



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 22, 2020

The Honorable Russell Vought
Director
Office of Management and Budget
Washington, DC 20503

Dear Mr. Vought:

This responds to your request for the views and recommendation of the Department of Justice (“Department”) on S.881, the “Promoting Research and Observations of Space Weather to Improve the Forecasting of Tomorrow Act,” as enrolled and presented to the President. The Department takes no position on whether the President should sign the bill. The bill does raise certain constitutional concerns related to the conduct of diplomacy, however, for which the Department recommends the following signing statement language:

Today, I have signed into law S.881, the “Promoting Research and Observations of Space Weather to Improve the Forecasting of Tomorrow Act,” or “PROSWIFT Act.” The Act provides authorities to improve the gathering of space weather data and the forecasting of space weather. I note, however, that certain provisions of the Act, while generally unobjectionable as a matter of policy, would limit my discretion under Article II of the Constitution to conduct the Nation’s foreign affairs. These include section 2(a) and 51 U.S.C. §§ 60601(c)(3) and 60603(c), as added by section 2(b). My Administration will treat these limitations as advisory and non-binding.

The following provisions raise this concern:

- Section 2(a) would declare that “[i]t shall be the policy of the United States to prepare and protect against the social and economic impacts of space weather phenomena by . . . *engaging with* all sectors of the space weather community, including academia, the commercial sector, and *international partners*” (emphasis added).
- Section 60601(b)(3) of title 51, U.S. Code, as added by section 2(b), would provide that “[e]ach Federal agency participating in the space weather interagency working group established under this subsection shall, to the extent practicable, *increase engagement and cooperation with the international community*, academic community, and commercial space weather sector on the observational infrastructure, data, and scientific research necessary to advance the monitoring, forecasting, and

prediction of, preparation for, and protection from, space weather phenomena” (emphasis added).

- Section 60603(c) of title 51, U.S. Code, as added by section 2(b), would provide that “[t]he Administrator of the National Oceanic and Atmospheric Administration, in coordination with the Secretary of Defense and the Administrator of the National Aeronautics and Space Administration, *shall work with* Federal and *international partners* in order to secure reliable backup baseline capability for near real-time coronal mass ejection imagery, solar wind, solar imaging, coronal imagery, and other relevant observations required to provide space weather forecasts (emphasis added).

These provisions would contravene the President’s constitutional “authority to represent the United States and to pursue its interests outside the borders of the country,” *The President’s Compliance with the “Timely Notification” Requirement of Section 501(b) of the National Security Act*, 10 Op. O.L.C. 159, 160 (1986), and “to determine the time, scope, and objectives of international negotiations or discussions.” *Unconstitutional Restrictions on the Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011*, 35 Op. O.L.C. ___, at *4 (Sept. 19, 2011) (citations and internal quotation marks omitted).

We considered a similar objection to 51 U.S.C. § 60603(b)(1), as added by section 2(b), which would provide that “[t]he Administrator of the National Aeronautics and Space Administration shall, *in cooperation with the European Space Agency and other international and interagency partners*, maintain operations of the Solar and Heliospheric Observatory/Large Angle and Spectrometric Coronagraph (referred to in this section as ‘SOHO/LASCO’) for as long as the satellite continues to deliver quality observations” (emphasis added). The fundamental directive here, however, is not to interact with other countries, but rather to obtain useful scientific data from the operation of a set of telescopes, which is within Congress’s constitutional authority under the Article IV Property Clause and Article I Commerce Clause to direct. Cooperation with other countries is merely an incidental and inevitable byproduct of operating the telescopes, as the LASCO was built jointly by the United States, Germany, England, and France, and is maintained aboard a spacecraft (SOHO) that was built under the auspices of the European Space Agency. We thus would not include section 60603(b)(1) in the signing statement, although the phrasing (that the problematic provisions “include” the ones enumerated) would leave room for addressing any diplomacy concerns that might arise in application of section 60603(b)(1).

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Thank you for the opportunity to present our views. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

A handwritten signature in black ink, appearing to read "MB Hankey". The signature is written in a cursive, slightly slanted style.

Mary Blanche Hankey
Deputy Assistant Attorney General