U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D. C. 20530

FEB 1 3 2018

The Honorable Bob Corker
Chairman
Committee on Foreign Relations
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice ("the Department") on S. 1631, the "Department of State Authorities Act, Fiscal Year 2018," as introduced. As we explain below, we object to a number of provisions of the bill that raise constitutional concerns. Additionally, several provisions of the bill raise policy concerns that we believe should be addressed. Below, we recommend changes to address those concerns.

I. Constitutional Concerns

A. Section 301: Procedures for Appointing Special Envoys and Related Positions

Section 301(b)–(g) of the bill would prescribe the appointment process for any appointees to positions with the title of "Special Envoy, Special Representative, Special Coordinator, Special Negotiator, Envoy, Representative, Coordinator, or Special Advisor." These provisions violate the Appointments Clause, infringe upon Executive removal authorities, intrude upon the President's foreign affairs authority, and raise bicameralism, presentment, and aggrandizement concerns. They should be deleted.

1. Section 301(b), (c), (f), and (g) would violate the Appointments Clause. These provisions would require the advice and consent of the Senate for appointees to positions with the above titles whose positions "demand the exercise of significant authority pursuant to the laws of the United States." S. 1631, §§ 301(d)(1), 301(f)(1)(A). With respect to existing positions, section 301(b) would require the Secretary of State ("the Secretary") to "present . . . to the Committee on Foreign Relations for the advice and consent of the Senate" any appointees to existing positions with the above titles that are "to be maintained by the Department" and are "not expressly authorized by a provision of law enacted by Congress." Similarly, section 301(g) would require the advice and consent of the Senate to appoint anyone to positions with the above titles that are currently "authorized by a provision of law enacted by Congress." With respect to new positions, section 301(c) would recognize that the Secretary could "establish[] or maintain[]

the "exclusivity of the President's removal power . . . by an attempt of the Senate to withdraw a confirmation; 36 Op. Att'y Gen. 382 (1931); *United States v. Smith*, 286 U.S. 6 (1932); by cutting off of the salaries of incumbent officials, *United States v. Lovett*, 328 U.S. 303 (1946); by making new limiting qualifications for an office applicable to an incumbent, 111 Cong. Rec. 17597–98 (1965) (statement of Assistant Attorney General Schlei); or by 'ripper' legislation which purports to abolish an office and immediately recreate it. Veto Message re: S. 518, 93d Cong., 1st Sess., 9 Weekly Comp. Pres. Doc. 681 (1973)." *Constitutionality of Proposed Legislation Requiring Renomination and Reconfirmation of Executive Branch Officers upon the Expiration of a Presidential Term*, 11 Op. O.L.C. 25, 26 (1987).

Section 301(b) and (c) would resemble unconstitutional "ripper" legislation. These provisions would give the Secretary a fixed deadline to "present any" officer of the United States holding the above listed titles (including incumbents) for the advice and consent of the Senate. They would effectively permit the Senate to remove particular incumbents by denying advice and consent. Section 301(f) also would amount to de facto removal by denying funding to any incumbent appointees whose appointments do not conform to the procedures that the Congress specified elsewhere in section 301. Furthermore, while we previously have interpreted analogous provisions to apply prospectively to avoid such constitutional issues, *see, e.g.*, *Applicability of Appointment Provisions of the Anti-Drug Abuse Act of 1988 to Incumbent Officeholders*, 12 Op. O.L.C. 286, 287 (1988), https://www.justice.gov/file/24001/download, such an interpretation would not be possible here. Section 301(b), (c), and (f) contain specific timing provisions for seeking advice and consent that would apply irrespective of whether the particular occupant of a position with a covered title was the incumbent or newly appointed.

3. Section 301(b)–(g) of the bill would infringe upon the President's foreign affairs authority with respect to any appointees to the listed titles who qualify as employees. As noted, section 301(b), (c), (f), and (g) generally would require the advice and consent of the Senate for any appointee to positions with the above listed titles. Section 301(d) and (e), however, would authorize the Secretary to "maintain or establish a position" with the above listed titles for renewable 180-day periods without seeking Senate advice and consent, but only if the Secretary satisfied specific conditions and reporting requirements. For instance, the Secretary would have to describe to the Committee the duties and purpose of the appointment and would have to certify "that the position is not expected to demand the exercise of significant authority pursuant to the laws of the United States," *i.e.*, that the position is occupied by an employee, not an officer. S. 1631, § 301(d). Section 301(f)(2) would cut off funding for such employees unless the Secretary provided the requisite notifications under section 301(d).

Imposing these restrictions on the President's ability to select and employ diplomatic agents and other employees for specific missions would impermissibly interfere with the President's foreign affairs authority. The President has exclusive authority to identify the agents

who will engage in diplomatic activity. *Unconstitutional Restrictions on 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 *3–5 (2011) ("*OSTP*"), https://www.justice.gov/file/18346/download. Congress, to be sure, under the Appointments Clause may provide for Senate confirmation of diplomatic officials who qualify as officers of the United States. But there is longstanding practice of the President's conferring diplomatic rank and title, such as the rank of ambassador, on employees for specific diplomatic missions who are not officers of the United States. *See* Memorandum for Edward L. Morgan, Deputy Counsel to the President, from Thomas E. Kauper, Acting Assistant Attorney General, Office of Legal Counsel, *Assigning the Personal Rank of "Ambassador"* (July 16, 1969). The conferral of such title and rank is incident to the President's foreign affairs authority and furthers diplomatic objectives. *See id.* While we do not here have occasion to reach the practice of conferring the personal rank of "ambassador" or "minister," *cf.* 22 U.S.C. § 3942 (setting forth limits on the conferral of the personal ranks of "ambassador" and "minister"), subjecting those employees receiving the titles that are included in this provision to the advice and consent of the Senate or to repeated reporting requirements that would compel the disclosure of the employees' specific duties infringe on this authority. The Congress generally cannot place conditions on the President's exercise of his exclusive foreign affairs authority. *See, e.g.*, *OSTP* at *5 ("Congress may not constitutionally 'dictate the modes and means by which the President engages in international diplomacy,' and '[s]pecifically[] . . . may not . . . place limits on the President's use of his preferred agents to engage in a category of important diplomatic relations.'" (quoting *Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act*, 33 Op. O.L.C. __, at *4–5 (2009), https://www.justice.gov/file/18496/download); *cf. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2087 (2015) ("The formal act of recognition is an executive power that Congress may not qualify.").

4. Section 301(b)–(g) of the bill also might violate the requirements of bicameralism and presentment, and the prohibitions on congressional aggrandizement, by directly interfering with the Executive Branch's selection of employees through means other than legislation. Those requirements bar the Congress from "vest[ing] in itself or its agents the power to take action with legal effects outside the legislative branch by some means other than the textually prescribed procedure of bicameral passage of a bill and presentation to the President." *Separation of Powers*, 20 Op. O.L.C. at 132 n.25. Section 301(d)–(f), however, would give one house of Congress a post-enactment role in controlling appointments of executive branch employees. *See INS v. Chadha*, 462 U.S. 919, 951 (1983); *Separation of Powers*, 20 Op. O.L.C. at 131–32.

"Congress may not employ any mode of exercising legislative power other than through bicameralism and presentment." *Id.* at 130. The Appointments Clause does not give the Congress any role in appointing employees. For the Congress to play any further role, it must enact legislation that comports with the requirements of bicameralism and presentment. Section 310(b)–(g), however, would permit the Senate to limit the personnel choices of the Executive

Branch directly. The Secretary would be required either to allow the Senate to exercise what amounts to a one-house legislative veto over the appointments of employees or to file periodic reports and certifications with the Senate. Those requirements would impose a "legal effect[] outside of the legislative branch" upon the Secretary. *Separation of Powers*, 20 Op. O.L.C. at 132 n.25. A direct aggrandizement is unconstitutional "no matter how limited the power thereby seized by Congress." *Id.* at 132 (citing *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 826–27 (D.C. Cir. 1993)).

For the foregoing reasons, we recommend deleting subsections (b)–(g) of section 301.

B. Sections 102(b)(4) and 103(b)(10): Recommendation of Legislative Authorities

Sections 102(b)(4) and 103(b)(10) of the bill would violate the Recommendations Clause by requiring the Secretary to submit legislative recommendations to the Congress. These provisions should be made precatory.

Under the Recommendations Clause, the President has exclusive authority to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient." U.S. Const. art. II, § 3. Section 102(b)(4), however, would require the Secretary to submit, as part of a briefing on a government-wide reorganization plan, "[r]ecommendations for any legislative authorities required to implement the proposed reorganization." Section 103(b)(10) also would require the strategic plan developed by the Department of State and United States Agency for International Development to "identify extraordinary resources and statutory authorities that may be necessary to implement this strategy." Requiring the Secretary to submit "[r]ecommendations for any legislative authorities" and identify "statutory authorities that may be necessary" amount to requirements that the Secretary, an executive branch official under plenary presidential supervision, submit recommendations for legislative measures to the Congress, in violation of the Recommendations Clause. *See Application of the Recommendations Clause to Section 802 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003*, 40 Op. O.L.C. __, *17 (2016) ("[T]he Recommendations Clause is best read to prohibit Congress from enacting laws that require the President to recommend legislation regardless of whether he judges it necessary and expedient"), https://www.justice.gov/opinion/file/929881/download.

Therefore, we recommend making section 102(b)(4) precatory by inserting "if appropriate" after "Recommendations." We recommend making section 103(b)(10) precatory by inserting "and appropriate" after "necessary."

any Special Envoy, Special Representative, Special Negotiator, Envoy, Representative, Coordinator, or Special Advisor position," but only if "the appointee is established for a specified term," and is "presented to the Committee . . . for the advice and consent of the Senate within 90 days of appointment." Finally, section 301(f) would enforce these requirements by, for instance, prohibiting funding for any appointee to the named positions "exercising significant authority pursuant to the laws of the United States," or funding for any staff or resources, until the appointee is "presented to the Committee on Foreign Relations for the advice and consent of the Senate." S. 1631, § 301(f)(1).

The Appointments Clause provides the exclusive means of appointing "officers of the United States." *Buckley v. Valeo*, 424 U.S. 1, 138–39 (1976). As a default, the President must appoint officers of the United States with the advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2. Alternatively, "Congress may by Law vest the Appointment of such inferior Officers as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.* Those exclusive procedures do not authorize the Congress to condition an appointment on the advice and consent of the Senate if a department head, as opposed to the President, is the appointing authority. *See Buckley*, 424 U.S. at 127 ("[N]either Congress nor its officers [are] included within the language 'Heads of Departments.'"); *Silver v. U.S. Postal Serv.*, 951 F.2d 1033, 1037 (9th Cir. 1991) ("Congress may not delegate itself a role in the appointment process . . . .").

The provisions described above would violate the Appointments Clause with respect to any occupant of the listed positions who is appointed by the Secretary and qualifies as an officer of the United States. Section 301 would presuppose that at least some occupants of the positions exercise "significant authority pursuant to the laws of the United States." *See* S. 1631, § 301(c), (d) & (f)(1). We presume that the phrase "significant authority pursuant to the laws of the United States" is intended to mean an officer of the United States under the Appointments Clause. *See Buckley*, 424 U.S. at 126; *see, e.g.*, *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 78 (2007), https://www.justice.gov/file/451191/download; *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 171 (1996) ("*Separation of Powers*"), https://www.justice.gov/file/20061/download. Thus, section 301(b), (c), (f), and (g) would violate the Appointments Clause with respect to any officer appointed by the Secretary, since the Congress cannot confer appointment authority on the Secretary and then reserve for the Senate an advice and consent role.

2. Section 301(b), (c), and (f) of the bill also would encroach upon executive removal authorities. While "Congress has the general authority to legislate in ways that in fact terminate an executive branch officer's . . . tenure," we have "long maintained that the Constitution does not permit this legislative authority to be deployed abusively as a de facto removal power." *Separation of Powers*, 20 Op. O.L.C. at 170. We have said that Congress would interfere with

C. Section 207(c): Reporting on Recommendations from OMB and Department Studies

Section 207(c) of the bill would require the disclosure of materials protected by the deliberative-process component of executive privilege and should be converted to a requirement that the Department of State submit a report containing the desired elements, as the Secretary of State determines appropriate.

Section 207(c)(1) would require the Department of State to "provide to the appropriate congressional committees upon request" certain information, including "a description of each recommendation from" studies that that Department currently produces pursuant to OMB and Department project management procedures, and "a table detailing which recommendations were accepted and which were rejected." Section 207(c)(2) also would require that Department to provide "a report or briefing detailing the rationale" for not implementing certain recommendations. At present, under the cited OMB circular, the relevant studies that that Department produces already appear to include recommendations for carrying out projects at optimal value, and the "reasons for not implementing recommendations from [the] studies should also be documented." OMB Circular A-131, § 7(e) (2013). Requiring the disclosure of the details of which recommendations the Department of State accepted and rejected necessarily would require the disclosure of the recommendations themselves, which are pre-decisional, deliberative materials protected by the deliberative process component of executive privilege. *See Assertion of Executive Privilege over Communications Regarding EPA's Ozone Air Quality Standards and California's Greenhouse Gas Waiver Request*, 32 Op. O.L.C. 1, 2 (2008), https://www.justice.gov/file/482151/download; *Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 154-57 (1989), https://www.justice.gov/file/24236/download.

Therefore, we recommend inserting "as appropriate" after "shall provide" in section 207(c). If this change is not made, the Executive would interpret this provision's disclosure requirements in a manner consistent with the President's authority to control the dissemination of privileged information.

Section 207(c) also could raise aggrandizement concerns by requiring the Department of State to produce information "upon request" by congressional committees. We would construe the provision to avoid those concerns. We recognize that the Congress has inherent authority to conduct hearings and issue subpoenas compelling the attendance of witnesses and the production of documents, without the enactment of legislation. *See McGrain v. Daugherty*, 273 U.S. 135, 174–75 (1927). But some features of the requests that committees could make under section 207(c) could go beyond a subpoena, which impermissibly would enable committees of Congress to direct executive action through means other than bicameralism and presentment. *See Chadha*,

462 U.S. at 951; *Bowsher v. Synar*, 478 U.S. 714, 726–27 (1986). To avoid these concerns, we would treat section 207(c) as authorizing only the type of requests that the Congress otherwise could issue under its subpoena power — *i.e.*, requests limited to documents already in existence that expire at the end of the Congress during which the subpoena was issued.

D. Section 502: Disclosure of National Security Information about Information Systems

Section 502 would implicate the President's constitutional authority to control the dissemination of sensitive national security information and should be amended to allow the President to withhold such information where appropriate.

Section 502(e) would require the Secretary to submit semi-annual classified reports to the Congress describing in detail "all known and suspected incidents" in which certain information systems may be compromised or where legal or security policy violations may be involved. *See* 44 U.S.C. § 3552(b). There is an established tradition of sharing national security information with the Congress. But even if the Secretary's report to the Congress remained classified, the President, as Commander in Chief, has constitutional authority to control the dissemination of national security information. Memorandum from John R. Stevenson, Legal Adviser, Department of State, and William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: The President's Executive Privilege to Withhold Foreign Policy and National Security Information* at 7 (Dec. 8, 1969) ("It is therefore concluded that the President has the power to withhold from the Senate information in the field of foreign relations or national security if in his judgment disclosure would be incompatible with the public interest."); *see Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 94–95 (1998), https://www.justice.gov/file/19671/download.

Thus, we recommend revising section 502(e) by inserting "as appropriate" after "in detail," and section 502(f) by inserting "as appropriate" after "relevant reporting period." If section 502 were enacted in its current form, the Executive Branch would treat it in a manner consistent with the President's constitutional authority to withhold national security information where he determines it is appropriate.

II. Policy Concerns

Section 107(2): Assistant Secretary of State for International Narcotics and Law Enforcement Affairs

Section 107(2) of the bill, creating new section 1(c)(3) of the State Department Basic Authorities Act of 1956, would establish the position of Assistant Secretary of State for International Narcotics and Law Enforcement Affairs. Proposed new section 1(c)(3)(B) of the Basic Authorities Act provides that the new assistant secretary "shall maintain continuous observation of and review all matters pertaining to international narcotics and law enforcement in the conduct of foreign policy . . . ." We believe that this language needs clarification, as the Assistant Secretary exercises continuous observation and review of all matters relating to international narcotics and law enforcement *assistance*. Therefore, the term "assistance" should be inserted after "enforcement" to clarify that the assistant secretary does not oversee other Federal agency law enforcement investigations.

Additionally, in section 107(2) (adding new 22 U.S.C. § 2651a(c)(3)(B)(v)), we recommend clarifying this provision by amending it to state the following:

> (v) Combating all forms of ~~illicit~~ trafficking *of illicit goods*, including ~~human trafficking~~ arms trafficking, and the illicit smuggling of bulk cash.
>
> *(vi) Ensuring the inclusion, in relevant law enforcement programs, of components that address human trafficking.*
>
> (vi*i*) Identifying and responding to global corruption, including strengthening the capacity of foreign government institutions responsible for addressing financial crimes.

Section 303(b)(1): Danger Pay Allowance

The Department of Justice strongly opposes section 303 of the bill. Section 303 would strike the provisions governing the post differential pay allowance (5 U.S.C. § 5925) and the danger pay allowance (5 U.S.C. § 5928) from the United States Code. Section 303 would consolidate post differential pay and danger pay into a single new category entitled "staffing incentives" and eliminate the authority that the Federal Bureau of Investigation and Drug Enforcement Administration ("DEA") currently possess to award danger pay to employees working in certain foreign jurisdictions. The rationale for this change is not clear to us.

The new incentive that section 303 would create would not be useful in addressing the distinct characteristics of a post, such as desirability and dangerousness. Moreover, section 303

would create ambiguity both as to *how* the incentive levels would be calculated and *by whom* (the State Department or the affected law enforcement agency).

Existing law reflects a recognition that FBI and DEA employees stationed overseas who engage in appropriate law enforcement activities may face dangerous conditions and other hazards not encountered by other Government employees stationed at the same post. *See* 5 U.S.C. § 5928. In enacting sections 5925 and 5928 of Title 5, Congress clearly articulated its intent to utilize the law enforcement expertise of the FBI and DEA, as well as the agencies' sensitivity to the circumstances of their own employees, to avoid undercompensating these employees. Thus, section 5928 also authorizes the FBI and DEA to make independent danger pay assessments and allowances for their employees, even where the State Department has determined that other United States Government personnel should not receive it. In considering the exercise of this authority, the FBI and DEA examine data from many sources to determine whether the official duties of their employees in-country actually expose them to the conditions and criteria set forth in section 5928.

We are not aware of any circumstances suggesting that the changes that section 303 would make are warranted. Therefore, we recommend that deleting the entirety of section 303. We would be happy to brief the Committee on our concerns about this provision.

Title IV: Diversity

Section 402 would require the Secretary to make public a report on the diversity of its workforce within 180 days after the bill's enactment. Currently, all agencies must provide this information each year to Equal Employment Opportunity Commission ("EEOC") pursuant to the EEOC's the Management Directive 715. In this respect, section 402 seems redundant.

Moreover, many provisions of the bill would duplicate existing diversity programs at the State Department. The State Department continues to emphasize a data-driven approach in order to increase transparency and accountability at all levels and already carries out many of the provisions outlined in section 402. However, section 402's requirement to publicly release information regarding race, ethnicity, age, grade or rank, and application, promotion and retention rates of the State Department's workforce "in a searchable database format" would raise privacy concerns, and would be inconsistent with Federal Government privacy-related policies and practices, as the data may be sufficiently granular that it would permit the identification of specific individuals and reveal details of their age, ethnicity, or career advancement. Similarly, requiring the publication of ethnicity, race, age, grade, or rank of the selection board membership would pose privacy concerns, as the data section 402 apparently would require would be sufficiently granular to permit the identification of specific individuals.

In light of these concerns, we recommend revising section 406(b), "Privacy Protection," by adding at the end the following text: "Before disclosure of the data under this title, the data shall be evaluated to reduce the risk of identification of individuals, in consultation with the Department's Senior Agency Official for Privacy or designee, and data need not be disclosed if the Department's Senior Agency Official for Privacy or designee determines disclosure would present too high a risk of identifying one or more individuals."

Additionally, section 406(b) provides that "[a]ny data collected under this title shall be subject to the relevant privacy protection statutes and regulations applicable to Federal employees." This title would require the collection and disclosure of certain information on employees and on applicants for employment. We recommend revising this sentence by adding the following: "and applicants for employment."

Additionally, section 404(a)(2) states that the Secretary ought to "instruct the [State Department's] Director of Human Resources to have a diversity recruitment goal, which should include outreach at appropriate colleges, universities, diversity organizations, and professional associations." Taken in context, the "diversity recruitment goal" seems more akin to a "plan of action." The phrase "establishing diversity recruitment goal" implies an intent to establish numerical hiring goals, which is not permissible by law for any group other than persons with disabilities. We recommend replacing this phrase with the phrase "a diversity recruitment plan of action." This language would clarify the provision as recommending that the Secretary engage various stakeholders in order to increase awareness among individuals from diverse groups about employment opportunities available at the Department of State.

Section 504: Annual Report on Security Violations

Section 504 would require the Secretary to submit reports to relevant congressional committees that include information on security violations, including "the number of violations committed by an employee with a history of one or more prior violations," and "disciplinary actions taken or criminal referrals." To avoid possible privacy concerns, we recommend adding the following text to section 504: "In reports under this section, the Secretary shall avoid, to the extent possible, the disclosure of personally identifiable information that reasonably would be expected to constitute an unwarranted invasion of personal privacy."

Section 505: Collecting Samples of Electronic Mail

Section 505 would require certain officials to "collect statistically valid samples of electronic mail sent by or received from employees of the Department [of State] who hold a security clearance granting such employees access to information classified at the level of Secret or above." S. 1631, § 505(c)(1). It appears that the intent of this provision is to collect samples

of electronic mail sent by or received *by* employees rather than *from* employees as it currently states. Section 505(c)(1) should be revised accordingly.

Title VI: Public Diplomacy

Section 602: Improving Research and Evaluation of Public Diplomacy

Section 602(e), entitled "Limited Exemption to the Privacy Act," provides that the Department of State

> shall maintain, collect, use, and disseminate records (as such term is defined in section 552a(a)(4) of title 5, United States Code) for research and data analysis of public diplomacy efforts intended for foreign audiences. Such research and data analysis shall be reasonably tailored to meet the purposes of this subsection and shall be carried out with due regard for privacy and civil liberties guidance and oversight.

The text of this subsection helpfully grants an authorization, pursuant to the Privacy Act, for data analysis of communications related to public diplomacy efforts, while requiring appropriate privacy and civil liberties guidance and oversight. However, the reference in the title of the provision to a "limited exemption" is confusing. We recommend changing the title to "Privacy Act Authorization."

Title VII: Foreign Corruption

Section 701: Definitions

Section 701 of the bill would define "corrupt actor," "corruption," "grand corruption," and "petty corruption." These definitions are not consistent with language used in international conventions or in domestic statutes and regulations, and this could result in confusion. Further, section 701's definitions might have unintended consequences that could damage our prosecutions of Foreign Corrupt Practices Act ("FCPA") cases, white collar crime, international narcotics trafficking cases, and other international corruption cases.

Section 703: Foreign Corruption

Section 703 of the bill would require the State Department to report to the Congress annually on public corruption in foreign nations. The report would include a ranking of foreign governments according to their efforts to combat corruption. We have serious concerns about section 703. Specifically, we are concerned that the report would undercut the efforts of existing

multilateral organizations and disrupt current cooperative undertakings by the Department of Justice, the Department of State, and certain foreign nations.

The Department of Justice works closely with foreign and domestic investigators and prosecutors to secure evidence and apprehend fugitives from and for its foreign partners. This cooperation is fundamental to our efforts to combat criminal conduct and threats to the safety of U.S. citizens. Thus, the United States has vital interests in developing and maintaining effective, reciprocal, foreign cooperation. The imposition by the United States of a reporting requirement that is unnecessarily offensive to foreign partners has the potential to damage the ability of the United States to remove dangerous fugitives wanted for prosecution in other countries and to pursue and prosecute dangerous international fugitives in United States courts. This includes individuals suspected of terrorism and involvement with transnational criminal organizations.

Additionally, the Department of Justice has developed key relationships with prosecuting authorities and anti-corruption advocates in nations that have endemic corruption issues. Section 703's ranking and grouping regime could jeopardize these relationships and otherwise marginalize the efforts of the very champions of reform with whom we have forged a bond.

We note in particular that section 703(1) would require the Secretary's report to group foreign nations, by quintile, based upon the World Bank Worldwide Governance Indicator on Control and Corruption, and the World Bank Worldwide Indicator on Voice and Accountability. The ranking of nations in the two lower level tiers could disrupt ongoing cooperation with the Department of State and the Department of Justice. The Justice Department occasionally cooperates with the prosecutors in nations that the State Department undoubtedly would rank as corrupt and subject to the punitive provisions in section 707 of the bill. The reporting requirement in section 703(1) could lead those countries not to share information and evidence.

Further, we question the need for title VII of the bill, as its mandates are largely duplicative. The United States already is a member to several international anti-corruption conventions that call for peer review, reporting regimes, and address many of the concerns the title VII would address, including the following:

- The United Nation's Convention Against Corruption (an international agreement which has been ratified by over 160 countries);
- The Group of States Against Corruption (49 member states); and
- The Organization for Economic Co-operation and Development (more than 40 member countries).

We also note the existence of third-party entities, such as Trace and Transparency International, that rank countries based upon their foreign corruption risks.

Title VII would create yet another, competing reporting and sanctions mechanism and that risks undermining the existing framework. This would be particularly damaging if or when embassy reports conflicted with assessments and judgements handed down by multilateral groups. Absent some indication that multilateral review mechanisms already in place are not serving their purpose, we believe that there is little need to compound the existing reporting or risk undermining its effectiveness.

Further, as noted above, section 703(1) would require the Secretary to base the quintile grouping in his report upon the World Bank Worldwide Governance Indicator on Control and Corruption, and the World Bank Worldwide Indicator on Voice and Accountability. We oppose the use of these reports as baselines for ranking. The language of these reports does not mesh well with the Justice Department's capacity building approach.

Finally, sections 703 and 704 of the bill would give the Department of State significant responsibility to describe, analyze, catalogue and rank corruption in all foreign countries. This responsibility poses significant logistical issues because it is unclear how the State Department would gather information across all relevant countries and what criteria would be used to rank the corruption risk and anti-corruption efforts. This lack of clarity might lead to concerns that detract from Department of State diplomacy and Department of Justice prosecutions if there were a perception that countries were being ranked as corrupt for political or economic reasons, which could undermine the public's confidence that the Justice Department was pursuing foreign corruption prosecutions impartially.

Section 704(a): Factors for Assessing Government Efforts to Combat Public Corruption

Section 704(a) of the bill sets forth a set of factors upon which the judgments to be set forth in the congressional reports required under section 703 are to be based. As we have explained, we have serious concerns about these reports. However, if the reporting requirement were to remain in the bill, we would recommend inserting in section 704(a) after "the Secretary" the following: ", in consultation with the Attorney General,"

Assessments about many of these factors, *e.g.*, 704(a)(4), (5), (7), (10), and (12), are best made by U.S. Government experts — including those within the Department of Justice. Accordingly, assessments under section 704(a) should be made in consultation with the Department of Justice and other appropriate Departments and agencies.

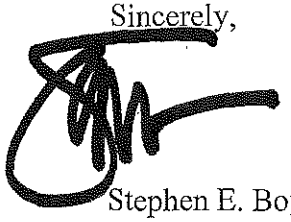
Effect of Title VII

As a whole, the annual reporting requirements and the punitive actions required by sections 703, 704, 707 and 708 of the bill could undermine the Department of State's and Justice Department's anti-corruption efforts. To the extent that foreign nations viewed the contemplated reporting as punitive or unfair, the impact upon the bilateral law enforcement relationship might not be limited to FCPA cases or other white collar crime. It may result in a slowdown in assistance or in the withdrawal of assistance from countries currently providing assistance.

* * *

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 Benjamin L. Cardin
Ranking Member

IDENTICAL LETTER SENT TO THE HONORABLE ED ROYCE, CHAIRMAN, COMMITTEE ON FOREIGN AFFAIRS, U.S. HOUSE OF REPRESENTATIVES, WITH A COPY TO THE HONORABLE ELIOT ENGEL, RANKING MEMBER, COMMITTEE ON FOREIGN AFFAIRS, U.S. HOUSE OF REPRESENTATIVES.