



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

DEC 11 2017

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security and Governmental Affairs  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice (Department) on S. 2046, the “Foundations for Evidence-Based Policymaking Act of 2017,” as reported by the House Committee on Oversight and Government Reform. We support efforts to improve the evidence used for policymaking. Moreover, we appreciate the efforts of the bill’s drafters to enhance confidentiality protections for statistical information.

Section 202 of the bill would, among other things, add a section 3520A to title 44, establishing a Chief Data Officer Council. *See* H.R. 4174, sec. 202(f)(1). Subsection (e) of 44 U.S.C. § 3520A as added by this bill would require the Comptroller General, “[n]ot later than 4 years after date of the enactment of this section,” to submit to the Congress “a report on whether the additional duties of the Council improved the use of evidence and program evaluation in the Federal Government” and would further provide that “[t]he Council shall terminate and this section shall be repealed upon the expiration of the two-year period that begins on the date the Comptroller General submits the evaluation under paragraph (1) to Congress.” *Id.* (adding 44 U.S.C. § 3520A(e)(1)–(2)). This provision would violate the anti-aggrandizement principle of the separation of powers and raise constitutional concerns as to its consistency with bicameralism and presentment requirements.

“Once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly ‘by passing new legislation’ that complies with the bicameralism and presentment requirements of Article I of the Constitution.” *Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986); *cf. INS v. Chadha*, 462 U.S. 919, 951–52 (1983) (explaining bicameralism and presentment restrictions on legislative power). Accordingly, it would unconstitutionally aggrandize Congress to vest “a congressional agent” — such as the Comptroller General, *see Bowsher*, 478 U.S. at 728 (noting that the Comptroller General is “removable only at the initiative of Congress”) — “with the power to exercise policymaking control over the post-enactment decisions of executive officials,” such as by tying the

The Honorable Ron Johnson

Page 2

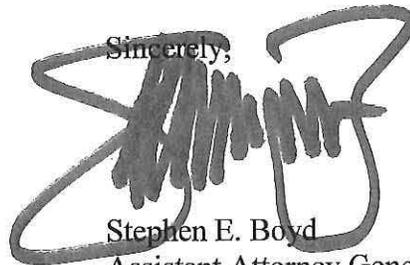
termination of certain executive functions to the Comptroller General's issuing of a report. *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 171 (1996) (citing *Bowsher*), <https://www.justice.gov/file/20061/download>.

Section 6 attempts to delegate to the Comptroller General the ability to determine when the repeal of this section will take effect. That delegation appears to permit a congressional agent to determine the timing of repeal based upon the occurrence of events at least partly within the agent's control, namely, the filing of the report required to take place at some point within 4 years after the date of enactment of this provision.

The problem could be addressed by replacing "upon the expiration of the two-year period that begins on the date the Comptroller General submits the evaluation under paragraph (1) to Congress" with a specific date or a date tied to the enactment of this provision of the bill, rather than any action by the Comptroller General.

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,

A handwritten signature in dark ink, appearing to read "S. Boyd", written over a large, stylized, abstract scribble that forms a large, irregular shape.

Stephen E. Boyd  
Assistant Attorney General

cc: The Honorable Claire McCaskill  
Ranking Member