



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D. C. 20530

AUG 17 2018

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 on S.1884, the "Reporting Efficiently to Proper Officials in Response to Terrorism ('REPORT') Act of 2017." As we explain below, we have both constitutional and policy concerns about the bill.

I. Constitutional Concerns

Section 2 of the bill would restrict the constitutional authority of the President to control dissemination of national security information. Under section 2, the primary Government agency investigating any act of terrorism that occurs in the United States would be required to submit to the Congress, within one year after the completion of the investigation, a report that included, among other things, "a statement of the facts of the act of terrorism" and "an explanation of any gaps in national security that could be addressed to prevent future acts of terrorism." Sec. 2(a), (b)(1)-(2). Although the bill would permit the report to be "accompanied by a classified annex," sec. 2(a), and would not require the submission of a report if one of the specified Executive Branch officials "determines that the information required to be reported could jeopardize an ongoing investigation or prosecution" and notifies Congress of that determination, sec. 2(c), these accommodations are not broad enough to protect the President's authority to control the dissemination of national security information. *See Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) (The President's "authority to classify and control access to information bearing on national security . . . flows principally from th[e] constitutional investment of [the Commander in Chief] power in the President" and the "authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief"); *Access to Classified Information*, 20 Op. O.L.C. 402, 404 (1996) (stating "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"). We recommend revising section 2(c) to add an exception to the reporting requirement for information the disclosure of which could cause harm to national security or United States foreign relations. If enacted without revision, we would treat the reporting requirement in a manner consistent with

the President's constitutional authority to control the dissemination of information protected by executive privilege, including by withholding information where necessary.

II. Policy Concerns

We recommend against requiring a report on every act of terrorism. We successfully disrupt potential acts of terrorism on a regular basis and, for the majority of this activity, there would be little informational benefit in regularly reporting individual instances to the Congress. Many of these investigations result in charges, convictions, and sentences, which are public and therefore available to Congress. When an investigation *successfully* disrupts a terrorist plot, it seems unlikely that reporting on that activity would further the purpose of identifying gaps. For these reasons, if there were a need for reporting information beyond that which currently is available, we would recommend limiting the report to identified gaps and recommendations (*see, e.g., (b)(2)-(3)*).

Further, we recommend clarifying whether Federal agencies must report on gaps identified in domestic terrorism investigations when no Federal government agency leads the investigation. In specifying which activities would require reporting, section 2(d) of the bill would incorporate the definition of an "act of terrorism" set forth in 18 U.S.C. § 3077, which, in turn, references 18 U.S.C. § 2331. With respect to many of the acts of terrorism the bill would reach through these definitions, there would be no Federal "primary Government agency investigating such act." This is because the definition in section 3077 includes acts of domestic terrorism (defined at 18 U.S.C. § 2331(5)) and, notwithstanding its definition in the Code, there is no Federal criminal offense of domestic terrorism *per se*. Thus, State and local officials often are the primary investigators of domestic terrorism offenses. The reporting obligations that the bill would impose on Federal officials in these circumstances are unclear.

Further, we recommend editing sections 2(a) and 2(c) to include the Secretary of State after the Director of the National Counterterrorism Center, given the foreign policy equities inherent in terrorism investigations and incidents, and, in section 2(a), moving the location of the phrase "as appropriate". As a result, section 2(a) would state the following: "... with the Secretary of Homeland Security, the Attorney General, the Director of the Federal Bureau of Investigation, the Director of the National Counterterrorism Center, and the Secretary of State, as appropriate..." Section 2(c) then would state the following: "... shall not apply in instances in which the Secretary of Homeland Security, the Attorney General, the Director of the Federal Bureau of Investigation, the head of the National Counterterrorism Center, or the Secretary of State, determines that the information required..."

Further, we think section 2(a) is unclear as to the nature of agencies' obligation to report "in collaboration with" one another, as the provision would require. We recommend using the more common statutory phrase "in consultation with."

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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 cursive script that reads "Prim Escalona / fox".

Stephen E. Boyd
Assistant Attorney General

cc: The Honorable Claire McCaskill
Ranking Member