to offer this option. (Released Rates of Motor Common Carriers of Household Goods, 2001 STB Lexis 1003, December 18, 2001).

Full replacement value protection would have a positive impact on morale. Increased liability would cause carriers to use more caution and care in handling household goods with less damage to the members' personal property. Most claims settlements pursuant to full value protection provisions would be made directly with carriers resulting in reduced claims administration costs for the Department. The ultimate consequence of increasing the carriers potential liability, consistent with full replacement value coverage, would be an enhancement of overall service member satisfaction and decrease the claims filed with the government for carrier caused loss and damage. This section would place the government employee on par with military members and private sector employees. In the competition with the private sector for skilled employees, the federal sector needs the flexibility to eliminate obvious impediments to the recruitment and retention of talented personnel.

Cost Implications: The actual cost of this discretionary spending program is unknown at present. The current private sector cost for full replacement value protection as set forth in the commercial tariff, whereby carrier liability is capped at $40,000 per shipment, is $338.00 per shipment. Informal estimates obtained from commercial household goods carriers have indicated a 2-to-4 percent per shipment cost increase might be more reasonable on such a large contract. On a Department of Defense-wide basis, civilian moves make up approximately 4.7 percent of the household goods shipments. That could cost as much as $2.1 to $4.1 million annually. It is anticipated that cost increases of this section would be offset, in part, by fewer claims being made against the Government under the Personnel Claims Act, 31 U.S.C. 3721, with fewer payments being made under that law.

Section 1103 would correct unintended consequences of section 9902(j) of title 5, United States Code, and reestablish retirement provisions for individuals who were separated from Federal service under a discontinued service retirement (DSR) and later reemployed. This section also would grant authority to the Secretary of Defense to waive provisions of section 8344 and 8468 of title 5 on a case-by-case basis for the reemployment of retired civilian employees within the Department of Defense (DoD).

Prior to enactment of section 9902(j), reemployed annuitants were able to contribute to the retirement fund and receive additional service credit toward their retirement annuity. Under the current provisions of section 9902(j), reemployed annuitants are not considered employees for retirement purposes. Therefore, upon their reemployment, those separated under DSR provisions cannot contribute to the retirement fund or receive additional service credit. Despite many subsequent years of service, they will never be eligible to receive a full annuity. In addition, they cannot contribute to the Thrift Savings Plan (TSP).

This section would allow the DoD to exercise discretion in determining when an annuitant, upon reemployment, would receive both their full salary and their annuity from the Civil Service Retirement and Disability Fund. Authorizing annuitants to receive both their full salary and their annuity would occur under specific circumstances (*e.g.*, when filling hard-to-fill or critical positions). Otherwise, the DoD either would offset a reemployed annuitant's salaries or terminate their annuity, as established under chapters 83 and 84 of title 5.

This technical fix to the law is needed to grant the Department the authority to reemploy annuitants and to ensure that reemployed annuitants who retired through no fault of their own (*i.e.*, discontinued service retirements) are allowed to receive additional credit toward future retirement and contribute toward their TSP accounts. This section would correct the unintended consequence of current law. Without this legislation, the Department would have severely limited flexibility to fill critical hard-to-fill positions.

Upon enactment, the DoD will update our current policy, guidance and procedures, and implement these changes within 30 calendar days.

Section 1104 would repeal the current statutory restrictions on the Department of Defense's ability to employ a retired military personnel within 180 days of a military member's retirement. These restrictions apply even when the retiree has competed for a vacancy and been determined to be the best-qualified candidate.

If applications of these restrictions were not currently suspended by the President's Proclamation 7463 of September 14, 2001, "Declaration of National Emergency by Reason of Certain Terrorists Attacks," the DoD would be placed at a serious competitive disadvantage in recruiting the expertise of retired military personnel in relation to other Federal agencies that do not have a similar 180-day restriction, and in relation to non-Federal employers. The Department's experience prior to the President's declaration has shown that in a competitive labor market, the case-by-case approvals required by section 3326 of title 5, United States Code, hamper the Department's ability to fill vacancies quickly and, in some instances, may result in the loss of well-qualified candidates.

This legislative proposal is needed to allow the Department to be competitive in the job market by eliminating barriers that slow the recruitment process in the recruitment and placement of well-qualified retired military members with valuable skills into its civilian workforce. While the application of section 3326 has been suspended during the current national emergency, the continued challenges associated with a competitive labor market and mission requirements of the Department suggest that a permanent resolution is necessary and appropriate. Such ongoing and fundamental considerations support the need to repeal the statutory restrictions under section 3326.

Section 1105 would expand the pool of jobs that would count for credit under the service agreements required by the National Security Education Program (NSEP) when individuals receive a scholarship or fellowship. This would enable more participants to complete their service requirement.

Existing law defines service requirement positions by reference to organizations, not by position, hampering our ability to attract needed expertise to the Federal Government.

This section would reinforce the importance of fulfilling the service requirement in traditional national security-related Federal agencies and offices. Section 1902(b)(2) of title 50, United States Code, sets forth requirements for Federal service for all recipients of NSEP undergraduate scholarships and graduate fellowships. The proposed revision broadens the entities in which the mandated service could be performed beyond the Department of Defense and Intelligence Community by: (1) creating a "tiered" requirement that allows NSEP scholars and fellows to support the Federal national security effort across a wider range of Federal agencies and offices; and (2) providing that award recipients may fulfill their service requirement by working at an educational institution in a discipline related to the field of study for which they received an award, if no positions are available in Federal agencies or offices involved in national security.

This section would maximize opportunities for every NSEP scholar and fellow to find employment in a national security-related position in the Federal sector.

TITLE XII—MATTERS RELATING TO FOREIGN NATIONS

Subtitle A—Assistance and Training

Section 1201 would provide the Secretary of Defense the authority, in limited circumstances, to provide logistic support, supplies, and services to allied forces participating in combined operations with the armed forces of the United States, on a non-reimbursable basis. Funding for such support would come from Department of Defense operation and maintenance funds and would be limited to no more than $100 million in a given fiscal year.

Logistic support, supplies, and services may be provided to allied nations pursuant to the terms of an Acquisition and Cross-Servicing Agreement concluded with that nation under the authority of 10 U.S.C. 2342. Such support is provided on a reciprocal, reimbursable basis, with the recipient country expected to pay for any support received. However, in some instances, allies wishing to participate in combined operations with the United States are financially unable to do so. In order to obtain and retain the participation of such allies in the Global War on Terrorism, Operation ENDURING FREEDOM, and Operation IRAQI FREEDOM, language explicitly allowing the Department to provide the support to on a non-reimbursable basis was included in Fiscal Year (FY) 2002 and FY 2003 supplemental funding legislation. However, this did not provide a complete or timely solution. As a result, section 1106 of the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004 (Public Law 108-136) authorized the use of Department of Defense operation and maintenance funds to provide logistic support, supplies, and services to coalition forces in Iraq. Section 9009 of the Department of Defense Appropriations Act, 2005 (Public Law 108-287) renewed this authority and extended it to Afghanistan. It is anticipated that the Department of Defense Appropriations Act, 2006 will again extend this authority.

This section would make permanent the authority of the Secretary of Defense to use operation and maintenance funds to provide non-reimbursable logistic support, supplies, and services to allies participating in combined operations with armed forces of the United States. However, use of this authority would be limited to certain combined operations in which the participation of the ally to be supported is determined to be essential to the success of the operation and would not occur but for the Department's provision of logistic support, supplies, and services on a non-reimbursable basis. In addition, the total value of support provided under this section would not exceed $100 million in a given fiscal year. An additional total amount of $20 million per year, during a contingency or otherwise, would be available to improve or modify the logistical support systems of allied forces to ensure interoperability with United States systems to facilitate future combined operations.

Section 1202 would fulfill a need deemed critical by the Commander, U.S. Central Command to provide interoperability and adequate support to coalition partners. In the subchapter authorizing Acquisition and Cross Servicing Agreements, section 2350 of title 10, United States Code, defines the logistic support, supplies, and services that may be acquired or provided under logistic support agreements with the governments of NATO countries and other eligible countries and organizations. As written, section 2350 prohibits the transfer of significant military equipment (SME) by an Acquisition and Cross Servicing Agreement (ACSA). The proposed change would authorize the Department of Defense to transfer under the authority of an ACSA, on a lease or loan basis, items identified as SME for personnel protection or to aid in personnel survivability to nations participating with U.S. Forces in military operations if the Secretary of Defense, with the concurrence of the Secretary of State, determines in writing that it is in the security interests of the United States to provide such support.

Operations IRAQI FREEDOM (OIF) and ENDURING FREEDOM (OEF) have demonstrated the requirement for such authority and are predictive of future value. Among other reasons, the unorthodox manner in which terrorists and insurgents indiscriminately target forces in areas previously called "rear areas" warrant the flexibility that this authority would provide. The value of such authority has been demonstrated as commanders desire to provide available hardened vehicles, primarily armored HMMWVs or HMMWVs with add-on-armor kits, to coalition partners. U.S. Forces count on our coalition partners to be able to patrol and engage opposition forces as needed. Due to improvised explosive devices and the weapons and/or weapon systems available to opposition forces, providing use of all reasonably available security measures not only for U.S. but also coalition forces of other countries is critical. However, since assets such as counter-improvised explosive device equipment, defusing equipment and certain vehicles (e.g., hardened or those with turrets) are currently designated as SME on the U.S. Munitions List, section 121.1, current ACSA authorities do not permit the Combatant Commander to provide them even temporarily to coalition forces.

The nations that have provided forces in support OIF and OEF often do not have the same capability to protect their personnel as U.S. Forces possess. There have been a number of occasions where coalition members have requested temporary U.S. logistical support in the form of items designated as SME in order to be able to accomplish OEF and OIF missions in concert

with U.S. Forces and in a safe manner. The proposed change would authorize the temporary transfer of these vehicles and other military equipment that would contribute to the survivability of the armed forces of coalition nations supporting U.S. efforts. Use of this temporary transfer authority would require the Secretary of Defense to determine in writing that it is in the security interests of the United States to provide such support, and allow only temporary use of the items for receipt of reciprocal value under existing ACSAs with coalition partner countries.

Section 1203 would expand the authority of the Department of Defense (DoD) to provide humanitarian and civic assistance in conjunction with military operations to include authority to restore or develop the capacity of the host nation's information and communications technology as necessary to provide basic information and communications services.

Section 401 of title 10, United States Code, authorizes U.S. military forces, in conjunction with military operations, to provide humanitarian and civic assistance in the areas of medical, dental, and veterinary care; surface transportation systems, well drilling and sanitation facilities; construction and repair of public facilities; and detection and clearance of land mines. Recent experience in military operations in Afghanistan, Iraq, and in providing military assistance to the tsunami victims in southern Asia and to earthquake victims in Pakistan indicates that the restoration or development of the host nation's basic information and communications capacity is vital to successful humanitarian programs. As with the other types of assistance authorized by 10 U.S.C. 401, military units will often have the capacity to provide such assistance in conjunction with military operations.

Recent Examples:

The current legal construct has prevented U.S. military forces from providing humanitarian and civic support in the form of information and communications technologies (ICTs). Current DoD ICT procurement programs appropriately focus today on combatant commander operational requirements that can be satisfied mostly through robust, encrypted wireless devices enabling situational awareness. The experiences of the past four years indicate that the national objectives executed by the Department of Defense can be better synergized with that of the interagency through the increased use of commercial ICT. Conclusions indicate that with appropriate consideration for information awareness, robust commercial communications between the DoD, those elements of the interagency deployed to an area of operations, the international community responding to crises, and the local populace can rapidly improve the effectiveness of operations across the spectrum of humanitarian and civic support, including stabilization and reconstruction. This rapport has now been recognized as one of the critical enabling factors to sharing humanitarian and civic support responsibilities with the myriad of international organizations, both commercial and not-for-profit.

In the case of humanitarian operations, the recent tsunami crisis in the Indian Ocean basin provided an excellent example of a missed opportunity to rapidly synergize international relief operations through the insertion of ICT systems. Lacking legal and, as a result, doctrinal authority to rapidly deploy and leave behind commercial communications, crucial time was lost in mitigating the crisis in the aftermath of the tsunami. Coordination was hampered by

communication and information incompatibilities, leading U.S. forces to accomplish portions of the mission others were prepared to complete if quickly and effectively engaged. This proposed change is the foundation on which the Department of Defense would build the communications and information sharing necessary to enable the synergizing actions required in today's international environment. Examples of deployable technology include the installation, use, and leave behind of commercial satellite earth stations providing access to commercially encrypted internet services, low cost wireless devices, voice over internet protocol phones, and laptops that provide multilingual chat and collaboration software.

In the case of Afghanistan and Iraq, dramatic improvements in stabilization and reconstruction activities could be possible through the addition of ICT infrastructure to the more traditional sectors already included in 10 U.S.C. 401. Using technology insertions that are sensitive to the long-term development of the countries involved, U.S. military forces could be empowered to rapidly deploy and leave behind communications capabilities that would jump-start the dialog essential to successful humanitarian and civil support. Discussions with the subject matter experts in the field indicate that the potential force-multiplying effect of such insertions on Provisional Reconstruction Team operations in Afghanistan would be profound. There is a growing body of empirical information that indicates that once inserted into an austere environment, relatively inexpensive commercial ICT can dramatically change the information flows associated with the development of civil society. The ability to cheaply enable potential threat information reporting via commercial devices would obviate the need to expose such sources to risk as they travel to U.S. military facilities to communicate essential information. Examples of this technology include the installation, use, and leave behind of commercial wireless systems connecting critical civil services with the U.S. Government and international organizations; satellite connectivity for education and distributed learning as a form of civic support; and seeding commercial internet service providers in austere environments, enabling sustainable commercial ICT sector growth. As the U.S. military is often the initial U.S. presence into these areas, and the stabilization environment often requires their continued presence in disproportionate numbers to the U.S. interagency, providing such authority to the U.S. military could result in significant improvements in the post-conflict/crisis environments facing the U.S. today.

Subtitle B—Reports

Section 1211 would relieve the Secretary of Defense of the requirement to report annually to Congress on certain information relating to allied contributions to the common defense. These reporting requirements purport to assess the defense contributions of others countries according to metrics that were relevant during the 1980s, but that are now largely obsolete. Reports on allied and partner contributions to global security should track national security priorities and should at a minimum include major partners in the global war on terror - including Operation Iraqi Freedom (OIF) and Operation Enduring Freedom (OEF) coalition members.

Newer reporting requirements track the North Atlantic Treaty Organization (NATO) Prague Capabilities Commitment and the NATO Response Force agreements, both of which are

more accurate measures of the value of allied contributions than the budgetary details that are the focus of the report required by section 1003 of the Department of Defense Authorization Act, 1985 (Public Law 98-525). Moreover, these new requirements are in addition to existing ones, rather than in lieu of them, resulting in an unnecessary duplication of effort. Most of the information that is not supplanted by more recent legislation is now publicly available in the NATO Handbook. Additionally, the Report on Allied Contributions to the Common Defense is too rigid to accommodate the increasingly central role of ad hoc, mission-specific, coalitions; consequently, dozens of countries that are participating in OIF and OEF as full coalition partners are not considered "allies" for purposes of the existing report.

Subtitle C—Other Matters

Section 1221 would exclude acquisition of petroleum, oil and lubricants (POL) from the dollar limitations placed on acquisitions made under Acquisition and Cross-Servicing Agreements (ACSA) with foreign allies.

The ACSA statute already excludes POL from the acquisition of supplies, which is otherwise limited to $50 million from North Atlantic Treaty Organization (NATO) members and $20 million from non-NATO members. Nevertheless, the Department of Defense is currently limited in its overall acquisition of supplies, services and construction per fiscal year to $200 million from NATO allies and $60 million from non-NATO allies. These limitations have not been increased for well over 10 years. The rising cost of POL, as well as the increased demand for POL to satisfy today's intense operational tempo, has rendered these amounts unrealistic.

TITLE XIII—COOPERATIVE THREAT REDUCTION WITH STATES OF THE FORMER SOVIET UNION

Section 1301 would extend the President's authority to waive conditions currently imposed on the Department of Defense's ability to obligate funds for construction of a chemical weapons destruction facility in Russia pursuant to section 1305 of the National Defense Authorization Act for Fiscal Year 2000 (Public Law 106-65).

Section 8144 of the Department of Defense Appropriations Act, 2003 (Public Law 107-248), section 1306 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136), and section 1303 of Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 have provided Presidential authority to waive the certification conditions through December 31, 2006.

The authority to obligate and expend funds for the purpose of constructing the chemical weapons destruction facility in Russia will be needed beyond December 31, 2006. Given the likelihood of additional delays in the project, this section would extend the waiver authority "for the duration of the project" rather than seek to predict a specific completion date (completion is planned for 2009).

DIVISION B—MILITARY CONSTRUCTION AUTHORIZATIONS

TITLE XXII—NAVY

Section 2205 would combine two separately authorized and approved military construction projects having the same purpose into a single project to consolidate funding streams and simplify program execution.

The Department of Defense requested, and Congress authorized and appropriated funds for, two separate projects to acquire land and construct facilities for an Outlying Landing Field (OLF) in Washington County, North Carolina. Project 689 was authorized in section 2201(a) of the Military Construction Authorization Act for Fiscal Year 2004 (Public Law 108-136) as part of "Various Locations, CONUS" for $56,360,000 and received an authorization for appropriation of $27,610,000 to purchase core land and begin horizontal construction. Project 691 was conceived before the Department of the Navy had completed its Environmental Impact Statement (EIS) and signed a Record of Decision (ROD) designating Washington County as the site of the OLF. Project 691 was authorized in section 2201(a) of the Military Construction Authorization Act for Fiscal Year 2005 (Public Law 108-375) at Washington County North Carolina for $136,900,000 after the Navy signed the ROD and received an authorization for appropriation in the amount of $20,150,000. Project 691 acquires buffer land beyond the core land area and proceeds with vertical construction. The tables in the back of the conference report (H.Rpt. 108-767) reflects a second increment of authorization for appropriation of funds for P689A of $15,000,000 and a base authorization for appropriation of funds for P691 of $15,000,000. The Navy received authorization and apportionment of $15,000,000 for each project in fiscal year (FY) 2005.

The unintended consequences of executing two projects with the same fundamental purpose of acquiring land and constructing facilities for the OLF are the limited flexibility to negotiate real estate transactions (wherever the Navy builds the landing field) and the increased level of effort to track the funds associated with each project. Consolidating both projects into a single military construction project would eliminate these problems. Consolidating both projects under the title of "Various Locations" is consistent with the Navy's response to ongoing litigation regarding the adequacy of the Navy's EIS and the Navy's commitment to undertake a Supplemental EIS.

Specifically, this section would amend the table in section 2201 of the Military Construction Authorization Act for FY 2004 to provide for the full authorization of both projects in the amount of $193,260,000 (the sum of the FY 2004 and FY 2005 authorized amounts), and amend the total to reflect the increase of $136,900,000 (the FY 2005 portion). Accounting for the first increment appropriation of $27,610,000 in FY 2004, the remaining balance is $165,650,000.

This section also would amend the table in section 2201 of the Military Construction Authorization Act for FY 2005 to eliminate reference to the Outlying Landing Field entirely

because the project is now incremented and was fully authorized in FY 2004. This section also would adjust the total to reflect the decrease of $136,900,000.

The Navy has prepared a new Form 1391 and assigned a new project number that consolidates both current OLF projects.

Cost Implications: This section would not create or change an entitlement or require a change in the funding of the projects already approved in a Program Budget Decision.

TITLE XXIX—GENERAL PROVISIONS

Subtitle A—Military Construction Program and Military Family Housing Changes

Section 2901 would allow the Secretary of Defense to use funds appropriated for operation and maintenance for construction to meet temporary operational requirements during a time of declared war, national emergency, or contingency operation. During times of emergency, time and flexibility are of the essence. This authority would provide basic facilities and infrastructure critical to military operations months and years ahead of the regular annual authorization and appropriation process for construction projects.

Currently, section 2805 of title 10, United States Code, limits the size of projects executed with funds appropriated for operation and maintenance to $1.5 million for projects correcting life, health, or safety threatening situations, and $750,000 for other construction requirements. By not limiting individual project size, this legislation would allow the Department to directly meet our forces' temporary operational needs regardless of project scope. This legislation would provide continuous, needed support to our commanders and troops during all ongoing and future contingency operations.

Sections 2803, 2804, and 2808 of title 10 limit funding for temporary construction during times of declared war, national emergency, or contingency operation to unobligated military construction and family housing appropriations. This section would enhance options for commanders by providing an additional source of funds to meet their urgent temporary operational requirements.

The proposed authority is limited to meeting only those temporary operational needs generated specifically by a war, emergency, or contingency situation. The intent is to provide the minimal construction necessary to meet the operational need; there is no intention to use the construction after the specific operation is complete.

When operational requirements exceed $200 million during a fiscal year, this section would allow the Secretary of Defense to waive this limit under certain circumstances.

Section 2902 would reduce the Congressional notification period before which the Secretary of the Navy could solicit contracts for housing or offer a conveyance or lease of

property or facilities and extend military unaccompanied housing privatization authority by two years.

Currently, 10 U.S.C. 2881a requires two 90-day Congressional notification periods. One is prior to issuance of a solicitation or offering of a conveyance or a lease. The second is prior to the transfer of funds into the Military Unaccompanied Housing Improvement Fund. This is an extended notification period compared to the 30-day period for military family housing privatization. Section 120 of the Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act, 2005 (Public Law 108-324) requires a notification of intent to transfer funds in conjunction with unaccompanied housing privatization 30 days in advance of the transfer. The proposed revision would align the notification periods for unaccompanied housing pilot projects with those prescribed in both title 10 and in annual appropriations acts.

This section also would extend military unaccompanied housing privatization authority by two years to September 30, 2009. In undertaking the pilot program, extended time has been required in order to establish guidelines for execution and scoring within the Administration. The Office of Management and Budget issued revised guidance on August 2, 2005. The Department of the Navy has been evaluating the feasibility of the Pacific Northwest as the third pilot location (in addition to San Diego and Hampton Roads). Given the revised guidance, it is possible that the Navy may need to look at other candidate locations. Extending the pilot authority would allow additional time for the Navy to identify alternative locations for the third pilot, if necessary, and execute them.

Section 2903 would permit the use of operation and maintenance funds up to $7,500,000 to carry out construction necessary to replace damaged or destroyed facilities.

Currently, 10 U.S.C. 2854 allows the use of military construction or military family housing funds for this purpose. Operation and maintenance funds up to $750,000 ($1,500,000 for life, health, or safety projects) also can be expended for such replacement construction under 10 U.S.C. 2805(c). However, it can often be difficult, particularly depending on when the need arises in a fiscal year, to secure the necessary military construction or military family housing funds to apply to projects under section 2854. Providing additional flexibility under section 2854 for funding replacement construction projects in exigent circumstances would offer commanders an expeditious avenue by which to replace facilities or infrastructure and, thus, restore mission capability.

This section effectively would provide an exception to the minor construction ceiling outlined in 10 U.S.C. 2805(c)(1). The $7,500,000 ceiling mirrors the maximum amount allowed for the repair of facilities without advance approval by the Secretary of a military department as provided in 10 U.S.C. 2811(b).

Section 2904. Under section 2831 of title 10, United States Code, proceeds from the handling and disposal of military family housing (including related land improvements) are to be transferred to the Military Family Housing Management Account. Once in that account, funds

are available for the payment of costs for the construction, acquisition, operation and maintenance and disposal of Government-owned or leased military family housing.

Because of the extensive divestiture of military family housing property under the Military Family Housing Privatization Initiative (MHPI), the operations and maintenance requirements for Government-owned military family housing are greatly diminished. At the same time, the military departments are continuing to privatize military family housing which often requires use of appropriated funds, which are transferred into the Department of Defense Family Housing Improvement Fund (FHIF) established by 10 U.S.C. 2883.

This section would authorize the transfer of proceeds from the disposal of family housing property into either the FHIF or the Family Housing Management Account. This would provide the military departments with the flexibility to use the proceeds to address family housing requirements through the housing privatization authorities in addition to the payment of costs associated with Government-owned military family housing as currently provided under 10 U.S.C. 2831(b)(3).

This section would expand the credits to the FHIF to include proceeds from the disposal of excess family housing property. It also would expand the statutory notification requirement involving transfer of funds into the FHIF to include the proceeds from the disposal of family housing property consistent with the above changes.

Cost Implications: There should be no budget implications. Any increased requirement in the appropriation for family housing maintenance and repair cost resulting from the disposal proceeds no longer being available to defray these costs would be offset by a decrease in family housing construction appropriation requirement due to the use of these proceeds in the FHIF.

Section 2905 would update the process for adjusting foreign leasing amounts because of foreign currency fluctuations. Instead of attempting to apply a baseline of 1987, this section would have the adjustments made base on the previous fiscal year's adjusted amount.

The maximum amounts for family housing leases in foreign countries are currently adjusted based on currency fluctuations since October 1, 1987. This base rate is no longer realistic due to the significant changes in many countries' economies and currencies in the ensuing years. Some currencies have inflated and deflated more than once, and the relationship of their current values to that of the Fiscal Year 1988 base rate is relatively indiscernible. For European countries now using the Euro, an additional adjustment is required dependent on the date of their entering the European Union, while others are anticipated to join in the future. This section would update the process and maintain consistency with changing world conditions as well as comparable overseas housing allowances.

Section 2906 would replace the current section 2856 of title 10, United States Code, with a new section 2856 to allow floor space in unaccompanied housing to be consistent with local private construction.

Section 2856 currently requires the Secretary of Defense to prescribe regulations establishing the maximum net allowable square footage per occupant for new barracks construction, and directs that such regulations be uniform within a military department. This section would replace that numerical limit with direction that the floor areas of new unaccompanied personnel housing not exceed the floor areas of similar housing in the private sector in that locality.

This section would remove an inequality for unaccompanied personnel in privatized and non-privatized housing. In the National Defense Authorization Act for Fiscal Year 2004, Congress amended 10 U.S.C. 2880 to direct that privatized unaccompanied housing, whether located on or off an installation, generally be comparable to the room patterns and floor areas of similar housing units in the locality. Similar direction for privatized family housing had been provided in Section 2880 as initially codified. Furthermore, in the National Defense Authorization Act for Fiscal Year 2001, Congress amended 10 U.S.C. 2826 to direct that newly constructed, improved, or leased family housing be similar to the room patterns and floor areas of similar housing in the locality. Lastly, unaccompanied members in the lower grades who are authorized to live off the installation, receive a Basic Allowance for Housing (BAH) that should be adequate to obtain housing occupied by civilians of comparable income levels in the locality. In contrast to the above, unaccompanied housing constructed through MILCON is not based on private sector standards, and it has no regard to the local conditions that are factored into privatized unaccompanied housing, BAH rates, and family housing.

This section would provide the Military Departments with the flexibility to improve the quality of life for unaccompanied members; and permit use of "off the shelf" private sector designs and industry construction practices and techniques, thus lowering construction costs which the Department expects will offset any increased cost associated with building a larger unit than currently permitted. The experience of the Department with applying local standards, designs, and construction practices and techniques for military housing has been larger and more livable dwellings at costs comparable to those it would have expended using MILCON unique standards-all to the benefit of our personnel.

As an interim measure, the Department of Defense in December 2005 increased the numerical area limit pursuant to 10 U.S.C. 2856 allowing the Military Departments the flexibility to construct unaccompanied housing similar to private sector apartments. This proposed legislation would provide a more complete, permanent, and equitable solution.

Cost Implications: There should be no budget implications. Any cost increases associated with building larger units may be offset by savings associated with use of private sector residential designs and construction practices.

Section 2907 would allow the Military Departments to use proceeds realized from the conveyance or lease of property pursuant to 10 U.S.C. 2878, and income derived from privatization activities such as investments under 10 U.S.C. 2875, to support housing privatization. The proceeds and income would be deposited in the Department of Defense

(DoD) Family Housing improvement Fund and the DoD Military Unaccompanied Housing Improvement Fund.

This section would permit the Military Departments to shift funds from projects with ample resources to projects in need of further financial support.

Section 2908 would increase various funding limitations related to emergency construction and unspecified minor military construction.

Subsection (a) would increase the funding limitation for emergency construction under 10 U.S.C. 2803 from $45 million to $60 million.

Subsection (b) would increase the funding limitations and reporting limits for unspecified minor military construction in 10 U.S.C. 2805.

The existing cost thresholds effectively limit the size and scope of facilities to be constructed utilizing unspecified minor military construction funds from both the military construction and operations and maintenance appropriations. The program has continued to lose ground to inflation over the past several years. The Government Accountability Office, in a report released in February 2004 entitled "Long-term Challenges in Managing the Military Construction Program", estimated that construction costs for the military have increased by an average of 41 percent since the thresholds amended in this provision were last adjusted. Increasing the cost limits for minor construction projects will allow the Department of Defense to (1) respond more effectively to urgent and unforeseen requirements with properly sized and scoped facilities, and (2) reduce the recapitalization rate faster by allowing facility projects under $3 million to be funded from the unspecified minor military construction account instead of the normal military construction programming and budgeting process. In addition, this legislation will provide an incentive to consolidate functions into efficient and modern space and eliminate obsolete, unproductive, and costly spaces providing more efficient use of scarce resources.

Section 2909 would amend section 2828 of title 10, United States Code, concerning the leasing of military family housing, and permit the Secretary of the Army to lease two housing units in the vicinity of Homestead, Florida, at a cost that exceeds the normal expenditure limitation. The housing units would be leased for key and essential personnel of the United States Special Operations Command South (SOCSOUTH).

Section 2828(b)(3) provides that not more than 500 housing units may be leased for an amount not to exceed $14,000 per unit per year, as adjusted annually. SOCSOUTH was relocated from Puerto Rico to Homestead AFB in March 2004. Homestead AFB does not have "key and essential" housing and the current limitation on leases is unrealistic in today's rental market in a high-cost area such as Miami. Other considerations such as security and communications also affect the cost of housing for key and essential personnel.

Currently, section 2828(b)(4) authorizes an exception for housing units for key and essential personnel of the United States Southern Command in Miami. For these personnel, the

Secretary of the Army may lease not more than eight housing units in the vicinity of Miami, Florida, for which the expenditure for the rental of such units (including the cost of utilities, maintenance, and operation, including security enhancements) exceeds the normal expenditure limitation. The amount of all leases under paragraph (4) may not exceed $280,000 per year, as adjusted. The term of any lease under paragraph (4) may not exceed five years.

This section provides a similar exception for two family housing units occupied by key and essential personnel of SOCSOUTH. The total amount for both leases may not exceed $70,000 per year, as adjusted annually.

Subtitle B—Real Property and Facilities Administration

Section 2911 would repeal the requirement that Secretaries of the military departments must consult with the Secretary of Housing and Urban Development (HUD) on the availability of suitable alternative housing before entering into contracts to construct authorized family housing units in the United States. If the Secretary of HUD does not advise the Secretary concerned within 21 days of the availability of alternative housing, the Secretary concerned may enter into a contract for the construction of the authorized housing units after first informing the major commands, the bases, and the Construction Agents. The current process has outlived its usefulness; creates unnecessary paperwork; and needlessly delays contract awards and project completions. In addition, HUD housing is often built to standards unsuitable for military families and located too far from military installations. As a result, during the past 10 years the Department of Defense has not used alternative HUD housing.

Section 2912 would amend the grants authority of the Department of Defense's Office of Economic Adjustment to allow it to award grants, conclude cooperative agreements, and supplement other Federal funds with regard to encroachment of State-owned and operated National Guard facilities when significantly used by the armed forces.

Section 2391 of title 10 currently defines military installations as facilities "under the jurisdiction of a military department." This definition would not include the several military installations that are owned and operated by States, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands. Several States, in particular, have very large military facilities under their ownership and control. These facilities exist for training of the States' National Guard. The facilities are also frequently used for training by active and reserve component forces of the armed forces of the United States, including the Army and Air National Guard when in Federal service. These State installations often have Federally funded buildings and other facilities. Equipment belonging to the United States is often stored there. But because the facilities belong to the State, they do not fall within the definition of "military installation" for purposes of section 2391. Consequently, they are ineligible for grants, cooperative agreements, etc., for "planning community adjustments and economic diversification" required because of encroachment. Since these State facilities are often of great importance to the training of the armed forces, it is in the direct interest of the Department of Defense that they remain available for that use. Encroachment can endanger their availability just as it can endanger the availability of military installations of the United States.

This section would allow those State-owned and operated facilities to receive planning assistance to avoid encroachment.

Section 2913 would consolidate two existing sections of title 10 and renumber the new section as section 2672. Sections 2668 and 2669 both deal with granting easements for rights-of-way. They differ only slightly and those differences, although perhaps of concern when the sections were originally enacted, have long since lost any genuine significance in practice. These two sections pre-date the enactment into positive law of title 10 in 1956. The predecessor to section 2668 was first enacted for the War Department in 1926 as Public Law 69-241, and the predecessor to section 2669 was first enacted for the War Department in 1946 as part of the Flood Control Act of 1946 (Public Law 79-526). Both were later made applicable to the Navy Department in 1951 by Public Law 82-120.

Subsection (a) would both consolidate and modernize sections 2668 and 2669. Paragraph (a)(1)(B) strikes language appearing in both sections that list the potential recipients of an easement. This language is now surplusage; since it effectively includes any possible entity, it creates no meaningful distinction between those who can and those who cannot receive an easement. Paragraph (a)(2) inserts gas, water, and sewer pipe lines, which are the three items section 2669 covers to the exclusion of section 2668. With this addition, the new section covers all the types of possible easements that are currently covered by the two existing sections. Paragraphs (1) through (7) also add, for modern formatting purposes, headings for each subsection.

There are two other distinctions between sections 2668 and 2669. The first distinction is in the first sentence of subsection (a) where section 2669 requires the easement to affirmatively be in the public interest and not to substantially injure the interests of the United States, while section 2668 only requires the easement to not be against the public interest. The consolidation adopts the language of section 2668, which is less restrictive and more recently enacted. The second distinction is in the termination language. Section 2669 has as its second criteria "nonuse," while section 2668 has "nonuse for a two-year period." Since the section 2668 criteria is more specific, giving as it does a set period, it allows greater predictability for the easement holder and the Government. The section 2668 language is adopted for the consolidation.

Subsection (b) would repeal section 2669.

Subsection (c) would provide conforming amendments to the chapter's table of sections.

Section 2914 would, without making any substantive change in the law, consolidate two existing sections of chapter 159, and part of a section of chapter 153, of title 10, United States Code, and rename the new section as "Transfers and Disposals: Interchanges and screening requirements." Taken together, sections 2571, 2693, and 2696 of title 10 provide a process for transferring real property within and out of the Department of Defense.

The real property portion of section 2571 deals with no-cost transfers of real property between the armed forces, which includes the Department of Homeland Security on behalf of the United States Coast Guard. Section 2693 deals specifically with conveyances to the Department of Justice correctional options program, but also contains a general requirement to first "screen" property within the Department of Defense. Section 2696 deals with the general screening of property after the Defense components and the Department of Justice have considered their requirements for the property. These three sections provide a continuous transfer and disposal process and, if consolidated, will provide greater clarity as to the process required for transfer and disposal of real property.

Subsection (a) would renumber the existing section 2696 by making it subsection (c) in the revised section 2696.

Subsection (b) would insert the relevant language from section 2571 as subsection (a) of section 2696. Because this language deals with no-cost transfers between the armed forces, it is a preliminary step to all other potential transfers or disposals. The inserted language changes "real estate" in the original language to "real property" to conform to usage throughout chapter 159.

Subsection (c) would transfer and renumber the existing section 2693 by making it subsection (b) in the revised section 2696. Because internal Defense "screening" and possible selection by the Department of Justice precedes the general screening requirements of the current section 2696, it is sensible to place it before the general screening requirements in the consolidated section.

Subsection (d) would make clerical amendments to the title and table of sections.

Subsection (e) would make conforming amendments to section 2571 and the table of sections for chapter 153.

This section would have no budget impact.

Section 2915 would increase from five to ten years the permissible leases of structures and real property related to structures in foreign countries that are needed for military purposes other than military family housing. The current maximum, initial lease term is extremely limiting, particularly when the United States is establishing bases in areas of the world in which the U.S. has never been before, and changing the infrastructure and mission requirements of established bases due to the transformation of mission and world strategies away from the Cold War.

The longer term would enable the Federal Government to employ better negotiation strategy overseas with private owners who are being asked to provide large amounts of space in strategic locations. The structures that the United States requests to lease usually require build-out to satisfy Navy requirements, sometimes at a high cost. As the Government is usually the sole tenant, the structures are typically adapted to American standards and are required to include

force protection measures. These requirements can result in a substantial build-out cost that is often amortized over the lease term. This results in a higher rental rate over the initial term of the lease due to the short-term amortization of the build-out. It also sets the basis for negotiations for any subsequent lease renewals or succeeding leases, putting the Government at a disadvantage since lessors are typically reluctant to agree to significant rental rate decreases, regardless of the fact that the initial build-out has been fully amortized. An increased term of ten years would allow any build-out to be amortized over a longer term, lowering that portion of the rent that is used to payoff the build-out cost. This would lower the Government's annual rental obligation and provide a better position for rental negotiations for any lease renewals or succeeding leases.

This change would put mission structures or related real property more in line with the 15-year lease term allowed for structures and related real property in Korea, and on the same footing as leases for family housing, which allows leasing for a ten-year period.

Cost Implications: Under this section, facility leases still would be executed within budget constraints, including the guidance of OMB Circular A-11 (which defines capital and operating leases, and dictates corresponding budget presentation). A lease executed under this authority would have to meet all of the criteria of an operating lease. As the Department of Defense has no authority to own foreign real property, ownership of the asset would remain with the lessor (*i.e.*, it would not be transferred to the Government), and the lease would not contain any purchase option. As the economic life of the structures to be leased is typically 50 years, a ten-year lease term would only be 20 percent of the economic life of the asset. Lease payments would not normally exceed 90 percent of the market value of the asset due to the short lease term in relation to the economic life of the asset, and because build-out improvements normally contribute to the market value of the property. Although the asset would be built-out for Government use, the structure itself would not be built to the unique specification of the Government and there is a private sector market for the asset after the Government vacates the space.

Section 2916 would provide options in the type consideration used for agreements to limit encroachment.

The military departments face two major problems that affect their ability to train. First, the habitat necessary to conserve certain species is being lost, and the decrease in suitable habitats has increased the burden on military installations that possess remaining habitats for many sensitive species. This dilemma has resulted in land use restrictions and a corresponding reduction in the availability of ranges for testing, training, and operations. Second, with expanding population growth, land near military installations is being developed for uses incompatible with military operations. Military operations impact noise, light, and air and can directly affect the surrounding community.

This section would amend 10 U.S.C. 2684a to provide flexibility in the type of consideration used for agreements entered into with eligible entities to address the use or development of real property in the vicinity of a military installation. The proposal would

authorize the exchange of excess lands for non Federal land located within the same state. This would allow the use of appropriated funds or excess lands, or a combination of the two, to provide the consideration necessary to enter into the agreements contemplated by section 2684a. The Secretary of the military department concerned will review the transaction to determine whether the property proposed for exchange is better suited for donation to a federal, state, local or homeless agency prior to exchange for encroachment prevention purposes and to ensure that the exchanged properties have equal fair market values. Qualified staff familiar with both the Federal real estate disposal process and the 10 U.S.C. 2684a implementation process will conduct this review. The results of this review, as it is applied to a particular transaction, will be submitted to the Office of Management and Budget for review and comment prior to such transactions. If the lands under consideration for exchange by the Department of Defense (DoD) are lands that were withdrawn from public use by the Department of the Interior, the DoD will obtain the concurrence of the Secretary of the Interior on the exchange prior to the transaction.

Section 2917 would add a new section to the real property chapter of title 10, United States Code, to allow the Department of Defense to grant certain types of restrictive easements. The two types of easements this provision would allow are those to protect conservation and those to ensure environmental response actions are not compromised by future owners.

Subsection (a) of the new section would address the occasional need to grant a conservation easement. When disposing of property that has, e.g., a historic nature, the Department of Defense (DoD) has found that it is often easier and faster to enter into agreements that allow a state historic preservation officer or private historic preservation organization to enforce against future owners the requirements we have placed on a historic structure.

Subsection (b) of the new section would address the occasional need to grant an environmental easement to ensure that an environmental remedy that continues on land being disposed of is not interfered in by future owners. Not all states allow the acceptance of such an easement to enforce various restrictive environmental covenants, but for those that do, this provision would allow the Department to grant the state or local government an enforcement right against future land owners to ensure the future owners do not obstruct the effectiveness of a remedy. This would be another tool to ensure that environmental remedies on former DoD properties continue to be effective.

Subtitle C—Base Closure and Realignment

Section 2921 would update existing law regarding the deposit of lease proceeds in 10 U.S.C. 2667 to recognize that Congress has created a new account, the Department of Defense Base Closure Account 2005, to receive funds associated with the closure or realignment of military installations in the 2005 Base Closure and Realignment (BRAC) round. This would resolve an inconsistency between 10 U.S.C. 2667(d)(5) and section 2906A of the Defense Base Closure and Realignment Act of 1990.

Section 2667 of title 10, United States Code, authorizes leasing of non-excess real and personal property. Section 2667(f) authorizes leases of such property at a military installation to

be closed or realigned under a base closure law pending final disposal of the property. Section 2667(d)(5) requires that monetary proceeds of such leases at base closure locations be placed in the Department of Defense Base Closure Account 1990, which was established to receive funds from various sources associated with the closure or realignment of military installations from prior Base Closure and Realignment (BRAC) rounds, specifically, military installations approved for closure or realignment prior to January 1, 2005. By contrast, section 2906A(a)(2) of the Act states that proceeds received from the lease of property at a military installation approved for closure or realignment after January 1, 2005 shall be deposited into the Department of Defense Base Closure Account 2005.

Subtitle D—Other Matters

Section 2931 would codify as permanent authority the Department of Defense Laboratory Revitalization Demonstration Program.

In the early 1990's, the Department of Defense recognized a need for its laboratory industrial base to remain up-to-date. Specifically, the labs often needed to adapt facilities quickly to meet emergent requirements. The speed at which change is required often exceeds the ability of the current military construction program to provide required facilities. In 1996 Congress authorized the Department of Defense Laboratory Revitalization Demonstration Program with a goal to increase the flexibility of Defense laboratories to modernize antiquated facilities. Section 2892 of Public Law 104-106, as later amended by section 2871 of Public Law 105-261, provided higher limits for operation and maintenance funded minor military construction than allowed under 10 U.S.C. 2805 to specifically allow Department of Defense laboratories more flexibility to provide required facilities. This flexibility has proven invaluable in allowing the laboratories to meet emergent requirements to support transformational initiatives.

The section would add a new subsection to 10 U.S.C. 2805 addressing laboratory revitalization. The new subsection would apply limits and definitions based on those in the temporary authority of the Department of Defense Laboratory Revitalization Demonstration Program.

The section would also, as a stylistic measure, insert subsection headings.

Section 2932. The changes proposed by this section would align the Department of Defense (DoD)'s unspecified military medical facility construction limits with the Department of Veterans Affairs. This would facilitate increased medical program collaboration between the Department of Defense and Veterans Affairs (VA).

As DoD/VA sharing initiatives have grown, so has the collaboration on medical facilities – including a new joint facility being built in the Chicago area. The Department expects sharing and joint facility construction with the VA to continue. Having similar thresholds would facilitate the continued cooperation and collaboration on medical construction projects between the two Departments.