

1 **SEC. \_\_. CLARIFICATION OF AUTHORITY FOR ACTIVITIES UNDER DEFENSE**  
2 **INSTITUTION CAPACITY BUILDING AUTHORITIES.**

3 Section 332(b) of title 10, United States Code, is amended—

4 (1) in the heading, by striking “TRAINING OF” and inserting “TRAINING AND  
5 ADVISORY SERVICES FOR”;

6 (2) in paragraph (1), by striking “advisors or trainers to provide training and  
7 associated training support services” and inserting “training, advisory services, and  
8 related assistance”; and

9 (3) in paragraph (2), by amending subparagraph (B) to read as follows:

10 “(B) A list of any organization described in paragraph (1) to which the  
11 Secretary provided training, advisory services, or related assistance under the  
12 program, including the number of advisors or trainers so provided, and a brief  
13 description of each activity related to such organization, including the duration  
14 and cost of each activity.”.

**[Please note: The “Changes to Existing Law” section below sets out in red-line format how the legislative text would amend existing law.]**

**Section-by-Section Analysis**

This legislative proposal (A) broadens the scope of personnel type authorized to contribute as subject matter experts to activities under Title 10 Section 332(b) by removing “employees of the Department of Defense and members of the armed forces,” and (B) clarifies the types of activities to be conducted under this authority by adding “advisory services and related assistance”. Further, this proposal revises the reporting requirement language in paragraph (2) to reflect the revisions proposed for paragraph (1).

Institutional capacity building (ICB) methodology has evolved from employing strict “training” activities as defined in Title 10 Section 301, which incorporates the meaning of the term “military education and training” under section 644 of the Foreign Assistance Act of 1961 (22 U.S.C. 2403). Current ICB efforts necessarily involve a combination of training, advisory services, and related assistance. As such, although not assigned as “advisors” under Section 332(a), ICB activities include advisory and related services such as reach-back subject matter

expert support during in-country engagements and between engagements to facilitate partner-led reform efforts.

This legislative proposal removes qualifying language that restricts the type of expertise that may be leveraged to support the Department's activities under this program. To achieve security cooperation objectives most successfully, including authorized institutional assessments under Section 332(b), the Department needs the flexibility to leverage the best subject-matter expertise available to the Department. To address the breadth and scope of priority capacity-building programs (including Section 333), DoD increasingly relies on expertise both from within the Department, and the interagency and broader Security Cooperation community, including Federally Funded Research and Development Centers (FFRDCs) and industry.

Further, the revisions proposed with regards to the reporting requirements reflect consistency with the proposed language in paragraph (1).

**Budget Implications:** This proposal has no significant budgetary impact. Incidental costs or savings are accounted for within the Fiscal Year (FY) 2020 President's Budget.

**Changes to Existing Law:** This proposal would make the following changes to section 332(b) of title 10, United States Code:

**§332. Friendly foreign countries; international and regional organizations: defense institution capacity building**

(a) MINISTRY OF DEFENSE ADVISOR AUTHORITY.—The Secretary of Defense may, with the concurrence of the Secretary of State, carry out a program to assign civilian employees of the Department of Defense and members of the armed forces as advisors to the ministries of defense (or security agencies serving a similar defense function) of foreign countries or regional organizations with security missions in order to—

(1) provide institutional, ministerial-level advice, and other training to personnel of the ministry or regional organization to which assigned in support of stabilization or post-conflict activities; or

(2) assist such ministry or regional organization in building core institutional capacity, competencies, and capabilities to manage defense-related processes.

(b) TRAINING OF AND ~~OF~~ ADVISORY SERVICES FOR PERSONNEL OF FOREIGN MINISTRIES WITH SECURITY MISSIONS.—

(1) IN GENERAL.—The Secretary of Defense may, with the concurrence of the Secretary of State, carry out a program to provide ~~advisors or trainers to provide training and associated training support services~~ training, advisory services, and related assistance to personnel of foreign ministries of defense (or ministries with security force oversight) or regional organizations with security missions—

(A) for the purpose of—

(i) enhancing civilian oversight of foreign security forces;

(ii) establishing responsible defense governance and internal controls in order to help build effective, transparent, and accountable defense institutions;

(iii) assessing organizational weaknesses and establishing a roadmap for addressing shortfalls; and

(iv) enhancing ministerial, general or joint staff, or service level core management competencies; and

(B) for such other purposes as the Secretary considers appropriate, consistent with the authority in subsection (a).

(2) NOTICE TO CONGRESS.—Each fiscal year quarter, the Secretary of Defense shall submit to the appropriate committees of Congress a report on activities under the program under paragraph (1) during the preceding fiscal year quarter. Each report shall include, for the fiscal year quarter covered by such report, the following:

(A) A list of activities under the program.

~~(B) A list of any organization described in paragraph (1) to which the Secretary provided advisors or trainers under the program, including the number of such advisors or trainers so provided, the duration of each provision of such an advisor or trainer, a brief description of the activities of each advisor or trainer so provided, and a statement of the cost of each provision of such an advisor or trainer.~~

(B) A list of any organization described in paragraph (1) to which the Secretary provided training, advisory services, or related assistance under the program, including the number of advisors or trainers so provided, and a brief description of each activity related to such organization, including the duration and cost of each activity.

(C) A comprehensive justification of any activities conducted pursuant to paragraph (1)(B).

(c) CONGRESSIONAL NOTICE.—Not later than 15 days before assigning a civilian employee of the Department of Defense or a member of the armed forces as an advisor to a regional organization with a security mission under subsection (a), the Secretary shall submit to the appropriate committees of Congress a notification of such assignment. Such a notification shall include each of the following:

(1) A statement of the intent of the Secretary to assign the advisor or trainer to the regional organization.

(2) The name of the regional organization and the location and duration of the assignment.

(3) A description of the assignment, including a description of the training or assistance proposed to be provided to the regional organization, the justification for the assignment, a description of the unique capabilities the advisor or trainer can provide to the regional organization, and a description of how the assignment serves the national security interests of the United States.

(4) Any other information relating to the assignment that the Secretary of Defense considers appropriate.

1 **SEC. \_\_\_\_ . CLARIFICATION OF PRECEDENCE FOR OFFICIALS AND**  
2 **CONFORMING AND TECHNICAL CHANGES FOR THE OFFICE OF**  
3 **THE SECRETARY OF DEFENSE.**

4 (a) CLARIFICATION OF PRECEDENCE.—Chapter 4 of title 10, United States Code, is  
5 amended as follows:

6 (1) Section 133a(c) is amended to read as follows:

7 “(c) PRECEDENCE IN DEPARTMENT OF DEFENSE.—The Under Secretary of Defense for  
8 Research and Engineering takes precedence in the Department of Defense after the Chief  
9 Management Officer of the Department of Defense.”.

10 (2) Section 133b(c) is amended to read as follows:

11 “(c) PRECEDENCE IN DEPARTMENT OF DEFENSE.—The Under Secretary of Defense for  
12 Acquisition and Sustainment takes precedence in the Department of Defense after the Under  
13 Secretary of Defense for Research and Engineering.”.

14 (3) Section 134(c) is amended to read as follows:

15 “(c) The Under Secretary of Defense for Policy takes precedence in the Department of  
16 Defense after the Under Secretary of Defense for Acquisition and Sustainment.”.

17 (4) Section 131 is amended by adding at the end the following new paragraph:

18 “(e) The officials serving in positions specified in section 131(b)(4) of this title take  
19 precedence in the Department of Defense after the Under Secretaries of Defense. The officials  
20 serving in positions specified in section 131(b)(4) take precedence among themselves in the  
21 order prescribed by the Secretary of Defense.”.

22 (5) Section 137a(d) is amended to read as follows:

1           “(d) The Deputy Under Secretaries of Defense take precedence in the Department of  
2 Defense after officials serving in positions specified in section 131(b)(4) of this title. The  
3 Deputy Under Secretaries take precedence among themselves in the order prescribed by the  
4 Secretary of Defense.”.

5           (6) Section 138(d) is amended by striking the first sentence and inserting “The  
6 Assistant Secretaries take precedence in the Department of Defense after the Deputy  
7 Under Secretaries of Defense.”.

8           (7) Section 142 is amended by striking subsection (d).

9           (b) CONFORMING CHANGES.—

10           (1) COMPOSITION OF THE OFFICE OF THE SECRETARY OF DEFENSE.—Section 131(b)  
11 of such title is amended—

12                   (A) in paragraph (4)—

13                           (i) by redesignating subparagraphs (A) through (D) as  
14 subparagraphs (B) through (E), respectively; and

15                           (ii) by inserting before subparagraph (B) (as so redesignated) the  
16 following new subparagraph (A):

17                                   “(A) The Chief Information Officer of the Department of Defense.”;

18                           (B) by striking paragraph (5); and

19                           (C) redesignating paragraphs (6) through (9) as paragraphs (5) through (8),  
20 respectively.

21           (2) DEPUTY UNDER SECRETARIES OF DEFENSE SEQUENCE.—Section 137a(c) of such  
22 title is amended by—

23                   (A) striking paragraph (5);

1 (B) redesignating paragraph (4) as paragraph (5); and  
2 (C) by inserting after paragraph (3) the following new paragraph (4):  
3 “(4) One of the Deputy Under Secretaries is the Deputy Under Secretary of Defense  
4 (Comptroller).”.

5 (c) TECHNICAL AMENDMENTS.—

6 (1) REFERENCES TO EXECUTIVE ORDERS.—Section 132 of such title is amended—

7 (A) by redesignating subsection (e) as subsection (d); and

8 (B) in subsection (d) (as so redesignated)—

9 (i) by striking “, including the following executive orders:” and  
10 inserting a period; and

11 (ii) by striking paragraphs (1) and (2).

12 (2) SPECIAL OPERATIONS REFERENCES.—

13 (A) ASSISTANT SECRETARIES OF DEFENSE.—Section 138(b)(2) of such title  
14 is amended in the matter preceding subparagraph (A) by striking “167(j)” and  
15 inserting “167(k)”.

16 (B) SPECIAL OPERATIONS POLICY AND OVERSIGHT COUNCIL.—Section  
17 139b(a) of such title is amended by striking “138(b)(4)” and inserting  
18 “138(b)(2)”.

**[Please note: The “Changes to Existing Law” section below sets out in red-line format how the legislative text would amend existing law.]**

### **Section-by-Section Analysis**

This proposal would clarify the many statutory provisions on precedence by eliminating conditional precedence and simplifying the sequence for officials; provide conforming changes to the sections in title 10, United States Code, for the Office of the Secretary of Defense (OSD) and Deputy Under Secretaries of Defense (DUSDs); and provide technical amendments

removing references to Executive Orders and references related to the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict.

In order to simplify precedence determinations, this proposal would remove conditional precedence (e.g., changes in precedence when precedence involves matters under the responsibilities of the official in question) and identify a single specific official (or group of officials) for which each official's precedence will follow. This change retains the basic order of precedence established in the National Defense Authorization Acts for Fiscal Years 2018 and 2019. The clarifying provisions are as follows:

- (1) Places the Under Secretary of Defense (USD) for Research and Engineering (R&E) after the CMO;
- (2) Places the USD for Acquisition and Sustainment (A&S) after the USD(R&E);
- (3) Places the USD for Policy after the USD(A&S);
- (4) Places the Presidentially Appointed, Senate-confirmed (PAS) "specified officials" (officials identified in section 131(b)(4) of title 10, U.S.C.) after the USDs;
- (5) Places the DUSDs after the PAS "specified officials" (i.e., 131(b)(4) officials); and
- (6) Places the Assistant Secretaries of Defense (ASDs) after the DUSDs.

Due to the establishment of the Chief Information Officer (CIO) as a Presidentially Appointed, Senate-confirmed official (PAS) effective January 1, 2019, the proposal would also amend section 131 by adding the CIO into the section for the other similar PAS officials (i.e., section 131(b)(4)). Of note, the proposed order of the "specified officials" listed in section 131(b)(4) is by alphabetical order. The Department requests that the Secretary retain the authority to prescribe the order of precedence for the section 131(b)(4) officials. Currently, the Secretary has placed the officials in order by the date of establishment of their positions. Additionally, the proposal recommends reflecting the order of the Deputy USDs in section 137a in the same order as their USDs.

**Budget Implications:** No budget implications.

**Changes to Existing Law:** This proposal would make the following changes to existing law:

## **TITLE 10, UNITED STATES CODE**

\* \* \* \* \*

### **CHAPTER 4—Office of the Secretary of Defense**

\* \* \* \* \*

#### **§131. Office of the Secretary of Defense**

(a) There is in the Department of Defense an Office of the Secretary of Defense. The function of the Office is to assist the Secretary of Defense in carrying out the Secretary's duties and responsibilities and to carry out such other duties as may be prescribed by law.

(b) The Office of the Secretary of Defense is composed of the following:

- (1) The Deputy Secretary of Defense.
- (2) The Chief Management Officer of the Department of Defense.
- (3) The Under Secretaries of Defense, as follows:
  - (A) The Under Secretary of Defense for Research and Engineering.
  - (B) The Under Secretary of Defense for Acquisition and Sustainment.
  - (C) The Under Secretary of Defense for Policy.
  - (D) The Under Secretary of Defense (Comptroller).
  - (E) The Under Secretary of Defense for Personnel and Readiness.
  - (F) The Under Secretary of Defense for Intelligence.
- (4) Other officers who are appointed by the President, by and with the advice and consent of the Senate, and who report directly to the Secretary and Deputy Secretary without intervening authority, as follows:
  - (A) The Chief Information Officer of the Department of Defense.
  - ~~(AB)~~ The Director of Cost Assessment and Program Evaluation.
  - ~~(BC)~~ The Director of Operational Test and Evaluation.
  - ~~(CD)~~ The General Counsel of the Department of Defense.
  - ~~(DE)~~ The Inspector General of the Department of Defense.
- ~~(5) The Chief Information Officer of the Department of Defense, who reports directly to the Secretary and Deputy Secretary without intervening authority.~~
- ~~(6)~~ The Deputy Under Secretaries of Defense.
- ~~(7)~~ The Assistant Secretaries of Defense.
- ~~(8)~~ Other officials provided for by law, as follows:
  - (A) The two Deputy Directors within the Office of the Director of Cost Assessment and Program Evaluation under section 139a(c) of this title.
  - (B) The Director of Small Business Programs appointed pursuant to section 144 of this title.
  - (C) The official designated under section 1501(a) of this title to have responsibility for Department of Defense matters relating to missing persons as set forth in section 1501 of this title.
  - (D) The Director of Military Family Readiness Policy under section 1781 of this title.
  - (E) The Director of the Office of Corrosion Policy and Oversight assigned pursuant to section 2228(a) of this title.
  - (I) The official designated under section 2438(a) of this title to have responsibility for conducting and overseeing performance assessments and root cause analyses for major defense acquisition programs.
- ~~(9)~~ Such other offices and officials as may be established by law or the Secretary of Defense may establish or designate in the Office.

(c) Officers of the armed forces may be assigned or detailed to permanent duty in the Office of the Secretary of Defense. However, the Secretary may not establish a military staff in the Office of the Secretary of Defense.

(d) The Secretary of each military department, and the civilian employees and members of the armed forces under the jurisdiction of the Secretary, shall cooperate fully with personnel of the Office of the Secretary of Defense to achieve efficient administration of the Department of



Defense and to carry out effectively the authority, direction, and control of the Secretary of Defense.

(e) The officials serving in positions specified in section 131(b)(4) of this title take precedence in the Department of Defense after the Under Secretaries of Defense. The officials serving in positions specified in section 131(b)(4) take precedence among themselves in the order prescribed by the Secretary of Defense.

### **§132. Deputy Secretary of Defense**

(a) \*\*\*

(c) The Deputy Secretary takes precedence in the Department of Defense immediately after the Secretary.

~~(d) Until September 30, 2020, the Deputy Secretary of Defense shall lead the Guam Oversight Council and shall be the Department of Defense's principal representative for coordinating the interagency efforts in matters relating to Guam, including the following executive orders:~~

~~(1) Executive Order No. 13299 of May 12, 2003 (68 Fed. Reg. 25477; 48 U.S.C. note prec. 1451; relating to the Interagency Group on Insular Affairs).~~

~~(2) Executive Order No. 12788 of January 15, 1992, as amended (57 Fed. Reg. 2213; relating to the Defense Economic Adjustment Program).~~

### **§132a. Chief Management Officer** *[no change, shown for reference]*

(a) \*\*\*

(d) PRECEDENCE.—The Chief Management Officer takes precedence in the Department of Defense after the Secretary of Defense and the Deputy Secretary of Defense.

(e) \*\*\*

### **§133a. Under Secretary of Defense for Research and Engineering**

(a) \*\*\*

(c) PRECEDENCE IN DEPARTMENT OF DEFENSE.—The Under Secretary of Defense for Research and Engineering takes precedence in the Department of Defense after the Chief Management Officer of the Department of Defense.

~~(1) Precedence in matters of responsibility.—With regard to all matters for which the Under Secretary has responsibility by the direction of the Secretary of Defense or by law, the Under Secretary takes precedence in the Department of Defense after the Secretary, the Deputy Secretary of Defense, and the Chief Management Officer of the Department of Defense.~~

~~(2) Precedence in other matters.—With regard to all matters other than the matters for which the Under Secretary has responsibility by the direction of the Secretary or by law, the Under Secretary takes precedence in the Department of Defense after the Secretary, the Deputy Secretary, the Chief Management Officer, and the Secretaries of the military departments.~~

### **§133b. Under Secretary of Defense for Acquisition and Sustainment**

(a) \*\*\*

(c) PRECEDENCE IN DEPARTMENT OF DEFENSE.—The Under Secretary of Defense for Acquisition and Sustainment takes precedence in the Department of Defense after the Under Secretary of Defense for Research and Engineering.

~~(1) Precedence in matters of responsibility.—With regard to all matters for which the Under Secretary has responsibility by the direction of the Secretary of Defense or by law, the Under Secretary takes precedence in the Department of Defense after the Secretary, the Deputy Secretary of Defense, the Chief Management Officer of the Department of Defense, and the Under Secretary of Defense for Research and Engineering.~~

~~(2) Precedence in other matters.—With regard to all matters other than the matters for which the Under Secretary has responsibility by the direction of the Secretary or by law, the Under Secretary takes precedence in the Department of Defense after the Secretary, the Deputy Secretary, the Chief Management Officer, the Under Secretary of Defense for Research and Engineering, and the Secretaries of the military departments.~~

### **§134. Under Secretary of Defense for Policy**

(a) \*\*\*

(c) The Under Secretary of Defense for Policy takes precedence in the Department of Defense after the Under Secretary of Defense for Acquisition and Sustainment takes precedence in the Department of Defense after the Secretary of Defense, the Deputy Secretary of Defense, the Under Secretary of Defense for Acquisition, Technology, and Logistics, and the Secretaries of the military departments.

### **§135. Under Secretary of Defense (Comptroller) [no change, shown for reference]**

(a)(1) \*\*\*

(e) The Under Secretary of Defense (Comptroller) takes precedence in the Department of Defense after the Under Secretary of Defense for Policy.

(f) \*\*\*

### **§136. Under Secretary of Defense for Personnel and Readiness [no change, shown for reference]**

(a) \*\*\*

(c) The Under Secretary of Defense for Personnel and Readiness takes precedence in the Department of Defense after the Under Secretary of Defense (Comptroller).

(d) \*\*\*

**§137. Under Secretary of Defense for Intelligence** *[no change, shown for reference]*

(a) \*\*\*

(c) The Under Secretary of Defense for Intelligence takes precedence in the Department of Defense after the Under Secretary of Defense for Personnel and Readiness.

**§137a. Deputy Under Secretaries of Defense**

(a)(1) \*\*\*

(c)(1) One of the Deputy Under Secretaries is the Deputy Under Secretary of Defense for Research and Engineering.

(2) One of the Deputy Under Secretaries is the Deputy Under Secretary of Defense for Acquisition and Sustainment.

(3) One of the Deputy Under Secretaries is the Deputy Under Secretary of Defense for Policy.

(4) One of the Deputy Under Secretaries is the Deputy Under Secretary of Defense (Comptroller).

~~(45) One of the Deputy Under Secretaries is the Deputy Under Secretary of Defense for Personnel and Readiness.~~

~~(5) One of the Deputy Under Secretaries is the Deputy Under Secretary of Defense (Comptroller).~~

(6) One of the Deputy Under Secretaries is the Deputy Under Secretary of Defense for Intelligence, who shall be appointed from among persons who have extensive expertise in intelligence matters.

(d) The Deputy Under Secretaries of Defense take precedence in the Department of Defense after officials serving in positions specified in section 131(b)(4) of this title ~~the Secretary of Defense, the Deputy Secretary of Defense, the Chief Management Officer of the Department of Defense, the Secretaries of the military departments, and the Under Secretaries of Defense~~. The Deputy Under Secretaries shall take precedence among themselves in the order prescribed by the Secretary of Defense.

**§138. Assistant Secretaries of Defense**

(a)(1) \*\*\*

(b)(1) \*\*\*

(2) One of the Assistant Secretaries is the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict. He shall have as his principal duty the overall supervision (including oversight of policy and resources) of special operations activities (as defined in section 167(j)(k) of this title) and low intensity conflict activities of the Department of Defense. The Assistant Secretary is the principal civilian adviser to the Secretary of Defense on special operations and low intensity conflict matters and (after the Secretary and Deputy Secretary) is the principal special operations and low intensity conflict official within the senior management of the Department of Defense. Subject to the authority, direction, and control of the Secretary of Defense, the Assistant Secretary shall do the following:

(A) \*\*\*

(d) ~~The Assistant Secretaries take precedence in the Department of Defense after the Deputy Under Secretaries of Defense the Secretary of Defense, the Deputy Secretary of Defense, the Chief Management Officer of the Department of Defense, the Secretaries of the military departments, the Under Secretaries of Defense, the officials serving in positions specified in section 131(b)(4) of this title, and the Deputy Under Secretaries of Defense.~~ The Assistant Secretaries take precedence among themselves in the order prescribed by the Secretary of Defense.

#### **§139b. Special Operations Policy and Oversight Council**

(a) IN GENERAL.—In order to fulfill the responsibilities specified in section 138(b)(4)(2) of this title, the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict, or the designee of the Assistant Secretary, shall establish and lead a team to be known as the "Special Operations Policy and Oversight Council" (in this section referred to as the "Council").

(b) \*\*\*

#### **§142. Chief Information Officer**

(a) \*\*\*

~~(d) The Chief Information Officer of the Department of Defense takes precedence in the Department of Defense with the officials serving in positions specified in section 131(b)(4) of this title. The officials serving in positions specified in such section and the Chief Information Officer take precedence among themselves in the order prescribed by the Secretary of Defense.~~

1 **SEC. \_\_\_\_. EXTENSION AND REVISIONS TO NEVER CONTRACT WITH THE**  
2 **ENEMY.**

3 (a) PERMANENT EXTENSION.—Section 841 of the Carl Levin and Howard P. “Buck”  
4 McKeon National Defense Authorization Act for Fiscal Year 2015 (10 U.S.C. 2302 note) is  
5 amended by striking subsection (n).

6 (b) EXPANSION OF PROGRAM.—Section 841(a) of such Act is amended—

7 (1) in the heading, by striking “IDENTIFICATION OF PERSONS AND ENTITIES” and  
8 inserting “PROGRAM”;

9 (2) in the matter preceding paragraph (1), by striking “establish in” and all that  
10 follows and inserting “establish a program to mitigate threats posed by vendors supporting  
11 operations outside the United States. The program shall use available intelligence to  
12 identify persons and entities that—”;

13 (3) in paragraph (1), by striking “; or” and inserting a semicolon;

14 (4) in paragraph (2), by striking the period and inserting a semicolon; and

15 (5) by adding at the end the following new paragraphs:

16 “(3) directly or indirectly support a covered person or entity or otherwise pose a  
17 force protection risk to personnel of the United States or coalition forces; or

18 “(4) pose an unacceptable national security risk.”.

19 (c) INCLUSION OF ALL CONTRACTS.—Sections 841 and 842 of such Act are further  
20 amended by striking “covered contract” each place it appears and inserting “contract”.

21 (d) INCLUSION OF ALL COMBATANT COMMANDS.—Sections 841 and 842 of such Act are  
22 further amended by striking “covered combatant command” each place it appears and inserting  
23 “combatant command”.

1 (e) COVERED PERSON OR ENTITY.—Section 843(6) of such Act is amended to read as  
2 follows:

3 “(6) COVERED PERSON OR ENTITY.—The term ‘covered person or entity’ means a  
4 person that is—

5 “(A) engaging in acts of violence against personnel of the United States or  
6 coalition forces;

7 “(B) providing financing, logistics, training, or intelligence to a person  
8 described in subparagraph (A);

9 “(C) engaging in foreign intelligence activities against the United States or  
10 against coalition forces;

11 “(D) engaging in transnational organized crime or criminal activities; or

12 “(E) engaging in other activities that present a direct or indirect risk to the  
13 national security of the United States or coalition forces.”.

14 (f) DELEGATION AUTHORITY OF COMBATANT COMMANDER.—

15 (1) USE OF DESIGNEES.—Sections 841 and 842 of such Act are further amended by  
16 striking “specified deputies” each place it appears and inserting “designee.”

17 (2) REMOVAL OF LIMITATIONS ON DELEGATIONS.—Section 841 of such Act is  
18 further amended by striking subsection (g).

19 (g) AUTHORITIES TO TERMINATE, VOID, AND RESTRICT.—Section 841(c) of such Act is  
20 further amended—

21 (1) in paragraph (1)—

22 (A) by inserting “to a person or entity” after “concerned”; and

23 (B) by striking “the contract” and all that follows and inserting “the person  
24 or entity has been identified under the program established under subsection (a).”;

1 (2) in paragraph (2), by striking “has failed” and all that follows and inserting  
2 “has been identified under the program established under subsection (a).”; and

3 (3) in paragraph (3), by striking “the contract” and all that follows and inserting  
4 “the contractor, or the recipient of the grant or cooperative agreement, has been identified  
5 under the program established under subsection (a).”.

6 (h) CONTRACT CLAUSE.— Section 841(d)(2)(B) of such Act is amended by inserting “and  
7 restrict future award to any contractor, or recipient of a grant or cooperative agreement, that has  
8 been identified under the program established under subsection (a)” after “subsection (c)”.

9 (i) PARTICIPATION OF SECRETARY OF STATE.—Section 841 of such Act is further  
10 amended—

11 (1) in subsection (a) in the matter preceding paragraph (1), by striking “in  
12 consultation with”; and

13 (2) in subsection (f)(1), by striking “in consultation with”.

14 (j) SHARING OF INFORMATION ON SUPPORTERS OF THE ENEMY.—Section 841(h)(1) of such  
15 Act is further amended by striking “may be providing” and all that follows through “or entity” and  
16 inserting “have been identified under the program established under subsection (a)”.

17 (k) REPEAL OF ANNUAL REPORTING REQUIREMENT.—Section 841 of such Act is further  
18 amended by striking subsection (i).

19 (l) ADDITION OF WAIVER.—Section 841 of such Act is further amended by inserting after  
20 subsection (h) the following new subsection:

21 “(i) WAIVER.—The Secretary of Defense, with the concurrence of the Secretary of State  
22 and in consultation with the Director of National Intelligence, may waive any requirement of this  
23 section if the Secretary of Defense determines waiving such requirement is in the national interest  
24 of the United States.”.

1 (m) INAPPLICABILITY TO CERTAIN CONTRACTS, GRANTS, AND COOPERATIVE

2 AGREEMENTS.—Section 841(j) of such Act is amended by striking “contracts, grants, and  
3 cooperative agreements” and all that follows and inserting “a contract, grant, or cooperative  
4 agreement that is performed entirely inside the United States unless the recipient of such contract,  
5 grant or cooperative agreement is a foreign entity.”.

6 (n) CONSTRUCTION WITH OTHER AUTHORITIES.—Section 841 of such Act is further  
7 amended—

8 (1) in subsection (l), by striking “Except as provided in subsection (m), the” and  
9 inserting “The”; and

10 (2) by striking subsection (m).

11 (o) ADDITIONAL ACCESS TO RECORDS.—Section 842 of such Act is further amended—

12 (1) in subsection (a)—

13 (A) in paragraph (1), by striking “, except as provided under subsection  
14 (c)(1),”;

15 (B) in paragraph (2), by striking “ensure that funds” and all that follows and  
16 inserting “support the program established under section 841(a).”;

17 (C) in paragraph (3), by striking “that funds” and all that follows and  
18 inserting “that the examination of such records will support the program  
19 established under section 841(a).”; and

20 (D) by striking paragraph (4); and

21 (2) by striking subsection (c).

22 (p) TECHNICAL AND CONFORMING AMENDMENTS.—



1 (1) SECTION HEADING.—The heading of section 841 of such Act is amended by  
2 striking “**PROHIBITION ON PROVIDING FUNDS TO THE ENEMY**” and inserting  
3 “**THREAT MITIGATION IN COMMERCIAL SUPPORT TO OPERATIONS**”.

4 (2) REDESIGNATIONS.—Section 841 of such Act is further amended by  
5 redesignating subsections (h) through (l) (as amended by subsections (a) through (o) of  
6 this section) as subsections (g) through (k), respectively.

7 (3) DEFINITIONS.—Section 843 of such Act is amended—

8 (A) by striking paragraphs (2) through (5); and

9 (B) redesignating paragraphs (6) through (9) as paragraphs (2) through (5),

10 respectively.

**[Please note: The “Changes to Existing Law” section below sets out in red-line format how the legislative text would amend existing law.]**

### **Section-by-Section Analysis**

This proposal expands the overarching “Never Contract with the Enemy” program and the applicability of the statutory authorities initially authorized under Sections 841, 842, and 843 of the National Defense Authorization Act (NDAA) for Fiscal Year 2015 (Public Law 113-291). The changes will enable the Department to exercise the full intent of the legislative authorities across all Combatant Commands, types of operations, and integration with the Whole of Government in support of National Military Strategy (NMS), POTUS & SECDEF Anti- Corruption objectives and address Government Accountability Office’s (GAO-17-317) High- Risk Series report of February 2017, under Contract Management “Challenges Related to Operational Contract Support.” The proposal specifically addresses shortcomings of which the statutory authorities in Sections 841 and 842 play a critical role both in force protection and reducing the operational risk of providing funding to the enemy. This proposal significantly enables the protection of globally positioned U.S. Forces and interagency partners and strengthens Combatant Command programs to prohibit U.S. Taxpayer funds received under a contract, grant, or cooperative agreement from contributing to persons or entities that provide support to those who pose a risk to U.S. national security. The provisions of this section are not intended to circumvent the rights of U.S. Persons. Nothing in this section shall be construed to contradict applicable Intelligence Oversight statutes, regulations, or policies. Any USPERS information discovered incident to vetting foreign entities will be handled strictly in accordance with applicable Intelligence Oversight statutes, regulations, or policies.

Specifically, this proposal improves the program requirement in section 841 to identify and mitigate vendor threats, expands the authorities outlined in sections 841 and 842 to all

combatant commands and expands the applicability to all contracts with performance outside the United States, or those performed inside the United States by foreign entities, regardless of type of operation or the dollar value of the contract, grant, or cooperative agreement. These proposed amendments cannot be accomplished in regulations or policy without a statutory change due to the requirement in the Competition in Contracting Act of 1984 (CICA) that contracting agencies obtain full and open competition through the use of competitive procedures when conducting a procurement for property or services.

The Department of Defense's (DoD) implementing guidance will be revised as necessary to ensure that exercise of these authorities, as augmented, is not re-delegated below the general or flag officer level and appropriate protocols are included to ensure proper oversight by the CCDR and documented compliance with the requirements of the statute. In particular, in cases when a subordinate joint force command is formed, the CCDR will retain oversight responsibility, but may further delegate responsibility for implementation within the joint operations area to the joint force commander.

The 2018 NDS requires the Joint Force to strengthen alliances, expand partnerships, and mitigate threats in all domains, including the commercial space. This is often influenced through contract awards for locally provided goods and services. Combatant Commands (CCMDs) operating in non-contingency, non-hostile locations rely heavily on contracted support to demonstrate strategic partnerships in countries worldwide. The enemy continues to expand areas of influence and find safe havens in areas other than those designated as contingency environments in order to advance transnational objectives. The 2016 "Worldwide Threat Assessment of the U.S. Intelligence Community" stated that terrorist and insurgent groups are increasingly capable of conducting effective insurgent campaigns, given their membership growth and accumulation of large financial and materiel caches. In order to "never contract with the enemy" and to combat such enemy activities in order to protect U.S. and coalition national security and prevent taxpayer dollars from flowing to individuals and entities hostile to the United States, it is imperative to have a whole-of-government vendor threat mitigation program in place for all CCMDs and respective Federal Agencies to have the requisite statutory authorities in place, regardless of the type of operation, to identify threats posed by vendors that provide federal funds, goods and services to the "enemy" and enable immediate action to be taken to terminate, void or restrict contract(s), grant(s) and cooperative agreement(s) with such individuals or entities. The proposal therefore removes the "contingency operation" and dollar threshold parameters to ensure Congress' intent of prohibiting funds from reaching the enemy is met in full.

The U.S. Africa Command (USAFRICOM) is a prime example of a geographic combatant command that has identified "the enemy" operating throughout the AOR and negatively impacting their mission, but lacks the requisite authorities to take appropriate action to terminate, void, and restrict contracts. For example, The USAFRICOM 2016 Theater Posture Plan highlights the perpetual risk of instability and conflict due to economic challenges, further complicated by the threat of violent extremist organizations. To protect and advance U.S. national security interests in Africa, USAFRICOM focuses on countries that serve as critical enduring hubs in support of U.S. operations focusing its efforts to achieve both short- and long-term counter-terrorism objectives by strengthening an enduring strategic partnership with multiple African Partner nations. In recent years, al-Qa'ida and Daesh activities in northern and western Africa, compounded by other extremist groups such as Boko Haram in Nigeria and al-Shabaab in Somalia, have gained traction

and collaboration in these African regions. These activities make countering violent extremist groups a growing challenge for USAFRICOM on the continent.

Between FY2015 –FY2018, over 6,000 contract actions valued at \$733.5M were awarded to foreign vendors, in support of USAFRICOM operations, exercises, security cooperation activities and engagements on the continent. Less than 1% of those actions qualify for action under the current statutory authority of section 841. The United States must maintain assured access and freedom of movement throughout the USAFRICOM area of responsibility but must mitigate the risk of providing funds to groups actively opposing U.S. interests. This authority is crucial in providing Contracting Activities the ability to continue purchasing products and services from host nations without funding violent extremist organizations.

In August 2015, USAFRICOM established their Foreign Vendor Vetting Program (FVVP) and identified US Army Africa as the Lead Service for Intelligence Support to USAFRICOM's FVVP. The 207th Military Intelligence Brigade, tasked to perform these functions, was FOC and began conducting assessments in Nov 2015. Since then, 239 vendors have been screened and 21 vendors have been assessed as High or Critical. In three instances, High or Critical vendors were the successful offerors. The contracts, however, did not meet the definition of a "covered contract" pursuant to Section 843, paragraph (4), of the 2015 NDAA, as they were not in support of a "contingency operation in which members of the Armed Forces are actively engaged in hostilities." As a result, the contract actions were ineligible for Section 841(a) authority to restrict award to those companies. In each instance, the Operational Commanders had to rely on their Title 10, Section 164 authority to make determinations whether or not to restrict the award. This practice lacks standardization and is unsustainable over a long period of time.

Additionally, the United States Transportation Command (USTRANSCOM), with its global mission, lacks the requisite authorities to take contract action against "the enemy" under current law. Within the last year, USTRANSCOM's Foreign Entity Vetting capability vetted 150 foreign vendors primarily operating as first-tier subcontractors. Through cooperation with industry, foreign vendors that meet criteria for a High or Critical threat has been reduced to under 20 percent of those submitted for review. USTRANSCOM's risk-based process, incorporating operations, intelligence and acquisitions, has further limited the necessity for extraordinary measures to preclude use of these vendors. The Commander has deemed 51 foreign vendors unsuitable for use on USTRANSCOM contracts since 2010, when the Command first established its vetting program. Nearly all cases were presented to the Departments of Treasury and Commerce to pursue through their debarment and sanctions enforcement authorities, but only six of these entities were ultimately listed, often months later. Only one case met the definition of a "covered person or contract" pursuant to Section 843, paragraph (6), of the 2015 NDAA. Without access to expanded authority and the ability to propagate determinations in accordance with Section 841, paragraph (h), USTRANSCOM has been unable to timely prevent other DoD components and government agencies' use of foreign entities found to support transnational organized crime, sanctions violations, and foreign intelligence collection.

Given the current global threat environment, the United States must have the requisite authorities to meet its National Security Strategies and defeat the enemy across the spectrum of irregular warfare. The 841 and 842 authorities are critical to the achievement of the specified

military strategies, joint force security operations (e.g. force protection on forward operating bases) and prohibiting funds from reaching the enemy.

**Budget Implications:** This proposal has no budget implications.

**Changes to Existing Law:** This proposal would amend subtitle E of title VIII of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (10 U.S.C. 2302 note) as follows:

**SEC 841. PROHIBITION ON PROVIDING FUNDS TO THE ENEMY THREAT MITIGATION IN COMMERCIAL SUPPORT TO OPERATIONS.**

(a) ~~IDENTIFICATION OF PERSONS AND ENTITIES PROGRAM.~~—The Secretary of Defense shall, in conjunction with the Director of National Intelligence and ~~in consultation with the~~ Secretary of State, ~~establish in each covered combatant command a program to identify persons and entities within the area of responsibility of such command that~~ establish a program to mitigate threats posed by vendors supporting operations outside the United States. The program shall use available intelligence to identify persons and entities that—

(1) provide funds, including goods and services, received under a ~~covered~~ contract, grant, or cooperative agreement of an executive agency directly or indirectly to a covered person or entity; ~~or~~

(2) fail to exercise due diligence to ensure that none of the funds, including goods and services, received under a ~~covered~~ contract, grant, or cooperative agreement of an executive agency are provided directly or indirectly to a covered person or entity;

(3) directly or indirectly support a covered person or entity or otherwise pose a force protection risk to personnel of the United States or coalition forces; or

(4) pose an unacceptable national security risk.

(b) NOTICE OF IDENTIFIED PERSONS AND ENTITIES.—

(1) NOTICE.—Upon the identification of a person or entity as being described by subsection (a), the head of the executive agency concerned (or the designee of such head) and the commander of the ~~covered~~ combatant command concerned (or the ~~specified deputies~~ designee of the commander) shall be notified, in writing, of such identification of the person or entity.

(2) RESPONSIVE ACTIONS.—Upon receipt of a notice under paragraph (1), the head of the executive agency concerned (or the designee of such head) and the commander of the ~~covered~~ combatant command concerned (or the ~~specified deputies~~ designee of the commander) may notify the heads of contracting activities, or other appropriate officials of the agency or command, in writing of such identification.

(3) MAKING OF NOTIFICATIONS.—Any written notification pursuant to this subsection shall be made in accordance with procedures established to implement the revisions of regulations required by this section.

(c) AUTHORITY TO TERMINATE OR VOID CONTRACTS, GRANTS, AND COOPERATIVE AGREEMENTS AND TO RESTRICT FUTURE AWARD.—Not later than 270 days after the date of the enactment of this Act, the Federal Acquisition Regulation, the Defense Federal Acquisition

Regulation Supplement, and the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards shall be revised to provide that, upon notice from the head of an executive agency (or the designee of such head) or the commander of a ~~covered~~ combatant command (or the ~~specified deputies~~ designee of the commander) pursuant to subsection (b), the head of contracting activity of an executive agency, or other appropriate official, may do the following:

(1) Restrict the award of contracts, grants, or cooperative agreements of the executive agency concerned to a person or entity upon a written determination by the head of contracting activity or other appropriate official that ~~the contract, grant, or cooperative agreement would provide funds received under such contract, grant, or cooperative agreement directly or indirectly to a covered person or entity.~~ the person or entity has been identified under the program established under subsection (a).

(2) Terminate for default any contract, grant, or cooperative agreement of the executive agency concerned upon a written determination by the head of contracting activity or other appropriate official that the contractor, or the recipient of the grant or cooperative agreement, ~~has failed to exercise due diligence to ensure that none of the funds received under the contract, grant, or cooperative agreement are provided directly or indirectly to a covered person or entity.~~ has been identified under the program established under subsection (a).

(3) Void in whole or in part any contract, grant, or cooperative agreement of the executive agency concerned upon a written determination by the head of contracting activity or other appropriate official that ~~the contract, grant, or cooperative agreement provides funds directly or indirectly to a covered person or entity.~~ the contractor, or the recipient of the grant or cooperative agreement, has been identified under the program established under subsection (a).

(d) CLAUSE.—

(1) IN GENERAL.—Not later than 270 days after the date of the enactment of this Act, the Federal Acquisition Regulation, the Defense Federal Acquisition Regulation Supplement, and the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards shall be revised to require that—

(A) the clause described in paragraph (2) shall be included in each ~~covered~~ contract, grant, and cooperative agreement of an executive agency that is awarded on or after the date that is 270 days after the date of the enactment of this Act; and

(B) to the maximum extent practicable, each ~~covered~~ contract, grant, and cooperative agreement of an executive agency that is awarded before the date of the enactment of this Act shall be modified to include the clause described in paragraph (2).

(2) CLAUSE DESCRIBED.—The clause described in this paragraph is a clause that—

(A) requires the contractor, or the recipient of the grant or cooperative agreement, to exercise due diligence to ensure that none of the funds, including goods and services, received under the contract, grant, or cooperative agreement are provided directly or indirectly to a covered person or entity; and

(B) notifies the contractor, or the recipient of the grant or cooperative agreement, of the authority of the head of contracting activity, or other appropriate official, to terminate or void the contract, grant, or cooperative agreement, in whole or in part, as provided in subsection (c) and restrict future award to any contractor,

or recipient of a grant or cooperative agreement, that has been identified under the program established under subsection (a).

(3) TREATMENT AS VOID.—For purposes of this section:

(A) A contract, grant, or cooperative agreement that is void is unenforceable as contrary to public policy.

(B) A contract, grant, or cooperative agreement that is void in part is unenforceable as contrary to public policy with regard to a segregable task or effort under the contract, grant, or cooperative agreement.

(4) PUBLIC COMMENT.—The President shall ensure that the process for revising regulations required by paragraph (1) shall include an opportunity for public comment, including an opportunity for comment on standards of due diligence required by this section.

(e) REQUIREMENTS FOLLOWING CONTRACT ACTIONS.—Not later than 270 days after the date of the enactment of this Act, the Federal Acquisition Regulation, the Defense Federal Acquisition Regulation Supplement, and the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards shall be revised as follows:

(1) To require that any head of contracting activity, or other appropriate official, taking an action under subsection (c) to terminate, void, or restrict a contract, grant, or cooperative agreement notify in writing the contractor or recipient of the grant or cooperative agreement, as applicable, of the action.

(2) To permit the contractor or recipient of a grant or cooperative agreement subject to an action taken under subsection (c) to terminate or void the contract, grant, or cooperative agreement, as the case may be, an opportunity to challenge the action by requesting an administrative review of the action under the procedures of the executive agency concerned not later than 30 days after receipt of notice of the action.

(f) ANNUAL REVIEW; PROTECTION OF CLASSIFIED INFORMATION.—

(1) ANNUAL REVIEW.—The Secretary of Defense, in conjunction with the Director of National Intelligence and ~~in consultation with~~ the Secretary of State shall, on an annual basis, review the lists of persons and entities previously covered by a notice under subsection (b) as having been identified as described by subsection (a) in order to determine whether or not such persons and entities continue to warrant identification as described by subsection (a). If a determination is made pursuant to such a review that a person or entity no longer warrants identification as described by subsection (a), the Secretary of Defense shall notify the head of the executive agency concerned (or the designee of such head) and the commander of the ~~covered~~ combatant command concerned (or the ~~specified deputies~~ designee of the commander) in writing of such determination.

(2) PROTECTION OF CLASSIFIED INFORMATION.—Classified information relied upon to make an identification in accordance with subsection (a) may not be disclosed to a contractor or a recipient of a grant or cooperative agreement with respect to which an action is taken pursuant to the authority provided in subsection (c), or to their representatives, in the absence of a protective order issued by a court of competent jurisdiction established under Article I or Article III of the Constitution of the United States that specifically addresses the conditions upon which such classified information may be so disclosed.

~~(g) DELEGATION OF CERTAIN RESPONSIBILITIES.—~~

~~(1) COMBATANT COMMAND RESPONSIBILITIES.—The commander of a covered combatant command may delegate the responsibilities in this section to any deputies of the commander designee specified by the commander for purposes of this section. Any delegation of responsibilities under this paragraph shall be made in writing.~~

~~(2) NONDELEGATION OF RESPONSIBILITY FOR CERTAIN ACTIONS.—The authority provided by subsection (c) to terminate, void, or restrict contracts, grants, and cooperative agreements, in whole or in part, may not be delegated below the level of head of contracting activity, or equivalent official for purposes of grants or cooperative agreements.~~

~~(hg) ADDITIONAL RESPONSIBILITIES OF EXECUTIVE AGENCIES.—~~

~~(1) SHARING OF INFORMATION ON SUPPORTERS OF THE ENEMY.—The Secretary of Defense shall, in consultation with the Director of the Office of Management and Budget, carry out a program through which agency components may provide information to heads of executive agencies (or the designees of such heads) and the commanders of the covered combatant commands (or the specified deputies designee of the commanders) relating to persons or entities who may be providing funds, including goods and services, received under contracts, grants, or cooperative agreements of the executive agencies directly or indirectly to a covered person or entity have been identified under the program established under subsection (a). The program shall be designed to facilitate and encourage the sharing of risk and threat information between executive agencies and the covered combatant commands.~~

~~(2) INCLUSION OF INFORMATION ON CONTRACT ACTIONS IN FAPIIS AND OTHER SYSTEMS.—Upon the termination, voiding, or restriction of a contract, grant, or cooperative agreement of an executive agency under subsection (c), the head of contracting activity of the executive agency shall provide for the inclusion in the Federal Awardee Performance and Integrity Information System (FAPIIS), or other formal system of records on contractors or entities, of appropriate information on the termination, voiding, or restriction, as the case may be, of the contract, grant, or cooperative agreement.~~

~~(3) REPORTS.—The head of contracting activity that receives a notice pursuant to subsection (b) shall submit to the head of the executive agency concerned (or the designee of such head) and the commander of the covered combatant command concerned (or specified deputies designee) a report on the action, if any, taken by the head of contracting activity pursuant to subsection (c), including a determination not to terminate, void, or restrict the contract, grant, or cooperative agreement as otherwise authorized by subsection (c).~~

~~(ih) REPORTS.—~~

~~(1) IN GENERAL.—Not later than March 1 of 2016, 2017, and 2018, the Director of the Office of Management and Budget shall submit to the appropriate committees of Congress a report on the use of the authorities in this section in the preceding calendar year, including the following:~~

~~(A) For each instance in which an executive agency exercised the authority to terminate, void, or restrict a contract, grant, and cooperative agreement pursuant to subsection (c), based on a notification under subsection (b), the following:~~

~~(i) The executive agency taking such action.~~

- ~~(ii) An explanation of the basis for the action taken.~~
- ~~(iii) The value of the contract, grant, or cooperative agreement voided or terminated.~~
- ~~(iv) The value of all contracts, grants, or cooperative agreements of the executive agency in force with the person or entity concerned at the time the contract, grant, or cooperative agreement was terminated or voided.~~

~~(B) For each instance in which an executive agency did not exercise the authority to terminate, void, or restrict a contract, grant, and cooperative agreement pursuant to subsection (c), based on a notification under subsection (b), the following:~~

- ~~(i) The executive agency concerned.~~
  - ~~(ii) An explanation of the basis for not taking the action.~~
- ~~(2) FORM.—Any report under this subsection may, at the election of the Director—~~  
~~(A) be submitted in unclassified form, but with a classified annex; or~~  
~~(B) be submitted in classified form.~~

(ih) WAIVER.—The Secretary of Defense, with the concurrence of the Secretary of State and in consultation with the Director of National Intelligence, may waive any requirement of this section if the Secretary of Defense determines waiving such requirement is in the national interest of the United States.

(ji) INAPPLICABILITY TO CERTAIN CONTRACTS, GRANTS, AND COOPERATIVE AGREEMENTS.—The provisions of this section do not apply to ~~contracts, grants, and cooperative agreements that are performed entirely inside the United States.~~ a contract, grant, or cooperative agreement that is performed entirely inside the United States unless the recipient of such contract, grant, or cooperative agreement is a foreign entity.

(kj) NATIONAL SECURITY EXCEPTION.—Nothing in this section shall apply to the authorized intelligence or law enforcement activities of the United States Government.

(lk) CONSTRUCTION WITH OTHER AUTHORITIES.—~~Except as provided in subsection (m), the~~ The authorities in this section shall be in addition to, and not to the exclusion of, any other authorities available to executive agencies to implement policies and purposes similar to those set forth in this section.

~~(m) COORDINATION WITH CURRENT AUTHORITIES.—~~

~~(1) REPEAL OF SUPERSEDED AUTHORITY RELATED TO CENTCOM.—Effective 270 days after the date of the enactment of this Act, section 841 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81; 125 Stat. 1510; 10 U.S.C. 2302 note) is repealed.~~

~~(2) REPEAL OF SUPERSEDED AUTHORITY RELATED TO DEPARTMENT OF DEFENSE.—Effective 270 days after the date of the enactment of this Act, section 831 of the National Defense Authorization Act for Fiscal Year 2014 (Public Law 113–66; 127 Stat. 810; 10 U.S.C. 2302 note) is repealed.~~

~~(3) USE OF SUPERSEDED AUTHORITIES IN IMPLEMENTATION OF REQUIREMENTS.—In providing for the implementation of the requirements of this section by the Department of~~



~~Defense, the Secretary of Defense may use and modify for that purpose the regulations and procedures established for purposes of the implementation of the requirements of section 841 of the National Defense Authorization Act for Fiscal Year 2012 and section 831 of the National Defense Authorization Act for Fiscal Year 2014.~~

~~(n) SUNSET.—The provisions of this section shall cease to be effective on December 31, 2021.~~

## **SEC. 842. ADDITIONAL ACCESS TO RECORDS**

(a) CONTRACTS, GRANTS, AND COOPERATIVE AGREEMENTS.—

(1) IN GENERAL.—Not later than 270 days after the date of the enactment of this Act, applicable regulations shall be revised to provide that, ~~except as provided under subsection (c)(1),~~ the clause described in paragraph (2) may, as appropriate, be included in each ~~covered~~ contract, grant, and cooperative agreement of an executive agency that is awarded on or after the date of the enactment of this Act.

(2) CLAUSE.—The clause described in this paragraph is a clause authorizing the head of the executive agency concerned, upon a written determination pursuant to paragraph (3), to examine any records of the contractor, the recipient of a grant or cooperative agreement, or any subcontractor or subgrantee under such contract, grant, or cooperative agreement to the extent necessary to ~~ensure that funds, including goods and services, available under the contract, grant, or cooperative agreement are not provided directly or indirectly to a covered person or entity.~~ support the program established under section 841(a).

(3) WRITTEN DETERMINATION.—The authority to examine records pursuant to the contract clause described in paragraph (2) may be exercised only upon a written determination by the contracting officer, or comparable official responsible for a grant or cooperative agreement, upon a finding by the commander of a ~~covered~~ combatant command (or the ~~specified deputies~~ designee of the commander) or the head of an executive agency (or the designee of such head) that there is reason to believe ~~that funds, including goods and services, available under the contract, grant, or cooperative agreement concerned may have been provided directly or indirectly to a covered person or entity.~~ that the examination of such records will support the program established under section 841(a).

~~(4) FLOWDOWN.—A clause described in paragraph (2) may also be included in any subcontract or subgrant under a covered contract, grant, or cooperative agreement if the subcontract or subgrant has an estimated value in excess of \$50,000.~~

(b) REPORTS.—

(1) IN GENERAL.—Not later than March 1 of 2016, 2017, and 2018, the Director of the Office of Management and Budget shall submit to the appropriate committees of Congress a report on the use of the authority provided by this section in the preceding calendar year.

(2) ELEMENTS.—Each report under this subsection shall identify, for the calendar year covered by such report, each instance in which an executive agency exercised the authority provided under this section to examine records, explain the basis for the action taken, and summarize the results of any examination of records so undertaken.

(3) FORM.—Any report under this subsection may be submitted in classified form.

~~(c) RELATIONSHIP TO EXISTING AUTHORITIES APPLICABLE TO CENTCOM.—~~

~~(1) APPLICABILITY.—This section shall not apply to contracts, grants, or cooperative agreements covered under section 842 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81; 125 Stat. 1513; 10 U.S.C. 2313 note).~~

~~(2) EXTENSION OF CURRENT AUTHORITIES APPLICABLE TO CENTCOM.—Section 842(d)(1) of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81; 125 Stat. 1514; 10 U.S.C. 2313 note) is amended by striking “date of the enactment of this Act” and inserting “date of the enactment of the Carl Levin and Howard P. ‘Buck’ McKeon National Defense Authorization Act for Fiscal Year 2015”.~~

**SEC. 843.  
DEFINITIONS.**

In this subtitle:

~~(1) APPROPRIATE COMMITTEES OF CONGRESS.—The term “appropriate committees of Congress” means—~~

~~(A) the Committee on Armed Services, the Committee on Homeland Security and Governmental Affairs, the Committee on Foreign Relations, and the Committee on Appropriations of the Senate; and~~

~~(B) the Committee on Armed Services, the Committee on Oversight and Government Reform, the Committee on Foreign Affairs, and the Committee on Appropriations of the House of Representatives.~~

~~(2) CONTINGENCY OPERATION.—The term “contingency operation” has the meaning given that term in section 101(a)(13) of title 10, United States Code.~~

~~(3) CONTRACT.—The term “contract” includes a contract for commercial items but is not limited to a contract for commercial items.~~

~~(4) COVERED COMBATANT COMMAND.—The term “covered combatant command” means the following:~~

~~(A) The United States Africa Command.~~

~~(B) The United States Central Command.~~

~~(C) The United States European Command.~~

~~(D) The United States Pacific Command.~~

~~(E) The United States Southern Command.~~

~~(F) The United States Transportation Command.~~

~~(5) COVERED CONTRACT, GRANT, OR COOPERATIVE AGREEMENT DEFINED.—The term “covered contract, grant, or cooperative agreement” means a contract, grant, or cooperative agreement with an estimated value in excess of \$50,000 that is performed outside the United States, including its possessions and territories, in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities.~~

~~(6) COVERED PERSON OR ENTITY.—The term “covered person or entity” means a person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities.~~

~~(62) COVERED PERSON OR ENTITY.—The term ‘covered person or entity’ means a~~

person that is—

(A) engaging in acts of violence against personnel of the United States or coalition forces;

(B) providing financing, logistics, training, or intelligence to a person described in subparagraph (A);

(C) engaging in foreign intelligence activities against the United States or against coalition forces;

(D) engaging in transnational organized crime or criminal activities; or

(E) engaging in other activities that present a direct or indirect risk to the national security of the United States or coalition forces.

(73) EXECUTIVE AGENCY.—The term “executive agency” has the meaning given that term in section 133 of title 41, United States Code.

(84) HEAD OF CONTRACTING ACTIVITY.—The term “head of contracting activity” has the meaning described in section 1.601 of the Federal Acquisition Regulation.

(95) UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS.—The term “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards” means the guidance issued by the Office of Management and Budget in part 200 of chapter II of title 2 of the Code of Federal Regulations.

1 **SEC. \_\_\_\_. POSSESSION OF FIREARMS BY MILITARY DESERTERS.**

2 (a) **MILITARY DESERTER DEFINED.**—Section 921(a) of title 18, United States Code, is  
3 amended by adding at the end the following new paragraph:

4 “(36) The term ‘military deserter’ means a member of the Armed Forces who  
5 has preferred charges for violation of section 885 of title 10 (Article 85 of the  
6 Uniform Code of Military Justice).”.

7 (b) **UNLAWFUL ACTS.**—Section 922(g)(2) of such title is amended by inserting “or a  
8 military deserter” after “a fugitive from justice”.

**[Please note: The following “Changes to Existing Law” section sets out in red-line format how the legislative text would amend existing law.]**

**Section-by-Section Analysis**

This legislative proposal would add a definition of “military deserters” to section 921 of chapter 44 of title 18, United States Code, and then add military deserters to the list of persons prohibited from purchasing, possessing, or transferring a firearm or ammunition under section 922(g) of title 18, United States Code.

The current prohibitions under section 922(g) include paragraph (2), “fugitive from justice.” This category has been interpreted by the Department of Justice, Federal Bureau of Investigation (FBI), and the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to only include military deserters with pending court-martial charges or an open law enforcement investigation. This creates a gap that allows an individual who has deserted to purchase, possess, or transfer a weapon exacerbating the potential that the deserter may cause harm to himself or others. By including deserters as a prohibition under section 922(g)(2), this gap can be easily closed.

Article 85 of the Uniform Code of Military Justice (10 USC 885), provides that any member of the armed forces who, without authority goes or remains absent from his unit, organization, or place of duty with intent to remain away there from permanently; quits his unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service; or without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States; is guilty of desertion.

At any given time, the Army, for example, has about 1,100 active deserters. Of these deserters, only about 10 (or 0.01 percent) would meet the strict interpretation used by the FBI

and ATF to classify a “deserter” as a fugitive from justice (i.e., pending court-martial). The U.S. Army Deserter Information Point (USADIP) enters all Army deserters into the National Criminal Information Center (NCIC) wanted persons file upon notification to law enforcement personnel that a Soldier has deserted. The USADIP then removes the Soldier from NCIC when the Soldier is returned to military control. Each of the military departments follows similar procedures.

The current legislative gap allows an individual who has deserted to purchase, possess, or transfer a weapon, exacerbating the potential that the deserter may cause harm to himself or others. This proposal expands the prohibition from possessing, purchasing, or transferring firearms to add military deserters (i.e., those who are in violation of Article 85 of the Uniform Code of Military Justice (10 USC 885)) to the classification of fugitives from justice under section 922(g)(2) of title 18.

**Budget Implications:** This proposal has no budgetary impact. The administrative duties associated with changes is included within the office staffs’ responsibilities and does not warrant any further increases or change to operations and duties within the office maintaining records.

**Changes to Existing Law:** This proposal would make the following changes to chapter 44 of title 18, United States Code:

**§921. Definitions**

(a) As used in this chapter—

\* \* \* \* \*

(35) The term “body armor” means any product sold or offered for sale, in interstate or foreign commerce, as a personal protective body covering intended to protect against gunfire, regardless of whether the product is to be worn alone or is sold as a complement to another product or garment.

(36) The term ‘military deserter’ means a member of the Armed Forces who has preferred charges for violation of section 885 of title 10 (Article 85 of the Uniform Code of Military Justice).

**§922. Unlawful acts**

\* \* \* \* \*

(g) It shall be unlawful for any person—

- (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
- (2) who is a fugitive from justice or a military deserter;
- (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
- (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
- (5) who, being an alien-

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that-

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

\* \* \* \* \*

1 **SEC. \_\_\_\_ . REST AND RECUPERATION LEAVE AND FOREIGN HOLIDAY LEAVE.**

2 (a) IN GENERAL.—Subchapter II of chapter 63 of title 5, United States Code, is amended  
3 by adding at the end the following new sections:

4 **“§6329d. Rest and recuperation leave**

5 “(a) DEFINITIONS.—In this section—

6 “(1) the term ‘agency’ means an Executive agency (as defined in section 105),  
7 excluding the Government Accountability Office;

8 “(2) the term ‘combat zone’ means a geographic area designated by an Executive  
9 Order of the President as an area in which the Armed Forces are engaging or have  
10 engaged in combat, an area designated by law to be treated as a combat zone, or a  
11 location the Department of Defense has certified for combat zone tax benefits due to its  
12 direct support of military operations;

13 “(3) the term ‘employee’ has the meaning given that term in section 6301;

14 “(4) the term ‘high risk, high threat post’ has the meaning given that term in  
15 section 104 of the Omnibus Diplomatic Security and Antiterrorism Act of 1986 (22  
16 U.S.C. 4803); and

17 “(5) the term ‘leave year’ means the period beginning on the first day of the first  
18 complete pay period in a calendar year and ending on the day immediately before the first  
19 day of the first complete pay period in the following calendar year.

20 “(b) LEAVE FOR REST AND RECUPERATION.—

21 “(1) IN GENERAL.—The head of an agency may grant up to 20 days of paid leave,  
22 per leave year, to a civilian employee of the agency serving in a combat zone or other  
23 high risk, high threat post for the purposes of rest and recuperation.

1           “(2) CONVERSION OF LEAVE PERIOD INTO HOURS.—The 20 days of leave referred  
2 to in paragraph (1) shall be converted to 160 hours of leave for full-time employees and  
3 proportionally adjusted for employees with a part-time tour of duty or an uncommon tour  
4 of duty in which the hours for which leave may be charged are in excess of 80 hours in a  
5 biweekly pay period.

6           “(c) DISCRETIONARY AUTHORITY OF AGENCY HEAD.—Use of the authority under  
7 subsection (b) is at the sole and exclusive discretion of the head of the agency concerned. The  
8 head of the agency may prescribe agency-wide policies to govern the use of the authority within  
9 the agency.

10           “(d) RECORDS.—An agency shall record leave provided under this section separately  
11 from leave authorized under any other provision of law.

12 **“§6329e. Foreign holiday leave**

13           “(a) DEFINITIONS.—In this section—

14                   “(1) the term ‘agency’ means an Executive agency (as defined in section 105),  
15 excluding the Government Accountability Office;

16                   “(2) the term ‘employee’ has the meaning given that term in section 6301; and

17                   “(3) the term ‘leave year’ means the period beginning on the first day of the first  
18 complete pay period in a calendar year and ending on the day immediately before the first  
19 day of the first complete pay period in the following calendar year.

20           “(b) LEAVE FOR LOCAL HOLIDAYS OBSERVED IN FOREIGN AREAS.—The head of an  
21 agency may grant up to 5 days of paid leave, per leave year, under this section to a civilian  
22 employee of the agency serving in a foreign area for local holidays observed in the foreign  
23 area—



1           “(1) if the head of the agency determines that the conduct of business during the  
2           local holidays would be inconsistent with host-country practice or otherwise not in the  
3           best interest of the United States; or

4           “(2) for such other reasons as the head of the agency determines necessary to  
5           advance the diplomatic interests of the United States.

6           “(c) DISCRETIONARY AUTHORITY OF AGENCY HEAD.—Use of the authority under  
7           subsection (b) is at the sole and exclusive discretion of the head of the agency concerned. The  
8           head of the agency may prescribe agency-wide policies to govern the use of the authority within  
9           the agency.

10          “(d) RECORDS.—An agency shall record leave provided under this section separately  
11          from leave authorized under any other provision of law.”.

12          (b) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is  
13          amended by inserting after the item relating to section 6329c the following new items:

        “6329d. Rest and recuperation leave.  
        “6329e. Foreign holiday leave.”.

### **Section-by-Section Analysis**

The United States Government maintains a continued civilian presence in countries throughout the world to further United States (U.S.) foreign policy and national security interests. The challenges faced by civilian employees serving in combat zones and other high risk, high threat areas are unique and warrant special considerations for leave purposes that are not generally recognized under the provisions of chapter 63 of title 5, United States Code (U.S.C.). These assignments often support activities abroad that are hazardous to life or health, and are distinguishable from normal Government employment. Prior to enactment of the Administrative Leave Act of 2016 (ALA), Executive departments granted administrative leave based on the broad management authority in 5 U.S.C. 301-302 to address the unique circumstances of this type of civilian service overseas. This authority has been restricted by the ALA and is no longer adequate to address the needs of this unique type of service.

The intent of the ALA was to place controls and limitations on the granting of administrative leave to ensure authorization was restricted to situations where its use had a purpose consistent with Government rules and regulations. The ALA defines administrative leave as paid leave authorized at the discretion of the agency without loss of or reduction in pay,

other leave, or service credit and that is not authorized under any provision of law. Additionally, 5 U.S.C. 6329a(b)(1) now imposes a 10-workday limitation on administrative leave for an employee per calendar year.

The enactment of the ALA limits federal agencies' authority to grant administrative leave for the unique circumstances that are associated with overseas duty, including service in combat zones in support of military and contingency operations. Specifically, the use of administrative leave in conjunction with authorized periods of rest and recuperation (R&R) will be limited. This affects employees from the Department of Defense (DoD), and foreign affairs agencies, including the Department of State (DOS), the Department of Agriculture, the Department of Commerce, and the United States Agency for International Development. This also affects employees from other agencies with an overseas presence, including agencies of the Department of Justice and Department of Health and Human Services.

DoD policy allows for Government-funded R&R travel for service members and DoD civilians who are assigned to combat zones supporting contingency operations overseas. The R&R program allows DoD to authorize periodic breaks from austere, stressful, and dangerous work environments. These isolated locations have unusual personal hazards, lack essential services such as medical care and recreation facilities, and have other environmental factors making the assignment difficult to sustain over an extended period of time. Payment of travel expenses for R&R breaks is considered in the best interests of the Government as it provides a respite for military and civilian personnel from unusually stressful work situations that require separation from family members. Without R&R breaks, the ability to continue to function at such a high operational tempo would be significantly impacted.

These R&R authorizations are often in countries where travel is difficult, dangerous, and subject to delays. As such, the Government provides military transportation or otherwise arranges and funds the travel that is needed for the employee to reach the R&R destination and return. Current DoD policy for service members provides that R&R travel is not charged to leave until the member reaches the R&R destination. Current DoD policy for civilians includes a provision to grant administrative leave to cover the R&R travel period. For Iraq, Afghanistan, and Pakistan, this is specifically defined as up to 10 work days per R&R break, not to exceed 20 work days over a 12-month period if multiple R&Rs are authorized.

DOS provides similar R&R benefits to incentivize their Foreign Service Officers to bid on undesirable duty stations in dangerous and remote locations. Current DOS policy provides for normally one to two days of administrative leave for the departure and return legs of the R&R trip (i.e., transit time), and a separate grant of administrative leave during the R&R period that is specific to the incentive package for the post.

There is no current legislative authority that provides a separate category of leave or a special authorization for paid leave for the purpose of R&R breaks. Such leave is currently treated as an excused absence (i.e., administrative leave). As such, the type of leave that is currently authorized under the R&R program would be subject to the 10-day annual limitation of the ALA, adversely impacting the ability for employees to utilize the current grant of up to 20 work days per R&R break per year.

Without new legislation to preserve benefits that are comparable to those currently offered during R&R breaks, employees who are deployed to combat zones (the IRS provides a complete list of currently recognized combat zones) or serving in other high risk/high threat locations would be required to use personal leave or leave without pay for the time spent on official travel attempting to reach and return from the R&R destination. Because of the often remote locations from which R&R breaks are authorized, travel time is often unpredictable and fraught with delays and difficulties. The ability to authorize administrative leave mitigates the impact of these delays. Without this authority, the effectiveness of the R&R program could be severely impacted, thereby hampering the Government's ability to recruit civilians for deployment to these dangerous locations, particularly in contingency operations (e.g., Iraq, Afghanistan, or Pakistan).

In addition to R&R breaks, civilians working in overseas locations occasionally require leave for the observance of local holidays in foreign areas. Historically, DoD has leveraged administrative leave for the observance of local holidays that meet certain criteria. DoD Instruction 1400.25, Volume 1261, allows for administrative leave when the Chief of Mission or geographic Combatant Commander determines a closure is appropriate when a local holiday or special occasion is of such significance that conduct of business by some or all offices would be an affront to the host-country government or not in the best interest of the United States. DOS has a similar policy and uses administrative leave for local holidays observed in foreign areas.

The National Defense Strategy (NDS) relies upon the ability to utilize civilians to perform work in support of military operations when the functions are not military-essential. This frees up uniformed personnel to perform tasks that only they can perform and also allows optimization of scarce resources. Civilians are a critical part of the Total Force mix; they serve as a force multiplier in the execution of NDS objectives and are essential to the successful execution of contingency operations. Failure to provide a legislative authority that preserves the leave benefits currently offered during R&R breaks would seriously impact the ability to meet deployment demands for civilians, thereby degrading the Department's ability to accomplish national defense strategies.

The proposed legislative action creates a new category of leave for use with R&R breaks from combat zones and high risk/high threat locations, in an amount that is equal to the current DoD authority for use of administrative leave during R&R breaks (i.e., not more than 20 work days in a year), as well as a new category of leave for up to 5 days of paid leave for local holidays observed in foreign areas. Approval of this proposal will preserve the current level of benefits and offset the unintended negative effects that would otherwise occur upon implementation of the ALA.

**Budget Implications:** No budget impact.

**Changes to Existing Law:** As set forth in the legislative text above, this proposal would add two new sections to title 5, United States Code.