U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

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The Honorable Mac Thornberry
Chairman
Committee on the Armed Services
U.S. House of Representatives
Washington, DC 20515

The Honorable John McCain
Chairman
Committee on the Armed Services
United States Senate
Washington, DC 20510

Dear Chairman Thornberry and Chairman McCain:

This letter presents the views of the Department of Justice ("Department") on policy issues raised by H.R. 2810, the "National Defense Authorization Act for Fiscal Year 2018," as passed by the House of Representatives and the Senate. As to the general desirability of the legislation, we defer to other Departments. However, several provisions raise policy concerns, as we explain below. We present our views on constitutional issues in separate correspondence.

The views of the Department are as follows:

I. House-Passed Version

Section 715: Opioid-Related Training

Section 715 of the House version of the bill contains a list of providers that automatically would be approved to provide opioid-related training, including the American Academy of Pain Management (which now is known as the Academy of Integrative Pain Management), the American Pain Society, the American Academy of Pain Medicine, and the American Society of Intervention Pain Physicians. Because the foregoing entities receive funding or have financial relationships with pharmaceutical companies, many of which manufacture opioids, we recommend not including them in the list of entities automatically approved to provide training. Alternatively, we would recommend adding language that would require the Secretary of Defense to approve, in advance, training materials that would be permitted to satisfy the training requirement set forth in section 715(a)(1).

Section 1073: Assisting the House of Representatives in Response to Cybersecurity Events

Section 1073 of the House version of the bill would require, in the event of a major cyber incident, that, upon a request by the Speaker of the House, Federal agencies support the House's cybersecurity needs. Thus, where an incident might affect the House, section 1073 essentially

would move the House to the top of the list for incident response. It would require agencies to provide support without reimbursement or — apparently — further appropriations. The language of section 1073 would appear to require individual agencies to provide assistance directly to the Legislative Branch without regard to the agencies' mission, capabilities, or budget.

Section 1073 does not reflect the current laws and policies delineating agency cyber jurisdiction and areas of responsibility. For example, for significant cyber incidents, Presidential Policy Directive 41 assigns the lead for threat response (including investigation and attribution) to the Department of Justice, for asset response (including technical assistance and mitigation) to the Department of Homeland Security, and for intelligence support to the Office of the Director of National Intelligence.

Moreover, in our separate letter addressing the constitutional concerns that the House version of H.R. 2810 raises, we explain the serious separation of powers concerns that section 1073 raises.

Section 3508: Foreign Spill Protection

Section 3508 of the House version of the bill would amend the Oil Pollution Act's ("OPA") definition of "owner or operator" and the definition of "responsible party" to include foreign offshore units and other facilities located seaward of the United States's exclusive economic zone. Further, it would amend these definitions to add the words "and entity," where the OPA currently refers to "persons." The definition of a "person" under the OPA does not include the United States, and as a result, the Department has taken the position that the United States has not waived its sovereign immunity under the OPA. Most of the relevant liability provisions currently use the term "person" as the operative term. A waiver of the sovereign immunity of the United States must be express, and we believe that the addition of "entity" does not suffice to meet that standard. However, the inclusion of "entity" could generate confusion about this issue.

To remove any doubt as to the United States' sovereign immunity under the OPA, we recommend amending section 3508 to refer to a "*foreign* entity." Specifically, we recommend the following edits (inserted text in *italics*):

- Section 3508(b)(1)(A)(i)(I): Revise the final clause to state "any person or *foreign* entity"
- Section 3508(b)(1)(A)(i)(II) : Revise the last clause to state, "the person or *foreign* entity that"
- Section 3508(b)(1)(A)(ii): Revise the clause as follows: "any person or other *foreign* entity owning or operating the facility, and any leaseholder . . ."

In addition, we note that there are areas where the U.S. continental shelf extends beyond the limits of the exclusive economic zone, consistent with international law, including in the Gulf

of Mexico. In lieu of the phrase "seaward of the exclusive economic zone" throughout section 3508, we would therefore recommend "seaward of areas under U.S. jurisdiction," if section 3508 is retained. We would further note that under international law, exercise of U.S. jurisdiction over actions and effects in such areas is generally limited, such that the statute should contain a provision that nothing in the Oil Pollution Act as amended shall be interpreted or applied contrary to international law.

Section 5501: Background Checks for Military Child Care Employees

Section 5501 of the House version of the bill would amend 10 U.S.C. § 1792 to require that criminal background checks of military child care employees (required under 42 U.S.C. § 13041) be conducted pursuant to regulations prescribed by the Defense Department in accordance with the Child Care Development Block Grant Act ("CCDBGA") of 1990, 42 U.S.C. § 9858f. Implementing the CCDBGA has been challenging, as the requirements of that statute do not coincide with the typical requirements for the FBI's non-criminal justice background checks. It has required extensive coordination between the FBI and the Department of Health and Human Services' Office of Child Care. Further, if military childcare facilities are licensed by a State and fall under the CCDBGA, the requirements of section 5501 may duplicate background checks already required under State authority.

We understand that the Department of Defense has concluded that its existing rule on this subject meets or exceeds the requirement of the CCDBGA. We defer to the views of the Department of Defense.

II. Senate-Passed Version

Section 1035: Transfer of Guantanamo Detainees to the United States for emergency or Medical Treatment

Section 1035 of the Senate version of the bill would provide the Administration with the option to permit the temporary transfer of Guantanamo Bay detainees to the United States for certain medical care. Although the provision is not mandatory, the Administration does not support including it in the bill at this time. As an initial matter, inclusion of section 1035 in any form likely would generate new litigation by Guantanamo Bay detainees and their counsel seeking to take advantage of the provision. Further, several of the provisions in section 1035 lack sufficient clarity to accomplish their apparent goals, which would present further litigation risk. For example, section 1035(d)(3) arguably should include a specific reference to chapter 21 B of title 42, United States Code (the Religious Freedom Restoration Act or "RFRA") in order to clarify, that, consistent with the provisions of RFRA, *see* 42 U.S.C. § 2000bb-3(b), detainees may not seek relief under RFRA. Further, we recommend deleting the qualification in section 1035(f)(2) that a habeas action be one "seeking release from custody" in order to avoid imposing a limitation upon the types of detainee habeas corpus claims that would lie within the exclusive jurisdiction of the U.S. District Court for the District of Columbia. Further, we recommend that the conferees consider clarifying in section 1035(f)(3) that a military judge in a military

commission proceeding likewise may not order the relief addressed in section 1035(f)(3), that is, release from custody or release within the United States.

Section 6012: Open Government Data

Section 6012 of the Senate version of the bill would require a government-wide policy for all federal agencies to publish their information in non-proprietary, machine-readable data formats. In proposed new 44 U.S.C. § 3563, we note that subsections (a)(2)(D) and (a)(2)(E) may be somewhat redundant. The provisions appear to be an attempt to codify OMB's Memorandum M-13-13 regarding "Open Data Policy – Managing Information as an Asset," which requires agencies to create and maintain an enterprise data inventory. We suggest that the bill's language may be clearer if it were amended to more closely track Section III.3.a of the memo, which states that the inventory should "indicate, as appropriate, if the agency has determined that the individual datasets may be made publicly available (i.e., release is permitted by law, subject to all privacy, confidentiality, security, and other valid requirements) and whether they are currently available to the public."

Section 6603: Review of Nuclear and Radiological Terrorism Prevention Strategy

Section 6603 of the Senate version of the bill would require the Secretary of Energy, acting through the Administrator for Nuclear Security, to enter into an arrangement with the National Academy of Sciences to conduct a review of the United States Nuclear and Radiological Terrorism Prevention Strategy. As part of this arrangement the Secretary of Energy, the Secretary of Defense, the Secretary of Homeland Security, the Secretary of State, and the Director of National Intelligence would each be required to appoint liaisons to the National Academy of Sciences. Section 6603 does not provide for the participation of the FBI.

This assessment would cover United States activities in (1) preventing state and non-state actors from acquiring the technologies, materials, and critical expertise needed to mount nuclear or radiological attacks; (2) countering efforts by state and non-state actors to mount such attacks; and (3) responding to nuclear and radiological incidents. This being the case, the failure to include the FBI as a participant in the assessment is a significant omission. The FBI plays a significant role and shoulders significant responsibilities in preventing, responding to, and mitigating actual and potential criminal or terrorist incidents involving nuclear or radiological materials.

In order to address this issue, we recommend inserting into section 6603(d) "…the Attorney General, acting primarily through the Director of the Federal Bureau of Investigation," as one of the National Academy of Sciences liaisons to assist with this review. For consistency, we recommend an identical insertion in section 6603(e).

Section 14007: Report on the National Biodefense Analysis and Countermeasures Center

Section 14007 of the Senate version of the bill would require the Secretary of Homeland Security and the Secretary of Defense to submit a joint report to the Congress on the closing of

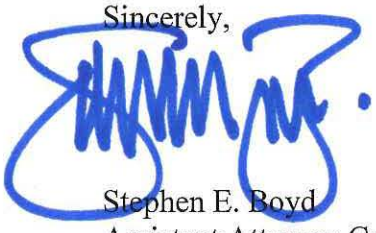
the National Biodefense Analysis and Countermeasures Center ("NBACC"). Section 14007(a) would require the report to contain the following information:

- the functions of the NBACC;
- a listing of the end users of the NBACC, including end users whose assets may be managed by other agencies;
- the cost and mission impact of NBACC closure for each end user (including an analysis of the functions of the NBACC that cannot be replicated by other Federal agencies); and
- a transition plan for essential NBACC functions, including the storage of samples needed for ongoing criminal cases.

Section 14007(b)(1) and (2) would require the Secretaries of Homeland Security and Defense to consult with the Attorney General and the Director of the FBI in preparing the report. However, we believe that consultation would be inadequate. The report should be submitted jointly with Attorney General, particularly since the FBI is the primary beneficiary of the NBACC's activities and therefore its experience and expertise would be essential to the preparation of an accurate and complete report. Accordingly, we recommend placing the Attorney General on equal footing with the Secretary of Homeland Security and the Secretary of Defense in preparing the assessment. Specifically, we recommend inserting ", the Attorney General," should be inserted before "and the Secretary of Defense" in section 14007(a). To correspond with this change, we recommend deleting section 14007(a)(2) (listing the Attorney General as an individual to be consulted) and renumbering the remaining subparagraphs.

Thank you for the opportunity to present our views. We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,



Stephen E. Boyd
Assistant Attorney General

cc: Adam Smith
Ranking Member
Committee on the Armed Services
U.S. House of Representatives

The Honorable Jack Reed
Ranking Member
Committee on the Armed Services
United States Senate