**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

JAN 09 2018

The Honorable Michael R. Pence
President
United States Senate
Washington, DC 20510

Dear Mr. President:

We write to provide our views on S. 1129, the "Coast Guard Authorization Act of 2017," as reported by the Senate Committee on Commerce, Science, and Transportation. The Department of Justice wishes to notify Congress of certain constitutional concerns raised by the bill and recommend ways to address those concerns.

**1. Sections 943(2) and 945(a), amending sections 226 and 229, respectively, of the National Oceanic and Atmospheric Administration ("NOAA") Commissioned Officer Corps Act of 2002 (codified at 33 U.S.C. §§ 3022 and 3029, respectively)**

**Recommended Change:** Eliminate proposed sections 226(b) and 229(e) of the NOAA Commissioned Officer Corps Act.

**Explanation:** Sections 943(2) and 945(a) would each provide that, if the President delegates to the Secretary of Commerce his authority to appoint NOAA commissioned officers, whether to a permanent grade (section 943(2)) or to a temporary grade (section 945(a)), he "shall, during a period in which the position of the Secretary is vacant, delegate such authority to the Deputy Secretary of Commerce or the Under Secretary for Oceans and Atmosphere during such period." S. 1129, sec. 943(2), § 226(b); *id.* sec. 945(a), § 229(e). As we explained in a 2005 opinion, "[t]he question whether Congress may permit the President or the head of a department to delegate appointment authority to an officer below the head of a department is a difficult one." *Assignment of Certain Functions Related to Military Appointments*, 29 Op. O.L.C. 132, 135 (2005). Sections 943(2) and 945(a) would not merely permit the delegation of appointment authority to an officer below the head of a department; they would in fact condition the President's delegation of authority to the head of a department on the President's further delegating, in certain circumstances, appointment authority to an inferior officer subordinate to the head of a department.

Those inferior officers would, however, be exercising that appointment authority only when the position of the Secretary is vacant. The constitutionality of this provision therefore could be defended on the ground that Congress may, during a vacancy in a principal office, temporarily authorize an inferior officer to perform the functions of that principal office,

including the appointment of inferior officers when the principal officer is also the head of a department.

The constitutional difficulty is that the statute would in some applications require the President to delegate the authority to appoint inferior officers to someone other than the acting head of the Commerce Department (at least, in any instance in which the President chose to delegate his authority to appoint NOAA commissioned officers to the Secretary of Commerce). To be sure, if there is no Secretary of Commerce, the default rule under the Vacancies Reform Act (VRA) is that the Deputy Secretary would be the Acting Secretary temporarily. 5 U.S.C. § 3345(a)(1). If so, the statute could be applied constitutionally because it permits the President to delegate the authority to appoint NOAA officers to the Deputy Secretary. But the VRA permits the President to designate another official as the Acting Secretary. 5 U.S.C. § 3345(a)(2)–(3). Instead of the Deputy Secretary, the President could designate the other official to whom the statute permits delegation of the authority to appoint NOAA officers—the Under Secretary for Oceans and Atmosphere, also known as the NOAA Administrator—as the Acting Secretary. But if the President chose to designate an official other than the NOAA Administrator as the Acting Secretary, this statute would unconstitutionally require the President to delegate the appointment power to an official who is not the head of a department (or any other official entitled to appoint officers of the United States under the Appointment Clause). *See* U.S. Const. art II, § 3. A similar constitutional problem would arise if, as a result of the time limitations in the VRA, 5 U.S.C. § 3346, the Deputy Secretary or the NOAA Administrator ceased to function as the acting head of the Department.

We recommend deleting sections 943(2) and 945(a) because the statute would operate unconstitutionally in those applications in which the Deputy Secretary or the NOAA Administrator is not the acting head of the Commerce Department.

**2. Section 961(a)(3), amending section 306 of the Hydrographic Services Improvement Act of 1998 (codified at 33 U.S.C. § 892d)**

**Recommended Change:** Unless a legislative record is available to withstand strict scrutiny, revise section 961(a)(3) to authorize funds "to reduce risks of harm to subsistence and coastal communities, **including Alaska Native communities,** associated with increased international maritime traffic." S. 1129, sec. 961(a)(3), § 306(b)(1)(E) (emphasis added to recommended changes).

**Explanation:** Section 961(a)(3) would amend section 306 of the Hydrographic Services Improvement Act of 1998 (codified at 33 U.S.C. § 892d) to authorize $10,000,000 for each fiscal year "to reduce risks of harm to Alaska Native subsistence and coastal communities associated with increased international maritime traffic." S. 1129, sec. 961(a)(3), § 306(b)(1)(E). Authorizing funds to benefit communities only of a certain race or ethnicity will likely be subject to strict scrutiny under *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995). To withstand strict scrutiny, the benefit would need to be supported by a legislative record demonstrating that it is narrowly tailored to fulfill a compelling governmental interest. Unless such a record is available, we recommend broadening the recipient class to all "subsistence and

coastal communities," which could expressly include Alaska Native communities as long as it does not exclude others.

**3. Section 928, amending section 261 of the NOAA Commissioned Officer Corps Act of 2002 (codified at 33 U.S.C. § 3071)**

**Recommended Change:** None, but lawmakers should be advised of the Executive Branch's longstanding view of 10 U.S.C. § 1034.

**Explanation:** Proposed section 928 would amend 33 U.S.C. § 3071 to make 10 U.S.C. § 1034, a military whistleblower protection provision, applicable to the commissioned officer corps of the National Oceanic and Atmospheric Administration (NOAA). S. 1129, sec. 928(a)(2), § 3071(8). If that provision were enacted into law, we would not construe it to interfere with the President's supervision of the Executive Branch, including his authority to discipline employees who disclose, without authorization, information protected by executive privilege.

Subsection (a) of 10 U.S.C. § 1034 provides as follows:

> (a) Restricting Communications With Members of Congress and Inspector General Prohibited.—
>
> > (1) No person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General.
> >
> > (2) Paragraph (1) does not apply to a communication that is unlawful.

Subsection (b) further provides that "[n]o person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces" for making a communication with Congress that is not restricted (as "unlawful"). Subsection (b) also prohibits retaliatory personnel actions against a member of the armed forces for communications with Congress concerning what the member "reasonably believes constitutes evidence of" the items listed in section 1033(c)(2)(A)–(C), including gross mismanagement.

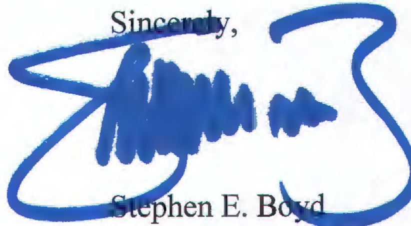
Notwithstanding Congress's significant, legitimate interest in addressing wrongdoing, abuse, and mismanagement in the Executive Branch, we have long taken the position that "a congressional enactment would be unconstitutional if it were interpreted to divest the President of his control over national security information in the Executive Branch by vesting lower-ranking personnel in that Branch with a right to furnish such information to a member of Congress without receiving official authorization to do so." *Access to Classified Information*, 20 Op. O.L.C. 402, 404 (1996) (internal quotation marks omitted); Brief for the Appellees at 48, *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153 (1989) (No. 87-2127). This principle extends to the disclosure to Congress of confidential, but unclassified, executive branch

deliberations. *See* Letter to the Secretary of Defense Directing Him to Withhold Certain Information from the Senate Committee on Government Operations, *Pub. Papers of Pres. Dwight D. Eisenhower* 483, 483–84 (May 17, 1954). We recognize that 10 U.S.C. § 1034 has long been part of the U.S. Code. But we have also long noted the problems posed by 10 U.S.C. § 1034 for the President's constitutional authority to control access to national security information and other privileged information. *See* Letter for Thomas M. Boyd, Acting Assistant Attorney General, Office of Legislative Affairs, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: S. 2355, H.R. 4264; the "National Defense Authorization Act for Fiscal Year 1989,"* att. at 4–6 (June 10, 1988).

For those reasons, we would construe 10 U.S.C. § 1034, if made applicable to the NOAA officer corps, not to infringe upon the President's constitutional authority to supervise and discipline employees who make unauthorized disclosures to Congress of confidential executive branch deliberations.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that, from the standpoint of the Administration's program, there is no objection to the submission of this letter.

Sincerely,



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