U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

OCT 04 2017

The Honorable Devin Nunes
Chairman
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice ("the Department") on H.R. 3180, the "Intelligence Authorization Act for Fiscal Year 2018." As we explain below, the bill raises both constitutional and policy concerns.

I. Constitutional Concerns

The bill raises two constitutional concerns. First, section 303 would prohibit the heads of elements of the intelligence community from restricting their contractors from meeting with the Congress to discuss contract matters, from taking adverse action against the contractor based such a meeting, or from requiring preclearance before contractors may meet with the Congress to discuss contract matters. "Congress may not," however, "bypass the procedures the President establishes to authorize the disclosure to Congress of classified and other privileged information by vesting lower-level employees with a right to disclose such information to Congress." *Authority to Prohibit Employees from Providing Information to Congress*, 28 Op. O.L.C. 79, 80 (2004). Therefore, consistent with longstanding practice, we would not construe section 303 to impair the President's constitutional authority in a particular case to maintain the confidentiality of national security information. *See, e.g.*, *Statement on Signing the National Defense Authorization Act for Fiscal Year 2008*, 1 Pub. Papers of Pres. George W. Bush 115, 115 (Jan. 28, 2008) (noting that section 846, purporting to protect contractor employees from reprisal for disclosures to Congress, was among provisions that "purport[ed] to impose requirements that could inhibit the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief" and that therefore the Executive would "construe such provisions in a manner consistent with the constitutional authority of the President").

Second, section 604 appears to violate the Recommendations Clause, U.S. Const. art. II, § 3. That section would require the Director of the Central Intelligence Agency to submit to the

congressional intelligence committees "a report on the feasibility, justification, costs, and benefits of expanding the jurisdiction of the protective services of the Central Intelligence Agency under section 15(a)(1) of the Central Intelligence Agency Act of 1949 (50 U.S.C. 3515(a))." The report would be required to include "an explanation of the need for expanding such jurisdiction beyond the 500-feet limit specified in such section 15(a)(1)."

We understand that the Administration has requested legislation from the Congress to expand the jurisdiction of CIA security services beyond the 500-foot limit, and we have no objection to submitting a report to Congress explaining the need to do so in accordance with this provision. But section 604, as currently drafted, contains a technical constitutional problem: by its literal terms, it would appear to obligate the Director of the Central Intelligence Agency to recommend the enactment of legislation expanding the jurisdiction of the protective services of the Central Intelligence Agency beyond the 500-feet limit specified in section 15(a)(1) of the Central Intelligence Agency Act of 1949. Because the Director is an Executive Branch official subject to plenary presidential supervision, such an obligation would contravene the President's discretion to "recommend to [Congress's] Consideration such Measures *as he shall judge* necessary and expedient," U.S. Const. art. II, § 3 (emphasis added); *see also Application of the Recommendations Clause to Section 802 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003*, 40 Op. O.L.C. __ (Aug. 25, 2016).

We recommend amending this provision to read "an explanation of the need, *if any,* for expanding such jurisdiction . . . ." (new text in *italics*).

II. Policy Concerns

Section 607: Review of Intelligence Community Participation in Vulnerabilities Equities Process

We note that the definition of "vulnerability" in section 607(c) differs somewhat from the definition in the Vulnerabilities Equities Process ("VEP") charter, which according to Annex C of the declassified VEP charter document (available at https://www.eff.org/files/2015/09/04/document_71_-_vep_ocr.pdf) is the following:

> "Vulnerability - A technical design or implementation flaw in an Industrial Control System, Government Off-The-Shelf (GOTS), Commercial Off-The-Shelf (COTS), or other commercial information technology product or systems that could potentially be used to exploit or penetrate a product or system (hardware or software, to include open-source software)."

Section 609: Sense of Congress on Notifications of Certain Disclosures of Classified Information

Section 609(b) would express the Congress's interpretation of existing law as requiring the heads of intelligence community elements to send a notification to the intelligence committees within seven days upon learning that "an individual in the executive branch has disclosed covered classified information to an official of an adversary foreign government using methods other than established intelligence channels." We understand the obligation of the intelligence community to keep the intelligence committees fully and currently informed of intelligence activities. However, we are concerned that a rigid, seven-day notification requirement could impede or interfere with counterintelligence investigations. Although section 609 merely expresses the sense of Congress, we nevertheless recommend amending the provision to ensure that any notification is required only when and where consistent with operational and investigative needs.

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: The Honorable Adam B. Schiff
Ranking Member