

S. HRG. 116-644

THE DEPARTMENT OF DEFENSE AUDIT

HEARING

BEFORE THE

SUBCOMMITTEE ON READINESS AND
MANAGEMENT SUPPORT

OF THE

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

NOVEMBER 20, 2019

Printed for the use of the Committee on Armed Services



Available via: <http://www.govinfo.gov>

U.S. GOVERNMENT PUBLISHING OFFICE

WASHINGTON : 2024

54-854 PDF

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THE DEPARTMENT OF DEFENSE AUDIT

WEDNESDAY, NOVEMBER 20, 2019

UNITED STATES SENATE,
SUBCOMMITTEE ON READINESS
AND MANAGEMENT SUPPORT,
COMMITTEE ON ARMED SERVICES,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:30 a.m. in room SR-222, Russell Senate Office Building, Senator Dan Sullivan (Chairman of the Subcommittee) presiding.

Members present: Senators Sullivan, Fischer, Ernst, Perdue, Blackburn, Shaheen, Hirono, Kaine, and Jones.

OPENING STATEMENT OF SENATOR DAN SULLIVAN

Senator SULLIVAN. Good morning. This hearing on the Subcommittee on Readiness and Management Support will come to order.

Today, this Subcommittee meets to receive testimony from Deputy Secretary of Defense David Norquist concerning the Department of Defense's (DOD) 2018 and 2019 audits. Last year, when he was serving as the DOD Comptroller, Secretary Norquist completed the first DOD audit ever. Soon thereafter, Secretary Norquist was nominated and then confirmed as Deputy Secretary of Defense with overwhelming Senate support from both sides of the aisle. He is a wealth of knowledge on these issues, and I thank him for being here today.

To a lot of people, aside from my good friend Senator Perdue, who I'm hopeful will be here a little bit later, the DOD audit might not come across as the most interesting topic in the world. However, Ranking Member Kaine and I take our oversight responsibility seriously and are happy to have this important and timely hearing.

Another responsibility we take seriously has been one of providing the funding needed to rebuild our military, with a specific focus on restoring readiness.

Conducting an audit of this magnitude is a massive undertaking, as I'm sure we'll hear. In fact, until Secretary Norquist arrived, it had never happened. The Pentagon had never completed an audit. Let me repeat that. In its history, the Department of Defense had never completed an audit. Kind of remarkable.

The fiscal year 2019 DOD audit is one of the largest audits of any organization in history. Over the course of this year, this audit has required more than 1,400 auditors and hundreds of DOD site inspections. These auditors and inspections evaluated thousands of

sample and document items to account for the roughly \$2.8 trillion in DOD assets. Conducting an audit of this size is no easy task, but it's a critical function that DOD must do, and the results reveal issues that we all must learn from. There is still much, much more work to be done, but I commend the Secretary for undertaking this difficult, but important, task.

As of last Friday, the Department of Defense completed its second agency-wide audit. While it did not receive an overall clean opinion, much knowledge was gained from actually doing the audit. I'm sure we'll hear more, but of the 24 individual audits done across the different agencies, 7 did come back clean.

So, why do we take the time to do an audit? In part, it is to encourage the more responsible use of resources within the Department, and, from a readiness perspective, the ability to promote real change within the Department. While identifying cyber vulnerabilities in DOD information technology systems or locating unaccounted-for equipment or improving the recordkeeping of personnel is not a glamorous undertaking, it does produce process improvements and technological upgrades that are long overdue. These improvements are critical to DOD's responsibility that, "It's important to gain full value from every taxpayer dollar spent on defense, thereby earning the trust of Congress". That is from the 2019 National Defense Strategy (NDS). In other words, if DOD wants Congress to continue to fund the military in order to counter great-power competition, like that from Russia and China, as laid out in the 2019 NDS, we, in the Congress, and the American people need to have the confidence that these dollars are being spent wisely.

As Chairman Inhofe regularly states, the NDS has been preparing our military for a return to strategic competition and does represent a prime example of bipartisanship for the support of that strategy and our troops in the Senate. The NDS explicitly states the audit as a priority towards driving a better budget discipline for the Department and achieving our overall national defense goals. I hope this budget discipline starts with the audit and spreads throughout the Department to all the financial processes within DOD, including our procurement, acquisition, and contracting processes that this subcommittee has oversight of. I look forward to hearing about the progress, some of the successes, some of the failures.

I know my Ranking Member, Senator Kaine, is also interested, so I will turn the dais over to him for his opening remarks.

STATEMENT OF SENATOR TIM KAINE

Senator KAINE. Thank you, Mr. Chairman.

Secretary Norquist, it's good to have you here. When I saw the amount of press streaming into the Capitol this morning, I thought finally the Pentagon audit is going to get the attention that it has deserved.

[Laughter.]

Senator KAINE. Apparently, there's other things going on, on the Hill. But, I do want to welcome you and thank you for your long record of public service, but also for your making sure that the auditability of the DOD is a top priority.

The fact that all Federal agencies were mandated to do audits, really beginning in 1990, and that the DOD has been the last to get in line is well known, so much so that the NDAA [National Defense Authorization Act], in, I believe, 2015, this committee sort of said, "Okay, you had enough time, you've got to make this happen." I was gratified to be part of the committee when we finally gave the ultimatum, and I'm gratified that, under your leadership, the DOD is moving to get this done.

Last week, the Department announced that it had officially failed the 2019 audit. That's not surprising. I think, actually, you would have found a great deal of skepticism on this committee had the 2019 report said, "Hey, everything's fine." When you start something as complex as this, if you're not finding areas to improve, failings that need to be corrected, then you lead policymakers to question the veracity or the sufficiency of the effort.

But, what the report last week showed is that there's so much more to be done to get warfighters and taxpayers what they deserve, a fully auditable Pentagon. We had a witness testify before the full committee recently. I'm blanking on the witness's name, but she used the phrase "efficiency for lethality," the idea that the audit should drive us to not spend on things we shouldn't, reduce spending on things we shouldn't, as a way of then directing those resources to more lethality, to a more effective Department of Defense.

I hope we can talk about a number of issues today. What benefits are the military forces already seeing from the audit and its findings? Benefits in efficiency, but it was always my hope, as a mayor and Governor, in looking at audits, to also learn some things that might improve the effectiveness of operations. I don't think it's just a number-counting exercise and an exercise that should lead to saving a dollar here or a dollar there. It should also lead to greater efficiencies and effectiveness. And so, I hope we can talk about benefits.

How is the process of the audit already helping the Pentagon clean up any data or accounting practices that need to be improved? What resources are being applied to the audit? Are there additional resources that need to be applied so that it can be as effective as possible, moving forward? And, in your opinion, Secretary Norquist, how long will it be, realistically, before the DOD will be in a position where the audits will be clean audits across all the numerous audits that are done?

So, I look forward to working with the committee, under your leadership, with the Department, to make good on this promise made so long ago to the American taxpayer that every aspect of the American Federal Government would be subject to an audit, and that we would learn from the audit in a process of continuous improvement so that we can get better at what we do.

Thank you.

Senator SULLIVAN. Thank you, Senator Kaine.

And, Mr. Secretary, thanks again for being here. We look forward to your opening statement. If you want a longer written statement, that will be submitted for the record.

The floor is yours.

**STATEMENT OF HON. DAVID L. NORQUIST, DEPUTY
SECRETARY OF DEFENSE**

Secretary NORQUIST. Thank you, Mr. Chairman.

Chairman Sullivan, Ranking Member Kaine, distinguished Members of the Committee, thank you for the opportunity to testify before you today on the Department of Defense financial statement audit.

There are three major questions about the audit I'd like to briefly address. First, why do we even have an audit? Second, what are the results of this year's audit? And third, how does the audit and other reforms benefit American taxpayers?

The short answer on why we have an audit is that DOD is an extraordinarily large and complex organization. We employ nearly 3 million servicemembers and civilians. While a typical commercial airline manages between 300 and 1,600 aircraft, the military services fly approximately 16,000 aircraft. We also manage 292 billion in inventory, more than 6 times the size of Walmart, the world's largest retail company. Financial statement audits are a proven commercial solution that uses independent auditors to effectively assess complex operations. A financial statement audit is comprehensive, and it includes verifying the count, location, and condition of our military equipment, property, material, and supplies. It tests vulnerabilities in our security system of our business systems, and it validates the accuracy of records and actions, such as promotions and separations. In short, it provides the independent feedback that both DOD leadership and Congress needs.

This year, more than 1,400 auditors conducted over 600 site visits, with the following results: consistent with last year, they reported no evidence of fraud, no significant issues with the amounts paid to civilian or military members, and that DOD could account for the existence and completeness of major military equipment. In addition, one more organization received a clean opinion: the Defense Commissary Agency. Now 7 of the 24 will have an unmodified or clean opinion this year. And of the 2,377 findings in fiscal year 2018, the Department was successful in closing more than 550, or 23 percent, of the findings. The audit demonstrates progress, but we have a lot more to do.

How does the audit benefit the American taxpayer? Well, the original and primary purpose in an audit is transparency. But, at DOD, we have seen how the audit saves money by improving inventory management, identifying vulnerabilities in cybersecurity, and providing better data for decisionmaking. Let me give two examples:

The Navy, at Fleet Logistics Center (FLC) Jacksonville, conducted a 10-week assessment, and they identified \$81 million worth of active material not tracked in the inventory system. That was now available for immediate use, decreasing maintenance time and filling 174 requisitions. They also eliminated unneeded equipment, freeing up approximately 200,000 square feet, the equivalent of 4.6 acres.

We are already seeing the benefits of better data in the use of data analytics. For example, the Department uses the ADVANA tool recently to automate the quarterly review process of its obligations. This workflow tool eliminated inefficiencies and provided the

analysts the time and the insights they needed to identify \$316 million in high-risk funds, moving them from a low-priority function to better use of those before they canceled or expired.

The audit is a foundational element of a broader landscape of business reform in the National Defense Strategy. We are moving forward on multiple fronts, improving our enterprise buying power, consolidating IT [information technology], realigning and reforming healthcare, consistent with congressional direction, reforming how we do background investigations to make them more effective and less expensive, and eliminating duplicate and inefficient business systems, as well as identifying efficiencies in what we like to call “the fourth estate.”

I would be remiss if I didn’t mention the harmful impacts of the ongoing continuing resolution (CR). I recognize I’m preaching to the choir. The Department and the White House have both expressed the urgent need for Congress to pass the fiscal year 2020 authorization and appropriation bills. The CR stopgap measures are wasteful to the taxpayer. They delay storm-damage repairs and the damage the gains our military has made in readiness and modernization. Ultimately, a CR is good for the enemy, not for the men and women of the United States military. The administration and I urge Congress to come to agreement as quickly as possible, consistent with the budget deal reached in the summer.

In closing, I’d like to thank President Trump for his leadership and the DOD workforce for embracing this complex and important issue. I’d also like to thank Congress and this committee, and in particular the committee staff, for your commitment to this massive undertaking and the role you have played in making an annual financial statement audit a regular way of doing business.

The Department of Defense is one of the most complex enterprises in the world. In partnership with this Congress, we must continually improve our business practices in order to reduce costs and maintain our competitive edge. Each of us owes it to the American taxpayer to be as responsible in spending their money as they were in earning it.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Norquist follows:]

PREPARED STATEMENT BY THE HONORABLE DAVID L. NORQUIST

Chairman Sullivan, Ranking Member Kaine, distinguished Members of the Committee, thank you for the opportunity to testify before you today on the Department of Defense financial statement audit. On November 15th, we completed our second Department-wide audit, which is one element of a broader reform agenda in support of the National Defense Strategy’s third line of effort: to reform the Department for greater performance and affordability.

There are three major questions about the audit I would like to address: 1) why do we have an audit; 2) what are the results of this year’s audit; and 3) how does the audit and other reforms benefit American taxpayers?

WHY DO WE HAVE AN AUDIT?

Simply put, we conduct an annual financial statement audit in accordance with the Government Management Reform Act of 1994 because it is the most efficient way to evaluate an extraordinarily large and complex organization. DOD employs nearly three million servicemembers and civilians and operates in over 160 countries on all seven continents, spanning about 30 million acres of land. While a typical commercial airline manages between 300 and 1,600 aircraft, the Military Services fly approximately 16,000 aircraft. DOD maintains approximately 573,000 facili-

ties, including 267,000 buildings, 184,000 structures, and 122,000 linear assets across more than 4,500 sites. It's not just the scale but the breadth of our mission. We run one of the largest health care systems in the country, which covers more than nine million people. Our bases are like small cities that contain similar amenities and services like police stations, fire stations, grocery stores, hospitals, and schools. And we manage \$292 billion in inventory, more than six times the size of Walmart, the world's largest retail company. In total, DOD manages nine supply chains with about five million items. Financial statement audits are a proven commercial solution that use independent auditors to provide sample-based assessments of complex operations. A financial statement audit includes:

- Verifying count, location and condition of our military equipment, property, materials, and supplies;
- Testing security vulnerabilities in our business systems; and
- Validating the accuracy of records and actions, such as promotions and separations.

A MAJOR UNDERTAKING

The fiscal year 2019 Audit involved:

- \$2.9 trillion in assets and \$2.8 trillion in liabilities
- About 1,400 auditors
- More than 600 site visits to military bases, depots, and warehouses
- Auditors requested over 200,000 items

To do this work, the auditors went through billions of transactions, pulled samples, and then tested them for accuracy and completeness. For example, for each payment to a contractor, auditors check to see if there is an invoice, a receiving report, and a matching contract. The auditors also confirm that they were approved at the right level, and recorded accurately and timely. Likewise, for each payment to an employee, military or civilian, auditors ask for proof that it was the correct payment for that employee. With respect to real property, the auditors asked the Services for their database of real property—to include buildings, underground water pipes, fence lines, etc.—and pulled a sample from that report. They then went to a select number of bases with that list and, for those items, checked what was supposed to be on each base. The auditors confirmed that it was there and what condition it was in and whether they had the records to demonstrate that they owned it. The auditors also looked around the base for any other property and checked to see if it was recorded. They did the same thing with inventory, going to warehouses, pulling samples of spare parts, and looking for completeness and accuracy. The results offer us independent feedback on how to improve our stewardship, and we are eager to receive this feedback.

WHAT ARE THE RESULTS OF THIS YEAR'S AUDIT?

For the fiscal year 2019 audit, more than 1,400 auditors reviewed billions of transactions from the more than 1,700 active accounts DOD manages. Consistent with last year, auditors reported:

- No evidence of fraud;
- No significant issues with amounts paid to civilian or military members;
- DOD could account for the existence and completeness of major military equipment; and
- All organizations with a clean opinion last year kept their clean opinion this year.

In addition:

- One more organization, the Defense Commissary Agency (DeCA), moved up to an unmodified (or clean) opinion in fiscal year 2019; and
- Of the 2,377 findings in fiscal year 2018, the Department was successful in closing more than 550, or 23 percent of the findings.

The specific details are as follows:

- Six DOD organizations sustained their unmodified, or clean, opinions, which is the highest rating: U.S. Army Corps of Engineers (USACE) Civil Works; Military Retirement Fund (MRF); Defense Health Agency—Contract Resource Management (DHA—CRM); Defense Finance and Accounting Service—Working Capital Fund (DFAS); the Defense Contract Audit Agency (DCAA); and the DOD Office of Inspector General (DOD OIG), which will conclude in January.

- This is the 24th consecutive unmodified opinion for the Military Retirement Fund. The fund's nearly \$900 billion represents approximately 30 percent of DOD's total assets.
- The Medicare-Eligible Retiree Health Care Fund (MERHCF) received a modified opinion, which means its financial statements are accurate with only modest exceptions.
- The remaining organizations received disclaimed audit opinions, which means the auditors did not have enough evidence to provide an opinion.
- No organization received an adverse opinion (i.e., were outright wrong).

DEFENSE COMMISSARY AGENCY



DeCA progressed from a qualified opinion in fiscal year 2018 to an unmodified (or clean) opinion this year.

The audit went deeper this year. Auditor sample selections and information the Department submitted to auditors, called "Provided by Client" requests, rose from 40,000 in the fiscal year 2018 audit to 45,000 this year. As a result, findings from all audits are also expected to increase.

The fiscal year 2019 audit reports are complete and available for your review on our public website [<https://comptroller.defense.gov/odcfo/afr2019.aspx>]. Auditors and the DOD Office of Inspector General will complete their contractual deliverables and provide detailed findings into our corporate database by the end of January. At that point, we will begin anew to address those findings, making needed improvements to our systems and processes. Unlike periodic program audits, the repetitive nature of these audits will go deeper each year while also providing us feedback that tells us if the fixes are in fact addressing the root cause and being sustained. That is part of the value that these audits provide. You will be able to see our progress—first in the form of findings being remediated, then through a reduced number of what auditors refer to as material weaknesses, and, ultimately, through organizations moving from a disclaimer of opinion to a positive audit opinion. The fiscal year 2019 audit demonstrated progress but we have more to do.

HOW DOES THE AUDIT BENEFIT AMERICAN TAXPAYERS?

The audit saves money by improving inventory management, identifying vulnerabilities in cybersecurity, and providing better data for decision-making.

Inventory

The audit is helping us improve the accuracy of our inventory. It's necessary to know exactly what spare parts you have and where they are in order to improve readiness. For example, at the Navy, Fleet Logistics Center Jacksonville conducted a 10-week exploratory assessment of material held within two Active aviation squadrons and one building. They identified \$81 million worth of active material not tracked in the system that was available for immediate use, decreasing maintenance time and filling 174 requisitions, including 30 high-priority. They also eliminated unneeded equipment freeing up approximately 200,000 square feet (~4.6 acres).

There was also confirmations of excellence. Auditors performed more than 60 site visits in which, for the items tested, no exceptions were noted (i.e., a 100 percent pass rate). These site visits were performed to confirm the existence and completeness of a broad range of assets including, but not limited to, inventory, real property, ordnance, and/or military equipment.

SUPER HORNET TAILHOOKS—NAS LEMOORE



At Naval Air Station Lemoore, located in California, 7 Super Hornet Tailhook sub-assemblies were turned in for repair. The tailhook is a “carcass constrained” item, and will be returned back to fleet once repaired. More than 580 consumable and repairable items valued at \$14 million have been identified.

IT Security

The audit is helping us close vulnerabilities in our IT systems. Access controls, our biggest area of improvement, is an important part of National Security, especially since there is no doubt that potential adversaries are seeking to gain access to our systems in the hope of stealing sensitive information or planting harmful software that could erode our advantage on future battlefields. Access controls also reduce the risk of fraud, waste, and abuse by preventing individuals from committing fraud or improperly accessing sensitive information and concealing those acts by changing system records. For example, four years ago, Army auditors found 29 problems with regard to the Logistics Modernization Program. All of those issues were fixed. This year, auditors at Picatinny Arsenal in Morris County, New Jersey, tested 60 IT application controls for the procurement, revenue, and inventory business process in the Logistics Modernization Program and found them to be effective with no exceptions noted.

MORE THAN 60 SITES ACHIEVED A 100 PERCENT PASS RATE



At Tooele Army Depot in Utah, auditors tested 3.5 million items of Operating Materials and Supplies for completeness and found no exceptions.

Data Analytics

Historically, the Department’s data was scattered across hundreds of systems making it difficult to access information and answer basic business questions in a timely fashion. We have developed a single authoritative source for audit and business data analytics. This big data platform, ADVANA, currently hosts over 15 billion transactions, has over 7,000 users, 250+ dashboards, ingests data automatically from over 120 DOD source systems, reconciles over \$1 trillion dollars in financial transactions, and has the flexibility to support analytics in the areas of audit, financial operations, cost management, and performance management.

We are also already seeing the benefits of better data. For example, the Department, using the ADVANA tool, recently automated the quarterly review process of its obligations. This workflow tool eliminated inefficiencies and provided analysts time and insight to identify a cumulative \$316 million in high-risk funds, allowing for a better use of those resources before expiring or canceling.

Costs

I'm often asked if the money we are spending on the audit is worth it when we have so many other priorities. The two main costs for the audit itself are the fees to the Independent Public Accounting firms (\$195 million) and infrastructure to support the audits (about \$250 million). The \$195 million in audit contract costs is approximately 1/30th of one percent of DOD's budget and, as a percent of revenue, is equal to or less than what many of the top Fortune 100 companies pay their auditors. Additionally, findings from the audits help the Department identify areas that need improvement and validate the effectiveness of corrective actions. Since we spent nearly \$500 million in fiscal year 2019 fixing audit problems, that feedback is critical. The total cost of performing the fiscal year 2019 audit, including remediation, remained consistent with the fiscal year 2018 audit, slightly less than \$1 billion. Arguably, much of this work would need to be completed regardless of whether the annual financial statement audits were required.

We expect the costs of the audit itself to remain relatively consistent over the next few years, but as our ability to support the audit improves and our reform efforts take hold, the cost to execute the audit will go down and the dividends from business reforms will continue to grow.

DOD REFORM AGENDA

The audit is a foundational element of a broader landscape of business reform described in the National Defense Strategy. We are moving forward on multiple fronts, such as improving our enterprise buying power; consolidating IT; realigning and reforming our healthcare; reforming how we conduct background investigations; eliminating duplicative and inefficient business systems; and identifying efficiencies within the Defense Wide organizations.

Buying Power

The goal of Category Management is to negotiate pricing for the category as a whole—increasing economies of scale—resulting in lower pricing. Category Management and the audit are mutually supporting. Category Management centralizes purchases and increases inventory transparency supporting the audit. The audit provides better transaction data, increasing the transparency of what we are buying—both quantities and prices. This information then indicates what items are good candidates for Category Management. For example, the Army programmed \$1.6 billion in savings from professional services contracts in the fiscal year 2020–2024 FYDP as a result of employing category management. Similarly, a review of Cisco routers uncovered \$61 million worth of equipment in a warehouse that DOD was paying to maintain as if they were installed. Some of the routers had been marked for disposal, but the DOD was still paying to maintain them. An interim contract is now in place, lowering customer prices.

IT Consolidation

DOD has more than 2,500 data centers, 355 cloud efforts, 48,000 applications, 11,000 circuits, and 1,850 business systems. Standardizing and modernizing the IT environment of networks, services, data centers, and leveraging Enterprise capabilities eliminates duplicative systems, and allows the Department to focus finite cyber resources across fewer areas, ultimately shrinking DOD's cyber threat. This has saved us \$63 million through fiscal year 2020 and will save us another \$73 million through fiscal year 2024. Additionally, in the defense agencies, we are consolidating 44 networks and 22 service desks into a single Enterprise service provider for Common Use IT and are closing 71 legacy data centers (18 closed; six more by the end of December).

Healthcare

Reform isn't only about savings, in healthcare it's about restoring military readiness and providing quality care for over nine million eligible individuals. In implementing the fiscal year 2017 NDAA provisions (Sections 702, 703, and 721), we are strengthening the readiness of our military's medical force, while improving health care quality for our military and their families. Our largest undertaking is the ongoing consolidation of the Medical Treatment Facilities (MTFs) under the authority, direction and control of the Defense Health Agency. When complete, DOD will have

a unified medical delivery system that more efficiently integrates purchased care and MTFs.

Background Investigations

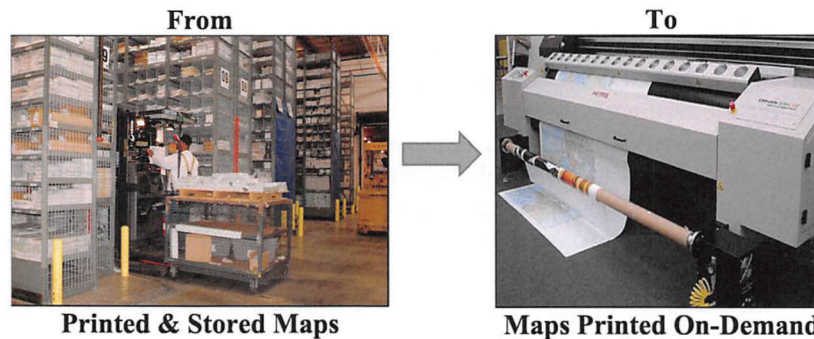
DOD assumed responsibility for the majority of the background investigations for the federal government. We began with a backlog of 725,800 in April 2018 and have lowered the backlog by 437,800 as of October 2019. We are adopting continuous monitoring in lieu of periodic reinvestigations. Continuous monitoring is a vetting and adjudication process to use technology to evaluate security clearance holders on an ongoing basis, instead of more expensive periodic investigations.

Looking For Savings

In the Army, Secretary Esper established the “Night Court” process that the Army used to cut approximately \$2.5 billion per year in order to free up funding for higher modernization priorities. We are now conducting a similar Defense-Wide Review to take a close look at all DOD activities that do not fall under the Military Departments (e.g., the Defense Agencies and Field Activities, the Office of the Secretary of Defense, the Joint Staff, the Inspector General, and SOCOM). The purpose is to identify time, money, and manpower to put back into top priorities in the fiscal year 2021 President’s Budget in support of the National Defense Strategy.

Through the audit and these broader reform initiatives, we are looking for savings, large and small, to reinvest back into the lethality and readiness of our military forces.

LOOKING FOR SAVINGS, LARGE AND SMALL



Previously, DLA stored 130 million physical maps in its warehouses. By moving to Print on Demand mapping, DOD saved \$10 million in fiscal year 2018 by reducing physical inventory by 95 percent, removing 130 million physical maps, and freeing up over 180,000 square feet of space. The new model uses digitized mapping that reduces shipping and storing. The next step is to adopt this new model across the Military Services.

CONCLUSION

The audit, resulting findings, and our subsequent corrective actions are doing exactly what they are supposed to do—find issues, validate efficient and effective processes, and help us focus limited resources on where we are most vulnerable or inefficient. We will keep this up every year, and this is how we will build a mechanism for sustaining improvements, move closer to a clean opinion, and continue to improve the efficiency of the Department.

I would remiss if I did not mention the harmful impacts of the ongoing Continuing Resolution (CR). The Department and the White House have both expressed the urgent need for Congress to pass the fiscal year 2020 authorization and appropriation bills in order for the government to be funded at the levels of the bipartisan budget deal passed this summer. The CR stopgap measures are wasteful to the taxpayer and damages the gains our military has made in readiness and modernization over the last few years. In order for us to pivot towards planning for a future high-end fight against great power competition, as the National Defense Strategy guides us, DOD must have the ability to better align our funding towards the prioritized accounts and programs. Under a CR, we are unable to begin new programs or projects, production rates for weapons, equipment and munitions cannot be in-

creased, and a CR disrupts major exercises and training events. Ultimately, a CR is good for the enemy, not the men and women of the United States military. The Administration urges Congress to come to agreement as quickly as possible consistent with the budget deal reached in the summer.

In closing, I would like to thank President Trump for his commitment to the audit, Secretary Esper for his steady support, the Inspector General for his partnership, and the DOD leadership and workforce for embracing this complex and important effort. I would also like to thank Congress and this committee, both the Members and your staff, for your commitment to this massive undertaking and the role you have played in making an annual financial statement audit a regular way of doing business. Most importantly, thank you for your support for our men and women in uniform. Our collective efforts help ensure they have the resources to do their jobs and return home safely.

The Department of Defense is one of the most complex enterprises in the world. In partnership with Congress, we must continually improve our business practices in order to reduce costs and maintain our competitive edge. Each of us owes it to the American taxpayers to be as responsible in spending their money as they were in earning it. As we undertake these financial audits in support of the National Defense Strategy, we will strive to make that an enduring legacy of this Administration.

Senator SULLIVAN. Thank you, Mr. Secretary.

Let me begin with a very basic question. And I'm not sure you have the answer, since you've only been in your position, in the Comptroller position, for a couple of years. But, from your perspective, why was the Pentagon never audited? You would think, given what you just mentioned—how important it is to the country, how large it is, how complex it is—that's exactly the kind of Federal agency that you do want to audit. Why was this the first time that somebody undertook this daunting task? And, again, I commend you for doing it.

Secretary NORQUIST. Thank you, Mr. Chairman.

Let me start, just to clarify. The Pentagon has multiple audits. We have GAO [Government Accountability Office], we have the IG [Inspector General], we have others. They do program audits, particular subjects. The difference with the financial statement is the sheer breadth and depth of it. It is an end-to-end audit, on a dramatic scale.

Senator SULLIVAN. What you just did twice.

Secretary NORQUIST. What we just did twice.

Senator SULLIVAN. That had never happened before.

Secretary NORQUIST. That had never happened before.

Senator SULLIVAN. Why?

Secretary NORQUIST. Well, there's a couple of reasons. One is, it is an extremely hard task that would outlast anyone who started it. And so—

Senator SULLIVAN. Okay, the Pentagon is used to hard tasks, so—

Secretary NORQUIST. It is.

Senator SULLIVAN. It won World War II, for example.

Secretary NORQUIST. They did. They did.

The challenge with the audit is, there was an emphasis on trying to get ready for it. This is where I brought a fundamentally different view from those who had come before me. They said, "It's too expensive to pay the auditors. Let's get ourselves ready enough that we could pass the audit, and then bring the auditors in." My experience at the Department of Homeland Security (DHS), where they were under audit, was that that would be a major mistake.

At DHS, we didn't have a choice. When I showed up, the auditors were already there. I found the auditors and their feedback to be the central piece of getting us to that clean opinion. So, my view is, the money we paid the auditors made sure that all the other money we were spending was going towards valuable things, we were getting feedback on whether we were being successful.

So, even though Defense Department was spending money on fixing problems, they had no audit baseline by which to tell you: Were they better from one year to the next? We have fixed that in this approach. We are carefully measuring those items, precisely for that purpose. I think that's the biggest difference, and I believe that the auditors are the key step in getting us to the clean opinion, not something you bring at the end, when you think you're ready.

Senator SULLIVAN. Okay. Let me dig into that a little bit more, because the audit did cost a lot of money. I think the fiscal year 2019 audit cost close to a billion dollars. If we're doing this annually, which is your goal—correct?

Secretary NORQUIST. Uh-huh.

Senator SULLIVAN.—will this eventually pay for itself or it already paying for itself?

Secretary NORQUIST. Let's take that into pieces. Before we started the audit, the Department was spending \$770 million to fix problems. With the audit piece—there's about 195–200 million dollars we pay the external auditors. We know, from the experience of the Army Corps of Engineers, that, when they went from no opinion to a clean opinion, the cost of their audit dropped in half. So, over time, that number will come down as we start to move from where they have to do detailed sampling to what we call "test of controls." But, that's a level of funding that's necessary for transparency, \$200 million is $\frac{1}{13}$ of 1 percent of our budget. To be held accountable, that's fine. We then have to spend certain money on DOD side to support that. Those numbers will come down, as well.

The big number, about half-a-billion dollars, is in the remediation. The question there is, can you show what you have fixed? In the absence of the audit, it's very hard. One of the things I learned in my prior jobs is, self-reporting of fixing problems isn't a very reliable indicator. I was dependent upon the auditors confirming that people had, in fact, fixed it. And one of the best things the auditors show us is, when an organization says they fixed 10 problems, and the auditor agrees with all 10, I have great confidence in that organization's ability to go forward. If another organization claims they've fixed 10, and the auditor agrees with them on 3, I have a problem. I've got some training I need to do, some people I need to talk to. That's not going to get them to success. But, you can't wait till the end of the process to find that. You need the auditors doing that on a continual basis.

We have already seen benefits and savings and return on investment, that I had not expected to see this early, long before we got to the point where I expected the cost to come down. But, we can—I can go on more about DFAS [Defense Finance and Accounting Service], but I'll let you wait if—

Senator SULLIVAN. Well, let me just ask another basic question. For those of us who are not auditors, what, exactly, does this en-

tail? You're going to installations, you have people fanning out over all our military bases, they're going to supply depots, what, exactly, are they doing? They're not counting every rifle and every tank. Or are they?

Secretary NORQUIST. No, they can't, because the sheer labor that would be involved is the problem. What the commercial practice brings us is best practices, they will go up to the highest level of the organization and look into their databases and say, "Show me everything you think you own and have in inventory." They start there. And then they pull samples from that and follow it all the way down to the installation. They went to Fort Wainwright, and they went to Anniston. And they come in with a list and say, "I need to see—not just a tank, I need to see this tank, with this serial number that's supposed to be here." And when they show up, is it in working condition? Because that's one of the things they test for, is you're accurate on working condition. "Do you have proof of ownership? Is it where it's supposed to be?" They walk through each of those. Then they look around the base, and they find a series of items, and they go the other direction, which is, "Here are 25 things we found on the base. Show us that you, at the Department level, have them in your system." So, it goes one direction, and then it comes the other. What they're looking for is examples of a breakdown, where the summary is not equal to the parts. But, that's sampling process across inventory. Then they do the same thing with pay. "You paid somebody a certain amount. Do you have the records to back up that that soldier was, in fact, promoted? Did they, in fact, qualify for hazardous-duty pay? Do you have the paperwork to support that? And can you produce it in a timely manner?" That's the process they go through. It's relatively extensive, but it's the standards that we're held to.

Senator SULLIVAN. Great. Thank you. Thank you, Mr. Secretary. I'm glad you're here to testify. And hopefully, we're all going to learn from this, and, most importantly, that the Pentagon is as well.

Senator Kaine.

Senator KAINE. Thank you, Mr. Chair.

Mr. Secretary, I'm going to start with a question that is based, not on the audit, but on your role as Deputy Secretary of Defense, the number-two official within the Pentagon. I was proud to support your nomination.

In the last day, there have been a number of articles that have come out, and I'll just read two headlines as examples. Business Insider, "The Army Is Prepared to Move Lieutenant Colonel Alexander Vindman and His Family to a Safe Location, If Necessary." Reuters, "Army Assessing Impeachment Witness Vindman's Security, U.S. official." These articles were based on some initial reporting that was done by the Wall Street Journal. Lieutenant Colonel Vindman is a Virginian—resident, like you are. Lieutenant Colonel Vindman is a patriotic American, like you are. I'm not going to ask you whether you think it's appropriate to attack his loyalty, his patriotism, his judgment, or his character, because I know how you would think about such an attack. I'm not going to ask you whether you think it's okay to use the White House social media account or other White House assets to amplify such an attack, because I

know what you would think about that. But, I do want to ask you this. In your role as Deputy Secretary of Defense, will you make sure that members of the military are not punished or face reprisals for cooperating with Congress?

Secretary NORQUIST. We take very seriously our responsibility to accurately and responsibly respond to Congress and, to the earlier part of your sentence, as well to any issues that relate to personal security. I'm not going to comment on any measures we take individuals on personal security, but we do take it very seriously and we expect people to be responsive and truthful in their dealings with Congress.

Senator KAINE. Thank you very much for that. I would urge you, at this particular time, to be very diligent in protecting members of our military if they are cooperating with Congress. I think that your words, delivered here, should, hopefully, give some assurance and some confidence to some who are very, very worried. And I know they're worried because their families are calling my office. They're my constituents, and they're nervous about what might happen to them. You giving them that assurance publicly means something to them.

Let me ask you this about the audit. A lot of the DOD programs that have to be audited are classified. So, when we do the NDAA, we're often grappling with issues in this room, even in a closed session, and then there's a separate classified annex that we have to spend, you know, in a more classified setting, figuring out our own responsibilities with those. Talk a little bit about how the audit approaches classified programs, and how you can do a real audit, and a meaningful one, while respecting the classified nature of the information.

Secretary NORQUIST. Thank you.

The challenge we had at the beginning was how to deal with classified information. In the budget, it's either—it's redacted or—in documents, it's often redacted, or it's otherwise just protected. We talked with GAO, who wants to be able to summarize the—a Federal Government-wide audit, and the concern was, "If you do that here, if we have redactions, if we have classified annexes, you won't be able to do a government-wide audit." So, what we looked was, how do we do this in a way that we can keep it unclassified? And here I'd like to tip my hat to a group called FASAB [Federal Accounting Standards Advisory Board] They're the accounting standards group for the Federal Government. Because we had to go to them and say, "We need you all to get a security clearance, because we have to be able to have conversations with you that are classified. And you have to give us the accounting standards on how to treat classified information." So, they did. That was one of the process we went through. They got security clearances. They, in fact, issue us classified guidance that allow us—you know, for example, when NASA [National Aeronautics and Space Administration] was going to a clean opinion, they went and said, "Hey, we've got a question about satellites. Do we expense or depreciate?" And so, we will have those types of things that are classified. And we will go to them, and they, in their clearances, will be able to say, "Here's how you should handle it in a classified" answer that allows us to present the data in an unclassified report. Our audi-

tors have security clearances, right up to the highest level. There's nothing that, because it's classified, is excluded from the audit. Even if it's the serious, most sensitive items, the IG will test it. There is nothing that's classified that is excluded from the scope of the audit.

Senator KAINE. Excellent. Excellent.

Let me ask you this. In a public hearing like this, I think we would like to get some success stories, so it's less about the findings or the agencies that passed, but do you have examples of things that you've learned in the audit process that you've already been able to direct toward this "efficiency for lethality" construct that the DOD witness talked about recently at our hearing?

Secretary NORQUIST. We have. Let me just walk through a couple of examples, and if people have others, I can go on extensively on this issue. But, let me pick the issue of inventory, and I'll use the Navy as an example.

I mentioned how the auditors went down, and then they'd pull samples and test them backwards. What the Navy started discovering is warehouses and storage facilities that had items that had never been loaded into their inventory system. So, you opened it up, and you found spare parts. And the spare parts were not where somebody who's trying to order them can get to them. So, the Navy—and I will give credit to Vice Admiral Dixon Smith, the N4, because he was particularly aggressive in this and would travel to some of these bases and just say, "Open that up. Open that up." And they started to, and he's found enough concerns he's said they're going to take 100 percent. But, even at the bases they have already visited, they've—which is about 5 or 6—they found \$167 million worth of usable supplies that, when they put them into the system, addressed unneeded—unmet demands, things that were on backorder, other items that now can be put back into the system. Again, you have the part, but if somebody doesn't know it's there, if the person who ordered it rotates away and the new one doesn't know that's where it's stored, and, more importantly, from the Department, the Department doesn't know it, so the neighboring base doesn't see it, you're out. So, each one of those is an immediate and direct savings to the taxpayer.

Senator KAINE. My time is expired, but others may want to hear other examples.

Secretary NORQUIST. Hopefully—I've got a list. I'm happy to keep going.

Senator KAINE. All right.

Thank you, Mr. Secretary.

Senator SULLIVAN. Senator Jones.

Senator JONES. Thank you, Mr. Chairman.

Mr. Secretary, thank you for being here, and thank you for the letter from November 15 regarding the Anniston Army Depot, which passed its audit test with 100 percent.

Tell me briefly, if you would, how important are those audit tests? I'm proud of Anniston, but I assume those—

Secretary NORQUIST. Right.

Senator JONES.—were going on elsewhere, too. So, what's the importance?

Secretary NORQUIST. These are the core of what the auditor does. When they pull samples from above, and they come down to a base, they're not testing everything on the base, but they've got a list of what they're looking for. At 60 of the places they showed up, there was 100 percent accuracy. Everything they looked for, that base had. And so, I sent you a letter because you had some of them in your State. That's incredibly valuable. One of the things that I have heard when I talk to the auditors is the importance of the local leadership. When they show up and the commander of the base meets them and walks them around, they can quickly see they're likely to have a good result because that leadership has control and oversight of the process. Now, we have other places where the samples are not there, so we have to get there on everyone. But, this is going to get solved at the local level, and then fixing the systems that lie between what's accurate at the local level and what we record at the departmentwide level. So, tremendous success.

One of the reasons I sent those letters out is because we don't just want to use sticks. People can go give kudos to those who deserve it, and that will help drive this process forward.

Senator JONES. As the process goes forward, those leaders at the various locations are going to get the word that they did participate and cooperate, and that'll—

Secretary NORQUIST. Right.

Senator JONES.—help everybody.

Secretary NORQUIST. It's also in everyone's evaluation form.

Senator JONES. Right.

Secretary NORQUIST. Senior officers and civil servants, the SES's [Senior Executive Service] have the audit as their—part of their performance evaluation.

Senator JONES. I want to move to an area where Senator Kaine kind of touched on. Are you familiar with the Antideficiency Act?

Secretary NORQUIST. I am.

Senator JONES. All right. I'm struggling here with a couple of things. On the one hand, I hear your testimony. You and I have talked in my office, and I just applaud your effort so much. You've emphasized the responsibility, and taking seriously your responsibility, to report to Congress. On the other hand, I'm also seeing this administration continually thwarting Congress's oversight capabilities. They're not producing witnesses, they're not producing documents, just because they don't particularly like the subject matter of the particular hearing. That's particularly going on in the House. Then, recently, I read a report this morning where OMB [the Office of Management and Budget] counsel has stated that, as a legislative branch of government, the GAO, when they report deficiencies or violations of the Antideficiency Act, that the administration, the executive branch agencies, have no obligation to report that back to Congress. It just seems to me that there is a concerted effort with the administration to just, basically, take those things that they don't want to report and just ignore the Article 1 branch of the Constitution. I'm really concerned about that. Have you seen OMB counsel's opinion? I'd like to hear your thoughts about that and whether or not that squares with what you said earlier about your ability and your earnest, honest efforts to report to Congress.

Secretary NORQUIST. I haven't seen that opinion, and I don't know whether, as a matter of law, they are correct. But, I know, as a matter of practice, whenever I had to sign out one of those, it went to everybody. It went to the President, it went to the leaders of the House and the Senate, it went, I believe, to GAO. So, in practice, I know that, when we have one—an Antideficiency Act violation, the notification is broadspread.

Senator JONES. Well, I think—and I appreciate that—I think that this is new. I may follow up with you, because I think that this is changing a practice that has been a practice across administrations, including this administration, but now we've come, apparently, with a counsel who expressed a new version of that. I may follow up to give you a chance to look at that guidance to see how it might affect the Department of Defense and your obligations to report to Congress.

If I have time, you mentioned the Navy, where you found about \$81 million of material, I think at the Jacksonville Naval Air Station, where it just freed up inventory, you were able to do some things. How important is that? What are the lessons that you can learn and take away from that particular episode, where there was, like, \$280 million that was just really, kind of, unaccounted for—\$81 million, when they found it, immediately got to use. Obviously, it is a little concerning to Congress that \$280 million at place can not be accounted for. Tell me a little bit about what you're trying to implement and how the lessons learn from that.

Secretary NORQUIST. The issue here is the value of the inventory. But, our concern is, over time, you know, people, if they buy inventory, if they store it without putting it into the system, they may know it's there, but their successor may not, the Department doesn't know it's there. It's inefficient. It's an inefficient way to use taxpayer resources. The value of the audit is, that's a problem, and the auditors will come up every year and poke them for that problem, and expose it, because the audit requires that, if we have it, it's in our system and it's properly recorded. That's why it goes both, "Can you account for what you have? And do you account for everything you have?" This is valuable for readiness. This is valuable for making sure we make the best use of taxpayers' money.

We think that there's a connection between this and some of the challenges of CRs, which is—a lot of this tends to be the type of supplies you might order at year-end. The more we can limit that, the more we can have the discipline over, "When you buy it, you log it into the system." Right? "You make sure that it's properly recorded." With the discipline—and this is where I get to the value of the audit—they come every year. It's not enough to clean out your office once. They're coming next year. They're coming the year after. You've got to make this a habit.

Senator JONES. Are you satisfied that the systems in place are adequate? It's just a question of plugging them in, as opposed to, we need to upgrade the systems?

Secretary NORQUIST. No, we're going to need to upgrade the systems. In some of the comments I got—because I met with each of the auditors, and one of them said, "As you field your new ERP [enterprise resource planning] systems, which are more compliant and more effective, you need to make better use of technology." A

lot of people are doing this manually, filling out paper forms and others. If they had tablets, where they could just do it more directly, they could barcode scan, all of those reduces the labor, and that increases compliance. What we're looking for here is places where either people stop doing it because they didn't have the labor and it was too hard, where the automation solution speeds that up. But, it highlights the very value of that, and that's important.

Senator JONES. All right. Well, thank you, Mr. Secretary. I will follow up with written questions regarding the OMB guidance.

Secretary NORQUIST. Okay.

Senator JONES. Thank you, Mr. Chairman.

Senator SULLIVAN. Senator Hirono.

Senator HIRONO. Thank you, Mr. Chairman.

Considering how long it took for the DOD to undergo an audit, thank you very much for expressing your firm belief that audits are very important.

As you noted, your auditors conducted a number of site visits, 600 site visits. Two of these visits were performed at Joint Base Pearl Harbor-Hickam and the Marine Corps Base Hawaii, and both of these came back 100 percent. And thank you for also noting how important it is that the local leadership buys in and cooperates with the audit. I want to give a shout-out to the folks at Joint Base Pearl Harbor and the Marine Corps Base.

Secretary NORQUIST. Excellent. Thank you for doing that.

Senator HIRONO. Thank you.

One of the areas that were pointed out in the most recent audit were newly identified high-risk areas involving privatized housing programs and the F-35 program. I won't go into my questions relating to those, but I assume that you are going to be undergoing the things that you need to do to bring those programs up to snuff. Because there's a lot of concern about military housing. It's an ongoing—

Secretary NORQUIST. Absolutely.

Senator HIRONO.—issue for us.

Senator Kaine touched on this other matter recently regarding the threats to Alexander Vindman and also your Deputy Assistant Secretary of Defense, Laura Cooper, who—I don't know if she's already testified, but she certainly will be testifying, and not to mention the constant efforts to out the whistleblower, and, basically, the whistleblower feeling very threatened by everything that is going on. So, I note that you are doing everything you can to make sure that Colonel Vindman and Ms. Cooper remain safe. What steps have you already taken to send a clear message to DOD staff that their identity, their jobs, and safety will be protected if they come forward to report abuse or misconduct?

Secretary NORQUIST. This is something that we have as a matter of practice on all sorts of things. We have IG reports, we have GAO reports. This is just part of the culture of how we—when people come forward, we expect them to be honest and truthful in their dealings, and we expect them to be taken care of in doing so. We look for, and the IG looks, if there's an issue of reprisal, to make sure that those are held accountable for it. We also look for their security. And again, as I mentioned, I'm not going to go into the measures we take, but if we think there's a security issue, we ei-

ther deal with it, we deal with local authorities. These are the types of things that occur in different forums, and we provide the same standard and approach across them. I think it's an important signal that we send in the way we deal with organizations.

Senator HIRONO. I think, in this environment, it's very important for the DOD, from the top, to say that the whistleblowers who come out of the DOD, or anyone who participates in appropriate proceedings, that they will be safe. I think it's really important for that message to be quite obvious and put out there, and I hope that that's what you will do.

On October 22, the day before Ms. Cooper was scheduled to testify before the House in a deposition, you signed a letter to Ms. Cooper's lawyer prohibiting her from participating in the impeachment inquiry. At her deposition, she was asked whether she was concerned about the repercussions against her at DOD for testifying, under subpoena, after receiving your letter. She stated, "This is a challenging environment, and for a civil servant who is trying—who is just trying to fulfill my obligations, this is a challenge. This is challenging in both respects." This is quoting Ms. Cooper.

In light of H. Res. 660 [House Resolution], which lays out the procedure for public impeachment hearings, will you refrain from prohibiting any other DOD official from cooperating with Congress, going forward?

Secretary NORQUIST. I did not prohibit her. I forwarded to her lawyer the information we had received from the White House that expressed their views about the impeachment process. One of the challenges, we wouldn't be able to send a lawyer with her. I wanted her to have that available information. But, we understand each of the individuals are making their own decision on how to—

Senator HIRONO. So, even if you were just forwarding a letter that came, not out of your department, but it came out from—I forget where it emanated, but for you to send it, it does create a chilling effect. Are you intending to continue to forward these kinds of letters from the White House or from any other—

Secretary NORQUIST. I don't know of any other individuals—

Senator HIRONO.—source?

Secretary NORQUIST.—being called. My only point is, I would have felt it inappropriate to not have their lawyer be aware of this information. That's why we shared it.

Senator HIRONO. But, you can understand why it—

Secretary NORQUIST. Oh, I understand. I understand the—that that's—

Senator HIRONO.—it comes from the number-two person.

Secretary NORQUIST.—which is, if you don't send it, if you do send it, what do you do? So, what we tried to do is set the right tone in the letter.

Senator HIRONO. So, in the letter, did you say, "We're just forwarding this, we're not going to"—

Secretary NORQUIST. I will check the language, and I will send it to you.

[The information referred to follows:]

Secretary NORQUIST. Please refer to Appendix B on page 48.

Senator HIRONO. Thank you.

Secretary NORQUIST. But, I think we tried to be clear about the nature of it. We try to be very professional in it, and factual in the way we handle these.

Senator HIRONO. Could I just ask one more question? I have no idea what my time is.

During his nomination hearing, I asked Secretary Esper whether he would commit to reinstating Parole in Place for undocumented family members of Active Duty servicemembers. Secretary Esper said that he would, "look into it, for sure." We are still waiting for some response on this issue. But, we did receive a response from Acting Under Secretary of Defense for Personnel and Readiness, Mr. James Stewart, who deferred comment on the program to the Department of Homeland Security, but committed to working closely with DHS on the future of the policy.

Well, you can understand why Active Duty servicemembers would be very concerned if the administration is going ahead—Department of Homeland Security is going ahead and deporting undocumented members even as they are serving our country. I'd like to know what steps the DOD has taken to coordinate with DHS, as referred to in this letter from James Stewart on this issue, and whether DOD has urged DHS to reinstate this program not to deport undocumented family members of Active Duty personnel.

Secretary NORQUIST. Senator, let me take that one for the record. I don't know the answer to your question.

[The information referred to follows:]

Secretary NORQUIST. Any significant event that impacts the readiness of servicemembers and their families is of concern. As such, the Department has worked closely with the Department of Homeland Security (DHS) as they reviewed the future of the Military Parole in Place policy and are not aware of any pending DHS termination. I note the passage of Section 1758 in the fiscal year 2020 National Defense Authorization Act that encourages DHS to continue to support Military Parole in Place and thank the Committee for its support.

Senator HIRONO. Well, I hope you get the message that we certainly don't want Active Duty servicemembers' families to be deported. That is not a good thing, and that program should be reinstated.

Thank you.

Senator SULLIVAN. Senator Ernst.

Senator ERNST. Thank you, Mr. Chair.

This is a really important hearing, I think, for all of us. And, Secretary Norquist, thank you for appearing today and testifying on this often overlooked topic. And Senator Sullivan and I were having a discussion yesterday, and we're just so thrilled actually to have some results to be put in front of us.

You have done, really, what your predecessors haven't been able to do, or did not do at the Pentagon, which is making the audit a priority. We've had past Comptrollers and Chief Financial Officers at the Pentagon, of both political parties, and they have whined, they've complained, they've dragged their feet on this issue, and found every last excuse under the sun not to get it done. And so, we've had Pentagon hearings going on and on and on, here on the Hill, for decades. So, again, thanks for doing the hard job and getting this audit done, and not delaying it further. Despite the disclaimer of opinion from the last 2 years, we are much further along in this progress toward a clean opinion, and I just wanted to make

that statement and thank you very much for your leadership on this topic.

Now, the National Defense Strategy makes it clear that the United States has a very distinct challenge to maintain its supremacy in the global arena, and this has implications on our homeland defense, overseas operations, and the vibrancy of a free and open society. Before we dive into these strategic goals, it's good to take a step back and maybe do a little bit of housekeeping. What I'd like you to explain, Mr. Secretary, is, in addition to fiscal responsibility, how do you think the audit's findings actually fit into the NDS and benefit our operational and war mission capabilities?

Secretary NORQUIST. Sure. So—

Senator ERNST. Why do we need to do this?

Secretary NORQUIST. Absolutely. The NDS has three lines of effort: enhancing lethality, working by, with, and through allies, and the third one is reform in the way we defend—operate for more efficiency. The reason for that is twofold. One is, we can see the same deficit numbers everyone else can, and we understand the fiscal limits with which the Department needs to operate. The second is, we have a responsibility, regardless of what level of funding we receive, to make sure that we're using it with the maximum benefit to lethality. That includes both driving inefficiencies out of our business processes, as well as simply cutting low-priority items and moving it to high-priority items. You know, some of the things, they're not bad things, they're just not as essential as others.

What the audit is helping us do is not only identify those inefficiencies where individual systems have been built that don't talk to each other—so, if you get to the point where you only enter the data once, and it flows through the system, there is a lot of labor savings and costs that come out of the way you operate, versus manual entries and transfers where they create data errors.

The other part of the National Defense Strategy as you go through this is, you're trying to improve readiness. That gets to the issue of the spare parts: can I get the spare parts in the people's hands, can I get things through depot maintenance faster?

And the last part is the data analytics. One of the big leaps in what the private sector's been able to do is to use terms—you can use "big data," you can—"cloud," whatever you want to call them—but, they're able to manipulate incredibly large sums of data. Well, DOD, we have tens of billions of transactions. When we get audited, it goes back to funds Congress appropriated to us 8 or 9 years ago, because those funds are still available for payment or disbursement. The ability to organize those in a dataset, to search them, to track them, to be able to find errors, that allows us to adopt some of the best practice from the private sector on inventory and other things you can't do when you don't trust your data.

Senator ERNST. Yeah.

Secretary NORQUIST. And so, I think those types of reforms, we—we can't adopt private-sector best practices unless we can get to the quality of the data they have so that we can rely on it.

Senator ERNST. Yes. And thank you. Kind of along that quality-versus-quantity issue, the DOD has closed 22 percent of the Notice of Findings and Recommendations from the fiscal year 2018—

Secretary NORQUIST. Correct.

Senator ERNST.—Audit. But the number has actually increased. Should we interpret that as “the system is working,” or should we be worried that we’re not making enough progress?

Secretary NORQUIST. The first answer is, the system is working. There were, I think, 200 more auditors this year than last year. One of the things that we took as a lesson learned from my time at Homeland was, we set up these contracts—normally, an auditor, when they think you’re not going to pass, they stop working. They say, “You have a disclaimer. We’re done.” We worked with our IG, who’s been a tremendous help in this whole process, and the contracts basically say, “Keep auditing. Even if you think we’re going to fail, keep auditing. We want as many problems as you can find.” And so, the thing I tell everyone inside the building is, when the auditors find, I think, 1,300 additional findings, those were always there. Right? The more clearly they identify them, the sooner we can make sure we have corrective action plans to address them. I expect, for the first couple of years, they will find more. We will keep closing them. We will get better and more efficient. At a certain point, they will have been able to fully go through it, and those numbers will come down. But, I see this as exactly what we’re paying them for and what I hope we would get out of them.

Senator ERNST. My time is expiring, so I just want to say, again, thanks for your leadership on this issue. It is such a bureaucratic beast, and trying to sort through that, boil it down, you’ve been able to take this on, and we, as Congress, truly do appreciate your effort. Thank you very much, Mr. Secretary.

Thank you, Mr. Chair.

Senator SULLIVAN. Thank you, Senator Ernst.

Senator Shaheen.

Senator SHAHEEN. Well, thank you.

I would add my appreciation to what you’ve heard from my colleagues about the work that you’re doing.

You talked about the list of examples of successes based—that you’ve already uncovered as the result of the audit. At some point, it would be helpful for us to get more of that list so that we can share that with others and let people know what’s been successful, to date, about the audit.

I want to go back to your early comment, though, about the CR, and preaching to the choir about the CR, because I do agree you’re preaching to the choir, but I also think there doesn’t seem to be a universal appreciation in Congress and in the administration for what the impact of a continuing resolution for the remainder of this year would be. And at what point—are you concerned that that might trigger the budget cap so it would kick us back into sequestration? Can you just talk about what the impacts are that you see if we are not able to get appropriations bills through?

Secretary NORQUIST. Sure. So, let me take them—first, the CR, and then I’ll go to sequestration.

The CR is designed to be destructive. It is——

Senator SHAHEEN. Right.

Secretary NORQUIST.—designed in order to get you not to want to do it. So, the first thing it says is, no new-starts. So, if we have ammunition that we would like to buy more of that the Congress—the House, the Senate, the Republicans, and Democrats have all

agreed, “You need more,” we get to October 1, and we say, “Let’s not start buying it yet. Let’s wait to place that order.” We have research technologies, artificial intelligence, our hypersonic missiles. Republicans, Democrats, House, and Senate all agree, “Let’s give the Chinese a 3-more-month headstart. Let’s make it harder for our people to keep up in that technology race by letting this drag out.” And then, the last part is, you’ve got families in training that constantly get disrupted because they don’t—we may believe that there’s a deal at the top-line, but they don’t know what that means to the installation. And so, in good fiscal sense, they withhold the money, they delay training, they minimize what they are going to do, and then sometime in December or in a previous year’s March, we then hand them all of that money and say, “Now do it in 6 months.” Well, they can’t get back their October training exercise, they can’t recover the time lost. Then we start having the challenges with inventory and others. It is a misuse of taxpayers’ money to manage it in this way.

The sequestration is even worse, because the sequestration is just a catastrophic cut that undermines everything. And again, they don’t know whether you’re going there, so they have to be very cautious about how they spend money. But, you’d have problems making payroll under sequestration. You’d have—you know, we could wait, but then we take an even cut in everything else. And then you’ve completely lost readiness. For anyone who has ship maintenance in their district—and they know the importance of the ships coming in on time, the maintenance happening on time—you can’t recover. The ship depot—the ship facility can’t take twice as many ships the next year. If they don’t come in on time, you’ve lost it. This is something we need to avoid. This is something we need to minimize the length, if at all possible.

Senator SHAHEEN. Thank you. I certainly agree, 100 percent.

I want to ask about another issue that’s outside of the audit, but it goes to your current role. And that is, as you’re aware, I’m sure, there are a number of—virtually all military facilities have an issue with PFAS [Perfluorooctanoic acid] chemicals. Secretary Esper, to his credit, appointed a task force, the day he got sworn in, to address that on military installations. My understanding is that the Navy is very close to a breakthrough on finding a replacement for the element in firefighting foam that would be equally effective. Can you give us any update on that? And, if not, can you take that for the record?

Secretary NORQUIST. Let me take the particular question of how close they are to the record.

[The information referred to follows:]

Secretary NORQUIST. The Environmental Security Technology Certification Program (ESTCP) is supporting two series of large-scale tests of fluorine-free alternatives to Aqueous Film Forming Foam (AFFF). The tests will be of both commercially-developed alternatives, as well as alternatives being developed by the Strategic Environmental Research and Development Program (SERDP). The first test series is being conducted by the Naval Research Laboratory (NRL) and is 50 percent complete. The team of Tyndall Air Force Base and Battelle have just received approval of their test plans and will conduct their first test in January 2020. Both teams are slated to submit their initial test reports in February 2020.

Secretary NORQUIST. I know this is an area very important to us. We have been researching alternatives. I think we spent \$22 mil-

lion on that. But, we'll continue, because we need a foam that protects armed service members when they're in high-risk areas, but we also need it to be one that's environmentally safe. And so, we will definitely get you the answer on how they stand.

As you pointed out, this is a high-priority area for the Secretary. He's got the task force working on 40 different actions. But, this is something—we're getting to that solution—is ultimately the right—the best place to end up.

Senator SHAHEEN. Good. Thank you.

Finally, in June, the Department released new standards for defense contractors called the Cybersecurity Maturity Model Certification, the CMMC, program. And I appreciate the need for this program, to ensure that there is cybersecurity in place for our contractors. But, can you talk about the extent to which the Department is working with those contractors? One of the things that we've heard from some of the businesses that we work with is that they're very concerned about the timeframe within which they have to comply with those standards, and also with the assistance. For the big folks, it's not an issue as much as for some of the smaller people who subcontract or who work with Defense, who don't have the capacity and the assistance that they need in order to comply. Can you talk about what's happening on that?

Secretary NORQUIST. Sure. For those who are unfamiliar with this, one of the issues we have is vulnerabilities in our supply chain in the businesses we deal with. And so, other countries tend to attack their networks to try and extract important data. CMMC is a set of standards that they're expected—and, much like a financial statement audit, they would hire a firm to come in and check their controls and be able to verify the quality. Part of the intent of this is to recognize that the larger firms are going to have an easier time. We need to work with the small businesses. In some cases, like when we have requirements that a firm has a SCIF [Sensitive Compartmented Information Facility], they are able to hire a firm that—whose SCIF they have access to so that they can work with folks who can set up a network that meets this compliance. So, if you have a very small firm, you don't try and build your own network. You just subscribe to one that's already certified. Now you know you can count on it, and that firm then just provides it to you as part of their IT services. But, this is something that I know the CIO [Chief Information Officer] and the Under Secretary for A&S [Acquisition and Sustainment] are going to work very closely with the small business community. We need them, most of all, to get up to that standards, and we don't want this to be a barrier to entry.

Senator SHAHEEN. Right. We don't want to lose all of the innovation that's coming out of the—

Secretary NORQUIST. No, that's where a lot of the innovation is coming from. You're absolutely right, Senator.

Senator SHAHEEN. Thank you.

Thank you, Mr. Chairman.

Senator SULLIVAN. Senator Ernst.

Senator ERNST. Thank you, Mr. Chair.

Mr. Secretary, along similar lines, but a little different question, focusing on the purchase of unsecure commercial items. Back in

August, I had sent a letter to you highlighting the threat that was posed by commercial off-the-shelf computers and other types of electronic equipment, specifically those that have been made in communist China and those that present those cybersecurity risks. I appreciate the letter that you sent back in reply, which discussed the ways in which the Department is addressing those types of vulnerabilities, but perhaps you could, maybe, just give us a quick update now on the progress that the Department has actually made in that area.

Secretary NORQUIST. Sure. So, one of the challenges you have in buying, particularly, electronics is—it's one thing to say this is a large Chinese-made product and it shouldn't be in the system. But, then you start buying other ones, and you start discovering components that were made—the company that provides it to you is a U.S.-based company, but all of a sudden there are components inside it. This is where the Department has to do careful analysis of what it's buying. We look at the threat intelligence, we look at their supply chains, and we test the products for its adherence to security standards. In some cases, we do penetration testing, red-teaming. But, we need to understand those supply chains to understand where are the places where we can't afford to have them bringing in those types of parts, because it creates a vulnerability. And working with those firms directly, in some cases, you can improve it if you take out the middleman, you buy directly from the vendor. But, in other cases, you have to understand if that vendor is assembling parts that includes pieces. Now, some of those pieces aren't a risk, others are. And that's where we have to work very carefully. And that's the process that we're putting in, both in—again, in cooperation between our CIO and our Under Secretary for Acquisition.

Senator ERNST. Do you know, is the Department still purchasing equipment that possibly could have been manufactured in areas of concern?

Secretary NORQUIST. Let me take that for the record so I know how far along in this we are.

[The information referred to follows:]

Secretary NORQUIST. Yes, the Department is still likely purchasing equipment manufactured in areas of concern. Many U.S. companies which produce cutting edge technologies also manufacture their products overseas. However, DOD does factor supply chain risk into our acquisition decisions, which distinguishes between products “made in” a country of concern, often as a routine business arrangement by U.S. companies, versus products “made by” a country of concern, where control and ownership may introduce extraordinary opportunities for malicious intervention. Location of manufacture is only one indicator of risk to the Department and must be assessed in the larger context of company ownership, board structures, security protocols, cybersecurity, financial relationships, and other considerations, to include counterintelligence. The Department is also participating in the Federal Acquisition Security Council (FASC), established in accordance with the 2018 SECURE Technology Act, with responsibilities and authorities to identify and address supply chain risks across the Federal Government.

United States Senate

August 27, 2019

Honorable David L. Norquist
Deputy Secretary of Defense
1010 Defense Pentagon
Washington, DC 20301-1010

Dear Deputy Secretary Norquist,

Congratulations on your confirmation as the Deputy Secretary of Defense. I appreciate your commitment to work with me to ensure every dollar that goes to the Department of Defense (DOD) is used in the most efficient way to support our men and women in uniform. I also look forward to working with you to strengthen our nation's defenses.

To that end, I am very concerned that despite repeated warning from multiple government agencies, DOD is continuing to purchase and use computers and other electronics with known cybersecurity risks. This includes equipment from a company with connections to the military and cyberespionage programs of communist China.

In 2016, DOD's own Joint Chiefs of Staff Intelligence Directorate cautioned that computers and handheld devices produced by Lenovo, the largest computer company in China, could introduce compromised hardware into the DoD supply chain, posing a cyberespionage risk to classified and unclassified DoD networks." Ten year prior in 2006, the State Department banned the use of the company's computers following reports that Lenovo computers were manufactured with hidden hardware or software used for cyberespionage. In 2015, the Department of Homeland Security issued warnings about pre-installed spyware and other vulnerabilities identified in Lenovo computers. Yet, DoD has not banned the purchase and use of Lenovo products. In fact, the Department spent more than \$2.1 million to purchase over 1,500 Lenovo products, including computers just last year.

As you probably know, a recent DOD Office of Inspector General (OIG) report, "Audit of the DoD's Management of the Cybersecurity Risks for Government Purchase Card Purchases of Commercial Off-the-Shelf Items," identified thousands of information technology items costing more than \$32 million purchased by the Army and Air Force last year that are vulnerable to hacking by our adversaries. While the Navy did not have information readily available, it does allow this equipment to be purchased and used on its network. Continuing to use this technology could compromise "missions critical to national security," the OIG warns.

If you have not already done so, I urge you to assess and mitigate the threat posed by any high-risk equipment currently in use and prohibit the purchase of any additional technology with cybersecurity vulnerabilities.

If it is determined that legislative authority is required to fully address this issue, please let me know how I can work with you to resolve the matter as swiftly as possible.

Thank you again for your service.

Sincerely,

Joni K. Ernst
U.S. Senator



DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

The Honorable Joni K. Ernst
United States Senate
Washington, DC 20510

NOV 06 2019

Dear Senator Ernst:

Thank you for your letter of August 27, 2019, which outlines concerns over cybersecurity risks present in commercial-off-the-shelf (COTS) information technology (IT) products and their potential for exploitation by cyberespionage programs of our adversaries.

I appreciate your interest in the Department's security posture and our ability to mitigate vulnerabilities to advanced persistent cyber threats. Congressional willingness to enact firm competitive restrictions, such as the telecommunications equipment prohibitions in the John S. McCain National Defense Authorization Act for FY 2019 section 889, including two prohibitions that took effect on August 13 and 20, 2019, provide the Department with effective and expedient mechanisms to prevent acquisition of certain risky products for use in DoD's information technology networks.

As you recognized, cybersecurity risks that come with the use of COTS IT products have the potential to affect classified and unclassified systems. A threat to any of the networks or critical infrastructure in which the Department's information is stored, shared, and communicated introduces enterprise risk. Even when particular cybersecurity vulnerabilities are recognized and specific procurements are prohibited, eliminating the risk present in already fielded components presents challenges.

The Department is participating fully in the Federal Acquisition Security Council (FASC), newly established by the Strengthening and Enhancing Cyber capabilities by the Utilizing Risk Exposure Technology Act of 2018 to improve cybersecurity risk posture. The FASC was established to perform supply chain risk management related functions in a consistent manner across Federal Government, and work is underway by council members to develop the policies, procedures, and criteria for identifying and mitigating supply chain risks. At this time, the Department is evaluating existing authorities, including those recently provided in the SECURE Technologies Act and Executive Order 13873, "Securing the Information and Communication Technology and Services Supply Chain," to identify the most effective means of addressing the vulnerabilities identified in your letter.

The Department appreciates your continued support. As additional legislative authorities are required to address current and emerging cybersecurity-related risks, I will reach out to you and your staff. Our common goal is to provide the men and women in uniform the finest and most secure information systems available.

Sincerely,

Senator ERNST. Okay. Wonderful.

Thank you very much, Mr. Chair.

Senator SULLIVAN. Senator Kaine.

Senator KAINE. Thank you.

Mr. Secretary, what I said in my opening comments, that I wanted to try to get your opinion about when it might be reasonable to expect—as we work through the process of these annual audits and then, you know, engage in corrective activities, when might it be reasonable for the committee to expect that the Department would have a completely clean set of audits?

Secretary NORQUIST. So, here's the trajectory you should expect. We have 24 organizations. I would expect, every year, to see movement forward, another one getting a clean opinion, people moving to modified. Within 5 or so years, I'd expect you to see the majority of them with a clean opinion. The Department itself won't get a clean opinion till the very last one falls. It took DHS 10 years to get a clean opinion. Five of those were waiting on the Coast Guard. Everyone else got to a clean opinion, and there was 5 years. And then, for several years, it was just Coast Guard property. Everything else was okay.

So, you'll start to see the number come down. I found it very helpful, by the way, because, in the hearings, the Coast Guard used to get that as an opening question, when they were the one left out, as to, "Why are you holding it up?" That helped focus everybody's attention. But, that will—you'll see that over time. You'll see different parts get to a clean opinion. You'll see the number of problems going down. You'll see some where they have only a single issue holding them up. That's very helpful for focusing it. I don't know how it takes to get to the last one, because it's really who's the slowest and takes the longest, and that will be the final pin to drop.

Senator KAINE. Thank you.

Mr. Chair, I would just like to ask to be introduced in the record—in response to Senator Hirono's questions, Secretary Norquist talked about the letter that he sent to—under—over his signature, to Daniel Levin, who is the attorney for Laura Cooper, and there was a reference to that letter. The letter is about a page-and-a-half long, and the operative paragraph is the penultimate one, which reads, in relevant part, "This letter informs you and Ms. Cooper of the administrationwide direction that executive personnel," "cannot participate in the impeachment inquiry under these circumstances," period. I would like to introduce this for the record. And I'm going to have some additional followup via QFR [questions for the record] about this letter.

Senator SULLIVAN. Without objection.

[The information referred to follows:]



DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

OCT 22 2019

Daniel Levin
White & Case LLP
701 Thirteenth Street, NW
Washington, DC 20005-3807

Dear Mr. Levin:

I understand that you have been retained by Ms. Laura Cooper, the Department's Deputy Assistant Secretary of Defense for Russia, Ukraine, and Eurasia, as her private counsel for a deposition to be conducted jointly by the House Permanent Select Committee on Intelligence, the Committee on Foreign Affairs, and the Committee on Oversight and Reform, "[p]ursuant to the House of Representatives' impeachment inquiry." The Department's October 15, 2019 letter to the Chairs of the three House Committees [Tab A] expressed its belief that the customary process of oversight and accommodation has historically served the interests of congressional oversight committees and the Department well. The Committees' purported "impeachment inquiry," however, presents at least two issues of great importance.

The first issue is the Committees' continued, blanket refusal to allow Department Counsel to be present at depositions of Department employees. Department Counsel's participation protects against the improper release of privileged or classified information, particularly material covered by the executive privilege which is the President's alone to assert and to waive. Excluding Department Counsel places the witness in the untenable position of having to decide whether to answer the Committees' questions or to assert Executive Branch confidentiality interests without an attorney from the Executive Branch present to advise on those interests. It violates settled practice and may jeopardize future accommodation. Furthermore, the Department of Justice has concluded that "congressional subpoenas that purport to require agency employees to appear without agency counsel are legally invalid and are not subject to civil or criminal enforcement." See *Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees*, 43 Op. O.L.C. (May 23, 2019) [Tab B].

The second issue is the absence of authority for the Committees to conduct an impeachment inquiry. In its October 15, 2019 letter, the Department conveyed concerns about the Committees' lack of authority to initiate an impeachment inquiry given the absence of a delegation of such authority by House Rule or Resolution. This correspondence echoed an October 8, 2019 letter from the White House Counsel [Tab C] expressing the President's view that the inquiry was "contrary to the Constitution of the United States and all past bipartisan precedent" and "violates fundamental fairness and constitutionally mandated due process."

This letter informs you and Ms. Cooper of the Administration-wide direction that Executive Branch personnel "cannot participate in [the impeachment] inquiry under these circumstances" [Tab C]. In the event that the Committees issue a subpoena to compel Ms. Cooper's appearance, you should be aware that the Supreme Court has held, in *United States v.*



Rumely, 345 U.S. 41 (1953), that a person cannot be sanctioned for refusing to comply with a congressional subpoena unauthorized by House Rule or Resolution.

To reiterate, the Department respects the oversight role of Congress and stands ready to work with the Committees should there be an appropriate resolution of outstanding legal issues. Any such resolution would have to consider the constitutional prerogatives and confidentiality interests of the co-equal Executive Branch, *see* Tab D, and ensure fundamental fairness to any Executive Branch employees involved in this process, including Ms. Cooper.

Sincerely,



Attachments:
As stated

Senator SULLIVAN. Mr. Secretary, let me ask a couple of other questions.

You mentioned that certain base commanders were very open and willing to work—did you run into some obstinance or resistance from other commanders? And was there a correlation between that and maybe not scoring so well? Or was the word out from the leadership in the Pentagon to make sure there was good cooperation here?

Secretary NORQUIST. I think it's gotten better from year to year. The auditors were the ones who gave me the feedback, and they said the more they're engaged, the more likely that you are to see

the results. It's a question of them focusing on the items in the process and what they need to be accountable for.

But, here was the big surprise for the audit. One of the concerns we had, going in, from those of you advocating for audit and those of us pushing it, is the risk that it would be seen as a paperwork drill, "You come, you audit me, and all you're doing to check is a bunch of paper and whether it—my bills match my invoices. This is just an admin drill." The issue over inventory, things that had direct benefit to readiness, this quickly turned around the views of the military that we dealt with to understand is—this wasn't about paperwork, this was about readiness, this was about being able to do their mission. So, I never ended up getting the pushback that I was afraid I was going to see and that everyone—until you started it, everyone just assumed was going to be the natural outcome of the audit. So, I think we've seen a change. I think we've seen that level of emphasis. Some places are stronger than others, but I think we're going to continue to see it grow.

Senator SULLIVAN. Let me ask, related to that topic—you know, some of the media, which I'm glad they covered it, but, not surprisingly, the headlines were a little alarming. There was a Reuters piece, a couple of days ago, "Pentagon Gets Failing Grade in its Second Audit." And then, a Bloomberg piece, just—well, yesterday, I think—headline, "Air Force's Inventory Listed Wrong Sites for 79 Nuclear Missiles." So—"misidentification of 79 Active Minuteman II nuclear-armed missiles, almost a fifth of the fleet." That's pretty alarming.

Can you talk to some of these headlines, and particularly the one with regard to 79, "missing nuclear missiles"?

Secretary NORQUIST. Right. So, these types of—

Senator SULLIVAN. Were they really missing? I'm a little bit concerned, if that was the case.

Secretary NORQUIST. So, the proper title would have been, "79 Uninstalled Missile Motors," because they aren't actual ICBMs [Intercontinental Ballistic Missiles] and missiles. They are the motors that are used in them. And when they are pulled out and put into maintenance in the supply system, there was an issue in the accuracy of the supply system, because it's manual, tracking whether they were still on the base, and whether they were at the depot. But, I don't think "uninstalled missile motors in maintenance" has the same drama as the title that you read.

This comes up in the audit. Occasionally, you'll have some story that references the Department and trillions of dollars, even though that number is orders of magnitude larger than our budget. There are these types of misunderstandings of what the auditors—again, remember, these audit reports are written by accountants. So, they are written with a level of detail that makes sense to somebody of that background. But, to others, these stories come out, and you try and translate it, and you get it wrong. So, part of my job is, when these come up, explaining, "No, our missiles are in the ground. We know where they are. They don't tend to move that often, for the ICBMs. So, 79 would not have been relocated. But, this is missile motors." And the answer is, it's still a problem, we still have to get inaccuracy of our missile motors, but it's not

the—it's a regular supply issue and inaccuracy from a manually updated database.

Senator SULLIVAN. Okay. So, on that headline, still useful, and it—obviously, keeping track of the missile motors is important, but it wasn't as if there was——

Secretary NORQUIST. Correct.

Senator SULLIVAN.—a loss of the——

Secretary NORQUIST. Correct. And they did a——

Senator SULLIVAN. We knew where these ICBMs were.

Secretary NORQUIST. Right. And the auditors did a site visit at F.E. Warren, and they gave it 100 percent thumbs-up. I met with them and asked them what issues. They didn't even bring this one up. They just talked about supply issues, in general.

Senator SULLIVAN. And "failing grade"? That's accurate. Was it——

Secretary NORQUIST. On the overall audit?

Senator SULLIVAN. Yes.

Secretary NORQUIST. Yeah, we didn't pass. I mean—well, let me—in fairness, seven organizations did, and the leaders of those should get credit, because many of them started those audits before anybody else in the Department. The—some of the funds, having clean opinions for 5 or 10 years. That was sheer will by the leadership of that organization, because there was not a pull signal from the Department level for many of those. So, credit to those who got it. But, we've still got another, you know——

Senator SULLIVAN. Let me ask a more parochial question, from my perspective. You said you were at Fort Wainwright in Alaska. What were the findings there? Positive? Negative? Any good examples or things that need to be improved upon?

Secretary NORQUIST. Sure. So, it's a great example of the test they did. They went to Fort Wainwright, and they had a list of 108 items that they wanted to find. These were everything from rotary-wing aircraft to coms gear. And then they looked around and picked 25 items they found, and then they went back to the database and said, "Can you show me these 25?" They had 95.5-percent pass rate. There were six things. Examples included: the serial number didn't match. Okay, well, then we can't be certain this is the same item. You have an item, but the serial doesn't match. Or the item was there, but it wasn't recorded in the system. Okay, you've got a missing piece entry. Six is somewhat small, but, again, this is a sample, so the question becomes, What—if you extrapolate that? But, it was 95.5-percent pass rate. That's a good example of the visits they did around the country. And I think it's the type of thing where that feedback is helpful, because the local commander can figure out why, "Why do I have these six areas?" And then they can determine, "Is it in other areas, as well? Do I have—if they came back and pulled a different sample, would I be 100 percent or would I still have the same errors?" And then they have, you know, 6 to 9 months to work on it before the auditors potentially sample them again.

Senator SULLIVAN. Great. Thank you.

Senator Perdue.

Senator PERDUE. Well, first of all, I want to thank you for your perseverance in here. You and the Ranking Member Kaine have been warriors on this for years.

I want to thank you, Secretary, for giving us our first audit in the history of the United States. I know it's a laborious process, and I know it's expensive, to start with, to do your first one. I just have a couple of quick questions.

When you look at the number—or the cost of this first exercise, pretty substantial, as you might imagine. This is our third-largest expense—item on our expense sheet, second only to Social Security and Medicare. But, it's only a few—it's only a little bit larger than some of our larger corporations. They do this routinely, and it doesn't cost them a billion dollars to do so. So, my question is, over time, do you see a possibility, number one, that we can get to the answers, here, quicker, now that we've got a start at it, we can get to a clean report? And then, what's the quantitative—I know we've talked about some of the subjective benefits of this, obvious—that are obvious, but how do we quantify that? I mean, it seems to me—you've mentioned, in a private conversation, that you've pretty much already paid for this, in many regards, quantitatively. Can you just tell the committee and get that on the record for us?

Secretary NORQUIST. Sure. So, you talked about the cost. Let's break it into the three parts.

There's the amount we pay to the public accounting firms—

Senator PERDUE. Right.

Secretary NORQUIST.—about \$195 million. Compared to our size, not dramatically different than some of the other large firms.

Senator PERDUE. It's about right.

Secretary NORQUIST. From the Corps of Engineers, their experience has been, though, that, as the audits move from these heavy sampling to reliance on controls, those costs will come down. So, we expect to see the amount we pay the auditors go down.

We have a similar amount, about \$250 million, that we spend either in labor of Federal employees or in the contract support that we use to support the audit. Some of that will come down. Some of that's just the cost of doing business correctly.

When you look at what DFAS spends to process, they have very good data over how much they spend fixing errors. Their cost will go down by at least \$400 million when they start getting clean data, which will fully cover the cost of the audit and the cost of our side of support.

Senator PERDUE. The clean data is a byproduct of an audit process.

Secretary NORQUIST. It absolutely is. And you think about the labor we spend when a transaction comes through that's unclean. Somebody has to research, they've got to figure out why the codes are wrong—

Senator PERDUE. Right.

Secretary NORQUIST.—which is an automatic—when the whole thing flies through without a touch. Right? And you're all set.

The second half of that is the money we spend on fixing problems. And again, we're doing this to comply with our standards and with the law, so we were spending that money in the past, and we

are spending now. The difference is, we didn't have the audit to tell us if it was right.

So, I'll just pick a system example. You're fielding a new accounting system. In the past, you'd field it, and then you'd start discovering it didn't post right, it didn't do what you want to. The person fielding it now knows the auditors are going to show every year and test that system, so you're not going to be done with your implementation before the auditor's given you a list of problems. And the program manager's thinking, "Am I paying you to make this system work?" So, that level of discipline benefits the taxpayer through these fieldings to get it to the right level.

What I was surprised by was, when you look at the money that the Navy has saved, the \$167 million, when you look at the \$316 million that the Department was able to use data analytics to recover as we did our budget scrubs, that's the cost of what we're spending on the audit, and then some. So, in terms of paying the auditors, we're already recovering that.

Senator PERDUE. Right.

Secretary NORQUIST. Now we're just living off the benefit of all of their findings, making sure the rest of the money we spend is better, that our processes get better, and that we bring discipline to the system. So, I had originally expected that this would be a savings some years out. And I know the patience with, "Just wait, it will pass." But, we are seeing that benefit now, and we are seeing the benefit to the taxpayer immediately.

Senator PERDUE. Can I ask one more, real quick?

I know you've talked about continuing resolutions since you've taken this job. And we now know, because the SECNAV [Secretary of the Navy], Secretary Spencer, has actually talked to us quantitatively about that, and now the service heads—Secretaries have also done that across the board. We now know that it costs upwards of couple-hundred-billion dollars over 10 years, in terms of these—the CR practice that we've been under for the last 45 years. Only 4 times in the last 45 years have we actually funded the government on time. And that means no need for a continuing resolution at the beginning of the year. In the last decade, all but one year, we've—the first quarter has been under a continuing resolution.

Now, this current debate that we'll have tomorrow, if we have a vote on the next continuing resolution, will be the 188th continuing resolution. Can you describe to us how the audit interacts with our growing awareness of how this insidious thing called a continuing resolution just devastates the military? It doesn't sound so onerous to me, as a business guy, coming—you're going to spend no more than last year? That doesn't sound so bad. But, because it ties the hands of the military at the line-item level, seems to me we're building in tremendous intrinsic costs there just because of our lack of doing the job here in Congress. And I know you agree with that. How would the audit help us identify, expose those wasteful efforts? Like, \$4 billion right now we're spending today, we're spending against \$4 billion of programs that the DOD has already said are obsolete, we don't want to spend those anymore, but we're obliged to under the continuing resolution law.

Secretary NORQUIST. So, you think of a contract where you're buying some supply. Normally, you might place the order at the beginning of the year for the entire year. And instead, you're going to take that, and somebody's going to make an order that covers the first 6 weeks. And then, after your contracting action, they have to do all the normal paperwork, they've got to load it in the system, and then, when the CR is extended, they do another contract for another 4 or 6 weeks. We keep breaking this contract into multiple parts, increasing the amount of manual labor that you have to do, increasing the chance for data error, making it much harder on the vendor to deliver the quantity at the right cost. What the audit will show you is just the volume of transactions you have artificially generated, the amount of additional work. We see the consequences with some of these inventory issues at year-end, where we held back money for 3 to 6 months, and then we push it forward and expect people to move out and be able to execute it with the 3 to 6 months left.

Senator PERDUE. We're holding excess inventory in anticipation of 3 months or more that we can't use.

Secretary NORQUIST. Or at the very end of the year, it's the one thing I can order. Right? So, I order the inventory, but it's a rush, because I didn't get it in a normal sequence like I did, so I put it on the shelf. I'll get around to loading it into the inventory system later. Life gets busy—

The other part is, the people doing the audit are the ones most affected by the CR. It's the acquisition community, it's the financial—all these folks who are now spending their time over here, we want over on the other side, getting the data and getting the process right.

It's very disruptive, and the audit highlights that. And then, the whole effect on the mission side, on the families, on the deployments, those are a pretty serious problem.

Senator PERDUE. Thank you.

Thank you, Mr. Chair.

Senator SULLIVAN. Senator Blackburn.

Senator BLACKBURN. Thank you, Mr. Chairman.

And, Mr. Secretary, thank you for being with us today.

I'll have tell you, going back to my freshman year in the House in 2003, we started working on the management initiative, the DOD audit processes, trying to simplify this and get everybody into a system where data would be interoperable, you would be able to put a lot of this online at that point. Now we want it all in the Cloud. But, what has frustrated me, and, I think, what continues to frustrate some of our men and women in uniform, is that you take two steps forward, you take a couple of steps back, and you end up not making as much progress as you would like to see made.

So, with our interests in Tennessee—Fort Campbell, Millington Air Naval Station, Arnold Air, our National Guard presence, the full-time National Guard Intel Unit—as I talk with these men and women, one of the things that continues to come up is having a standardized process, having best practices, and being able to look, not just at what is immediately in front of you, but looking out—further out. Senator Perdue just talked about the necessity for hav-

ing budget authority and not running on a CR. That's a big part of that. And we realize that. But, also, I think the—what comes back to being an issue with DOD is the fact that they just can't seem to get ahead of this process and get those best practices in place.

So, what I'd like to hear from you is, if you've got a system in place to really incentivize identification of cost savings by DOD employees, if that would help. And also, what about a best-practices database? Is that something that, as you go through this and you pull this data, and you go in and research this, are you building a best-practices database that is going to be available systemwide? And then, the third thing I would say is, leveraging leaders from the private sector who can really come in, based on their experience, and help you streamline processes and optimize operations for the Department. Because right now—and this is one of the problems, I think, that our units have when they're deployed, is the number of hoops they have to jump through to get authority or something that they need in a timely manner.

As you look, holistically, at this and what you intend to glean from it, if you'll just answer those, it would be helpful.

Secretary NORQUIST. Sure. One of the important things is how the audit puts a spotlight on some of those problems. And one of the things that we have set up at the Department is, we have three forums that include the headquarters, but also Army, Navy, and Air Force. One of them focuses on the IT aspects of the audit; another, on the logistics, which is a lot of the issue you're talking about; and the third is on financial management. And part of the answer is, we're all going to find the same problem. So, when we have the right fix, when we have a solution that is usable across it—and so, for example, the Army is experimenting with—it's a series of codes called a BOT, a micro-thing—but, what it does is, it's software that, when you depart, runs through the accounts and looks for every place you had a login account, and turns it off instead of waiting for six different organizations to get the paperwork to go in and turn off your access. That works. Everybody can adopt it. The similar thing we're looking at is, how do I make sure somebody doesn't login as one user in one account, still login as another. We're trying to design a control that prevents somebody from doing both of those functions. All of those are best practices, and we have a forum that shares those.

You talk about being in the private sector. Secretary Spencer, at the Navy, bought in private-sector overview of how you do aircraft maintenance and has been looking through and adopting some of the best practices on the Navy aircraft in order to fix the depot issues, the supply issues they have been facing. And so, when they have those, they then share them with the other services. But, each of these answers, there's a lot of analogy to what we do, even though we're different, in the private sector. And the more we can—we used to call it, you know, best practices in government. I think it used to be called plagiarism when I was in college. But, you take their ideas, and you use them, and you use it to drive efficiency in the process.

Senator BLACKBURN. Thank you.

I yield back.

Senator SULLIVAN. Thank you, Senator Blackburn.

Senator Perdue.

Senator PERDUE. Well, thank you for accommodating. I just have one more.

We could do this all day, Mr. Secretary, but you've got a job to do, and we do, too.

But, this is so impactful. We're talking about big dollars here, \$160 billion that we spent. Where do we go from here? And what do you think we're going to identify? If you're not ready to quantify this today, I totally understand that. But, one of the purposes of an audit is to look at operational effectiveness and best practices Senator Blackburn just mentioned. But, I'm looking at the top-line. This is our, sort of, first deep-dive look at the broad base of the DOD. And, when you look at the impacts of CRs and other things, given the NDS, what do you think the potential is going to be for some rationalization of this lost cause?

For example—and I will just highlight this quickly—we spend about 14 percent of the total money on overhead. Now, that's up from about 2 percent in about the Vietnam era. So, it's 2 percent to 14. I'd like to know what that increase is. That should be part of the audit process, as well. Then we allocate the balance—a third, a third, a third—which is not consistent with the NDS. And I would hope that the audit, in getting more efficacy about where the money is spent and how that's decided, will give us some flexibility in how to address that.

So, my question, sir, is, where do we go from here? What's the next step this year? And what do you hope to improve after the first audit? And then, secondarily, what do you think the rationalization potential could be in DOD? If you're not ready to quantify a number there, I would totally understand. But, at least directionally, give us some idea of what you're thinking.

Secretary NORQUIST. Sure. So, I think the next big step—I mean, in the small steps, we're going to keep identifying the errors, we're going to close them—the next big step is to take advantage of the data we have. Part of it is, we used to do transactions in blocks, thousands of transactions as a single entry. Can't do that and pass an audit. So, we're doing individual transactions. The advantage of that is, you can now search on them. So, whereas, before, somebody looking at a budget would see they had \$100 million, they've spent 50; they can now click on that and get every single transaction that makes that up. Well, now if you want to get after overhead, if you want to get after some of those other expenses, you can go through those transactions and sort out, is this overhead, as in logistics support and maintenance and essential things, or is this overhead, as in I hired a consultant? Right? And am I getting something? So, that level of transaction-level data.

Part of what I want to push for is, we should be able to have a meeting in the Pentagon that looks like what you'd have in a business company, where all the business units are there and you've got a report from your CFO [Chief Financial Officer], that there's no discussion about the report. It is an accurate summary of the financial activities of each of the organization. We're now going to have a discussion about what it means. Right? If you don't trust

the data, you can't get there. But, if you start having this transaction level, we can bring it up.

We use, in Defense, something called PPBE "planning, program, budget, execution." It doesn't have a backloop—right?—where you go and you say, and here's what we did and how it comes back. So, we may end up changing that to PPBA, where we go from budgeting to the accountability, which is, did you do with the money, what did you get for it? Before I do programming for the next 5 years, how do I take that information back into the system? And this is moving accounting from being a note at the end that we send a report to somebody to—and again, the audit report is just to somebody, but it's the data that produces it that can come back to the leadership in a usable format. And this is what private-sector companies are able to do, because they trust their data. And that's what we want to be able to get to from how you manage an entity.

Senator PERDUE. Well, of all the people who come to the Hill and testify, I have to tell you, you have consistently been a straight shooter, and I so much appreciate that. Thanks for all you're doing over there.

Thank you, Mr. Chair, for—

Senator SULLIVAN. Thank you, Senator Perdue.

And I want to thank the Secretary, as well.

I want to thank my colleagues. You're looking—three of the leaders in the Senate on these audit and budget issues for the Pentagon—Senator Ernst, Senator Blackburn, Senator Perdue. So, thank you, to them.

And, you know, Mr. Secretary, you did raise the issue of the CR, and heard bipartisan concern here today, which I think is important, how you described it. There is a way to deal with it, which is to allow us to get on the Defense appropriations bill and have my colleagues on the other side stop filibustering from getting on that, and we can just vote on it. That would certainly help. That's what we're trying to do. So, to the bipartisan concern, there's a simple answer: Let's get on the bill and vote on the Defense approps bill that came out of the Appropriations Committee with a strong bipartisan support. But, we'll continue to press that. I certainly will.

Well, I want to thank you, again.

And members are requested to submit any additional questions for the record by Friday at noon.

Mr. Secretary, I appreciate and respectfully ask that you promptly respond to any of these additional questions from any of the members of this committee.

With that, we are adjourned.

[Whereupon, at 10:49 a.m., the committee adjourned.]

[Questions for the record with answers supplied follow:]

QUESTIONS SUBMITTED BY SENATOR DAVID PERDUE

AUDIT OF DIGITAL ASSETS

1. Senator PERDUE. Secretary Norquist, the fiscal year 2018 and fiscal year 2019 Department of Defense audits revealed problems throughout DOD concerning inventory accuracy and complying with cybersecurity discipline. While these audits have identified physical assets, including properties and systems under DOD's management, I am concerned that the department is failing to obtain a full account of its digital assets, specifically Internet Protocol (IP) addresses owned and operated by DOD. To what extent has the DOD audit included a comprehensive inventory count of DOD's digital assets (e.g. IP addresses, certificates, domains, and cloud instances, as well as services and DOD assets hosted in contractor and cloud environments)?

Secretary NORQUIST. All DOD financial statement audits have been performed by independent auditors in accordance with applicable professional standards with the objective of rendering an opinion on the fairness of presentation of the financial statements in accordance with generally accepted accounting principles. The auditor's testing may provide some feedback on the sufficiency of the controls over digital assets, but a financial statement audit is not expected to address all of the specific points above.

- For those digital assets that are subject to inclusion on the financial statements (expensed or capitalized), the financial statement auditors perform testing of management's controls and substantive testing of transactions on a sample basis which may identify instances of incomplete or inaccurate accounting for these assets.
- This may include assets such as computing hardware and software purchased / developed by DOD. However, this would not typically include digital assets such as IP addresses and certificates that are not recorded in the financial statements.

Furthermore, the DOD doesn't technically "own" IPv4 address space such that we could sell the IPv4 addresses and keep proceeds. DOD has an allocation of IPv4 address space, and if some or all of that address space were sold in accordance with statute and policy, the proceeds would go to the U.S. Treasury and not DOD. While the Department may not own IP addresses, it is the responsibility of management to perform inventory counts of the Department's assets, including digital assets. DOD is increasing enterprise-wide maturity in IT asset inventory reporting for commercial software licenses and commodity IT laptop and desktop computers by: improving property accountability for commercial software license purchases; modernizing cybersecurity end-point identification, management and asset reporting solutions; and, implementing enterprise-wide purchasing and licensing solutions for the most widely-used commercial software products and commodity laptop and desktop computers.

While professional standards require auditors to obtain sufficient knowledge of information systems relevant to financial reporting to plan and perform the audit, they do not require the verification of every single internet protocol address or digital asset.

2. Senator PERDUE. Secretary Norquist, if not, what reasoning/review is behind the Department's decision to not include digital assets in the audit's purview?

Secretary NORQUIST. The objective of the DOD audit is to verify that the Department's financial statements are fairly stated by assessing the DOD's ability to capture, record and report its financial activity and balances. All of the DOD's books and records are subject to audit scrutiny, including digital assets that have a significant impact on the financial statements. The DOD Office of Inspector General (DOD OIG) auditors and the independent public accounting (IPA) firms performing the audit determine the scope of the audit and the specific procedures to perform.

3. Senator PERDUE. Secretary Norquist, with regards to DOD audit protocol, do auditors from outside firms, as well as auditors from DOD's Office of Inspector General (OIG), include digital inventory when conducting site visits?

Secretary NORQUIST. The DOD OIG auditors and the IPA firms performing the audit determine the scope of the audit and the specific procedures to perform. The DOD OIG has an oversight role for the audit, including understanding the IPAs' site visit objectives, planned test procedures, and samples selected. If the auditors, deem digital assets to be significant (i.e., subject for inclusion on the financial statements based on generally accepted accounting principles), they will include them in the scope of the audit accordingly.

4. Senator PERDUE. Secretary Norquist, what level of risk is the Department assuming by not having a proper accounting of global DOD digital assets?

Secretary NORQUIST. To the extent that the inability to account for digital assets reflects an inability to monitor activity on Department of Defense (DOD) networks, or is indicative of unevaluated software or hardware operating on DOD networks, this would present a cybersecurity risk. However, the ability to meet the financial/accounting requirement would not necessarily reduce cybersecurity risk and vice versa.

Financial risks from weaknesses in accounting for digital assets typically include increased likelihood of incurring higher costs for purchasing and maintaining IT assets, when compared with IT asset costs for entities with well-managed digital asset inventories. The potential cost risks from poor inventory accounting can arise from purchasing excess inventory, failing to maximize volume purchase discounts, planning and negotiating procurements with incomplete price and requirements data, and struggling to optimize asset utilization.

DOD software applications, hardware appliances, and hosting locations / enclaves are required to undergo assessment and authorization following the DOD Risk Management Framework (DOD Instruction 8510.01) on an annual basis. DOD Authorizing Officials (AO) are responsible for assuring that software and devices connected to their networks are properly accredited. The workflow and evidence is tracked and maintained in automated systems such as the Enterprise Mission Assurance Support System (eMASS). Similarly, and as described in greater detail below in response to QFR 6, DOD has long leveraged network scanning technologies to evaluate status and configurations on DOD networks. DOD is in the processes of migrating toward an infrastructure of end-point management through comply-to-connect and automated continuous monitoring technologies, further described below.

5. Senator PERDUE. Secretary Norquist, how is the Department quantifying that risk?

Secretary NORQUIST. Regarding the financial risks, the Department of Defense (DOD) quantifies the risks of higher costs from weaknesses in digital asset inventories by estimating the potential cost avoidance that could be achieved by improving IT asset visibility, IT asset management, and IT category management procurement processes. This analysis includes estimating the potential cost improvements and efficiencies that could be achieved by: implementing enterprise software licensing and purchasing solutions that align purchases with validated requirements; using category management and acquisition strategies that optimize contract terms and prices for the most widely used commercial assets; and, reducing duplicative procurement actions.

Regarding cybersecurity risks associated with status of devices, software and systems operating on DOD Networks, DOD maintains its cyber hygiene scorecard. Compiled from data provided from its legacy information security continuous monitoring (ISCM) capability, that scorecard tracks status of key configuration control and security architecture metrics, and is leveraged by DOD to meet Federal Information Security Management Act (FISMA) reporting requirements. The importance to DOD of improving the ability to monitor and manage network software and devices operating on its endpoints, is reflected in this being an initiative within the DOD Top 10 Cyber Landscape efforts, and is track within the DOD Top 10 Cyber Scorecard.

6. Senator PERDUE. Secretary Norquist, if the Department is not capturing digital inventory in the DOD audit, how does it intend to continuously discover and monitor digital assets that are dynamic and ephemeral?

Secretary NORQUIST. DOD is modernizing its capability to continuously discover and monitor digital assets by transitioning from the legacy information security continuous monitoring (ISCM) to Comply-to-connect (C2C) and Automated Continuous Endpoint Monitoring (ACEM) frameworks. ACEM enhances the existing end-point management solution by providing a more effective means to discover end points that are not currently managed using ISCM solutions, which will enable more complete deployment of current and planned end-point management solutions. Implementing C2C will ensure that all hosts—regardless of whether asset is a physical device or virtual host—are authenticated as known and authorized resources, and are configured in compliance with applicable cybersecurity and asset management policies and standards. ISCM, ACEM, and C2C are and will continue to be continuous monitoring activities. The monitoring data could be leveraged at any point in time to support audit requirements.

Implementation of the C2C framework, in particular, will improve ability to manage static and ephemeral hosts by denying access to network resources and services

for hosts that fail to authenticate or fail to meet minimum cybersecurity policy requirements. C2C, along with ACEM and other planned cybersecurity modernization initiatives, will increase the ability to automate remediation of deficiencies in policy compliance for authorized hosts, regardless of whether the host is a physical or virtual host. Operators will be required to intervene on an exception basis to address unauthorized assets or assets that cannot be brought into configuration compliance using automated solutions.

IDENTIFYING HUAWEI INVENTORY OCONUS

7. Senator PERDUE. Secretary Norquist, the U.S. military maintains hundreds of military bases in more than 70 countries worldwide. Some of these bases rely on the host nation's telecommunication networks to provide the base with broadband services. Many of these countries utilize equipment from Huawei to operate their telecommunications network. When auditors conduct site visits OCONUS [Outside Continental United States], are they evaluating the cybersecurity risks that military installations are potentially incurring by relying on telecommunication networks that utilize Huawei equipment, particularly in light of recent legislation that has prohibited that use?

Secretary NORQUIST. Financial statement auditors test information system controls in support of a financial statement audit. In such instances, the testing generally involves assessing general and application controls such as security management and configuration management. The scope of a financial statement audit typically does not include evaluating the cybersecurity risks related to use of specific telecommunications networks unless those networks are relevant and significant to the DOD's financial statements.

- Even in those cases, the auditor's primary consideration would be controls over the initiation of unauthorized transactions or changes to data relevant to financial reporting and would not address controls to prevent espionage (i.e., unauthorized ability to view data transmitted over telecommunication networks).

8. Senator PERDUE. Secretary Norquist, if not, what are the potential risks that DOD could incur by failing to create cybersecurity protocols that ensure military bases OCONUS are not operating on networks that utilize Huawei equipment?

Secretary NORQUIST. The Department shares your concern regarding the supply chain risk posed by Huawei, and other Chinese providers. DOD is aware that there is likely proliferation of these technologies within commercial telecommunications upon which DOD may be required to rely, particularly in foreign countries. However, DOD always assumes that its network traffic is vulnerable in foreign countries, takes steps to reduce the risk to its network traffic through strong encryption, and redundant and diverse communications.

QUESTIONS SUBMITTED BY SENATOR JACK REED

TRANSPARENCY OF AUDIT FIRMS

9. Senator REED. Secretary Norquist, as part of his confirmation process, Secretary Esper noted that it is important for the Secretary of Defense to know whether an auditor has been disciplined in the past for poor performance before an auditor is selected to do work for DOD. Do you agree with Secretary Esper?

Secretary NORQUIST. Yes, it would absolutely be prudent for the Secretary of Defense to be aware of this information and for the DOD to have a full understanding of the specific circumstances and any remediating factors related to a case where an auditor has been disciplined for poor performance in the past. This type of information is relevant and should be closely examined in making procurement decisions with taxpayer funds.

10. Senator REED. Secretary Norquist, will you personally commit to using your best efforts to ensure that as part of any contract action (including awards, renewals, and amendments), the Department requires any accounting firm providing financial statement auditing or audit remediation services to the Department in support of the audit required under section 3521 of title 31, United States Code, to provide the Department with a statement setting forth the details of any disciplinary proceedings conducted by any entity with the authority to enforce compliance with rules or laws applying to audit services offered by the accounting firm or its associated persons?

Secretary NORQUIST. Yes, in March 2019 a Defense Federal Acquisition Regulation supplement rule was issued to implement section 1006 of the fiscal year 2019 National Defense Authorization Act (NDAA), which requires these statements to be made part contracting process. The Department is continuing to refine the process whereby future solicitations for audit services would require accounting firms to verify that either they have not been subject to any such disciplinary proceedings, or in the event that they have been subject to disciplinary proceedings, fully disclose the related facts and circumstances as part of the solicitation response.

QUESTIONS SUBMITTED BY SENATOR JEANNE SHAHEEN

PFAS—FREE FIREFIGHTING FOAM RESEARCH

11. Senator SHAHEEN. Secretary Norquist, I understand that the Naval Research Laboratory is currently working on developing an alternative fluorine-free firefighting foam. Can you provide an update on the ongoing research and the status on its fielding and implementation?

Secretary NORQUIST. The Environmental Security Technology Certification Program (ESTCP) is supporting two series of large-scale tests of fluorine-free alternatives to Aqueous Film Forming Foam (AFFF). The tests will be of both commercially-developed alternatives, as well as alternatives being developed by the Strategic Environmental Research and Development Program (SERDP). The first test series is being conducted by the Naval Research Laboratory (NRL) and is 50 percent complete. The team of Tyndall Air Force Base and Battelle have just received approval of their test plans and will conduct their first test in January 2020. Both teams are slated to submit their initial test reports in February 2020.

QUESTIONS SUBMITTED BY SENATOR MAZIE K. HIRONO

OBSTRUCTING CONGRESS

12. Senator HIRONO. Secretary Norquist, in response to my question about whether you would refrain from prohibiting DOD officials, like Ms. Laura Cooper, from participating in the House of Representatives' impeachment inquiry, you stated: "I did not prohibit her. What I did was I forwarded her the information that we—I forwarded to her lawyer the information we had received from the White House that expressed their views about the impeachment process." Your letter to Mr. Levin, however, does more than forward the White House's letter. Your letter states, "This letter informs you and Ms. Cooper of the Administration-wide direction that Executive Branch personnel 'cannot participate in [the impeachment] inquiry under these circumstances'." As I stated at the hearing, a letter like this does create a chilling effect. Will you refrain from prohibiting or deterring any other DOD officials from cooperating with Congress going forward?

Secretary NORQUIST. On October 22, 2019, I wrote Ms. Cooper's personal counsel to inform him of the Administration-wide direction that Executive Branch personnel cannot participate in the impeachment inquiry under the circumstances. Though interagency communications remain confidential, I can say the Administration's guidance remains the same.

13. Senator HIRONO. Secretary Norquist, will you agree to formally notify everyone who works at DOD of their legal right to report misconduct to Congress without retaliation?

Secretary NORQUIST. Pursuant to the No FEAR Act, all personnel are informed of the rights and protections available to them under Federal antidiscrimination and whistleblower protection laws. New employees receive No FEAR Act training within 90 calendar days of their appointment to service. Further, all employees are required to complete refresher training every two years to ensure continued understanding of their rights and responsibilities.

14. Senator HIRONO. Secretary Norquist, you stated at the hearing that you "take very seriously our responsibility to accurately and responsibly respond to Congress." On November 3, 2019, the Department of Defense General Counsel, Paul Ney, ordered the Pentagon to identify and submit for review all documents about the distribution of military aid to Ukraine. Will you allow your staff to cooperate with Congress and provide documents collected by General Counsel Paul Ney to Congress?

Secretary NORQUIST. The Department remains firmly committed to accommodating congressional oversight. Most if not all the documents collected internally

pursuant to the DOD General Counsel's memorandum of October 3, 2019, are also responsive to the House Permanent Select Committee on Intelligence's subpoena of October 7, 2019. There are legal and practical concerns with the subpoena as detailed in the White House Counsel's letter of October 8, 2019, which must be addressed prior to any responsive documents being supplied to Congress.

PAROLE IN PLACE

15. Senator HIRONO. Secretary Norquist, recent news reports indicated that the Trump administration has been looking into terminating the "parole in place" program for military families since this summer. This program, which began under President George W. Bush, has helped undocumented family members of servicemembers adjust their legal status without being forced to leave the United States and face a ban from entering the country for up to 10 years. According to a July 5, 2018, Military Times article, data showed that rejections of parole in place requests for families of Active Duty members rose from 11 percent in fiscal year 2016 to about 14.5 percent in fiscal year 2018. When I asked you about this program during the hearing, you said that you would take my question for the record. Secretary Esper previously committed to me that he would look into this issue. What steps has DOD taken to coordinate with the Department of Homeland Security (DHS) on this issue?

Secretary NORQUIST. Any significant event that impacts the readiness of our servicemembers and their families is of concern. As such, we have worked closely with the Department of Homeland Security as they reviewed the future of the Military Parole in Place policy and are not aware of any pending DHS termination. We note the passage of Section 1758 in the Fiscal Year 2020 National Defense Authorization Act that encourages DHS to continue to support Military Parole in Place and thank the Committee for its support.

16. Senator HIRONO. Secretary Norquist, has DOD urged DHS to preserve this parole in place program or reconsider DHS's recent increase in rates of denial of parole in place for families of Active Duty servicemembers?

Secretary NORQUIST. The Department has worked closely with the Department of Homeland Security (DHS) as they reviewed the future of the Military Parole in Place policy, and is not aware of any pending DHS termination.

17. Senator HIRONO. Secretary Norquist, during his nomination hearing, Secretary Esper indicated he would not expend any DOD resources to help DHS identify and deport veterans. To your knowledge, has DOD provided to DHS any information or resources related to veterans who may be subject to deportation?

Secretary NORQUIST. The Defense Department is not aware of any such information being provided to the Department of Homeland Security related to veteran deportation. The Department does provide information pertinent to the naturalization adjudications of qualifying servicemembers as requested.

QUESTIONS SUBMITTED BY SENATOR TIM KAINE

PARTICIPATION IN THE IMPEACHMENT INQUIRY

18. Senator KAINE. Secretary Norquist, In your October 22, 2019, letter to Daniel Levin, the counsel for Ms. Laura Cooper, you provided the Administration's direction stating that Executive Branch personnel "cannot participate in the impeachment inquiry" and that even if issued a Congressional subpoena to compel their appearance and testimony that the Supreme Court Ruling in *United States v. Rumely*, 345 U.S. 41 (1953) held "that a person cannot be sanctioned for refusing to comply with a congressional subpoena unauthorized by a House Rule or Resolution." Did you send this letter at the direction of the White House?

Secretary NORQUIST. On October 22, 2019, I wrote Ms. Cooper's personal counsel to inform him of the Administration-wide direction that Executive Branch personnel cannot participate in the impeachment inquiry under the circumstances. Though interagency communications remain confidential, I can say the Administration's guidance remains the same.

19. Senator KAINE. Secretary Norquist, In your October 22, 2019, letter to Daniel Levin, the counsel for Ms. Laura Cooper, you provided the Administration's direction stating that Executive Branch personnel "cannot participate in the impeachment inquiry" and that even if issued a Congressional subpoena to compel their ap-

pearance and testimony that the Supreme Court Ruling in *United States v. Rumely*, 345 U.S. 41 (1953) held “that a person cannot be sanctioned for refusing to comply with a congressional subpoena unauthorized by a House Rule or Resolution.” Did the White House draft this letter?

Secretary NORQUIST. On October 22, 2019, I wrote Ms. Cooper’s personal counsel to inform him of the Administration-wide direction that Executive Branch personnel cannot participate in the impeachment inquiry under the circumstances. To answer your question, respectfully, interagency communications remain confidential.

20. Senator KAINE. Secretary Norquist, In your October 22, 2019, letter to Daniel Levin, the counsel for Ms. Laura Cooper, you provided the Administration’s direction stating that Executive Branch personnel “cannot participate in the impeachment inquiry” and that even if issued a Congressional subpoena to compel an appearance and testimony that the Supreme Court Ruling in *United States v. Rumely*, 345 U.S. 41 (1953) held “that a person cannot be sanctioned for refusing to comply with a congressional subpoena unauthorized by a House Rule or Resolution.” Are other Departments of the Executive Branch providing similar, or identical, letters to witnesses requested in the impeachment inquiry?

Secretary NORQUIST. I respectfully refer you to the other Departments you are referencing.

21. Senator KAINE. Secretary Norquist, In your October 22, 2019, letter to Daniel Levin, the counsel for Ms. Laura Cooper, you provided the Administration’s direction stating that Executive Branch personnel “cannot participate in the impeachment inquiry” and that even if issued a Congressional subpoena to compel an appearance and testimony that the Supreme Court Ruling in *United States v. Rumely*, 345 U.S. 41 (1953) held “that a person cannot be sanctioned for refusing to comply with a congressional subpoena unauthorized by a House Rule or Resolution.” Why did you fail to state that witnesses who did comply with the House impeachment inquiry, voluntarily or under subpoena, would not be discouraged or subjected to adverse administrative action?

Secretary NORQUIST. The Department will not tolerate any unlawful act of retaliation or reprisal against DOD personnel who have participated in the House impeachment inquiry.

22. Senator KAINE. Secretary Norquist, in your October 22, 2019, letter to Daniel Levin, the counsel for Ms. Laura Cooper, you provided the Administration’s direction stating that Executive Branch personnel “cannot participate in the impeachment inquiry” and that even if issued a Congressional subpoena to compel an appearance and testimony that the Supreme Court Ruling in *United States v. Rumely*, 345 U.S. 41 (1953) held “that a person cannot be sanctioned for refusing to comply with a congressional subpoena unauthorized by a House Rule or Resolution.” Will witnesses to participate with the House impeachment inquiry, voluntarily or under subpoena, be subjected to retaliation or adverse administrative action?

Secretary NORQUIST. The Department will not tolerate any unlawful act of retaliation or reprisal against DOD personnel who have participated in the House impeachment inquiry. Pursuant to the No FEAR Act, all personnel are informed of the rights and protections available to them under Federal antidiscrimination and whistleblower protection laws. New employees receive No FEAR Act training within 90 calendar days of their appointment to service. Further, all employees are required to complete refresher training every two years to ensure continued understanding of their rights and responsibilities.

RESOURCES TO RESPOND TO AUDIT FINDINGS

23. Senator KAINE. Secretary Norquist, the recent audit found a number of deficiencies in DOD accounting practices, including with respect to controlling access to informational technology (IT) systems, inappropriate accounting for inventory on military installations, and lack of supporting documentation for many transactions. The military services have many competing budgetary priorities, when the fiscal year 2021 budget request is delivered to the Hill, can you commit to providing this committee a list and accounting of the unfunded or underfunded activities that would address and close the findings and recommendations of the audit?

Secretary NORQUIST. Yes, I will commit to providing the committee with a list of unfunded or underfunded activities that would help address open audit findings.

Specific to the Services, there were fiscal year 2020 congressional marks related to business systems modernization efforts for fiscal year 2020 that will impede progress towards an audit opinion. For example, the Department of the Navy en-

acted funding reduction to Information Technology Development totaled \$123.6 million, including a \$61.7 million cut to the Navy's new integrated military pay and personnel system (NP2). The Air Force integrated personnel and pay system (IPPS) was zeroed out by \$20 million in the marks. These types of congressional marks negatively impact the financial statement audit.

Details related to the marks are included in Appendix A on page 47.

METRICS TO ASCERTAIN PROGRESS TOWARDS A CLEAN AUDIT

24. Senator KAINE. Secretary Norquist, DOD has been under a mandate to achieve a clean audit since the passage of the 1990 Chief Financial Officers Act. We are closer now than we have ever been, but the path forward is still unclear. What specific metrics should we be tracking to see that forward progress is being made on the path to the clean audit and that we are not backsliding or losing momentum?

Secretary NORQUIST. Maintaining consistent and continued audit progress is a priority for the Department. Our leadership team is tracking a broad array of metrics to monitor and measure that include but are not limited to:

- The number of material weaknesses that were validated by external auditors as fully resolved or downgraded in the current fiscal year over prior fiscal years,
- Progression of audit opinions from disclaimer to modified and/or unmodified,
- The total number of open audit notices of findings and recommendations (NFRs) for the most recent fiscal year and the preceding two fiscal years,
- The number of repeat or reissued NFRs from the most recent fiscal year (trends), and
- The number of closed NFRs in the current fiscal year and prior fiscal years.

The Department's NFR Database consolidates and tracks the status of NFRs from the DOD consolidated audit as well as Component audits and examinations. The database encourages accountability and transparency as it provides visibility of issued findings for the entire DOD community. As part of complying with the fiscal year 2020 National Defense Authorization Act (NDAA), we will provide you and your staff information relating to these metrics.

QUESTIONS SUBMITTED BY SENATOR DOUG JONES

RESPONSE TO GAO AUDITS

25. Senator JONES. Secretary Norquist, in a memorandum to Agency General Counsels dated November 5, 2019, entitled "Reminder Regarding Non-Binding Nature of GAO Opinions," the Office of Management and Budget General Counsel Mark Paoletta advised that "an Executive Branch agency is under no obligation to report an action it has determined does not constitute an Anti-deficiency Act (ADA) violation," despite a finding by the Government Accountability Office (GAO) that the agency has committed an ADA violation. This I believe to be a change in practice, and I'm concerned that it will have a negative impact on Congressional oversight. What guidance have you received about implementing this "reminder" and what is the Department of Defense's plan for reporting findings by the GAO or the Department of ADA violations in the future?

Secretary NORQUIST. The Department of Defense (DOD) intends to follow the guidance set forth in OMB Circular A-11, as explained by the Office of Management and Budget (OMB) General Counsel. Specifically, in cases where DOD, after consultation with OMB, agrees with the Government Accountability Office (GAO) that an Anti-deficiency Act (ADA) violation has occurred, the Department will report the violation.

In cases where DOD does not agree, after consultation with OMB, with the GAO's finding that an ADA violation occurred, the Department will exercise its discretion, on a case-by-case basis, as to whether to report or otherwise communicate with GAO and Congress on the matter. I understand that, over the past 10 years, there has been only one instance where the GAO determined that DOD violated the ADA, contrary to the Department's conclusion that no violation had occurred. In that case, the OGC conducted a short fact-finding inquiry and prepared a written opinion that was forwarded to GAO and OMB explaining its conclusion that the ADA had not been violated.

Appendix A

DETAILS RELATED TO THE SERVICE FISCAL YEAR 2020 MARKS

Air Force:

For AF related to unfunded and underfunded requirements, primary concerns is to minimize impact to findings remediation related to IT corrective actions. Reference, the discussion on marks against programs. AF IPPS was zeroed out (\$20M) in the marks. The major audit issues in MIL Pay require transformation and integration of pay and entitlements. AF needs support to minimize impacts to IT fixes and avoid delays with business systems reform in support of audit.

Navy:

The Department of the Navy (DON) has a prioritized strategy to consolidate systems, improve business processes, and financial reporting—with the goal of an expedited favorable audit opinion. This Department-wide undertaking was adequately funded in the President's Budget for fiscal year 2020 and throughout upcoming budget years. However, the Appropriations Act for fiscal year 2020 signed in December reduced the funding for several crucial priorities. The marks focused on business systems modernization efforts, a linchpin in DON's plan. These reductions will significantly delay plans to streamline business operations and implement automated controls necessary for audit compliance. The marks will impede DON's progress toward an audit opinion.

Enacted funding reduction to Information Technology Development totaled \$123.6 million. This mark in part included the following major audit-related initiatives:

- \$61.7 million cut to the Navy's new integrated military pay and personnel system (NP2);
- \$14.8 million reduction to the planned ships/subs enterprise maintenance solution (NMMES-TR);
- \$11.9 million cut to a new Departmental contract-writing system (ePS), which will integrate buying with accounting and contract payments; and
- \$3.2 million reduction for the Naval Operation Supply System (NOSS), which will integrate requisitioning, inventory, and logistics services.

In addition to the above marks, Enterprise Information Technology was given a \$10 million Congressional mark, comprising in part the modernization to DON's target accounting system (Navy ERP) and to the primary civilian time and attendance system (SLDCADA). Congress also marked an Operations and Maintenance, Navy, account (4A1M) by \$15 million; this account contains funding for audit-related business process improvements.

The Marine Corps' goal is to achieve a modified/qualified audit opinion on its financial statements in fiscal year 2020. In order to meet this goal in fiscal year 2020, the Marine Corps identified \$44 million in requirements that are unfunded or underfunded. Funding these requirements would speed the Marine Corps' progress toward a modified/qualified opinion. Half of the amount would provide for government employees and vendor personnel to correct deficiencies and respond to auditors; the other half would improve inventory management systems. DON leaders are analyzing options to mitigate this funding gap.

Appendix B



DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

OCT 22 2019

Daniel Levin
White & Case LLP
701 Thirteenth Street, NW
Washington, DC 20005-3807

Dear Mr. Levin:

I understand that you have been retained by Ms. Laura Cooper, the Department's Deputy Assistant Secretary of Defense for Russia, Ukraine, and Eurasia, as her private counsel for a deposition to be conducted jointly by the House Permanent Select Committee on Intelligence, the Committee on Foreign Affairs, and the Committee on Oversight and Reform, "[p]ursuant to the House of Representatives' impeachment inquiry." The Department's October 15, 2019 letter to the Chairs of the three House Committees [Tab A] expressed its belief that the customary process of oversight and accommodation has historically served the interests of congressional oversight committees and the Department well. The Committees' purported "impeachment inquiry," however, presents at least two issues of great importance.

The first issue is the Committees' continued, blanket refusal to allow Department Counsel to be present at depositions of Department employees. Department Counsel's participation protects against the improper release of privileged or classified information, particularly material covered by the executive privilege which is the President's alone to assert and to waive. Excluding Department Counsel places the witness in the untenable position of having to decide whether to answer the Committees' questions or to assert Executive Branch confidentiality interests without an attorney from the Executive Branch present to advise on those interests. It violates settled practice and may jeopardize future accommodation. Furthermore, the Department of Justice has concluded that "congressional subpoenas that purport to require agency employees to appear without agency counsel are legally invalid and are not subject to civil or criminal enforcement." See *Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees*, 43 Op. O.L.C. (May 23, 2019) [Tab B].

The second issue is the absence of authority for the Committees to conduct an impeachment inquiry. In its October 15, 2019 letter, the Department conveyed concerns about the Committees' lack of authority to initiate an impeachment inquiry given the absence of a delegation of such authority by House Rule or Resolution. This correspondence echoed an October 8, 2019 letter from the White House Counsel [Tab C] expressing the President's view that the inquiry was "contrary to the Constitution of the United States and all past bipartisan precedent" and "violates fundamental fairness and constitutionally mandated due process."

This letter informs you and Ms. Cooper of the Administration-wide direction that Executive Branch personnel "cannot participate in [the impeachment] inquiry under these circumstances" [Tab C]. In the event that the Committees issue a subpoena to compel Ms. Cooper's appearance, you should be aware that the Supreme Court has held, in *United States v.*



Rumely, 345 U.S. 41 (1953), that a person cannot be sanctioned for refusing to comply with a congressional subpoena unauthorized by House Rule or Resolution.

To reiterate, the Department respects the oversight role of Congress and stands ready to work with the Committees should there be an appropriate resolution of outstanding legal issues. Any such resolution would have to consider the constitutional prerogatives and confidentiality interests of the co-equal Executive Branch, *see* Tab D, and ensure fundamental fairness to any Executive Branch employees involved in this process, including Ms. Cooper.

Sincerely,

A handwritten signature in blue ink, appearing to read "Paul L. Math". The signature is fluid and cursive, with the first name "Paul" being the most prominent.

Attachments:
As stated



OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, DC 20301-1300

OCT 15 2019

The Honorable Adam B. Schiff
Chairman
House Permanent Select Committee on Intelligence
Washington, D.C. 20515

The Honorable Eliot L. Engel
Chairman
House Committee on Foreign Affairs
Washington, D.C. 20515

The Honorable Elijah E. Cummings
Chairman
House Committee on Oversight and Reform
Washington, D.C. 20515

Dear Messrs. Chairmen:

I write on behalf of the Department to confirm that we received your letter and subpoena of October 7, 2019, seeking the production of all documents and communications in the custody, possession, or control of the Department of Defense for fourteen categories of information no later than 5:00 pm on October 15, 2019. As your cover letter states, the Permanent Select Committee on Intelligence, in consultation with the Committee on Foreign Affairs and the Committee on Oversight and Reform, issued the subpoena "[p]ursuant to the House of Representatives' impeachment inquiry."

The Department understands the significance of your request for information and has taken steps to identify, preserve, and collect potentially responsive documents. The customary process of oversight and accommodation has historically served the interests of congressional oversight committees and the Department well. The Department is prepared to engage in that process consistent with longstanding practice and provide the responsive information should there be resolution of this matter.

The current subpoena, however, raises a number of legal and practical concerns that must first be addressed. For example, although your letter asserts that the subpoena has issued "[p]ursuant to the House of Representatives' impeachment inquiry," the House has not authorized your committees to conduct any such inquiry. The Supreme Court has long held that the first step in assessing the validity of a subpoena from a congressional committee is determining "whether the committee was authorized" to issue the subpoena, which requires "constru[ing] the scope of the authority which the House of Representatives gave to" the committee. *United States v. Rimeby*, 345 U.S. 41, 42-43 (1953). Here, none of your committees has identified any House rule or House resolution that authorized the committees to begin an

inquiry pursuant to the impeachment power. In marked contrast with historical precedents, the House has not expressly adopted any resolution authorizing an impeachment investigation.

The House also has not delegated such authority to any of your three committees by rule. *See* H. Res. 6, 116th Cong. (2019). To the contrary, House Rule X is currently the only source of your three committees' jurisdiction, and that rule does not provide any of the committees the power to initiate an impeachment inquiry. Indeed, the rule does not mention impeachment at all. *See* H. Rule X, cl. 1(i), (n); cl. 11. Absent a delegation by House Rule or a resolution of the House, none of your committees has been delegated jurisdiction to conduct an investigation pursuant to the impeachment power under Article I, Section 2 of the Constitution.

Even if the inquiry were validly authorized, much of the information sought in the subpoena appears to consist of confidential Executive Branch communications that are potentially protected by executive privilege and would require careful review to ensure that no such information is improperly disclosed. Furthermore, as a practical matter, given the broad scope of your request, the time required to collect the documents, review them for responsiveness and relevant privileges, and produce responsive, non-privileged documents to the committee is not feasible within the mere eight days afforded to the Department to comply with the subpoena.

On a separate note, the Department also objects to your letter's assertion that the Secretary of Defense's "failure or refusal to comply with the subpoena, including at the direction or behest of the President or the White House, shall constitute evidence of obstruction of the House's impeachment inquiry and may be used as an adverse inference against [the Secretary] and the President." Invoking reasonable legal defenses to a subpoena, including invoking legal privileges that are held by the President, in no way manifests evidence of obstruction or otherwise warrants an adverse inference. Indeed, the very idea that reasonably asserting legal rights is itself evidence of wrongdoing turns fundamental notions of fairness on their head and is inconsistent with the rule of law. In fact, the department is diligently preserving and collecting potentially responsive documents.

In light of these concerns, and in view of the President's position as expressed in the White House Counsel's October 8 letter, and without waiving any other objections to the subpoena that the Department may have, the Department is unable to comply with your request for documents at this time. Nevertheless, the Department respects the oversight role of the appropriate committees of Congress, and stands ready to work with your committees should there be an appropriate resolution of this matter. Any such resolution would have to protect the constitutional prerogatives and confidentiality interests of the co-equal Executive Branch and ensure fundamental fairness to any Executive Branch employees involved in this process.

Sincerely,



Robert R. Hood
Assistant Secretary of Defense
for Legislative Affairs

Cc: The Honorable Devin Nunes, Ranking Member
House Permanent Select Committee on Intelligence

The Honorable Michael McCaul, Ranking Member
House Committee on Foreign Affairs

The Honorable Jim Jordan, Ranking Member
House Committee on Oversight and Reform

(Slip Opinion)

**Attempted Exclusion of Agency Counsel from
Congressional Depositions of Agency Employees**

Congress may not constitutionally prohibit agency counsel from accompanying agency employees called to testify about matters that potentially involve information protected by executive privilege. Such a prohibition would impair the President's constitutional authority to control the disclosure of privileged information and to supervise the Executive Branch's communications with Congress.

Congressional subpoenas that purport to require agency employees to appear without agency counsel are legally invalid and are not subject to civil or criminal enforcement.

May 23, 2019

MEMORANDUM FOR THE ATTORNEY GENERAL
AND THE COUNSEL TO THE PRESIDENT

On April 2, 2019, the House Committee on Oversight and Reform (the "Committee") issued subpoenas seeking to compel testimony in two separate investigations from two witnesses: John Gore, Principal Deputy Assistant Attorney General for the Department's Civil Rights Division, and Carl Kline, the former head of the White House Personnel Security Office. The Committee sought to question both witnesses about matters that potentially involved communications that were protected by executive privilege. Although the Committee's Rule 15(e) permitted the witnesses to be accompanied at the depositions by private counsel, who would owe duties to the witnesses themselves, the rule purported to bar the presence of agency counsel, who would represent the interests of the Executive Branch.¹ Despite some efforts at accommodation on both sides, the Committee continued to insist that agency counsel could not attend the witnesses' depositions. In response to your requests, we advised that a congressional committee may not constitutionally compel an executive branch witness to testify about potentially privileged matters while depriving the witness of the assistance of agency counsel. Based upon our advice, Mr. Gore and Mr. Kline were directed not to appear at their depo-

¹ Tracking the text of the Committee's rule, which excludes "counsel . . . for agencies," we speak in this opinion of "agency counsel," but our analysis applies equally to all counsel representing the interests of the Executive Branch, no matter whether the witness works for an "agency," as defined by statute. See, e.g., *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (holding that the Office of the President is not an "agency" for purposes of the Freedom of Information Act).

sitions without agency counsel. This memorandum explains the basis for our conclusions.

When this issue last arose, during the Obama Administration, this Office recognized “constitutional concerns” with the exclusion of agency counsel, because such a rule “could potentially undermine the Executive Branch’s ability to protect its confidentiality interests in the course of the constitutionally mandated accommodation process, as well as the President’s constitutional authority to consider and assert executive privilege where appropriate.” *Authority of the Department of Health and Human Services to Pay for Private Counsel to Represent an Employee Before Congressional Committees*, 41 Op. O.L.C. ___, *5 n.6 (Jan. 18, 2017) (“*Authority to Pay for Private Counsel*”). This Office, however, was asked to address only the retention of private counsel for a deposition and thus did not evaluate these constitutional concerns.

Faced squarely with the constitutional question here, we concluded that Congress may not compel an executive branch witness to appear without agency counsel and thereby compromise the President’s constitutional authority to control the disclosure of privileged information and to supervise the Executive Branch’s communications with congressional entities. The “Executive Branch’s longstanding general practice has been for agency attorneys to accompany” agency employees who are questioned by congressional committees conducting oversight inquiries. *Id.* at *3. When an agency employee is asked to testify about matters within the scope of his official duties, he is necessarily asked to provide agency information. The agency must have the ability to protect relevant privileges and to ensure that any information provided on its behalf is accurate, complete, and properly limited in scope. Although private counsel may indirectly assist the employee in protecting privileged information, counsel’s obligation is to protect the personal interests of the employee, not the interests of the Executive Branch. The Committee, therefore, could not constitutionally bar agency counsel from accompanying agency employees called to testify on matters within the scope of their official duties. In light of this constitutional infirmity, we advised that the Committee subpoenas purporting to require the witnesses to appear without agency counsel were legally invalid and not subject to civil or criminal enforcement.

I.

Congress generally obtains the information necessary to perform its legislative functions by making requests and issuing subpoenas for docu-

Attempted Exclusion of Agency Counsel from Congressional Depositions

ments and testimony through its organized committees. *See, e.g., Barenblatt v. United States*, 360 U.S. 109, 116 (1959); *Watkins v. United States*, 354 U.S. 178, 187–88 (1957). Committees typically seek the information they need from the Executive Branch first by requesting documents and sometimes voluntary interviews. Following such requests, a committee may proceed with a hearing at which Members of Congress ask questions of the witness, and such a hearing is usually open to the public. When executive branch employees appear—either at a voluntary interview or a hearing—agency counsel or another agency representative traditionally accompany them. *See, e.g., Representation of White House Employees*, 4B Op. O.L.C. 749, 754 (1980).

Congressional committees have only rarely attempted to collect information by compelling depositions conducted by committee staff. *See* Jay R. Shampansky, Cong. Research Serv., 95-949 A, *Staff Depositions in Congressional Investigations* 1–2 & n.3 (updated Dec. 3, 1999) (“*Staff Depositions*”). Historically, these efforts were confined to specific investigations that were limited in scope. *See, e.g., Inquiry into the Matter of Billy Carter and Libya: Hearings Before the Subcomm. to Investigate the Activities of Individuals Representing the Interests of Foreign Governments of the S. Comm. on the Judiciary*, 96th Cong. 1708–10, 1718–27, 1742 (1980) (discussing issues related to Senate resolution authorizing depositions by staff members). Recently, however, committees have made increasing use of depositions, and the House of Representatives has adopted an order in the current Congress that permits depositions to go forward without the presence of any Member of Congress. *See* H. Res. 6, 116th Cong. § 103(a)(1) (2019).

Although executive branch witnesses have sometimes appeared and testified at staff depositions, the Executive Branch has frequently objected to the taking of compelled testimony by congressional staff members. These objections have questioned whether committees may properly authorize staff to depose senior executive officials, whether Members of Congress must be present during a committee deposition, and whether the procedures for such depositions adequately protect the President’s ability to protect privileged executive branch information. *See, e.g., H. Comm. on International Relations*, 104th Cong., Final Report of the Select Subcommittee to Investigate the United States Role in Iranian Arms Transfers to Croatia and Bosnia 54–56 (Comm. Print 1997) (summarizing the White House’s position that its officials would not “be allowed to sit for staff depositions, because to do so would intrude upon the President’s ‘deliberative process’”); *see also* Letter for Henry Waxman, Chairman, Commit-

tee on Oversight and Government Reform, U.S. House of Representatives, from Dinah Bear, General Counsel, Council on Environmental Quality at 1 (Mar. 12, 2007) (“Allowing Committee staff to depose Executive Branch representatives on the record would be an extraordinary formalization of the congressional oversight process and would give unelected staff powers and authorities historically exercised only by Members of Congress participating in a public hearing.”); Letter for Henry A. Waxman, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives, from Stephanie Daigle, Associate Administrator, U.S. Environmental Protection Agency at 2 (Apr. 12, 2007) (“[T]he use of formal interviews by Committee counsel, transcribed by a court reporter, rather than the customary informal briefings, have the potential to be overly adversarial and to intimidate Agency staff.”). No court has addressed whether Congress may use its oversight authority to compel witnesses to appear at staff depositions conducted outside the presence of any Member of Congress. Courts have recognized, however, that Congress’s ability to “delegate the exercise of the subpoena power is not lightly to be inferred” because it is “capable of oppressive use.” *Shelton v. United States*, 327 F.2d 601, 606 n.14 (D.C. Cir. 1963); cf. *United States v. Bryan*, 339 U.S. 323, 332 (1950) (concluding, in the context of a criminal contempt-of-Congress citation, that “respondent could rightfully have demanded attendance of a quorum of the Committee and declined to testify or to produce documents so long as a quorum was not present”).

The question we address here arose out of the Committee’s effort to compel two executive branch witnesses, Mr. Gore and Mr. Kline, to appear at depositions subject to the restrictions of Committee Rule 15(e). In relevant part, Rule 15(e) provides as follows:

No one may be present at depositions except members, committee staff designated by the Chair of the Committee or the Ranking Minority Member of the Committee, an official reporter, the witness, and the witness’s counsel. Observers or counsel for other persons, or for agencies under investigation, may not attend.

H. Comm. on Oversight & Reform, 116th Cong., Rule 15(e). In both instances, the Committee sought executive branch information, including matters that implicated executive privilege, but it asserted the authority to compel the witness to answer questions without the assistance of agency counsel. We summarize here the efforts at accommodation made by the Executive Branch and the Committee in connection with the disputes.

*Attempted Exclusion of Agency Counsel from Congressional Depositions***A.**

The Committee subpoenaed Mr. Gore to testify about privileged matters concerning the Secretary of Commerce's decision to include a citizenship question on the 2020 United States Census. On March 7, 2019, Mr. Gore voluntarily appeared before the Committee, with the assistance of Department counsel, for a transcribed interview on the same topic. Mr. Gore answered all of the Committee's questions, except for those that were determined by Department counsel to concern confidential deliberations within the Executive Branch. The Department's interest in protecting this subject matter was particularly acute because the Secretary of Commerce's decision was subject to active litigation, and those challenges were pending in the Supreme Court. *See Dep't of Commerce v. New York*, No. 18-966 (U.S.) (argued Apr. 23, 2019). Some of the information sought by the Committee had previously been held by a federal district court to be protected by the deliberative process privilege, as well as other privileges, in civil discovery.

On April 2, the Committee served Mr. Gore with a deposition subpoena in an effort to compel responses to the questions that he did not answer during his March 7 interview. Committee staff advised that Committee Rule 15(e) required the exclusion of the agency counsel who had previously represented Mr. Gore. On April 9, the Department explained that the Committee's effort to bar Department counsel would unconstitutionally infringe upon the prerogatives of the Executive Branch. *See* Letter for Elijah E. Cummings, Chairman, Committee on Oversight and Reform, U.S. House of Representatives, from Stephen E. Boyd, Assistant Attorney General, Office of Legislative Affairs at 2–3 (Apr. 9, 2019). Because the Committee sought information from Mr. Gore relating to his official duties, the Department explained that agency counsel must be present to ensure appropriate limits to Mr. Gore's questioning, to ensure the accuracy and completeness of information provided on behalf of the Department, and to ensure that a Department official was not pressed into revealing privileged information. *Id.* The Attorney General determined that Mr. Gore would not appear at the deposition without the assistance of Department counsel. *Id.* at 3.

On April 10, 2019, the Committee responded by disputing the Department's constitutional view, contending that Committee Rule 15(e) had been in place for more than a decade and reflected an appropriate exercise of Congress's authority to determine the rules of its own proceedings. *See* Letter for William P. Barr, Attorney General, from Elijah E. Cummings,

Chairman, Committee on Oversight and Reform, U.S. House of Representatives at 2–3 (Apr. 10, 2019) (“April 10 Cummings Letter”) (citing U.S. Const. art. I, § 5, cl. 2). The Committee advised that Mr. Gore could be accompanied by his private counsel, *id.* at 2, and offered to allow Department counsel to wait in a separate room during the deposition, *id.* at 3. The Committee stated that, if necessary, Mr. Gore could request a break during the deposition to consult with Department counsel. *Id.*

On April 24, 2019, the Department reiterated its constitutional objection and explained that the Committee’s proposed accommodation would not satisfy the Department’s need to have agency counsel assist Mr. Gore at the deposition. *See* Letter for Elijah E. Cummings, Chairman, Committee on Oversight and Reform, U.S. House of Representatives, from Stephen E. Boyd, Assistant Attorney General, Office of Legislative Affairs at 1 (Apr. 24, 2019). Mr. Gore therefore did not appear on the noticed deposition date.

B.

The Committee subpoenaed Mr. Kline to testify concerning the activities of the White House Personnel Security Office in adjudicating security clearances during his time as head of the Office. On March 20, 2019, the current White House Chief Security Officer, with representation by the Office of Counsel to the President (“Counsel’s Office”), briefed the Committee’s staff on the White House security clearance process for nearly 90 minutes and answered questions from a Member of Congress and staff. On April 1, 2019, the White House offered to have Mr. Kline appear voluntarily before the Committee for a transcribed interview.

Instead, the Committee subpoenaed Mr. Kline on April 2, 2019. The Committee indicated that Committee Rule 15(e) would bar any representative from the Counsel’s Office from attending Mr. Kline’s deposition. On April 18, 2019, the Counsel’s Office advised the Committee that a representative from that office must attend to represent the White House’s interests in any deposition of Mr. Kline. *See* Letter for Elijah E. Cummings, Chairman, Committee on Oversight and Reform, U.S. House of Representatives, from Michael M. Purpura, Deputy Counsel to the President at 2 (Apr. 18, 2019). The Counsel’s Office relied on the views concerning the exclusion of agency counsel that were articulated by the Department in its April 9, 2019 letter to the Committee. *Id.* The Counsel’s Office explained that the President has the authority to raise privilege

Attempted Exclusion of Agency Counsel from Congressional Depositions

concerns at any point during a deposition, and that this could occur only if an attorney from the Counsel's Office accompanied Mr. Kline. *Id.*

On April 22, 2019, the Committee responded, stating, as it had in correspondence concerning Mr. Gore, that its rules were justified based upon Congress's constitutional authority to determine the rules of its proceedings. *See* U.S. Const. art. I, § 5, cl. 2. The Committee asserted that Committee Rule 15(e) had been enforced under multiple chairmen. *See* Letter for Pat Cipollone, Counsel to the President, from Elijah E. Cummings, Chairman, Committee on Oversight and Reform, U.S. House of Representatives at 3 (Apr. 22, 2019) ("April 22 Cummings Letter"). The Committee advised that Mr. Kline could be accompanied by his private counsel, and, as with Mr. Gore, offered to permit attorneys from the Counsel's Office to wait outside the deposition room in case Mr. Kline requested to consult with them during the deposition. *Id.*

In an April 22, 2019 reply, the Counsel's Office explained that, in light of the Committee's decision to apply Rule 15(e), the Acting Chief of Staff to the President had directed Mr. Kline not to attend the deposition for the reasons stated in the April 18, 2019 letter. *See* Letter for Elijah Cummings, Chairman, Committee on Oversight and Reform, U.S. House of Representatives, from Michael M. Purpura, Deputy Counsel to the President at 1 (Apr. 22, 2019). The Committee and the Counsel's Office subsequently agreed to a voluntary transcribed interview of Mr. Kline with the participation of the Counsel's Office. Mr. Kline was interviewed on May 1, 2019. He answered some of the Committee's questions, but at the direction of the representative from the Counsel's Office, he did not address particular matters implicating privileged information.

II.

Under our constitutional separation of powers, both Congress and the Executive Branch must respect the legitimate prerogatives of the other branch. *See, e.g., INS v. Chadha*, 462 U.S. 919, 951 (1983) ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."); *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 127, 130–31 (D.C. Cir. 1977) ("[E]ach branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation."). Here, the Committee sought to apply Committee Rule 15(e) to compel executive branch officials to testify about poten-

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tially privileged matters while barring agency counsel from the room. We concluded that the Committee could not constitutionally compel such an appearance for two reasons. First, the exclusion of agency counsel impairs the President's ability to exercise his constitutional authority to control privileged information of the Executive Branch. Second, the exclusion undermines the President's ability to exercise his constitutional authority to supervise the Executive Branch's interactions with Congress.

A.

Committee Rule 15(e) unconstitutionally interferes with the President's right to control the disclosure of privileged information. Both the Supreme Court and this Office have long recognized the President's "constitutional authority to protect national security and other privileged information" in the exercise of the President's Article II powers. *Authority of Agency Officials to Prohibit Employees from Providing Information to Congress*, 28 Op. O.L.C. 79, 80 (2004) ("*Authority of Agency Officials*"); see *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (the President's "authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President [as Commander in Chief] and exists quite apart from any explicit congressional grant"); *United States v. Nixon*, 418 U.S. 683, 705–06 (1974) ("Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings."). That authority is "not limited to classified information, but extend[s] to *all* . . . information protected by [executive] privilege," including presidential and attorney-client communications, attorney work product, deliberative process information, law enforcement files, and national security and foreign affairs information. *Authority of Agency Officials*, 28 Op. O.L.C. at 81 (emphasis added).² Protection of such information is "fundamental to the operation of Government and inextri-

² Although some of these components, such as deliberative process information, parallel aspects of common law privileges, each falls within the doctrine of executive privilege. See, e.g., *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 101–102 n.34 (1998); *Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 2, 3 (1996) (opinion of Attorney General Janet Reno) (observing that "[e]xecutive privilege applies" to certain White House documents "because of their deliberative nature, and because they fall within the scope of the attorney-client privilege and the work-product doctrine").

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cably rooted in the separation of powers under the Constitution.” *Nixon*, 418 U.S. at 708. It ensures that “high Government officials and those who advise and assist them in the performance of their manifold duties” can engage in full and candid decisionmaking, *id.* at 705, 708, and it is necessary to protect sensitive security and other information that could be used to the public’s detriment.

The President may protect such privileged information from disclosure in the Executive’s responses to congressional oversight proceedings. See *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974). As we have explained, “[i]n the congressional oversight context, as in all others, the decision whether and under what circumstances to disclose classified information” or other forms of privileged information “must be made by someone who is acting on the official authority of the President and who is ultimately responsible to the President.” *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 100 (1998) (“*Whistleblower Protections*”). Thus, “Congress may not vest lower-ranking personnel in the Executive branch with a “right” to furnish national security or other privileged information to a member of Congress without receiving official authorization to do so.” *Authority of Agency Officials*, 28 Op. O.L.C. at 80 (quoting March 9, 1998 Statement of Administration Policy on S. 1668, 105th Cong.); see *Constitutionality of the Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007*, 32 Op. O.L.C. 27, 43 (2008) (“*Direct Reporting Requirement*”) (“We have long concluded that statutory provisions that purport to authorize Executive Branch officers to communicate directly with Congress without appropriate supervision . . . infringe upon the President’s constitutional authority to protect against the unauthorized disclosure of constitutionally privileged information.”). Because “statutes may not override the constitutional doctrine of executive privilege,” they may not “prohibit the supervision of the disclosure of any privileged information, be it classified, deliberative process or other privileged material.” *Authority of Agency Officials*, 28 Op. O.L.C. at 81. It necessarily follows that congressional committees’ rules of procedure may not be used to override privilege or the Executive’s ability to supervise the disclosure of privileged information.

The foregoing principles governed our analysis here. In order to control the disclosure of privileged information, the President must have the discretion to designate a representative of the government to protect this interest at congressional depositions of agency employees. When employ-

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ees testify about information created or received during their employment, they are disclosing the Executive Branch's information. The same thing is true for former employees.³ Yet, in many cases, agency employees will have only limited experience with executive privilege and may not have the necessary legal expertise to determine whether a question implicates a protected privilege. Moreover, the employees' personal interests in avoiding a conflict with the committee may not track the longer-term interests of the Executive Branch. Without an agency representative at the deposition to evaluate which questions implicate executive privilege, an employee may be pressed—wittingly or unwittingly—into revealing protected information such as internal deliberations, attorney-client communications, or national security information. *See Nixon*, 418 U.S. at 705–06; *Senate Select Comm.*, 498 F.2d at 731. Or the agency employee may be pressed into responding to inquiries that are beyond the scope of Congress's oversight authority. *See Barenblatt*, 360 U.S. at 111–12 (“Congress may only investigate into those areas in which it may potentially legislate or appropriate [and] cannot inquire into matters which are within the exclusive province of one of the other branches of the Government.”).

Even if the President has not yet asserted a particular privilege, excluding agency counsel would diminish the President's ability to decide whether a privilege should be asserted. The Executive Branch cannot foresee every question or topic that may arise during a deposition, but if questions seeking privileged information are asked, agency counsel, if present, can ensure that the employee does not impermissibly disclose privileged information. *See Memorandum for Rudolph W. Giuliani, Associate Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, Re: Congressional Demand for Deposition of Counsel to the President Fred F. Fielding* at 2 (July 23, 1982) (“A witness before a Congressional committee may be asked—under threat of contempt—a wide range of unanticipated questions about highly sensitive deliberations and thought processes. He therefore may be unable to confine his remarks only to those which do not impair the deliberative process.”). The President, through his subordinates, must be able to intervene *before* that information is disclosed, lest the effectiveness of the

³ *See, e.g., Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys*, 31 Op. O.L.C. 1 (2007) (opinion of Acting Attorney General Paul D. Clement) (concluding that the President may assert executive privilege with respect to testimony by two former White House officials).

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privilege be diminished. *See* Memorandum for Peter J. Wallison, Counsel to the President, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel at 2 (Sept. 8, 1986) (agency counsel attending congressional interviews can advise “about the sensitivity of particular information and, if need be, to terminate the interview to avoid disclosure of privileged information”). Accordingly, Committee Rule 15(e) unduly interferes with the President’s supervision of the disclosure of privileged information by barring agency counsel from the deposition of an agency employee concerning official activities.

These concerns were readily apparent in connection with the subpoenas of Mr. Gore and Mr. Kline. In both instances, the Committee sought information about communications among senior executive branch officials regarding official decisions. There was no doubt that the depositions would implicate matters in which the Executive Branch had constitutionally based confidentiality interests. Indeed, in Mr. Gore’s March 7 interview, the Committee repeatedly asked him questions concerning potentially privileged matters—some of which a federal court had already held were protected by privilege in civil discovery. *See New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502, 548 n.19 (S.D.N.Y. 2019) (summarizing discovery orders). And the Committee then noticed the deposition precisely to compel answers to such questions. *See* April 10 Cummings Letter at 3 (“The Department is well aware of the scope of the deposition, based on the issues raised at Mr. Gore’s March 7 interview and the list of 18 [previously unanswered] questions provided by Committee staff.”). In Mr. Kline’s May 1 interview, the witness was similarly instructed not to answer a number of questions implicating the Executive Branch’s confidentiality interests. Prohibiting agency counsel from attending the depositions would have substantially impaired the Executive Branch’s ability to continue to protect such privileged information and to make similar confidentiality determinations in response to new questions. The Committee’s demands that the witnesses address questions already deemed unanswerable by agency counsel indicated that the exclusion of agency counsel would have been intended, in no small part, to circumvent executive branch mechanisms for preserving confidentiality.

B.

Committee Rule 15(e) also interferes with the President’s authority to supervise the Executive Branch’s interactions with Congress. The Constitution vests “[t]he executive Power” in the President, U.S. Const.

art. II, § 1, cl. 1, and requires him to “take Care that the Laws be faithfully executed,” *id.* § 3. This power and responsibility grant the President the “constitutional authority to supervise and control the activity of subordinate officials within the executive branch.” *The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 132 (1993) (citing *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992)); *see also* *Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress*, 6 Op. O.L.C. 632, 637 (1982) (“*Constitutionality of Reporting Statute*”). As we have previously explained, “the right of the President to protect his control over the Executive Branch [is] based on the fundamental principle that the President’s relationship with his subordinates must be free from certain types of interference from the coordinate branches of government in order to permit the President effectively to carry out his constitutionally assigned responsibilities.” *Authority of HUD’s Chief Financial Officer to Submit Final Reports on Violations of Appropriations Laws*, 28 Op. O.L.C. 248, 252 (2004) (“*Authority of HUD’s CFO*”) (quoting *Constitutionality of Reporting Statute*, 6 Op. O.L.C. at 638–39).

The President’s authority to supervise his subordinates in the Executive Branch includes the power to control communications with, and information provided to, Congress on behalf of the Executive Branch. *See Direct Reporting Requirement*, 32 Op. O.L.C. at 31, 39; *Authority of Agency Officials*, 28 Op. O.L.C. at 80–81; *cf. United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467–68 (1951) (upholding “a refusal by a subordinate of the Department of Justice to submit papers to the court in response to its subpoena *duces tecum* on the ground that the subordinate [wa]s prohibited from making such submission by” a valid order of the Attorney General). At a minimum, this responsibility includes the power to know about, and assert authority over, the disclosures his subordinates make to Congress regarding their official duties.

Congressional efforts to prevent the President from supervising the Executive Branch’s interactions with Congress interfere with the President’s ability to perform his constitutional responsibilities. We have long recognized that statutes, “if construed or enforced to permit Executive Branch officers to communicate directly with Congress without appropriate supervision by the President or his subordinates, would violate the constitutional separation of powers and, specifically, the President’s Article II authority to supervise Executive Branch personnel.” *Direct Reporting Requirement*, 32 Op. O.L.C. at 31–32, 39 (citing *Authority of the Special Counsel of the Merit Systems Protection Board to Litigate and Submit Legislation to Congress*, 8 Op. O.L.C. 30, 31 (1984); *Authority of HUD’s*

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CFO, 28 Op. O.L.C. at 252–53; *Authority of Agency Officials*, 28 Op. O.L.C. at 80–82). It is on this basis that the Department has consistently resisted congressional attempts to require, by statute, that executive branch officials submit information to Congress in the form of reports without prior opportunity for review by their superiors. *See, e.g., id.* at 34–39 (“[S]tatutory reporting requirements cannot constitutionally be applied to interfere with presidential supervision and control of the communications that Executive Branch officers . . . send to Congress.”); *Authority of HUD’s CFO*, 28 Op. O.L.C. at 252–53; *Access to Classified Information*, 20 Op. O.L.C. 402, 403–05 (1996); *Inspector General Legislation*, 1 Op. O.L.C. 16, 18 (1977).

Information sought in congressional depositions is no different. An agency employee testifying about official activities may be asked to disclose confidential information, yet the employee may lack the expertise necessary to protect privileged information on his own. Nor will an employee’s private counsel always adequately protect such information. Private counsel may not have the expertise to recognize all situations raising issues of executive privilege, and in any event, recognizing such situations and protecting privileged information is not private counsel’s job. Private counsel’s obligation is to protect the personal interests of the employee, not the interests of the Executive Branch. An agency representative, by contrast, is charged with protecting the Executive Branch’s interests during the deposition—ensuring that the information the employee provides to Congress is accurate, complete, and within the proper scope, and that privileged information is not disclosed. The Committee’s rule prohibiting agency counsel from accompanying an agency employee to a deposition would effectively, and unconstitutionally, require that employee to report directly to Congress on behalf of the Executive Branch, without an adequate opportunity for review by an authorized representative of the Executive Branch.

C.

Having concluded that the Committee could not constitutionally bar agency counsel from accompanying Mr. Gore or Mr. Kline to depositions, we further advised that the subpoenas that required them to appear without agency counsel, over the Executive Branch’s objections, exceeded the Committee’s lawful authority and therefore lacked legal effect. The Committee could not constitutionally compel Mr. Gore or Mr. Kline to appear under such circumstances, and thus the subpoenas could not be

enforced by civil or criminal means or through any inherent contempt power of Congress.

This conclusion is consistent with our treatment of referrals to the Department of contempt-of-Congress citations for criminal prosecution under 2 U.S.C. §§ 192 and 194. We have opined that “the criminal contempt of Congress statute does not apply to the President or presidential subordinates who assert executive privilege.” *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350, 356 (1995); see also *Whether the Department of Justice May Prosecute White House Officials for Contempt of Congress*, 32 Op. O.L.C. 65, 65–69 (2008) (concluding that the Department cannot take “prosecutorial action, with respect to current or former White House officials who . . . declined to appear to testify, in response to subpoenas from a congressional committee, based on the President’s assertion of executive privilege”); *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 101–102 (1984) (“*Prosecution for Contempt*”) (finding that “the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official” who followed presidential instructions to “assert[] the President’s claim of executive privilege”). Nor may Congress “utilize its inherent ‘civil’ contempt powers to arrest, bring to trial, and punish an executive official who assert[s] a Presidential claim of executive privilege.” *Prosecution for Contempt*, 8 Op. O.L.C. at 140 n.42. The fundamental constitutional principles underlying executive privilege would be vitiated if any executive branch employee following a direction to invoke the privilege could be prosecuted for doing so.

Similarly, we believe it would be unconstitutional to enforce a subpoena against an agency employee who declined to appear before Congress, at the agency’s direction, because the committee would not permit an agency representative to accompany him. As discussed above, having an agency representative present at a deposition of an agency employee may be necessary for the President to exercise his authority to supervise the disclosure of privileged information, as well as to ensure that the testimony provided is accurate, complete, and properly limited in scope. Therefore, agency employees, like Mr. Gore and Mr. Kline, who follow an agency instruction not to appear without the presence of an agency representative are acting lawfully to protect the constitutional interests of the Executive Branch.

III.

In reaching this conclusion, we considered the contrary arguments advanced by the Committee in its April 10 and April 22 letters. The Committee's principal argument was that prohibiting agency counsel from attending depositions of agency employees poses no constitutional concern because Congress has the authority to "determine the Rules of its Proceedings," U.S. Const. art. I, § 5, cl. 2; *see* April 10 Cummings Letter at 2–3; April 22 Cummings Letter at 3. But congressional rulemaking authority "only empowers Congress to bind itself." *Chadha*, 462 U.S. at 955 n.21 (positing that the Constitution's provision of several powers like procedural rulemaking where each House of Congress can act alone reveals "the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances"). Such rulemaking authority does not grant Congress the power to compel testimony from agency officials under circumstances that interfere with the legitimate prerogatives of the Executive Branch.

Congress's authority to make rules governing its own procedures does not mean that the constitutional authorities of a co-equal branch of government are checked at the door. *See Barenblatt*, 360 U.S. at 112 (noting that when engaging in oversight, Congress "must exercise its powers subject to the limitations placed by the Constitution on governmental action"). To the contrary, Congress "may not by its rules ignore constitutional restraints." *United States v. Ballin*, 144 U.S. 1, 5 (1892). Congress may not, by statute, override the President's constitutional authority to control the disclosure of privileged information and to supervise executive branch employees. *See Direct Reporting Requirement*, 32 Op. O.L.C. at 43–44; *Whistleblower Protections*, 22 Op. O.L.C. at 100. It necessarily follows that a committee may not accomplish the same result by adopting a rule governing its own proceedings.

The Committee also justified Committee Rule 15(e) on the ground that it has been in place for a decade. *See* April 10 Cummings Letter at 3; April 22 Cummings Letter at 3. But congressional committee use of depositions is a relatively recent innovation, and historically such "[d]epositions have been used in a relatively small number of major congressional investigations." *Staff Depositions* at 1. Moreover, committees proposing the use of depositions have previously faced objections that they may improperly "circumvent the traditional committee process" of hearings and staff interviews and may "compromise the rights of

deponents.” *Id.* at 2; *see supra* pp. 3–4. Accordingly, the Committee’s limited previous use of depositions from which agency counsel were excluded does not reflect a “long settled and established practice,” much less one that has been met by acquiescence from the Executive Branch. *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (internal quotation marks and brackets omitted).

In addition, the Committee claimed that Rule 15(e) serves the purpose of “ensur[ing] that the Committee is able to depose witnesses in furtherance of its investigations without having in the room representatives of the agency under investigation.” April 10 Cummings Letter at 2; April 22 Cummings Letter at 3. But that assertion does no more than restate the rule’s effect, without advancing any legitimate rationale for excluding the agency’s representatives, much less one sufficient to alter the constitutional calculus. The Committee here did not seek information concerning the private affairs of agency employees or articulate any particularized interest in excluding agency counsel. In fact, agency counsel appeared at the staff interviews of both Mr. Gore and Mr. Kline. In view of the President’s clear and well-established interests in protecting privileged information and supervising the Executive Branch’s interactions with Congress, the Committee offered no countervailing explanation for why it would be necessary to exclude any agency representative from these two depositions.

Indeed, the Committee has not explained why, as a general matter, the House needs to exclude agency counsel from depositions of agency officials. Agency representatives routinely accompany and support agency employees during congressional hearings and staff interviews. *See Authority to Pay for Private Counsel*, 41 Op. O.L.C. at *3 (“When congressional committees seek to question employees of an Executive Branch agency in the course of a congressional oversight inquiry of the agency, the Executive Branch’s longstanding general practice has been for agency attorneys to accompany the witnesses.”); *Reimbursing Justice Department Employees for Fees Incurred in Using Private Counsel Representation at Congressional Depositions*, 14 Op. O.L.C. 132, 133 (1990) (“[W]hen Department employees are asked in their official capacities to give oral testimony for a congressional investigation (whether at a hearing, interview or deposition), a Department counsel or other representative will normally accompany the witness.”); *Representation of White House Employees*, 4B Op. O.L.C. at 754 (“[L]egitimate governmental interests” are “[o]rdinarily . . . monitored by agency counsel who accompany executive branch employees called to testify before congressional commit-

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tees.”). There is no basis for believing that this routine practice diminishes the Committee’s ability to acquire any information it may legitimately seek.⁴

In defending the exclusion of agency counsel, the Committee pointed out that the witnesses may bring their private counsel to the depositions. April 10 Cummings Letter at 2; April 22 Cummings Letter at 3. But allowing agency employees to be accompanied by private counsel is no substitute for the presence of agency counsel. In addition to imposing unnecessary burdens on agency employees by requiring the retention of private counsel, the practice does not adequately protect the agency’s interests. As explained above, the President must be able to supervise who discloses executive branch information and under what conditions. An employee’s private counsel, however, represents the interests of the employee, not the agency, and “the attorney owes a fiduciary duty and a duty of confidentiality to the employee, not the agency.” *Authority to Pay for Private Counsel*, 41 Op. O.L.C. at *5; see also *Representation of White House Employees*, 4B Op. O.L.C. at 754 (“[A]ny counsel directed to represent governmental interests must be controlled by the Government, and private counsel retained by employees to represent personal interests should not be permitted to assert governmental interests or privileges.”). Even if the private counsel may sometimes assist the agency employee in protecting agency information, the Committee cannot require the Executive Branch to rely upon the private counsel to make such judgments. Private counsel is not likely to know as well as agency counsel when a line of questioning, especially an unanticipated one, might intrude upon the Executive Branch’s constitutionally protected interests.

Finally, we concluded that the Committee’s proposed accommodation—to make a separate room available for agency counsel at the two depositions—was insufficient to remedy these constitutional concerns. See April 10 Cummings Letter at 3; April 22 Cummings Letter at 3. That

⁴ In a similar vein, agency employees are routinely represented by agency counsel in connection with depositions in civil litigation and, where appropriate, agency counsel will instruct agency employees not to answer questions that implicate privilege. Further, as the Supreme Court recognized in *Touhy*, 340 U.S. 462, the head of an agency may properly bar subordinate officials from disclosing privileged agency information, and departments have accordingly enacted so-called *Touhy* regulations to ensure that privileged information is appropriately protected by agency officials in civil discovery. See, e.g., 28 C.F.R. §§ 16.21–16.29 (Department of Justice *Touhy* regulations). Just as agency counsel may properly participate in ensuring appropriate disclosures in depositions in civil litigation, agency counsel may properly do so in congressional depositions.

practice would put the onus on the agency employee and his private counsel to divine whether the agency would have privilege concerns about each question, and then “request a break during the deposition to consult with” agency counsel. April 10 Cummings Letter at 3; *see* April 22 Cummings Letter at 3. Because this practice would leave such judgments entirely up to the employee and his private counsel, as well as depend on the discretion of the Committee’s staff to grant the requested break, it would not adequately ensure that the agency could make the necessary decisions to protect privileged information during the course of the deposition. It also would prevent the Executive Branch from ensuring that the testimony provided was accurate, complete, and properly limited in scope.

We recognize that there is at least one circumstance—an appearance before a grand jury—where a witness’s attorney must remain in a separate room during questioning. *See* Fed. R. Crim. P. 6(d)(1); *United States v. Mandujano*, 425 U.S. 564, 581 (1976). However, grand juries can hardly provide a model for congressional depositions, because they operate under conditions of extreme secrecy, and there is a long-established practice of excluding *all* attorneys for witnesses before the grand jury. *See, e.g., In re Black*, 47 F.2d 542, 543 (2d Cir. 1931); *Latham v. United States*, 226 F. 420, 422 (5th Cir. 1915). Committee Rule 15(e) not only lacks the historical pedigree of grand-jury proceedings, but the information collected in congressional depositions is not inherently confidential. Indeed, the Committee does not even have a categorical objection to allowing witnesses to be accompanied by counsel. Rather, the rule permits witnesses to be accompanied by counsel of their choice, provided that counsel does not represent the agency as well. This targeted exclusion underscores the separation of powers problems.⁵

⁵ Indeed, the federal courts have recognized that “[t]here is a clear difference between Congress’s legislative tasks and the responsibility of a grand jury.” *Senate Select Comm.*, 498 F.2d at 732; *see also Nixon*, 418 U.S. at 712 n.19 (distinguishing the “constitutional need for relevant evidence in criminal trials,” on the one hand, from “the need for relevant evidence in civil litigation” and “congressional demands for information,” on the other). Congressional depositions appear more akin to depositions in civil litigation, rather than grand juries, and in civil litigation it is well established that attorneys “representing the deponent” and attorneys representing “any party to the litigation” have “the right to be present” at a deposition. Jay E. Grenig & Jeffrey S. Kinsler, *Handbook of Federal Civil Discovery and Disclosure* § 5:29 (4th ed. 2018).

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IV.

For the foregoing reasons, we concluded that the Committee's prohibition on agency counsel's attendance at depositions impermissibly infringed on the President's constitutional authority to protect information within the scope of executive privilege and to supervise the Executive Branch's communications with Congress. Although the Executive Branch must facilitate legitimate congressional oversight, the constitutionally mandated accommodation process runs both ways. *See Am. Tel. & Tel. Co.*, 567 F.2d at 127, 130–31. Just as the Executive must provide Congress with information necessary to perform its legislative functions, Congress through its oversight processes may not override the Executive Branch's constitutional prerogatives. *See Barenblatt*, 360 U.S. at 112. Here, the constitutional balance requires that agency representatives be permitted to assist agency officials in connection with providing deposition testimony, including on matters that implicate privileged information. Thus, we advised that the subpoenas purporting to compel Mr. Gore and Mr. Kline to appear without agency counsel exceeded the Committee's authority and were without legal effect.

STEVEN A. ENGEL
Assistant Attorney General
Office of Legal Counsel

THE WHITE HOUSE
WASHINGTON

October 8, 2019

The Honorable Nancy Pelosi
Speaker
House of Representatives
Washington, D.C. 20515

The Honorable Eliot L. Engel
Chairman
House Foreign Affairs Committee
Washington, D.C. 20515

The Honorable Adam B. Schiff
Chairman
House Permanent Select Committee on
Intelligence
Washington, D.C. 20515

The Honorable Elijah E. Cummings
Chairman
House Committee on Oversight and Reform
Washington, D.C. 20515

Dear Madam Speaker and Messrs. Chairmen:

I write on behalf of President Donald J. Trump in response to your numerous, legally unsupported demands made as part of what you have labeled—contrary to the Constitution of the United States and all past bipartisan precedent—as an “impeachment inquiry.” As you know, you have designed and implemented your inquiry in a manner that violates fundamental fairness and constitutionally mandated due process.

For example, you have denied the President the right to cross-examine witnesses, to call witnesses, to receive transcripts of testimony, to have access to evidence, to have counsel present, and many other basic rights guaranteed to all Americans. You have conducted your proceedings in secret. You have violated civil liberties and the separation of powers by threatening Executive Branch officials, claiming that you will seek to punish those who exercise fundamental constitutional rights and prerogatives. All of this violates the Constitution, the rule of law, and *every past precedent*. Never before in our history has the House of Representatives—under the control of either political party—taken the American people down the dangerous path you seem determined to pursue.

Put simply, you seek to overturn the results of the 2016 election and deprive the American people of the President they have freely chosen. Many Democrats now apparently view impeachment not only as a means to undo the democratic results of the *last* election, but as a strategy to influence the *next* election, which is barely more than a year away. As one member of Congress explained, he is “concerned that if we don’t impeach the President, he will get reelected.”¹ Your highly partisan and unconstitutional effort threatens grave and lasting damage to our democratic institutions, to our system of free elections, and to the American people.

¹ Interview with Rep. Al Green, MSNBC (May 5, 2019).

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Cummings
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For his part, President Trump took the unprecedented step of providing the public transparency by declassifying and releasing the record of his call with President Zelenskyy of Ukraine. The record clearly established that the call was completely appropriate and that there is no basis for your inquiry. The fact that there was nothing wrong with the call was also powerfully confirmed by Chairman Schiff's decision to create a false version of the call and read it to the American people at a congressional hearing, without disclosing that he was simply making it all up.

In addition, information has recently come to light that the whistleblower had contact with Chairman Schiff's office before filing the complaint. His initial denial of such contact caused *The Washington Post* to conclude that Chairman Schiff "clearly made a statement that was false."² In any event, the American people understand that Chairman Schiff cannot covertly assist with the submission of a complaint, mislead the public about his involvement, read a counterfeited version of the call to the American people, and then pretend to sit in judgment as a neutral "investigator."

For these reasons, President Trump and his Administration reject your baseless, unconstitutional efforts to overturn the democratic process. Your unprecedented actions have left the President with no choice. In order to fulfill his duties to the American people, the Constitution, the Executive Branch, and all future occupants of the Office of the Presidency, President Trump and his Administration cannot participate in your partisan and unconstitutional inquiry under these circumstances.

I. Your "Inquiry" Is Constitutionally Invalid and Violates Basic Due Process Rights and the Separation of Powers.

Your inquiry is constitutionally invalid and a violation of due process. In the history of our Nation, the House of Representatives has never attempted to launch an impeachment inquiry against the President without a majority of the House taking political accountability for that decision by voting to authorize such a dramatic constitutional step. Here, House leadership claims to have initiated the gravest inter-branch conflict contemplated under our Constitution by means of nothing more than a press conference at which the Speaker of the House simply announced an "official impeachment inquiry."³ Your contrived process is unprecedented in the

² Glenn Kessler, *Schiff's False Claim His Committee Had Not Spoken to the Whistleblower*, Wash. Post (Oct. 4, 2019).

³ Press Release, Nancy Pelosi, Pelosi Remarks Announcing Impeachment Inquiry (Sept. 24, 2019).

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history of the Nation,⁴ and lacks the necessary authorization for a valid impeachment proceeding.⁵

The Committees' inquiry also suffers from a separate, fatal defect. Despite Speaker Pelosi's commitment to "treat the President with fairness,"⁶ the Committees have not established any procedures affording the President even the most basic protections demanded by due process under the Constitution and by fundamental fairness. Chairman Nadler of the House Judiciary Committee has expressly acknowledged, at least when the President was a member of his own party, that "[t]he power of impeachment . . . demands a rigorous level of due process," and that in this context "due process mean[s] . . . the right to be informed of the law, of the charges against you, the right to confront the witnesses against you, to call your own witnesses, and to have the assistance of counsel."⁷ All of these procedures have been abandoned here.

These due process rights are not a matter of discretion for the Committees to dispense with at will. To the contrary, they are constitutional requirements. The Supreme Court has recognized that due process protections apply to all congressional investigations.⁸ Indeed, it has been recognized that the Due Process Clause applies to impeachment proceedings.⁹ And precedent for the rights to cross-examine witnesses, call witnesses, and present evidence dates back nearly 150 years.¹⁰ Yet the Committees have decided to deny the President these elementary rights and protections that form the basis of the American justice system and are protected by the Constitution. No citizen—including the President—should be treated this unfairly.

⁴ Since the Founding of the Republic, under unbroken practice, the House has never undertaken the solemn responsibility of an impeachment inquiry directed at the President without first adopting a resolution authorizing a committee to begin the inquiry. The inquiries into the impeachments of Presidents Andrew Johnson and Bill Clinton proceeded in multiple phases, each authorized by a separate House resolution. *See, e.g.*, H.R. Res. 581, 105th Cong. (1998); H.R. Res. 525, 105th Cong. (1998); III Hinds' Precedents §§ 2400-02, 2408, 2412. And before the Judiciary Committee initiated an impeachment inquiry into President Richard Nixon, the Committee's chairman rightfully recognized that "a[n] [inquiry] resolution has always been passed by the House" and "is a necessary step." III Deschler's Precedents ch. 14, § 15.2. The House then satisfied that requirement by adopting H.R. Res. 803, 93rd Cong. (1974).

⁵ Chairman Nadler has recognized the importance of taking a vote in the House before beginning a presidential impeachment inquiry. At the outset of the Clinton impeachment inquiry—where a floor vote was held—he argued that even limiting the time for *debate* before that vote was improper and that "an hour debate on this momentous decision is an insult to the American people and another sign that this is not going to be fair." 144 Cong. Rec. H10018 (daily ed. Oct. 8, 1998) (statement of Rep. Jerrold Nadler). Here, the House has dispensed with any vote and any debate *at all*.

⁶ Press Release, Nancy Pelosi, Transcript of Pelosi Weekly Press Conference Today (Oct. 2, 2019).

⁷ *Examining the Allegations of Misconduct Against IRS Commissioner John Koskinen (Part II): Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 3 (2016) (statement of Rep. Jerrold Nadler); *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 17 (1998) (statement of Rep. Jerrold Nadler).

⁸ *See, e.g., Watkins v. United States*, 354 U.S. 178, 188 (1957); *Quinn v. United States*, 349 U.S. 155, 161 (1955).

⁹ *See Hastings v. United States*, 802 F. Supp. 490, 504 (D.D.C. 1992), *vacated on other grounds by Hastings v. United States*, 988 F.2d 1280 (D.C. Cir. 1993).

¹⁰ *See, e.g.*, III Hinds' Precedents § 2445.

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To comply with the Constitution's demands, appropriate procedures would include—at a minimum—the right to see all evidence, to present evidence, to call witnesses, to have counsel present at all hearings, to cross-examine all witnesses, to make objections relating to the examination of witnesses or the admissibility of testimony and evidence, and to respond to evidence and testimony. Likewise, the Committees must provide for the disclosure of all evidence favorable to the President and all evidence bearing on the credibility of witnesses called to testify in the inquiry. The Committees' current procedures provide *none* of these basic constitutional rights.

In addition, the House has not provided the Committees' Ranking Members with the authority to issue subpoenas. The right of the minority to issue subpoenas—subject to the same rules as the majority—has been the standard, bipartisan practice in all recent resolutions authorizing presidential impeachment inquiries.¹¹ The House's failure to provide co-equal subpoena power in this case ensures that any inquiry will be nothing more than a one-sided effort by House Democrats to gather information favorable to their views and to selectively release it as only they determine. The House's utter disregard for the established procedural safeguards followed in past impeachment inquiries shows that the current proceedings are nothing more than an unconstitutional exercise in political theater.

As if denying the President basic procedural protections were not enough, the Committees have also resorted to threats and intimidation against potential Executive Branch witnesses. Threats by the Committees against Executive Branch witnesses who assert common and longstanding rights destroy the integrity of the process and brazenly violate fundamental due process. In letters to State Department employees, the Committees have ominously threatened—without any legal basis and before the Committees even issued a subpoena—that “[a]ny failure to appear” in response to a mere letter *request* for a deposition “shall constitute evidence of obstruction.”¹² Worse, the Committees have broadly threatened that if State Department officials attempt to insist upon the right for the Department to have an agency lawyer present at depositions to protect legitimate Executive Branch confidentiality interests—or apparently if they make any effort to protect those confidentiality interests *at all*—these officials will have their salaries withheld.¹³

The suggestion that it would somehow be problematic for anyone to raise long-established Executive Branch confidentiality interests and privileges in response to a request for a deposition is legally unfounded. Not surprisingly, the Office of Legal Counsel at the Department of Justice has made clear on multiple occasions that employees of the Executive Branch who have been instructed not to appear or not to provide particular testimony before Congress based on privileges or immunities of the Executive Branch cannot be punished for

¹¹ H.R. Res. 581, 105th Cong. (1998); H.R. Res. 803, 93rd Cong. (1974).

¹² Letter from Eliot L. Engel, Chairman, House Committee on Foreign Affairs, et al., to George P. Kent, Deputy Assistant Secretary, U.S. Department of State 1 (Sept. 27, 2019).

¹³ See Letter from Eliot L. Engel, Chairman, House Committee on Foreign Affairs, et al., to John J. Sullivan, Deputy Secretary of State 2-3 (Oct. 1, 2019).

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following such instructions.¹⁴ Current and former State Department officials are duty bound to protect the confidentiality interests of the Executive Branch, and the Office of Legal Counsel has also recognized that it is unconstitutional to exclude agency counsel from participating in congressional depositions.¹⁵ In addition, any attempt to withhold an official's salary for the assertion of such interests would be unprecedented and unconstitutional.¹⁶ The Committees' assertions on these points amount to nothing more than strong-arm tactics designed to rush proceedings without any regard for due process and the rights of individuals and of the Executive Branch. Threats aimed at intimidating individuals who assert these basic rights are attacks on civil liberties that should profoundly concern all Americans.

II. The Invalid "Impeachment Inquiry" Plainly Seeks To Reverse the Election of 2016 and To Influence the Election of 2020.

The effort to impeach President Trump—without regard to any evidence of his actions in office—is a naked political strategy that began the day he was inaugurated, and perhaps even before.¹⁷ In fact, your transparent rush to judgment, lack of democratically accountable authorization, and violation of basic rights in the current proceedings make clear the illegitimate, partisan purpose of this purported "impeachment inquiry." The Founders, however, did not create the extraordinary mechanism of impeachment so it could be used by a political party that feared for its prospects against the sitting President in the next election. The decision as to who will be elected President in 2020 should rest with the people of the United States, exactly where the Constitution places it.

Democrats themselves used to recognize the dire implications of impeachment for the Nation. For example, in the past, Chairman Nadler has explained:

The effect of impeachment is to overturn the popular will of the voters. We must not overturn an election and remove a President from office except to defend our system of government or our constitutional liberties against a dire threat, and we must not do so without an overwhelming consensus of the American people. There must never be a narrowly voted impeachment or an impeachment supported by one of our major political parties and opposed by another. Such an impeachment will produce divisiveness and bitterness in our

¹⁴ See, e.g., *Testimonial Immunity Before Congress of the Former Counsel to the President*, 43 Op. O.L.C. ___, *19 (May 20, 2019); *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 102, 140 (1984) ("The Executive, however, must be free from the threat of criminal prosecution if its right to assert executive privilege is to have any practical substance.")

¹⁵ *Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees*, 43 Op. O.L.C. ___, *1-2 (May 23, 2019).

¹⁶ See President Donald J. Trump, Statement by the President on Signing the Consolidated Appropriations Act, 2019 (Feb. 15, 2019); *Authority of Agency Officials To Prohibit Employees From Providing Information to Congress*, 28 Op. O.L.C. 79, 80 (2004).

¹⁷ See Matea Gold, *The Campaign To Impeach President Trump Has Begun*, Wash. Post (Jan. 21, 2017) ("At the moment the new commander in chief was sworn in, a campaign to build public support for his impeachment went live . . .").

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politics for years to come, and will call into question the very legitimacy of our political institutions.¹⁸

Unfortunately, the President's political opponents now seem eager to transform impeachment from an extraordinary remedy that should rarely be contemplated into a conventional political weapon to be deployed for partisan gain. These actions are a far cry from what our Founders envisioned when they vested Congress with the "important trust" of considering impeachment.¹⁹ Precisely because it nullifies the outcome of the democratic process, impeachment of the President is fraught with the risk of deepening divisions in the country and creating long-lasting rifts in the body politic.²⁰ Unfortunately, you are now playing out exactly the partisan rush to judgment that the Founders so strongly warned against. The American people deserve much better than this.

III. There Is No Legitimate Basis for Your "Impeachment Inquiry"; Instead, the Committees' Actions Raise Serious Questions.

It is transparent that you have resorted to such unprecedented and unconstitutional procedures because you know that a fair process would expose the lack of any basis for your inquiry. Your current effort is founded on a completely appropriate call on July 25, 2019, between President Trump and President Zelenskyy of Ukraine. Without waiting to see what was actually said on the call, a press conference was held announcing an "impeachment inquiry" based on falsehoods and misinformation about the call.²¹ To rebut those falsehoods, and to provide transparency to the American people, President Trump secured agreement from the Government of Ukraine and took the extraordinary step of declassifying and publicly releasing the record of the call. That record clearly established that the call was completely appropriate, that the President did nothing wrong, and that there is no basis for an impeachment inquiry. At a joint press conference shortly after the call's public release, President Zelenskyy agreed that the call was appropriate.²² In addition, the Department of Justice announced that officials there had reviewed the call after a referral for an alleged campaign finance law violation and found no such violation.²³

Perhaps the best evidence that there was no wrongdoing on the call is the fact that, after the actual record of the call was released, Chairman Schiff chose to concoct a false version of the call and to read his made-up transcript to the American people at a public hearing.²⁴ This

¹⁸ 144 Cong. Rec. H11786 (daily ed. Dec. 18, 1998) (statement of Rep. Jerrold Nadler).

¹⁹ The Federalist No. 65 (Alexander Hamilton).

²⁰ See *id.*

²¹ Press Release, Nancy Pelosi, Pelosi Remarks Announcing Impeachment Inquiry (Sept. 24, 2019).

²² *President Trump Meeting with Ukrainian President*, C-SPAN (Sept. 25, 2019).

²³ Statement of Kerri Kupec, Director, Office of Public Affairs, Dept. of Justice (Sept. 25, 2019) ("[T]he Department's Criminal Division reviewed the official record of the call and determined, based on the facts and applicable law, that there was no campaign finance violation and that no further action was warranted.")

²⁴ See *Whistleblower Disclosure: Hearing Before the H. Select Comm. on Intel.*, 116th Cong. (Sept. 26, 2019) (statement of Rep. Adam Schiff).

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powerfully confirms there is no issue with the actual call. Otherwise, why would Chairman Schiff feel the need to make up his own version? The Chairman's action only further undermines the public's confidence in the fairness of any inquiry before his Committee.

The real problem, as we are now learning, is that Chairman Schiff's office, and perhaps others—despite initial denials—were involved in advising the whistleblower before the complaint was filed. Initially, when asked on national television about interactions with the whistleblower, Chairman Schiff unequivocally stated that “[w]e have not spoken directly with the whistleblower. We would like to.”²⁵

Now, however, it has been reported that the whistleblower approached the House Intelligence Committee with information—and received guidance from the Committee—*before* filing a complaint with the Inspector General.²⁶ As a result, *The Washington Post* concluded that Chairman Schiff “clearly made a statement that was false.”²⁷ Anyone who was involved in the preparation or submission of the whistleblower's complaint cannot possibly act as a fair and impartial judge in the same matter—particularly after misleading the American people about his involvement.

All of this raises serious questions that must be investigated. However, the Committees are preventing anyone, including the minority, from looking into these critically important matters. At the very least, Chairman Schiff must immediately make available all documents relating to these issues. After all, the American people have a right to know about the Committees' own actions with respect to these matters.

* * *

Given that your inquiry lacks any legitimate constitutional foundation, any pretense of fairness, or even the most elementary due process protections, the Executive Branch cannot be expected to participate in it. Because participating in this inquiry under the current unconstitutional posture would inflict lasting institutional harm on the Executive Branch and lasting damage to the separation of powers, you have left the President no choice. Consistent with the duties of the President of the United States, and in particular his obligation to preserve the rights of future occupants of his office, President Trump cannot permit his Administration to participate in this partisan inquiry under these circumstances.

Your recent letter to the Acting White House Chief of Staff argues that “[e]ven if an impeachment inquiry were not underway,” the Oversight Committee may seek this information

²⁵ Interview with Chairman Adam Schiff, MSNBC (Sept. 17, 2019).

²⁶ Julian Barnes, et al., *Schiff Got Early Account of Accusations as Whistle-Blower's Concerns Grew*, N.Y. Times (Oct. 2, 2019).

²⁷ Glenn Kessler, *Schiff's False Claim His Committee Had Not Spoken to the Whistleblower*, Wash. Post (Oct. 4, 2019).

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as a matter of the established oversight process.²⁸ Respectfully, the Committees cannot have it both ways. The letter comes from the Chairmen of three different Committees, it transmits a subpoena “[p]ursuant to the House of Representatives’ impeachment inquiry,” it recites that the documents will “be collected as part of the House’s impeachment inquiry,” and it asserts that the documents will be “shared among the Committees, as well as with the Committee on the Judiciary as appropriate.”²⁹ The letter is in no way directed at collecting information in aid of legislation, and you simply cannot expect to rely on oversight authority to gather information for an unauthorized impeachment inquiry that conflicts with all historical precedent and rides roughshod over due process and the separation of powers. If the Committees wish to return to the regular order of oversight requests, we stand ready to engage in that process as we have in the past, in a manner consistent with well-established bipartisan constitutional protections and a respect for the separation of powers enshrined in our Constitution.

For the foregoing reasons, the President cannot allow your constitutionally illegitimate proceedings to distract him and those in the Executive Branch from their work on behalf of the American people. The President has a country to lead. The American people elected him to do this job, and he remains focused on fulfilling his promises to the American people. He has important work that he must continue on their behalf, both at home and around the world, including continuing strong economic growth, extending historically low levels of unemployment, negotiating trade deals, fixing our broken immigration system, lowering prescription drug prices, and addressing mass shooting violence. We hope that, in light of the many deficiencies we have identified in your proceedings, you will abandon the current invalid efforts to pursue an impeachment inquiry and join the President in focusing on the many important goals that matter to the American people.

Sincerely,

Pat A. Cipollone
Counsel to the President

cc: Hon. Kevin McCarthy, Minority Leader, House of Representatives
Hon. Michael McCaul, Ranking Member, House Committee on Foreign Affairs
Hon. Devin Nunes, Ranking Member, House Permanent Select Committee on
Intelligence
Hon. Jim Jordan, Ranking Member, House Committee on Oversight and Reform

²⁸ Letter from Elijah E. Cummings, Chairman, House Committee on Oversight and Government Reform, et al., to John Michael Mulvaney, Acting Chief of Staff to the President 3 (Oct. 4, 2019).

²⁹ *Id.* at 1.

Department Guidance Regarding Privileges and Work-Product Protections [Tab D]

The Department asks all personnel to abide by important obligations as employees of the Department. These obligations include the following requirements:

- Improper disclosure of any classified information is strictly prohibited.
- No documents, electronically stored information, or tangible things relating to official duties, including personal notes, should be produced or turned over during or after the proceedings. As noted in the Department's October 15 letter, the Department has taken independent steps to "identify, preserve, and collect potentially responsive documents" [Tab A], in order to engage with the three Committees or other Congressional Committees once outstanding legal issues are resolved.
- All privileges and work-product protections must be strictly preserved, including, but not limited to:

1) Executive Privilege. It is for the President and the Department of Justice—not the Department of Defense—to determine for the Executive Branch the scope of the privilege and whether it has been waived, e.g., by public statements. Accordingly, the Department advises that employees exercise an abundance of caution and refrain from giving any testimony, unless otherwise instructed by the White House, regarding:

(a) internal White House (including National Security Council (NSC), Office of Management and Budget (OMB)) communications (including but not limited to letters, documents, phone calls, and e-mails);

(b) communications between White House officials (including NSC and OMB) and individuals outside the Executive Branch (including individuals in the U.S. Government, foreign government officials, and private individuals);

(c) communications between White House officials and other Executive Branch officials; and

(d) discussions among Executive Branch officials regarding communications with the White House or the subject matter of such communications.

See Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys, Solicitor General and Acting Attorney General Paul D. Clement (June 27, 2007) [attached].

2) Attorney-Client Privilege. No testimony regarding communications between Department officials and the Department's Office of General Counsel, White

House Counsel, the Department of Justice, or any other attorneys related to the seeking or giving of legal advice or opinions.

- 3) Attorney Work-Product. No testimony regarding any documents, electronically stored media, tangible things, or conversations or opinions produced or expressed by the Department's Office of General Counsel or other attorneys in preparation for litigation or any other legal proceedings.
- 4) Deliberative Process Privilege. No testimony regarding pre-decisional discussions of Department policy decisions.

The Department understands the difficult circumstances facing your client and appreciates her and your professionalism in adhering to this guidance.

Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys

Executive privilege may properly be asserted over the documents and testimony concerning the dismissal and replacement of U.S. Attorneys that have been subpoenaed by congressional committees.

June 27, 2007

THE PRESIDENT
THE WHITE HOUSE

Dear Mr. President:

The Senate Committee on the Judiciary and the House Committee on the Judiciary recently issued five subpoenas in connection with their inquiries into the resignation of several U.S. Attorneys in 2006. Broadly speaking, four of the five subpoenas seek documents in the custody of current or former White House officials ("White House documents") concerning the dismissal and replacement of the U.S. Attorneys. In addition, two of the five subpoenas demand testimony about these matters from two former White House officials, Harriet Miers, former Counsel to the President, and Sara Taylor, former Deputy Assistant to the President and Director of Political Affairs.

You have requested my legal advice as to whether you may assert executive privilege with respect to the subpoenaed documents and testimony concerning the categories of information described in this letter. It is my considered legal judgment that you may assert executive privilege over the subpoenaed documents and testimony.

I.

The documents that the Office of the Counsel to the President has identified as responsive to the subpoenas fall into three broad categories related to the possible dismissal and replacement of U.S. Attorneys, including congressional and media inquiries about the dismissals: (1) internal White House communications; (2) communications by White House officials with individuals outside the Executive Branch, including with individuals in the Legislative Branch; and (3) communications between White House officials and Department of Justice officials. The Committees' subpoenas also seek testimony from Ms. Miers and Ms. Taylor concerning the same subject matters, and the assertion of privilege with respect to such testimony requires the same legal analysis.

The Office of Legal Counsel of the Department of Justice has reviewed the documents identified by the Counsel to the President as responsive to the subpoenas and is satisfied that the documents fall within the scope of executive

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privilege. The Office further believes that Congress's interests in the documents and related testimony would not be sufficient to override an executive privilege claim. For the reasons discussed below, I concur with both assessments.

A.

The initial category of subpoenaed documents and testimony consists of internal White House communications about the possible dismissal and replacement of U.S. Attorneys. Among other things, these communications discuss the wisdom of such a proposal, specific U.S. Attorneys who could be removed, potential replacement candidates, and possible responses to congressional and media inquiries about the dismissals. These types of internal deliberations among White House officials fall squarely within the scope of executive privilege. One of the underlying purposes of the privilege is to promote sound decisionmaking by ensuring that senior government officials and their advisers speak frankly and candidly during the decisionmaking process. As the Supreme Court has explained, “[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and to do so in a way many would be unwilling to express except privately.” *United States v. Nixon*, 418 U.S. 683, 708 (1974); see also *Assertion of Executive Privilege with Respect to Prosecutorial Documents*, 25 Op. O.L.C. 1, 2 (2001) (“The Constitution clearly gives the President the power to protect the confidentiality of executive branch deliberations.”); *Assertion of Executive Privilege With Respect to Clemency Decision*, 23 Op. O.L.C. 1, 2 (1999) (opinion of Attorney General Janet Reno) (“*Clemency Decision*”) (“[N]ot only does executive privilege apply to confidential communications to the President, but also to ‘communications between high Government officials and those who advise and assist them in the performance of their manifold duties.’”) (quoting *Nixon*, 418 U.S. at 705). These confidentiality interests are particularly strong where, as here, the communications may implicate a “quintessential and nondelegable Presidential power,” such as the authority to nominate or to remove U.S. Attorneys. *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997); *Clemency Decision*, 23 Op. O.L.C. at 2–3 (finding that executive privilege protected Department and White House deliberations related to decision to grant clemency).

Under D.C. Circuit precedent, a congressional committee may not overcome an assertion of executive privilege unless it establishes that the documents and information are “demonstrably critical to the responsible fulfillment of the Committee’s functions.” *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). And those functions must be in furtherance of Congress’s legitimate legislative responsibilities. See *McGrain v. Daugherty*, 273 U.S. 135, 160 (1927) (Congress has oversight authority “to enable it efficiently to exercise a legislative function belonging to it under the Constitution”).

Assertion of Executive Privilege Concerning Dismissal of U.S. Attorneys

As a threshold matter, it is not at all clear that internal White House communications about the possible dismissal and replacement of U.S. Attorneys fall within the scope of *McGrain* and its progeny. The Supreme Court has held that Congress's oversight powers do not reach "matters which are within the exclusive province of one of the other branches of the Government." *Barenblatt v. United States*, 360 U.S. 109, 112 (1959). The Senate has the authority to approve or reject the appointment of officers whose appointment by law requires the advice and consent of the Senate (which has been the case for U.S. Attorneys since the founding of the Republic), but it is for the President to decide whom to nominate to such positions and whether to remove such officers once appointed. Though the President traditionally consults with members of Congress about the selection of potential U.S. Attorney nominees as a matter of courtesy or in an effort to secure their confirmation, that does not confer upon Congress authority to inquire into the deliberations of the President with respect to the exercise of his power to remove or nominate a U.S. Attorney.¹ Consequently, there is reason to question whether Congress has oversight authority to investigate deliberations by White House officials concerning proposals to dismiss and replace U.S. Attorneys, because such deliberations necessarily relate to the potential exercise by the President of an authority assigned to him alone. See *Clemency Decision*, 23 Op. O.L.C. at 3-4 ("[I]t appears that Congress' oversight authority does not extend to the process employed in connection with a particular clemency decision, to the materials generated or the discussions that took place as part of that process, or to the advice or views the President received in connection with a clemency decision [because the decision to grant clemency is an exclusive Executive Branch function]."); *Scope of Congressional Oversight and Investigative Power With Respect to the Executive Branch*, 9 Op. O.L.C. 60, 62 (1985) (congressional oversight authority does not extend to "functions fall[ing] within the Executive's exclusive domain").

In any event, even if the Committees have oversight authority, there is no doubt that the materials sought qualify for the privilege and the Committees have not demonstrated that their interests justify overriding a claim of executive privilege as to the matters at issue. The House Committee, for instance, asserts in its letter accompanying the subpoenas that "[c]ommunications among the White House staff involved in the U.S. Attorney replacement plan are obviously of paramount importance to any understanding of how and why these U.S. Attorneys were

¹ See, e.g., *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 483 (1989) (Kennedy, J., concurring) ("[T]he Clause divides the appointment power into two separate spheres: the President's power to 'nominate,' and the Senate's power to give or withhold its 'Advice and Consent.' No role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for [the] appointment."); *Myers v. United States*, 272 U.S. 52, 122 (1926) ("The power of removal is incident to the power of appointment; not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.").

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selected to be fired.” Letter for Fred F. Fielding, Counsel to the President, from John Conyers, Jr., Chairman, House Judiciary Committee at 2 (June 13, 2007). But the Committees never explain how or why this information is “demonstrably critical” to any “legislative judgments” Congress might be able to exercise in the U.S. Attorney matter. *Senate Select Comm.*, 498 F.2d at 732. Broad, generalized assertions that the requested materials are of public import are simply insufficient under the “demonstrably critical” standard. Under *Senate Select Committee*, to override a privilege claim the Committees must “point[] to . . . specific legislative decisions that cannot responsibly be made without access to [the privileged] materials.” *Id.* at 733.

Moreover, any legitimate oversight interest the Committees might have in internal White House communications about the proposal is sharply reduced by the thousands of documents and dozens of hours of interviews and testimony already provided to the Committees by the Department of Justice as part of its extraordinary effort at accommodation.² This information has given the Committees extraordinary—and indeed, unprecedented—insight into the Department’s decision to request the U.S. Attorney resignations, including the role of White House officials in the process. See, e.g., *History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. O.L.C. 751, 758–59, 767 (1982) (documenting refusals by Presidents Jackson, Tyler, and Cleveland

² During the past three months, the Department has released or made available for review to the Committees approximately 8,500 pages of documents concerning the U.S. Attorney resignations. The Department has included in its productions many sensitive, deliberative documents related to the resignation requests, including e-mails and other communications with White House officials. The Committees’ staffs have also interviewed, at length and on the record, a number of senior Department officials, including, among others, the Deputy Attorney General, the Acting Associate Attorney General, the Attorney General’s former chief of staff, the Deputy Attorney General’s chief of staff, and two former Directors of the Executive Office for U.S. Attorneys. During these interviews, the Committees’ staffs explored in great depth all aspects of the decision to request the U.S. Attorney resignations, including the role of White House officials in the decisionmaking process. In addition, the Attorney General, the Deputy Attorney General, the Principal Associate Deputy Attorney General, the Attorney General’s former chief of staff, and the Department’s former White House Liaison have testified before one or both of the Committees about the terminations and explained, under oath, their understanding of such involvement.

The President has also made significant efforts to accommodate the Committees’ needs. More than three months ago, the Counsel to the President proposed to make senior White House officials, including Ms. Miers, available for informal interviews about “(a) communications between the White House and persons outside the White House concerning the request for resignations of the U.S. Attorneys in question; and (b) communications between the White House and Members of Congress concerning those requests,” and he offered to give the Committees access to White House documents on the same subjects. Letter for Patrick Leahy, U.S. Senate, et al., from Fred F. Fielding, Counsel to the President at 1–2 (Mar. 20, 2007). The Committees declined this offer. The Counsel to the President has since reiterated this offer of accommodation but to no avail. See Letter for Patrick Leahy, U.S. Senate, and John Conyers, Jr., U.S. House of Representatives, from Fred F. Fielding, Counsel to the President at 1 (Apr. 12, 2007); Letter for Patrick Leahy, U.S. Senate, John Conyers, Jr., U.S. House of Representatives, and Linda T. Sanchez, U.S. House of Representatives, from Fred F. Fielding, Counsel to the President at 1–2 (June 7, 2007).

Assertion of Executive Privilege Concerning Dismissal of U.S. Attorneys

to provide information related to the decision to remove Executive Branch officials, including a U.S. Attorney).

In a letter accompanying the subpoenas, the House Committee references the alleged “written misstatements” and “false statements” provided by the Department to the Committees about the U.S. Attorney dismissals. *See* Letter for Fred F. Fielding, Counsel to the President, from John Conyers, Jr., Chairman, House Judiciary Committee at 2 (June 13, 2007). The Department has recognized the Committees’ interest in investigating the extent to which Department officials may have provided inaccurate or incomplete information to Congress. This interest does not, however, justify the Committees’ demand for White House documents and information about the U.S. Attorney resignations. Officials in the Department, not officials in the White House, presented the challenged statements, and as noted, the Department has provided unprecedented information to Congress concerning, *inter alia*, the process that led to the Department’s statements. The Committees’ legitimate oversight interests therefore have already been addressed by the Department, which has sought to provide the Committees with all documents related to the preparation of any inaccurate information given to Congress.

Given the amount of information the Committees already possess about the Department’s decision to remove the U.S. Attorneys (including the involvement of White House officials), there would be little additional legislative purpose served by revealing internal White House communications about the U.S. Attorney matter, and, in any event, none that would outweigh the President’s interest in maintaining the confidentiality of such internal deliberations. *See Senate Select Comm.*, 498 F.2d at 732–33 (explaining that a congressional committee may not obtain information protected by executive privilege if that information is available through non-privileged sources). Consequently, I do not believe that the Committees have shown a “demonstrably critical” need for internal White House communications on this matter.

B.

For many of the same reasons, I believe that communications between White House officials and individuals outside the Executive Branch, including with individuals in the Legislative Branch, concerning the possible dismissal and replacement of U.S. Attorneys, and possible responses to congressional and media inquiries about the dismissals, fall within the scope of executive privilege. Courts have long recognized the importance of information gathering in presidential decisionmaking. *See, e.g., In re Sealed Case*, 121 F.3d at 751–52 (describing role of investigation and information collection in presidential decisionmaking). Naturally, in order for the President and his advisers to make an informed decision, presidential aides must sometimes solicit information from individuals outside the White House and the Executive Branch. This need is particularly strong when the decision involved is whether to remove political appointees, such

as U.S. Attorneys, who serve in local districts spread throughout the United States. In those situations, the President and his advisers will be fully informed only if they solicit and receive advice from a range of individuals. Yet the President's ability to obtain such information often depends on the provider's understanding that his frank and candid views will remain confidential. *See Nixon*, 418 U.S. at 705 ("Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."); *In re Sealed Case*, 121 F.3d at 751 ("In many instances, potential exposure of the information in the possession of an adviser can be as inhibiting as exposure of the actual advice she gave to the President. Without protection of her sources of information, an adviser may be tempted to forego obtaining comprehensive briefings or initiating deep and intense probing for fear of losing deniability.").

That the communications involve individuals outside the Executive Branch does not undermine the President's confidentiality interests. The communications at issue occurred with the understanding that they would be held in confidence, and they related to decisionmaking regarding U.S. Attorney removals or replacements or responding to congressional or media inquiries about the U.S. Attorney matter. Under these circumstances, the communications retain their confidential and Executive Branch character and remain protected. *See In re Sealed Case*, 121 F.3d at 752 ("Given the need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources, the [presidential communications component of executive] privilege must apply both to communications which these advisers solicited and received from others as well as those they authored themselves.").

Again, the Committees offer no compelling explanation or analysis as to why access to confidential communications between White House officials and individuals outside the Executive Branch is "demonstrably critical to the responsible fulfillment of the [Committees'] functions." *Senate Select Comm.*, 498 F.2d at 731. Absent such a showing, the Committees may not override an executive privilege claim.

C.

The final category of documents and testimony concerns communications between the Department of Justice and the White House concerning proposals to dismiss and replace U.S. Attorneys and possible responses to congressional and media inquiries about the U.S. Attorney resignations. These communications are

³ Moreover, the Department has previously conveyed to the Committees its concern that there would be a substantial inhibiting effect on future informal confidential communications between Executive Branch and Legislative Branch representatives if such communications were to be produced in the normal course of congressional oversight.

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deliberative and clearly fall within the scope of executive privilege.⁴ *See supra* p. 2. In this case, however, the Department has already disclosed to Congress a substantial amount of documents and information related to White House communications about the U.S. Attorney matter. Consequently, in assessing whether it would be legally permissible to assert executive privilege, it is useful to divide this category into three subcategories, each with slightly different considerations: (1) documents and testimony related to communications between the Department and White House officials that have not already been disclosed by the Department; (2) documents concerning White House-Department communications previously disclosed to the Committees by the Department; and (3) testimony from current or former White House officials (such as the testimony sought from Ms. Miers or Ms. Taylor) about previously disclosed White House-Department communications. After carefully considering the matter, I believe there is a strong legal basis for asserting executive privilege over each of these subcategories.

The President's interest in protecting the confidentiality of documents and information about undisclosed White House-Department communications is powerful. Most, if not all, of these communications concern either potential replacements for the dismissed U.S. Attorneys or possible responses to inquiries from Congress and the media about the U.S. Attorney resignations. As discussed above, the President's need to protect deliberations about the selection of U.S. Attorneys is compelling, particularly given Congress's lack of legislative authority over the nomination or replacement of U.S. Attorneys. *See In re Sealed Case*, 121 F.3d at 751-52. The President also has undeniable confidentiality interests in discussions between White House and Department officials over how to respond to congressional and media inquiries about the U.S. Attorney matter. As Attorney General Janet Reno advised the President in 1996, the ability of the Office of the Counsel to the President to assist the President in responding to investigations "would be significantly impaired" if a congressional committee could review "confidential documents . . . prepared in order to assist the President and his staff in responding to an investigation by the [committee] seeking the documents." *Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 2, 3 (1996). Despite extensive communications with officials at the Department and the White House, the Committees have yet to articulate any "demonstrably critical" oversight interest that would justify overriding these compelling confidentiality concerns.

There are also legitimate reasons to assert executive privilege over White House documents reflecting White House-Department communications that have been previously disclosed to the Committees by the Department. As discussed,

⁴ To the extent they exist, White House communications approving the Department's actions by or on behalf of the President would receive particularly strong protection under executive privilege. *See, e.g., In re Sealed Case*, 121 F.3d at 752-53 (describing heightened protection provided to presidential communications).

these documents are deliberative in nature and clearly fall within the scope of executive privilege. The Department's accommodation with respect to some White House-Department communications does not constitute a waiver and does not preclude the President from asserting executive privilege with respect to White House materials or testimony concerning such communications. The D.C. Circuit has recognized that each branch has a "constitutional mandate to seek optimal accommodation" of each other's legitimate interests. *United States v. AT&T Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977). If the Department's provision of documents and information to Congress, as part of the accommodation process, eliminated the President's ability to assert privilege over White House documents and information concerning those same communications, then the Executive Branch would be hampered, if not prevented, from engaging in future accommodations. Thus, in order to preserve the constitutional process of interbranch accommodation, the President may claim privilege over documents and information concerning the communications that the Department of Justice has previously disclosed to the Committees. Indeed, the relevant legal principles should and do encourage, rather than punish, such accommodation by recognizing that Congress's need for such documents is reduced to the extent similar materials have been provided voluntarily as part of the accommodation process.

Here, the Committees' need for White House documents concerning these communications is weak. The Committees already possess the relevant communications, and it is well established that Congress may not override executive privilege to obtain materials that are cumulative or that could be obtained from an alternative source. See *Senate Select Comm.*, 498 F.2d at 732-33 (holding public release of redacted audio tape transcripts "substantially undermined" any legislative need for tapes themselves); *Clemency Decision*, 23 Op. O.L.C. at 3-4 (finding that documents were not demonstrably critical where Congress could obtain relevant information "through non-privileged documents and testimony"). Accordingly, the Committees do not have a "demonstrably critical" need to collect White House documents reflecting previously disclosed White House-Department communications.

Finally, the Committees have also failed to establish the requisite need for testimony from current or former White House officials about previously disclosed White House-Department communications. Congressional interest in investigating the replacement of U.S. Attorneys clearly falls outside its core constitutional responsibilities, and any legitimate interest Congress may have in the disclosed communications has been satisfied by the Department's extraordinary accommodation involving the extensive production of documents to the Committees, interviews, and hearing testimony concerning these communications. As the D.C. Circuit has explained, because "legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability," Congress will rarely need or be entitled to a "precise reconstruction of past events" to carry out its legislative responsibilities. *Senate Select Comm.*,

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498 F.2d at 732.⁵ On the other hand, the White House has very legitimate interests in protecting the confidentiality of this information because it would be very difficult, if not impossible, for current or former White House officials testifying about the disclosed communications to separate in their minds knowledge that is derived from the Department's disclosures from knowledge that is derived from other privileged sources, such as internal White House communications. Consequently, given the President's strong confidentiality interests and the Committees' limited legislative needs, I believe that White House information about previously disclosed White House-Department communications may properly be subject to an executive privilege claim.

II.

In sum, I believe that executive privilege may properly be asserted with respect to the subpoenaed documents and testimony as described above.

PAUL D. CLEMENT
Solicitor General & Acting Attorney General

⁵ See also *Senate Select Comm.*, 498 F.2d at 732 (explaining that Congress "frequently legislates on the basis of conflicting information provided in its hearings"); *Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 159 (1989) ("Congress will seldom have any legitimate legislative interest in knowing the precise predecisional positions and statements of particular executive branch officials.").

