



**U.S. Department of Justice**

Office of Legislative Affairs

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*Office of the Assistant Attorney General*

*Washington, D.C. 20530*

**DEC 14 2020**

The Honorable Russell T. Vought  
Acting 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 on the enrolled bill H.R. 6395, the “William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021.” As to the general desirability of the legislation, we defer to other Departments. However, should the President approve the bill, we recommend that he issue an accompanying statement that includes the language set forth below. Likewise, should he disapprove the bill, we recommend that he issue a similar statement, but omit our first paragraph as well as our language indicating how he would construe the bill’s provisions. In addition, as we explain below, the bill raises several important policy concerns.

**I. Constitutional Concerns**

To address the constitutional concerns that we have identified, we recommend that the President issue a statement accompanying his approval or disapproval of the bill. Should he approve the bill, we recommend that the statement contain the following language:

Today, I have signed into law H.R. 6395, the “William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021” (the “Act”). I applaud both the Senate and House Armed Services Committees for their work on the bill and the leadership of both chambers for securing its passage. I note, however, that the Act includes several provisions that raise constitutional concerns.

Several provisions of the Act, including sections 111(a), 144, 344, 1054, 1057(a), 1061(a)(3), 1224, 1258, and 1635, purport to restrict the President’s authority to direct the use of personnel and materiel in a manner the President believes necessary or advisable for the successful conduct of military missions. My Administration will implement these provisions consistent with the President’s exclusive constitutional authority as Commander in Chief.

Other provisions of the Act, including sections 1233, 1260(a), 1263, 1270, 1280A(i), 1294, 1295(a), 6112(a), 9722(a), 9723(a)(1), and 9724(b), purport to dictate the position of the United States in foreign relations. My Administration will treat these provisions consistent with the President's exclusive constitutional authorities as the sole representative of the Nation in foreign relations, including the authorities to determine the terms upon which recognition is given to foreign sovereigns, to receive foreign representatives, and to conduct the Nation's diplomacy.

Some provisions of the Act in particular, including sections 111(b), 154(d), 227(d), 902(c)(4), 930(a), 931(a)(2), 1030, 1215, 1245(b), 1275(c), 1292(a), 1299K(a), and 2871(b), purport to require that the Congress receive a certification, notification, assessment, or report, sometimes from a subordinate in the executive branch, before the President may direct certain military or diplomatic actions. I reiterate the long-standing understanding of the executive branch that these types of provisions apply only to circumstances in which such advance action is feasible and consistent with the President's exclusive constitutional authorities as Commander in Chief and as the sole representative of the Nation. Nor may the President's exercise of these constitutional authorities be conditioned on the decision of a subordinate.

Sections 1041 and 1043 of the Act continue restrictions on transfers of detainees held at the United States Naval Station, Guantánamo Bay. Consistent with the statements I have issued in signing previous National Defense Authorization Acts, I reiterate the executive branch's established position that, under certain circumstances, restrictions on the President's authority to transfer detainees violates constitutional separation-of-powers principles, including the President's constitutional authority as Commander in Chief.

A number of provisions of the Act, including sections 126, 151(a), 157(d), 322, 361(c)(3), 363(d), 599(b)(3), 807(d)(1), 836(g)(2), 849(b)(2)(G), 1280(b)(4), 1614(a)(2)(F), 1632(b), 1745(b), 1801(b)(1), 2863(e)(2), 2866(g)(5), 6210(c), 6212(a) (31 U.S.C. 5318(g)(8)(B)(iii)(III)), 9202(a)(1)(G)(i)(II) & (2)(C)(iv), 9413(c), 9603(c)(2)(A)–(B), 9714(b)(1), and 9905(c)(6), purport to prevent or require the President or executive branch officials under the President's supervision to recommend certain legislative measures to the Congress. My Administration will treat these provisions consistent with Article II, section 3 of the Constitution, which provides the President the discretion to recommend to the Congress only "such Measures as he shall judge necessary and expedient."

A number of other provisions of the Act, including sections 165(a)(3), 227(e), 713(b)(2)(A), 1217(b), 1221(d), 1232(c), 1296, 1632(b), 1649(a)(2)(B)(ii) & (b)(3)(B), 1651(a)(2)(A), 1703, 1727(a), 6311(a), 6314(a), and 9002(b)(1)(B) & (b)(3)(B), purport to mandate or regulate the dissemination of information that

may be protected by executive privilege, including by interfering with Presidential control of the process for making a determination that information is protected. My Administration will treat these provisions consistent with the President's constitutional authority to control information, the disclosure of which could impair national security, foreign relations, law enforcement, or the performance of the President's constitutional duties. I anticipate that, when supervising officials decide they must defer, limit, or preclude the disclosure of any sensitive information required these provisions, they will contact the appropriate congressional committees promptly to begin the accommodation process that has traditionally been followed with respect to disclosure of sensitive information.

Finally, several provisions of the Act present concerns regarding the appointment and removal of officers and the separation of powers. For example, section 345 directs the Secretary of Defense to establish and support an independent advisory panel, comprising appointees by both the Secretary of Defense and Members of the Congress, with responsibility to prepare a report for the Secretary and for the Congress on the weapon system sustainment ecosystem. Under the separation of powers, a panel that includes congressional appointees, who would be outside the President's supervision, cannot be located in the executive branch. My Administration accordingly will treat the advisory panel as a legislative branch entity, and the Secretary will support this panel only as consistent with executive branch objectives.

Section 370 similarly directs the Secretary of Defense to establish a commission, comprising members appointed by the Secretary of Defense and Members of the Congress, with responsibility to develop a plan for removing certain names, displays, and monuments associated with the Confederacy from Department of Defense property. The provision purports to direct the Secretary to implement the commission's plan. The members of the commission, however, are not principal officers in the executive branch and cannot direct the Secretary of Defense. To avoid Appointments Clause and separation of powers concerns, my Administration will treat this commission as located in the legislative branch and my Administration will consider any plans the commission develops to be advisory and non-binding.

Section 633(d) purports to condition the authority of the Secretary of Defense to take certain action on the acceptance of a required analysis by two congressional committees. I reiterate the longstanding understanding of the executive branch that such a condition is a constitutionally impermissible form of congressional aggrandizement in the execution of the laws. The Congress may affect the execution of the laws only by enacting a new statute in accordance with the requirements of bicameralism and presentment prescribed in Article I, section 7. My Administration will make appropriate efforts to notify the relevant

committees before taking the specified actions and will accord the recommendations of such committees all appropriate and serious consideration, but it will not treat the Secretary's action as dependent on prior approval by congressional committees.

Section 901 abolishes the Presidentially appointed, Senate-confirmed position of Chief Management Officer in the Department of Defense and directs the Secretary of Defense to transfer the duties formerly belonging to that position to another officer or employee. Section 901(b)(1) purports to prohibit the assignment of those duties to a previous holder of the office. This prohibition is an unconstitutional exercise by the Congress of the power that the Constitution vests in the President to remove the incumbent from office. My Administration will implement these provisions consistent with the President's removal power and will not treat the prohibition in section 901(b)(1) as preventing the assignment of the incumbent to another position that performs the former responsibilities of the Chief Management Officer.

Sections 1712(b) and 1715 create offices with program responsibility for cybersecurity that may constitute the exercise of "significant authority pursuant to the laws of the United States" under the Supreme Court's decisions in *Lucia v. SEC* and *Buckley v. Valeo*. These offices would be headed by individuals appointed by the Director of the National Security Agency and the Director of Cybersecurity and Infrastructure Security, respectively. To ensure compliance with the Appointments Clause, my expectation is that these individuals will be appointed with the approval of their respective department heads, the Secretary of Defense and the Secretary of Homeland Security.

Section 1752 establishes an Office of the National Cyber Director within the Executive Office of the President. The National Cyber Director is to be appointed by the President with the advice and consent of the Senate, and the duties of the Director are to advise the President on cybersecurity strategy and policy and to assist him in supervising the executive agencies as they carry out that strategy and policy. By requiring Senate confirmation of a close adviser to the President, this provision risks interfering with the President's ability to obtain advice on important public policy issues from someone in whom the President has the utmost confidence. I do not understand this provision as foreclosing my reliance upon other advisors to assist in the development and oversight of cybersecurity strategy and policy.

As noted above, should the President disapprove the bill, we recommend omitting from the statement the first paragraph as well as our language indicating how he would construe the bill's provisions. We would be pleased to assist in making any revisions to the language necessary to accommodate this circumstance.

## **II. Policy Concerns**

### **Section 6311: Department of Justice Report on Deferred and Non-prosecution Agreements**

Section 6311 of the bill would require the Attorney General to report annually on deferred prosecution agreements ("DPAs") and non-prosecution agreements ("NPAs"), either of which relating to violations or suspected violations of the Bank Secrecy Act. It would require that the report contain (1) a list of DPAs and NPAs; (2) the justification for entering into each such agreement; (3) the list of factors that were taken into account in determining that the Attorney General should enter into each such agreement; and (4) the extent of coordination the Attorney General conducted with the Financial Crimes Enforcement Network prior to entering into each such agreement. We oppose this provision.

Section 6311 would require the production of privileged information, intruding on the prosecutorial discretion of line attorneys, assistant United States attorneys, and others in the Department of Justice. The Department has a broad confidentiality interest in materials that reflect its internal deliberative process. The confidentiality of prosecutorial assessments ensures that prosecutors will not be chilled from providing the candid and independent analysis essential to just and effective law enforcement. Reporting on decisional factors would require the disclosure of sensitive and privileged information, including sensitive deliberations about law enforcement, which would inhibit the exercise of prosecutorial discretion by line attorneys, assistant United States attorneys, and others in the Department of Justice. Further, reporting on DPAs would involve reporting on open matters and risk creating a public perception that there existed undue political or congressional influence over law enforcement and litigation decisions. Moreover, this reporting requirement would call for reporting on closed matters. The Department also has compelling reasons for its practice of not disclosing certain information about closed cases, including protecting the reputations of those who are investigated and not charged, protecting the identities of sources, and protecting follow-on investigations. It also risks disclosure of sensitive law enforcement information (including information regarding "the extent of coordination," if any, among the Department and regulators, that may be considered when entering a deferred prosecution or non-prosecution agreement). For these reasons (in addition to the constitutional concern that we identified in our proposed signing statement language), we oppose section 6311.

**Section 6313: Prohibition on Concealment of the Source of Assets in Monetary Transactions**

Section 6313 of the bill would make it a crime for an individual to conceal from a financial institution the source of assets involving certain individuals or entities. This new offense would be another tool in the Department's arsenal for prosecuting those who try to launder ill-gotten gains.

**Section 6403: Beneficial Ownership Information Reporting Requirements**

Title LXIV of the bill (sections 6401-6403) would require certain new and existing corporations and limited liability companies to disclose information about their beneficial owners, as defined in the bill. We believe that these provisions would set forth a helpful framework for improving the collection of beneficial ownership information for legal entities, assisting in the identification of criminals who use shell companies to hide their identities.

**Freedom of Information Act Considerations**

Several provisions of the bill appear targeted toward creating exemptions to the disclosure requirements of the Freedom of Information Act ("FOIA"). We believe that the language of these provisions would not permit agencies to protect certain information under Exemption 3 of the FOIA because these provisions do not explicitly and specifically reference Exemption 3. The potentially problematic provisions are sections 6109(a) (proposed new 31 U.S.C. § 310(i)(2)(B)), 6209(a) (proposed new 31 U.S.C. § 5318(o)(3)(B)), 8218(a) (proposed new 14 U.S.C. § 719(e)(1)), and 8440(a) (proposed new 46 U.S.C. § 3507(b)(1)(G) on p. 3313. We defer to Department of the Treasury and to the Coast Guard with respect to the importance of this issue.

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Thank you for requesting our views on this important matter. Please do not hesitate to contact this office if we may be of additional assistance in this or any other matter.

Sincerely,



Mary Blanche Hankey  
Acting Assistant Attorney General