Office of the Attorney General
Washington, D. C. 20530

November 13, 2007

The Honorable Ike Skelton
Chairman
Committee on Armed Services
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 1585, the "National Defense Authorization Act for Fiscal Year 2008," as passed by the House and the Senate. We have significant constitutional and policy concerns about this legislation.

I. Constitutional Concerns

A. Senate-passed Version

1. Section 1539: Commission on Wartime Contracting.

Section 1539 of the Senate version would establish the Commission on Wartime Contracting, three members of which would be appointed by the Senate, three members by the House of Representatives, and one each by the Secretaries of Defense and State. Generally, the commission would be charged to investigate Government contracting for the missions in Afghanistan and Iraq. However, the specific functions that section 1539 would require the commission to perform in conducting its studies give rise to the following constitutional concerns:

National Security and Other Privileged Information. Subparagraph 1539(a)(3)(A)(iii) of the Senate version provides that the commission shall study and investigate Federal "agency contracting for the performance of security and intelligence functions in Operation Iraqi Freedom and Operation Enduring Freedom." Subparagraph 1539(a)(5)(C) further provides that the commission "may secure directly from the Department of Defense and any other department or agency of the Federal Government any information or assistance that the Commission considers necessary to enable the Commission to carry out" its duties.

Both provisions should be qualified by language authorizing the activities and information sharing in question only "to the extent allowed by law and consistent with national security interests." Without such a qualification, these provisions could be read as purporting to authorize commission activities that would infringe upon the President's constitutional authority over national security and other types of privileged information, the disclosure of which could

impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the President's constitutional duties as Chief Executive and Commander-in-Chief. *See, e.g., Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988).

Separation of Powers and Due Process. Several provisions of section 1539 purport to give the commission the authority to determine whether particular individuals or entities have violated United States or international laws. *See* subparagraphs 1539(a)(3)(C)(iv) ("the Commission shall assess . . . the extent to which *those responsible* for . . . waste, fraud, abuse, or mismanagement have been held financially or legally accountable") (emphasis added); 1539(a)(3)(C)(vi) ("the *Commission shall assess . . . the extent of* the misuse of force and *violations of the laws of war or Federal law by contractors*"); 1539(a)(5)(G)(ii) ("The Commission may refer to the Attorney General any *violation* or potential violation of law identified by the Commission in carrying out its duties.") (emphasis added). Although the bill does not expressly provide that the Commission's "assessments" or "identifications" would have legal effect, these provisions impermissibly purport to authorize the commission to perform functions constitutionally assigned to the Executive and Judicial branches. *See Quinn v. United States*, 349 U.S. 155, 161 (1955) (Congress's "power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary.").

The provisions authorizing the Commission to determine whether individuals have "violated" Federal or international law also raise due process concerns. It is vital for the Government to protect the rights and reputations of persons who have not been tried and convicted of offenses against the harm and stigma that would flow from public pronouncements by a Government-created commission that certain individuals or entities have "violated" the law. To avoid these concerns, the bill should be revised to provide that the commission is authorized only to report suspected or potential violations, to disclose confidentially to appropriate Government entities only (not to the public) the identities of potential violators, and simply to refer cases of possible illegality to the Department of Justice for further investigation. *See Proposed Legislation to Grant Additional Power to the President's Commission on Organized Crime*, 7 Op. OLC 128, 138 (August 24, 1983) ("Whichever powers are sought, care should be taken that their use does not raise any suggestion that the Commission is targeting particular individuals. [A Government commission's] prudential use of whichever powers are granted should protect against accusations that the Commission is being used as a stalking horse for the [Justice] Department's own investigations.").

Reports on Justice Department Referrals. Subparagraph 1539(a)(5)(G)(ii) would require the Attorney General to "submit to Congress a report on each prosecution, conviction, resolution, or other disposition that results from a referral" of any potential violation of law identified by the commission and transmitted to the Department of Justice. This provision raises separation of powers concerns.

Article II places the power to enforce the laws solely in the President, and the decision to charge a particular offense is a core Executive function. Accordingly, legislative attempts to invade the deliberative processes that lie at the core of the Executive branch's exercise of prosecutorial discretion present separation of powers concerns. *See, e.g., Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 125 (1984) ("[T]he constitutionally prescribed separation of powers requires that the Executive retain discretion with respect to whom it will prosecute for violations of the law."). This position accords with the judicial view of prosecutorial discretion expressed by the Supreme Court. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (prosecutorial decision to indict "has long been regarded as the special province of the Executive Branch"); *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("the Executive Branch has the exclusive authority and absolute discretion to decide whether to prosecute a case.").

The reporting requirement in subparagraph 1539(a)(5)(G)(ii) raises concerns regarding the confidentiality of law enforcement files, the need to maintain the Executive branch's prosecutorial discretion, and the rights of innocent persons under investigation, particularly insofar as the provision would require the Attorney General to submit reports concerning settlement decisions and decisions not to prosecute. *See generally Congressional Requests for Information from Inspectors General Concerning Open Criminal Investigations*, 13 Op. OLC 77, 83 n.9 (March 24, 1989) (explaining that "the executive branch has a long-term institutional interest in maintaining the confidentiality of the prosecutorial decisionmaking process" and that even "much of the information in a closed criminal enforcement file — such as unpublished details of allegations against particular individuals and details that would reveal confidential sources and investigative techniques and methods — would continue to need protection"; and concluding that "[i]t is therefore important to weigh the potential 'chilling effect' of a disclosure of details of the prosecutorial deliberative process in a closed case against the immediate needs of Congress"). We believe this provision should be limited to reporting on public prosecutions only. At the very least, the provision should be amended to eliminate reporting on settlement decisions and decisions not to prosecute.

Recommendations Clause. Subparagraph 1539(a)(4)(C)(iii) provides that the commission's final report shall include "specific recommendations" for improving the use of contractors in conducting wartime operations. To the extent the commission includes members of the Executive branch (and not just private persons appointed by members of the Executive branch), this provision would raise Recommendations Clause concerns. *See Status of the Commission on Railroad Retirement Reform for Purposes of the Applicability of Ethics Laws*, 13 Op. OLC 285, 287-88 (September 14, 1989) ("It has been the longstanding view of the Department of Justice that Article II, Section 3 of the Constitution vests in the President plenary and exclusive discretion concerning legislative proposals submitted by the executive branch to the Congress. Thus, Congress may not require executive branch officials to submit legislative proposals to the Congress."). To avoid these concerns, the bill should clarify that the commission is authorized only to study and report its views on contracting practices and potential improvements thereto, not to recommend legislative measures to Congress.

Detailees. Subparagraph 1539(a)(5)(E) provides that "[a]ny employee of the Federal Government may be detailed to Commission" and that any such detailee "shall retain the rights, status, and privileges of his or her regular employment without interruption." For detailees who hail from Executive branch, the provision authorizing the detailee to "retain the rights, status and privileges of his or her regular employment without interruption" raises concerns to the extent it purports to authorize the detailee to retain access to classified national security or other privileged Executive branch information while serving the Commission. *See Detail of Law Enforcement Agents to Congressional Committees*, 12 Op. OLC 184, 184-85 (September 13, 1988). Most Executive branch agencies have policies and procedures in place to address such concerns. To avoid the foregoing constitutional concerns and prevent any confusion about whether section 1539 purports to override Executive branch detailee policies designed to address those concerns, we recommend amending subparagraph 1539(a)(5)(E) to say, "... without interruption to the extent allowed by law and the policies applicable to the detailee's regular employment at the time of the detail."

2. Section 1539: Special Inspector General for Iraq Reconstruction

Appointments Clause. Paragraph 1539(b)(1) of the Senate version provides that the Special Inspector General for Iraq Reconstruction ("SIGIR") "shall ... conduct a series of audits to identify potential waste, fraud, abuse, or mismanagement" on the part of Federal government contractors providing services to support Operations *Iraqi Freedom* and *Enduring Freedom*. Congress's decision to vest the SIGIR with new responsibilities is constitutionally permissible provided that the new duties are "germane" to the SIGIR's existing responsibilities. *Shoemaker v. United States*, 147 U.S. 282, 301 (1893); *see also The Constitutional Separation of Powers Between the President and Congress*, 20 Op. OLC 124, 157-59 (May 7, 1996). We assume that paragraph 1539(b)(1)'s reference to Operation *Enduring Freedom*, which pertains to operations in Afghanistan, represents a drafting error. The SIGIR's existing statutory jurisdiction does not encompass Operation *Enduring Freedom*, and we do not read paragraph 1539(b) (or any other provision of the bill) as an attempt to extend SIGIR jurisdiction to operations in Afghanistan for two reasons. First, such an extension would raise concerns under the "germaneness" inquiry described above. Second, such an extension would seem inconsistent with the jurisdiction of the separate Special Inspector General for Afghanistan Reconstruction ("SIGAR") the bill purports to create. For these reasons, we recommend that the reference to Operation *Enduring Freedom* in paragraph 1539(b)(1) be removed entirely or decoupled from any reference to the SIGIR. To the extent the paragraph, in conjunction with other provisions of the bill, seeks to expand the SIGIR's jurisdiction to include additional investigations related to Operation *Iraqi Freedom*, we believe the expansion (at least as described herein) would likely satisfy the germaneness test. However, the Administration notes that the SIGIR's responsibilities should be construed narrowly in order to avoid constitutional problems in this regard.

Determinations of "Unlawful" Activity. Subparagraph 1539(b)(3)(F) would authorize the SIGIR to focus his or her audits on, among other subjects, the "nature and extent of any

incidents of misconduct or unlawful activity by contractor employees." As we noted with regard to the commission provisions in section 1539, the Constitution generally, and the Due Process Clause in particular, limits the manner in which Government entities may determine that specific individuals have "violated" a law. *See Quinn v. United States*, 349 U.S. 155, 161 (1955); *Proposed Legislation to Grant Additional Power to the President's Commission on Organized Crime*, 7 Op. OLC 128, 138 (August 24, 1983). Accordingly, the bill should be revised to eliminate the provisions purporting to authorize the SIGIR to issue conclusive determinations of the "illegality" of conduct under investigation, and to require the SIGIR to refrain from identifying investigated persons by name in public reports. *See Congressional Requests for Information from Inspectors General Concerning Open Criminal Investigations*, 13 Op. OLC at 85 (noting Senate Committee's view, with respect to inspector general reports issued under a different statute, that "[i]t would be highly improper and often a violation of due process for an IG's report to list the names of those under investigation or to describe them with sufficient precision to enable the identities of the targets to be easily ascertained"); *cf.* Section 1542(e)(1)(G) (listing "investigation of ... *potential* unethical or illegal actions of Federal . . . contractors . . . and referral of such reports, as necessary, to the Department of Justice" as one of the duties of the Special Inspector General for Afghanistan Reconstruction) (emphasis added).

3. Section 1542: Special Inspector General for Afghanistan

Referrals to the Department of Justice. The bill states that the SIGAR will refer potential wrongdoing to the Department of Justice "to ensure further investigations, prosecutions, recovery of further funds, or other remedies." Subparagraph 1542(e)(1)(G); *see also* Paragraph 1542(l)(2) (SIGAR shall prepare and submit to Congress a final accountability report on all referrals of potential wrongdoing "to ensure further investigations, prosecutions, or remedies"). This provision raises separation of powers concerns to the extent that it suggests that the Department of Justice must take investigative or prosecutorial actions upon referrals identified by the SIGAR. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 832 (1985 (a prosecutor's decision not to indict "has long been regarded as the special province of the Executive Branch"); *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"). To avoid such concerns, we recommend amending subparagraph 1542(e)(1)(G) to state that the referrals will be made "to ensure that the Department may undertake, as appropriate, further investigations, prosecutions, recovery of further funds, or other remedies."

4. Section 1218: Missile Defense Against Iran

Section 1218 of the Senate version provision purports to infringe upon the President's constitutional authority to conduct foreign affairs by declaring the policy of the "United States" with respect to developing and deploying missile defense against Iran. Article II of the Constitution commits to the President responsibility for conducting foreign affairs that exists independent of Congress's Article I authority. *See, e.g., Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767-68 (1971).

Legislative provisions like section 1218, which purport to set "United States" foreign policy that could constrain or undermine the President's diplomatic efforts or negotiations with foreign nations, raise separation of powers concerns. To avoid these concerns, this section should be amended to reflect the sense of Congress.

5. Section 1531: Iraqi Oil Resources

Section 1531 of the Senate version would prohibit the use of appropriated funds for the exercise of United States "control of the oil resources of Iraq." This provision may impermissibly interfere with the President's constitutional authority as Commander in Chief to conduct and direct military operations in Iraq, because in combat operations, taking temporary control over a particular oil resource might be a tactical necessity. Accordingly, we recommend that the provision be amended to contain some qualifying language, such as that the prohibition on control applies unless the President determines or certifies that such control is necessary for national security or military reasons.

6. Section 1023: Hate Crimes

The Department reiterates the Administration's position that all violent crimes are unacceptable, regardless of the victims, and should be punished firmly. However, the Department also reiterates the Administration's strong opposition to the unnecessary and constitutionally questionable prohibition of certain "hate crimes" by section 1023 of the Senate-passed bill. Specifically, the section's proposed paragraph 249(a)(1) of title 18 raises constitutional concerns. Federalization of criminal law concerning the violence prohibited by the bill would be constitutional only if done in the implementation of a power granted to the Federal government, such as the power to protect Federal personnel, to regulate interstate commerce, or to enforce equal protection of the laws. Paragraph 249(a)(1) is not by its terms limited to the exercise of such a power, and it is not at all clear that a sufficient basis exists to uphold this provision of the bill. If the President were presented a bill that included this provision, his senior advisors would recommend that he veto the bill.

7. Sections 233, 876 and 1802: Mandatory Budget Recommendations

Sections 233 and 876, and paragraph 1802(c)(3) all purport to require that certain Executive branch matters or proposals be included in the President's budget submission or in other legislative proposals to Congress. There is no question that an Executive branch budget request qualifies as a legislative recommendation to Congress. *See, e.g.*, Memorandum to Robert W. Minor, Acting Deputy Attorney General, from Frederick W. Ford, Acting Assistant Attorney General, Office of Legal Counsel, *H. J. Res. 346* (Aug. 16, 1955). Accordingly, the bill's requirement that subordinate Executive branch officials submit such requests to Congress conflicts with the President's constitutional authority under the Recommendations Clause, U.S. Const. art. II, sec. 3, to recommend to Congress only such measures as he considers necessary and expedient, and also conflicts with general separation of powers principles. *See id.; see also*

Authority of the Special Counsel of the Merit Systems Protection Board to Litigate and Submit Legislation to Congress, 8 Op. O.L.C. 30, 36 (1984); *see also Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress*, 6 Op. O.L.C. 632, 639-41 (1982).

8. Section 931: Defense Department Consideration of Climate Change

Section 931 of the Senate version would mandate the inclusion of a study on global climate change in the National Security Strategy, National Defense Strategy, and Quadrennial Defense Review. The Department reiterates the Administration's opposition to this provision. This section sets a harmful precedent and raises constitutional questions because it could be viewed as a statutory authorization for external, non-governmental entities to influence United States national security and defense policy. The content of the products referenced in the provision should not be reflected in law, particularly in a manner that could impinge upon the flexibility of national security professionals and policy officials to determine the most appropriate subjects for these strategy documents.

9. Section 5201: Technical Corrections

Section 5201 of the Senate version provides (emphasis added),"The amendments made by this title make no substantive changes in existing law and *may not be construed as making a substantive change in existing law*." Insofar as the italicized portion of this provision purports to prohibit the Federal courts from duly interpreting a statute in the exercise of the judicial power under Article III of the Constitution, it would conflict with that constitutional authority and with the constitutional separation of powers. To avoid this concern, the provision could be amended to replace "may not" with "should not."

10. Section 861: Protected Disclosures by Contractor Employees

The Administration strongly opposes section 861 of the Senate version. This provision should be deleted from the bill. Section 861would amend 10 U.S.C. § 2409 to provide additional whistleblower protections to employees of Federal contractors who disclose certain information to, *inter alia*, Members of Congress, representatives of congressional committees, and the Government Accountability Office. This provision purports to authorize disclosures that would clearly infringe the President's constitutional authority to protect the disclosure of national security and other privileged information, as well as his constitutional authority to supervise Executive branch personnel and Executive branch communications to Congress. *See, e.g.*, *Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 154-57 (1989); Whistleblower Protections for Classified Disclosures, Statement Before the Permanent Select Committee on Intelligence, U.S. House of Representatives, by Randolph Moss, Deputy Assistant Attorney General, Office of Legal Counsel (May 20, 1998); Letter Opinion for Alex M. Azar, II, General Counsel, Department of Health and Human Services, from Jack L. Goldsmith, III, Assistant Attorney General, Office of Legal Counsel, *Re: Authority of Agency*

Officials to Prohibit Employees from Providing Information to Congress, at 2-3 (May 21, 2004), http://www.usdoj.gov/olc/crsmemoresponsese.htm ("*Azar Opinion*").

11. Section 1042: Reports on Threats from Ungoverned Areas

Section 1042 of the Senate version purports to require the Secretaries of Defense and State to submit a report to Congress that describes (1) the intelligence capabilities of certain terrorist groups and (2) "the schedule for implementing any actions" "to be taken to improve the capabilities and skills of the Department of Defense and the Department of State" in response to the terrorists' intelligence capabilities. § 1042(b)(4). This provision threatens to infringe upon the "President's authority to conduct covert activities abroad pursuant to the President's constitutional responsibilities, including his responsibility to safeguard the lives and interests of Americans abroad." *Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions*, 13 Op. O.L.C. 258, 258 (1989). To avoid these concerns, we recommend amending the reporting requirement in subsection (b) to provide that the Secretaries of Defense and State "may provide the following information to Congress, as appropriate under law."

12. Section 1043: National Security Recommendations by Independent Organization

Section 1043 of the Senate version would require the Secretary of Defense to enter into a contract with an "independent, non-profit, non-partisan organization," which shall be responsible for issuing a report that contains recommendations to Congress and the President regarding changes to the "national security interagency system." The Administration strongly opposes this provision and urges that it be removed, first and foremost, because it raises separation of powers concerns in attempting legislatively to constrain the President's ability to set national security policy in the manner he believes best serves his obligation to protect the country. In addition, the provision raises more discrete constitutional concerns. To the extent the recommendations of the "independent organization" referenced in section 1043, recommendations which would be prepared pursuant to a Defense Department contract and funded with Federal appropriations, could be attributed to the Secretary or the Department of Defense, section 1043 raises concerns under the Recommendations Clause, U.S. Const. art. II, § 3, which vests in the President alone, and not his subordinates, the power to "recommend" legislative measures to Congress. Section 1043 could avoid this concern by clarifying that the contracted organization's report — including any recommendations contained therein — either: (1) is subject to presidential review and approval prior to its transmission to Congress; or (2) does not represent the recommendations of the Secretary, the Department of Defense, or the Executive branch. That said, the Administration remains of the view that the entire provision should be deleted as inconsistent with separation of powers principles and the President's authority and responsibility over matters of national security.

13. Section 1063: Direct Reporting Requirements for Elements of the Intelligence Community

Section 1063 of the Senate version purports to require the "Director of the National Counterterrorism Center, the Director of a national intelligence center, or the head of any department, agency, or element of the intelligence community" to respond to Armed Services Committee requests for intelligence reports, including legal opinions, within 15 days of receiving such a request. The provision further provides that no reporting entity may withhold any information covered by the request unless the President certified "that such document or information is not being provided because the President is asserting a privilege pursuant to the Constitution of the United States." And the provision purports to prohibit Executive branch officers, including the President, from supervising "the head of any department, agency, or element of the intelligence community, or any designate of such a head" who wishes to provide, or has been asked to provide, "testimony, legislative recommendations, or comments" to the Armed Services committees.

Section 1063 is constitutionally objectionable and must be revised or removed for several reasons. First, the requirement that covered entities respond fully within 15 days to the requests at issue in the provision unless the President certified his assertion of a constitutional privilege is not only unreasonable, but would infringe upon the President's constitutional authority to protect from disclosure national security and other privileged information. *See, e.g., Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). Second, and more fundamentally, decades of precedent spanning many Administrations make clear that section 1063's attempt to authorize Executive branch subordinates to provide information and legislative recommendations to the Congress regardless of presidential approval or objection violates the Recommendations Clause of the Constitution and the separation of powers by attempting to negate the President's constitutional authority under Article II to supervise Executive branch subordinates and protect against the unauthorized disclosure of national security and other information subject to executive privilege. As the Department of Justice advised Congress during the Clinton Administration in objecting to a similar reporting provision, such reporting requirements are constitutionally objectionable because they "would interfere with the President's control over the executive branch and with his legitimate interest in overseeing the presentation of the executive branch's views to Congress." *Letter to William V. Roth, Chairman, Committee on Finance, United States Senate, and Bill Archer, Chairman, Committee on Ways and Means, United States House of Representatives, from L. Anthony Sutin, Acting Assistant Attorney General, Office of Legislative Affairs* at 4 (June 8, 1998). The Clinton Administration issued a Statement of Administration Policy ("SAP") to the same effect regarding a bill that purported to give employees in the intelligence community a right to disclose classified information to Congress without authorization. That SAP stated that:

> This provision is clearly contrary to the Supreme Court's explicit recognition of the President's constitutional authority to protect national security and other privileged information. Congress may not vest lower-ranking personnel in the Executive branch with a "right" to furnish national security or other privileged information to a member of

Congress without receiving official authorization to do so. By seeking to divest the President of his authority over the disclosure of such information, S. 1668 would unconstitutionally infringe upon the President's constitutional authority.

This position was more fully articulated in the Office of Legal Counsel testimony before Congress that same year. *See Whistleblower Protections for Classified Disclosures, Statement Before the Permanent Select Committee on Intelligence, U.S. House of Representatives, by Randolph Moss, Deputy Assistant Attorney General, Office of Legal Counsel* (May 20, 1998). And the principles that the Office of Legal Counsel and the Clinton Administration cited in 1998 have been cited by Administrations both before and since to oppose similar provisions. *See, e.g.*, Letter Opinion for Alex M. Azar, II, General Counsel, Department of Health and Human Services, from Jack L. Goldsmith, III, Assistant Attorney General, Office of Legal Counsel, Re: Authority of Agency Officials to Prohibit Employees from Providing Information to Congress, at 2-3 (May 21, 2004), available at http://www.usdoj.gov/olc/crsmemoresponsese.htm ("Azar Opinion") (statutory provisions requiring subordinate officers to communicate directly with Congress "unconstitutionally limit[] the President's ability to supervise and control the work of subordinate officers and employees of the Executive Branch"); *Authority of the Special Counsel of the Merit Systems Protection Board to Litigate and Submit Legislation to Congress*, 8 Op. O.L.C. 30, 31 (1984) (concluding that "to permit Congress to authorize or require an Executive Branch officer to submit budget information and legislative recommendations directly to Congress, prior to their being reviewed and cleared by the President or another appropriate reviewing official, would constitute precisely the kind of interference in the affairs of one Branch by a coordinate Branch which the separation of powers was intended to prevent").

As stated in the SAP issued on July 10, 2007, for the Senate version of H.R. 1585, if this provision were ultimately presented to the President, his senior advisors would recommend that he veto the bill.

14. Sections 1065 and 1066: Security Clearance Procedures

Sections 1065 and 1066 of the Senate version purport to require the President, the Secretary of Defense, and the Director of National Intelligence to adopt certain procedures and programs regarding the issuance of security clearances for access to classified information. As the Supreme Court has long recognized, *see, e.g., Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988), Article II of the Constitution vests in the President the authority and the duty to safeguard access to national security information, *see also Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92 (1998) (citing cases); *Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 154-57 (1989) (discussing cases and Executive Branch practice since the Founding). To avoid a conflict with this constitutional authority, sections 1065 and 1066 should be deleted or, at the very least, made precatory.

15. Section 1087: Foreign Sovereign Immunities

Section 1087 of the Senate version would create an exception to immunity under the Foreign Sovereign Immunities Act ("FSIA") for foreign nations and foreign officials acting in their official capacities (a status that — under the bill — would render nations vicariously liable for their officials' actions). Section 1087 conflicts with principles of official immunity under customary international law even under the restrictive view of such immunity adopted by the United States, because section 1087 would abrogate immunity for civil claims premised upon a broader range of sovereign state acts, and a much broader category of acts by foreign state officials, than international law, as recognized by the United States and codified in FSIA, has ever permitted. *See* 28 U.S.C. §§ 1602, 1605-1607; *Restatement (Third) on Foreign Relations Law* § 451 cmt. a (1987); *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993); *Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352, 2356-57 (2007). We believe that section1087 merits very careful scrutiny because it conflicts not just with international law, but with international law on immunity principles that the United States long has recognized because they serve and protect important United States interests.

In abandoning settled principles of official immunity, section 1087 could, if applied in certain circumstances, constrain the President in his role as the "sole organ of the federal government in the field of international relations," *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936), by making it more difficult for him to deal with, or host, foreign officials who fear (or have been targeted by) lawsuits authorized under the bill, *cf.* Art. II, § 3 (granting the President the exclusive power to "receive Ambassadors and other public Ministers"). The clear relationship between the President's ability to conduct foreign affairs and sovereign immunity for official acts by foreign nations and their officials explains why judicial recognition of official immunity claims traditionally turned on Executive branch suggestions, a tradition that FSIA did not disturb with respect to head of state immunity. *See, e.g., United States v. Noriega*, 117 F.3d 1206, 1211 (11th Cir. 1997). Section 1087 would disturb the tradition of official immunity by extending FSIA's statutory abrogation of immunity to official foreign acts that, unlike the acts currently covered by the FSIA, the United States has long treated as immune in accordance with international law absent an Executive branch recommendation to the contrary. For these legal reasons, as well as many policy reasons, we have grave concerns about whether this provision should be enacted. If it is not deleted altogether, we believe that it should at least contain a provision that expressly excepts from its general abrogation of immunity individuals or states who the President advises should be considered immune.

16. Section 871.

Section 871 of the Senate version would require the Secretary of Defense to promulgate excessive and burdensome regulations for any private contractor performing services in an area of combat operations where personnel are required to carry weapons in the performance of their duties. This provision raises separation of powers concerns because such

regulations could undermine the effectiveness of United States military activities and operations in theatres of ongoing armed conflict that are essential to national security. To avoid this concern, we recommend revising section 871 to make the requirement for regulations precatory, or to provide greater flexibility to the Secretary in designing and implementing the regulations.

B. House-passed Version

In addition to the specific concerns we note below, we incorporate by reference the concerns identified in the Administration's May 2007 Statement of Administration Policy on the House-passed text.

1. Section 703: Pharmacy Benefits Pricing

Section 703 of the House version would confer apparently significant sovereign authority, *i.e.*, the authority to exclude pharmaceutical agents from the pharmacy benefits program, upon a committee established under 10 U.S.C. § 1074g without apparent compliance with the Appointments Clause, U.S. Const. art. II, sec. 2, cl. 2.

2. Section 807: Procurement from Native Hawaiian-Serving Institutions

Section 807 of the House version would add Native Hawaiian-Serving Institutions to the race and national origin-based institutional categories for which Government contract preferences are imposed. This addition does not appear to be supported by a "strong basis in evidence" that contracting preferences for Native Hawaiian-Serving Institutions are necessary to serve a compelling government interest.

3. Section 932: Technical Amendments

Section 932 of the House version would infringe upon the Opinions Clause of the Constitution, U.S. Const. art. II, sec. 2, cl. 1, which authorizes the President to "require the opinion . . . of the principal Officer in each of the executive Departments, upon any subject relating to the duties of their respective offices." Section 932 would interfere with this unqualified constitutional authority by purporting to bar the Secretary of Defense from making recommendations to the President for nominees to fill certain vacancies unless he first obtained the concurrence of the Director of National Intelligence.

4. Section 951: Imposition of IPCC Projections

Section 951 of the House version would, like section 931 of the Senate version, mandate the inclusion of a study on global climate change in the National Security Strategy, National Defense Strategy, and Quadrennial Defense Review. The Administration opposes this provision. This section sets a harmful precedent and raises constitutional questions because it could be viewed as a statutory authorization for external, non-governmental entities to influence United

States national security and defense policy. The content of the products referenced in the provision should not be reflected in law, particularly in a manner that could impinge upon the flexibility of national security professionals and policy officials to determine the most appropriate subjects for these strategy documents.

5. Section 1222: United States Control over Iraqi Oil Resources

Section 1222 of the House version provides for the continuation of the existing prohibition against the use of appropriated funds for the exercise of United States control "over any oil resource" in Iraq. This provision may interfere impermissibly with the President's constitutional authority as Commander-in-Chief to conduct and direct military operations in Iraq, because circumstances could arise in combat operations where taking temporary control over a particular oil resource might become a tactical necessity.

6. Section 1231: Special Inspector General for Afghanistan Reconstruction

National Security and Other Privileged Information. The bill purports to give the Special Inspector General for Afghanistan ("SIGAR") broad authority to inquire into any kind of contract related to United States operations in Afghanistan, including intelligence and security contracts. *See* Paragraph 1231(f)(1). We do not object to this provision on the understanding that it will be construed consistent with the President's constitutional authority over information the disclosure of which could impair national security, foreign relations, or the performance of the President's constitutional duties as Chief Executive and Commander in Chief. *See, e.g.*, *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988).

Collaboration between the SIGAR and other Inspectors General. Paragraph 1231(f)(4) provides that the SIGAR "shall coordinate with, and receive the cooperation of, the Inspector General of the Department of Defense." We do not object to this collaboration requirement on the understanding that it will be construed consistent with the President's constitutional authority to supervise the unitary Executive branch.

7. Recommendation Clause Concerns

A number of provisions in the House version would require what appear to be legislative recommendations or measures to be submitted to the Congress by the Executive branch, in conflict with the Recommendations Clause, U.S. Const. art. II, sec. 3, which reserves to the President the discretion to submit to Congress only such recommendations as he deems "necessary and expedient." These provisions include subsection 222(b), subparagraph 222(d)(2)(C), paragraph 354(b)(4), subparagraph 516(d)(3)(C), sections 946 and 952, and subsection 1012(b).

8. Mandatory Disclosure of Classified National Security Information

In addition to section 1231, several other provisions of the House version appear to require the disclosure of classified or otherwise highly sensitive national security information to Congress, congressional committees, or other entities in a manner that may conflict with the President's constitutional authority to control the disclosure and dissemination of such information. These provisions include sections 221, 1224, 1225, and 1232-1233.

9. Unitary Executive/Micromanagement Concerns

Several provisions of the House version would interfere unduly with the President's constitutional authority to supervise the Executive branch, or would improperly micromanage the internal deliberative processes and organization of the Executive branch. In particular, sections 324-330 would unduly micromanage the processes used by the Office of Management and Budget and the Department of Defense to determine whether to use a contractor in lieu of public employment and undermine the President's control over the operations of the Executive branch, such as by requiring consultation with relevant Defense Department employees regarding whether to use a contractor (subparagraph 324(b)(2)(B) and subsection 330(a)), prohibiting the Secretary of Defense from seeking to use a contractor "by reason of any direction or requirement provided by the OMB" and prohibiting the Office of Management and Budget from "direct[ing] or requir[ing]" the Department of Defense to use a contractor for a Defense Department function (subsection 328(a) and (b)), and permitting Federal employees, represented by their union, to intervene in litigation challenging the use of a contractor to perform a Defense Department function (subsections 329(a) and (b)).

II. Policy Concerns

A. Senate-passed Version

1. Section 366: Employee Challenges to Contracting Out

Section 366 of the Senate version would provide Federal employees a right to challenge agency determinations to contract out work. Specifically, it would authorize Federal employees to file administrative cases against their agencies regarding contracting decisions and permit Federal employees to participate in court proceedings involving agency decisions to award contracts. We oppose this provision. It would reverse a 2001 judicial interpretation that Congress intended to waive sovereign immunity only to allow disappointed private bidders to challenge Government contract awards. To allow Government employees a right to file protests against their employing agencies would complicate the Government's defense of agency decision making in the award of contracts. For these same reasons, we oppose the corresponding provision in the House version, section 329.

2. Section 824: Purchases from the Federal Prison Industries

Section 824 of the Senate version would establish various conditions to be met before the Secretary of Defense could purchase products manufactured through the Federal Prison Industries program ("FPI") in the Justice Department's Bureau of Prisons. We support the goal of providing Federal agencies with the flexibility through competition to purchase quality goods and services at fair and reasonable prices with the expectation of timely performance. However, section 824 would attempt to accomplish that goal by greatly reducing Federal inmate work opportunities through the FPI program, the Bureau of Prisons' most successful tool in reducing recidivism. Any proposal to curtail the FPI program must be accompanied by cost-effective proposals to increase Federal inmate work opportunities. We oppose section 824 and recommend that it be deleted.

3. Sections 1023 and 1024: Hate Crimes

As we note in Part I of this letter, the Administration believes that all violent crimes are unacceptable, regardless of the victims, and should be punished firmly. However, sections 1023 and 1024 raise a number of policy concerns in addition to the constitutional concern we discussed above. Section 1023 would prohibit willfully causing or attempting to cause bodily injury to any person based upon the person's actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability. These prohibitions would leave other classes (such as the elderly, members of the military, police officers, and victims of prior crimes) without similar special status. In addition, State and local criminal laws already provide criminal penalties for the violence addressed by the proposed Federal crime defined in section 1023, and many of these laws carry stricter penalties (including mandatory minimums and the death penalty) than section 1023 would impose. For all of these reasons, we believe the bill's hate crimes provisions are unnecessary and objectionable on policy grounds. If the President were presented a bill that included these provisions, his senior advisors would recommend that he veto the bill.

The bill's hate crimes provisions also raise several other concerns. Paragraph 1024(c)(5) of the Senate version would require the Attorney General, in consultation with the National Governors' Association ("NGA"), to conduct an audit on the effectiveness of certain Justice Department grants distributed for the investigation and prosecution of hate crimes. We oppose this provision.

It is not appropriate for the National Governor's Association to assume a formal, statutorily-required role in the auditing of the Department's grants. We recommend deleting this provision. Alternatively, we recommend amending it either to provide that the Attorney General may consult with the NGA for these purposes or to provide that the NGA conduct its own evaluation of the impacts of the grants.

In addition, subsection 1024(a) would require the Comptroller General, in consultation with the NGA, to collect certain data relating to hate crimes. We note that this provision may well lack the stringent data privacy and confidentiality statutes that would govern if this initiative were undertaken by the Justice Department's Office of Justice Programs ("OJP"). The OJP's expertise in data collection, analysis, reporting, and evaluation better positions it — as opposed to the collaboration currently envisioned — to undertake these functions. We believe that the data collection and analysis envisioned would require substantial expertise because subparagraph 1024(a)(1)(A)'s expanded definition of hate crimes has not been utilized in prior Federal data collection efforts.

4. Section 861: Protected Disclosures by Contractor Employees

As noted above, section 861 of the Senate version would provide additional whistleblower protections to employees of Federal contractors who disclose certain information to, *inter alia*, Members of Congress, representatives of congressional committees, and the Government Accountability Office. Notably, section 861 of would establish a cause of action for contractor employees making these disclosures.

We oppose this provision. It would authorize an employee of a Federal contractor to file suit against a Government contractor in Federal district court if the employee were aggrieved by agency action or a failure to act in regard to the disclosure. However, existing law already authorizes any person aggrieved by an agency order to seek review in a United States Court of Appeals. The new provision is unnecessary in light of the existing protections for whistleblowers in the private sector, including Government contractor employees. It would impose undue burdens upon the Government and could subject the Government to allegations of breach of contract if an agency were required to withhold funds otherwise due under a Government contract.

5. Sections 1064 and 1065: Issuance of Security Clearances

Section 1064 of the Senate version would limit the individuals to whom a security clearance could be granted and prohibit the use of mental health counseling as a per se disqualifier, and section 1065 would require a demonstration project applying "new and innovative approaches to improve the processing of requests for security clearances." These provisions would intrude piecemeal into presidentially-approved adjudicative guidelines for access to classified information. They do not alter these guidelines in any substantive way and simply add burdensome reporting requirements. We are unaware of any need for these provisions and believe that any changes to the guidelines should not be effected in a piecemeal manner.

6. Section 1087: Foreign Sovereign Immunities

As noted above, section 1087 of the Senate version would replace current paragraph 1605(a)(7) of the Foreign Sovereign Immunities Act, the terrorism exception to foreign

sovereign immunity, with a new provision, section 1605A. The amendment would recreate at section 1605A this terrorism exception to FSIA immunity for foreign nations and foreign officials acting in their official capacities (a status that the bill provides would render the nations the officials represent vicariously liable for the officials' actions). We agree with the many concerns that other Administration components have raised regarding this legislation, and wish to note the following legal and practical problems we perceive with the amendment.

First, section 1087 seems to remove the Attorney General's authority to get a court to stay discovery that would interfere with a related criminal case or national security operation. *See* 28 U.S.C. § 1605(g). We object to any elimination of the § 1605(g) authority to limit discovery.

Second, section 1087 would change the terrorism waiver in current law that requires (a) that the foreign state be a state sponsor of terrorism, (b) that the victim-claimant be a United States national, and (c) that the claimant give the foreign state a chance to arbitrate first, if the act occurred in the foreign state. Section 1087 apparently — possibly inadvertently — would change these concurrent conditions into alternatives (and add military members, and employees and contractors of United States), so that there would be a terrorism waiver if any one of these conditions were met. In other words, claims with no nexus to the United States and no state sponsor of terrorism designation could be brought in United States courts.

We note in particular that proposed new paragraph 1605A(a)(1)(B)(ii)-(iii) would extend the jurisdiction of courts beyond United States nationals, to members of the United States Armed Forces and to employees of the Government or its contractors (whether United States nationals or not). This could substantially expand the number of suits filed under the provision. The states designated as state sponsors of terrorism, as a group, have very few assets in the United States, and so creating an exponentially larger number of potential judgment creditors would expand the number of people with claims to the limited assets that do exist and enhance the inequitable "race to the courthouse" mentality that has characterized this litigation. Moreover, many of these assets — for example, those of Iran — are protected by United States treaty obligations that the United States Government then must appear in litigation to defend. In addition, creating the possibility of a large pool of judgment creditors whose judgments cannot be satisfied raises the possibility that pressure will mount to satisfy the judgment from United States Government funds (as, in fact, occurred several years ago when Congress appropriated hundreds of millions of dollars to pay judgments against Iran, but even then only paid some, and not all, of the existing judgment holders). This is inequitable both to those plaintiffs who are not included in these sorts of remedial schemes and to the American taxpayer who must foot the bill. The Department has objected repeatedly to litigation-centered solutions to these sorts of problems because of their substantial inequities, and expanding the scope of potential claimants only increases those inequities.

Moreover, to the extent other countries applied a similar standard to the United States, the expansion of current law to cover non-United States nationals who are employees of the United

States or of our contractors will also expand the potential liability of the United States for allegedly tortious acts affecting foreign citizens who are not nationals of their chosen forum.

Third, proposed new subsection 1605A(c) would amend the FSIA to provide that the statute of limitations for cases runs on the latter of 10 years after the original enactment of the terrorism exception (April 24, 1996), or 10 years from the date on which the cause of action arose. Taken together with subsection (d) of section 1087, which would make the new provisions applicable to pending claims, these provisions would extend the statute of limitations applicable in some pending lawsuits in which courts have found claims to be late-filed, where the acts giving rise to the suit arose more than 10 years before date of filing of lawsuit, but within 10 years of date of enactment of 1605(a)(7). *See e.g., Vine v. Iraq*, 459 F. Supp. 2d 10, 20-21 (D.D.C. 2006); *Buonocore v. Libya*, 2007 WL 2007509 (D.D.C. 2007). Changing the statute of limitation period would upset the balance struck at the time paragraph 1605(a)(7) of the FISA was originally enacted.

Fourth, proposed new subsection 1605A(d) would create a Federal cause of action under the FSIA. A Federal cause of action is unnecessary, as victims are free to pursue claims under State and local law, and the courts are able to decide those claims based upon normal conflict of laws analysis. Additionally, a provision creating a cause of action should not be cast as an amendment to the FSIA, which has traditionally been viewed as only a jurisdictional grant. Adding substantive provisions to the FSIA could have unintended consequences for litigation involving the scope of the FSIA in a wide variety of contexts.

Fifth, proposed new subsection 1605A(d) provides for the assessment of punitive damages against foreign states and their officials, agents, or employees. International law does not recognize punitive damages against foreign sovereigns. Therefore, this provision could have repercussions in cases against the United States abroad. Additionally, the assessment of punitive damages against foreign sovereigns would allow individual judges, rather than the Executive branch, to address matters that should be addressed in the context of foreign policy.

Sixth, proposed new subsection 1605A(d) provides that a foreign state shall be vicariously liable for the acts of its agents, officials, or employees. The intent of this provision is not clear; if it is intended to impose some form of automatic liability regardless of whether the state remedies the act or renounces it, it could pose obstacles to United States foreign policy goals of allowing states to regulate their own citizens. Moreover, it could have ramifications for defenses associated with principles of international comity and *forum non conveniens*, which the United States Government often supports.

Seventh, proposed new subsection 1605A(f) would allow the district court to appoint special masters to hear damages claims. The intent of this provision is not clear, as district courts have inherent power to appoint magistrate judges or special masters as necessary in any case.

Eighth, proposed new paragraph 1605A(f)(2) would direct the Attorney General to transfer funds from the account created by the Victims of Crime Act to the administrator of the district court in which a case under paragraph 1605(a)(7) was pending, in order to "carry out Orders of [District Courts] appointing Special Masters." The intent of this provision is not clear. However, Victims of Crime Act funds have designated purposes and are intended to assist victims of all crimes, not just victims of terrorism. These funds should not be diverted if the size of the payments authorized by proposed new paragraph 1605(f)(2) are so high that they would deplete these funds.

Ninth, proposed new subsection 1605A(g) would limit appeals in cases under this section to appeals from final judgments, unless the appeal were certified under 28 U.S.C. § 1292(b) as an interlocutory appeal. This provision would insert obstacles into the appeal process for foreign sovereigns, as orders denying sovereign immunity ordinarily are treated as collateral orders subject to appeal without prior certification. Thus, it would alter a critical aspect of the current balance achieved by the FSIA. Additionally, we note that the United States relies on its ability to take immediate interlocutory appeals when its assertions of immunity are denied at first instance. We would be greatly prejudiced by reciprocal treatment abroad.

Tenth, the proposed new subsection 1605(A)(h) would allow any claimant filing suit to obtain a pre-judgment *lis pendens* lien on any property of a foreign sovereign located within the jurisdiction where the suit was filed, simply by filing a notice with the clerk of court. This provision would allow pre-judgment attachment of foreign sovereign property before any determination of immunity or liability was made, posing substantial obstacles to the sovereign's control over that property. This would result in significant foreign policy difficulties for the United States and limit foreign sovereign use of property in violation of international law.

Additionally, the provision makes no exception for property that we have treaty obligations to protect (for example, property subject to obligations under diplomatic or consular treaties or conventions). Attachment of such property and interference with a foreign sovereign's use or disposition of such property would violate United States Government treaty obligations. We have particular concerns about the provision in subsection (h) creating a lien by the filing a notice of pending action, when service of a complaint need not be effected for months. This provision potentially allows the equivalent of *ex parte* injunctions against foreign states, which is contrary to generally accepted practices of international law and would subject the operation of the United States Government overseas to great risk if it were adopted by other countries. Given the breadth of our involvement in litigation in foreign courts and the vast amount of United States government property located abroad, any expansion of a court's authority to attach or execute against sovereign property of foreign states beyond what is recognized by international law would put the United States at great risk.

Eleventh, proposed new subsection 1605(A)(c) would amend the FSIA to add a new paragraph 1610(g)(1). This new provision would allow the attachment of the property of an agency or instrumentality of a foreign sovereign in satisfaction of a judgment against the foreign

sovereign without regard for the factors the Supreme Court has determined should be applied before allowing enforcement of judgments in such a manner. *See First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983) ("*Bancec*").

This provision may raise due process and Fifth Amendment takings problems. Although the Supreme Court's analysis in *Bancec* was based on "equitable" factors and did not purport to be constitutionally derived, there may well be constitutional implications to making property of one separate juridical entity available to satisfy judgments entered against a separate juridical entity. Making juridically separate agencies or instrumentalities subject to liability for the acts of their home governments is not recognized at international law (or in any other context in domestic law), and could lead to significant international repercussions against United States-citizen owned properties and interests abroad. This provision would expose every minority shareholder and creditor of a company majority-owned by a foreign government (including any United States citizen shareholders or creditors) to the risk that the assets of the company may be seized to satisfy obligations of that foreign government. If the intent of this provision is to deter foreign governments from creating "sham" entities to shield assets, the *Bancec* factors would seem to allow for consideration for such an effort, rendering the provision unnecessary.

Twelfth, proposed new subsection 1610(g)(2) (in subsection (c) of the bill) provides that any property of a foreign state sought in connection with a judgment under proposed new subsection 1605A "shall not be immune from execution" because the property is regulated by the United States Government by reason of an action taken by the United States under the Trading with the Enemy Act ("TWEA") or the International Emergency Economic Powers Act ("IEEPA"). While this provision appears, from its title, to be an attempt to waive United States Government sovereign immunity, its intent is not clear. Property regulated under TWEA or IEEPA is not necessarily rendered immune under United States Government immunity, except when it is seized or held by the United States. In this instance, it is not the property that is immune but rather the United States Government which is immune, in the sense that it cannot be compelled by a Court to turn it over. Property regulated under TWEA or IEEPA can be rendered immune from judicial process as a consequence of the regulation. That immunity is not derivative of United States sovereign immunity but rather as a result of the authority granted by those statutes.

If the intent of the section is to eliminate the Executive's power to render property regulated under TWEA or IEEPA immune, the provision infringes to a significant extent on the power of the Executive to make foreign policy determinations regarding the property of foreign sovereigns located in the United States and to establish regulatory regimes intended to have certain foreign policy effects.

Thirteenth, paragraph (d)(1) of section 1087 provides that the revisions made by section 1087 are applicable to all pending cases. At paragraph (d)(2), section 1087 provides that the revisions are "to be given affect" in any case re-filed within 60 days of enactment, where the case had been "adversely affected" on the grounds that the FSIA failed to create a cause of

action, where that case remained pending on appeal or on a motion for relief under Federal Rule 60(b). As to such cases, the defenses of *res judicata*, collateral estoppel, and statutes of limitations would be waived.

Paragraph (d)(1) might have significant effect on pending cases and raise complicated issues in cases where some of these issues have already been decided. The second part of this provision, paragraph (d)(2), seems intended to revive a case against Iraq, which — while dismissed for failure to state a cause of action — remains pending on a Rule 60(b) motion in district court. Reinstatement of this case would result in the resuscitation of asserted claims of almost a billion dollars against the Government of Iraq, which could disrupt current foreign policy economic recovery initiatives in that region. Additionally, it is not clear whether Congress has the authority to resuscitate a claim that has already gone to final judgment in this manner or whether it has the authority to eliminate the assertions of defenses by the Government of Iraq that otherwise would apply to a claim filed by these plaintiffs. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). Further, it is inequitable to provide relief by a statute clearly directed at only one set of plaintiffs.

7. Section 1539: Wartime Contracts and Contracting Processes in Operations *Iraqi Freedom* and *Enduring Freedom*

As noted above, section 1539 of the Senate version would establish a Commission on Wartime Contracting ("the commission") to "study and investigate" and report on contracting by Federal agencies for the reconstruction of Iraq and Afghanistan, and for the performance of security, intelligence, and logistical support for Operations *Iraqi Freedom* and *Enduring Freedom*. § 1539(a)(1), (3), (4). The content that section 1539 would require the commission's final report to contain suggests that the commission's focus would be to address and make recommendations for improving a variety of contracting processes. *See, e.g.*, 1539(a)(4) (C) (iii) (calling for recommendations for improvements for wartime contracting in various contract "process[es]," including requirements definition, award, management, identifying inherently governmental functions; and holding contractors accountable for fraud, waste, abuse, and mismanagement.)

Section 1539 could complicate further the investigation of potential waste, fraud, abuse, and mismanagement. The commission's performance of certain of its duties[1] suggests the possibility that the commission could collect evidence and make findings concerning particular cases of potential fraud, waste, abuse, or mismanagement. Case-specific investigation and findings by the commission could interfere with ongoing civil and criminal law enforcement efforts concerning the same or similar matters. This would include investigations, criminal

[1]Specifically, these duties include the duty to "assess" and to make "findings" concerning "(iii) the extent of waste, fraud, abuse, or mismanagement under such contracts; (iv) the extent to which those responsible . . . have been held financially or legally accountable . . ." Senate Version § 1539(3)(C) and (4).

prosecutions, and civil litigation to recover losses resulting from waste, fraud, abuse, or mismanagement. It also would include the investigative activity for which subsection 1539(b) calls, such investigations via a "series of audits" by the Special Inspector General for Iraq Reconstruction, in collaboration with various inspector generals.

Section 1539 also lacks provisions to promote both the investigation of waste, fraud, abuse, and mismanagement, and the redress of resulting Government losses. Subsection 1539(b) would require the SIGIR, in collaboration with the inspectors general of the Department of Defense, the Department of State, and USAID to conduct a "series of audits" focused on "a specific contract, task order, or site of performance under a contract or task order." The purpose of these audits would be to identify potential waste, fraud, abuse, or mismanagement in the performance of Defense Department contracts and subcontracts for the logistical support of coalition forces in Operations *Iraqi Freedom* and *Enduring Freedom*. Additionally, subsection 1539(b) would require the SIGIR to audit other Federal agency contracts for the performance of security and reconstruction. § 1539(b)(1), (2). However, the provisions governing the audits do not include any specific direction to SIGIR to quantify, as appropriate, any potential losses to the Government. Such a direction would facilitate efforts by the Department of Justice and other Federal agencies to recover losses and overpayments. Additionally, subsection 1539(b) does not contain any express requirement (such as that contained in subparagraph 1542(e)(1)(G), relating to the Special Inspector General for Afghanistan Reconstruction) that, as appropriate, SIGIR refer the findings and evidence collected through its audits to the Department of Justice for further investigation, prosecution, recovery of funds or the pursuit of other remedies.

Section 1539 does not contain express exceptions for the withholding and treatment of law enforcement information and sensitive litigation-related information. Paragraph 1539(a)(5) would authorize the commission to "secure directly" from any Federal department or agency "any information or assistance that the commission consider[ed] necessary to enable the commission to carry out the requirements of this subsection" and would require the commission to report to Congress without delay whenever information or assistance was "unreasonably refused." Insofar as the commission might be assessing the extent of fraud, waste, abuse, and mismanagement, and the extent to which the responsible parties have been held accountable, the commission might seek sensitive law enforcement information directly from the Department of Justice, various inspectors general, or other agencies. Paragraph 1539(a)(5) does not contain an express exemption from providing the commission with information the disclosure of which is prohibited by another provision of law (*e.g.*, classified or grand jury materials or *qui tam* actions still under seal) or that is part of an ongoing civil or criminal investigation. Although refusing to produce information on these bases could not be said to constitute an "unreasonable" refusal, an express exception might be helpful. Likewise, the subparagraph does not expressly limit the commission from publicly disclosing sensitive law enforcement information whose public disclosure may not be otherwise prohibited by law. We recommend adding a limitation on public disclosure similar to that set forth in paragraph 1542(h)(7) of the Senate version.

8. Section 1542: Special Inspector General for Afghanistan Reconstruction

Paragraph 1542(h)(7) of the Senate version, establishing the Special Inspector General for Afghanistan Reconstruction, would limit the public disclosure of information that was "part of an ongoing criminal investigation." We recommend expanding this limitation to protect information relating to the investigation of civil fraud and to the investigations of violations of the False Claims Act.

9. Section 1022: Repeal of Clarification of Insurrection Act Authority

The Department reiterates the Administration's opposition to section 1022 of the Senate version, which could be perceived as significantly restricting the statutory authority for the President to direct the Secretary of Defense to preserve life and property, and would limit imprudently the President's authority to call upon the Reserves. Such a result would be detrimental to the President's ability to employ the Armed Forces effectively to respond to the major public emergencies contemplated by the statute.

B. House-passed Version

1. Section 329: Employee Challenges to Contracting Out

Section 329 of the House version would provide Federal employees a right to challenge agency determinations to contract out work. For the reasons set forth above with respect to section 366 of the Senate version, we oppose this provision.

2. Section 1054: Repeal of Clarification of Insurrection Act

The Department strongly opposes section 1054 of the House version, as it does section 1022 of the Senate version, because section 1054 could be perceived as significantly restricting the statutory authority for the President to direct the Secretary of Defense to preserve life and property, and would limit imprudently the President's authority to call upon the Reserves. Such a result would be detrimental to the President's ability to employ the Armed Forces effectively to respond to the major public emergencies contemplated by the statute.

3. Section 1056: Background Investigations for Civilian Access to Military Bases

Section 1056 of the House version would require background investigations of any unescorted civilians, including non-Department of Defense Federal employees, seeking access to military bases. Homeland Security Presidential Directive 12 ("HSPD-12") provides uniform standards for access to all Federal facilities and logistical systems. Section 1056 would add a needless layer to this process and undermine efforts to establish uniform and reciprocal access procedures across the Federal government. And, because section 1056 calls for a background

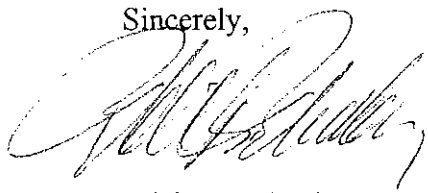
investigation less stringent than HSPD-12 requires, the provision would add this additional layer while adding no additional value to the screening process.

III. Errata

Subsection 1082(a) of the Senate version of the bill references tetrachloroethylene as "PCE." We believe that the intended reference is "TCE."

Thank you for the opportunity to present our views. 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,



Michael B. Mukasey
Attorney General

cc: The Honorable Duncan Hunter
Ranking Minority Member

IDENTICAL LETTER SENT TO THE HONORABLE CARL LEVIN, CHAIRMAN, COMMITTEE ON ARMED SERVICES, UNITED STATES SENATE; WITH A COPY TO THE HONORABLE JOHN McCAIN, RANKING MINORITY MEMBER.

Office of the Attorney General
Washington, D. C. 20530

November 13, 2007

The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 1585, the "National Defense Authorization Act for Fiscal Year 2008," as passed by the House and the Senate. We have significant constitutional and policy concerns about this legislation.

I. Constitutional Concerns

A. Senate-passed Version

1. Section 1539: Commission on Wartime Contracting.

Section 1539 of the Senate version would establish the Commission on Wartime Contracting, three members of which would be appointed by the Senate, three members by the House of Representatives, and one each by the Secretaries of Defense and State. Generally, the commission would be charged to investigate Government contracting for the missions in Afghanistan and Iraq. However, the specific functions that section 1539 would require the commission to perform in conducting its studies give rise to the following constitutional concerns:

National Security and Other Privileged Information. Subparagraph 1539(a)(3)(A)(iii) of the Senate version provides that the commission shall study and investigate Federal "agency contracting for the performance of security and intelligence functions in Operation Iraqi Freedom and Operation Enduring Freedom." Subparagraph 1539(a)(5)(C) further provides that the commission "may secure directly from the Department of Defense and any other department or agency of the Federal Government any information or assistance that the Commission considers necessary to enable the Commission to carry out" its duties.

Both provisions should be qualified by language authorizing the activities and information sharing in question only "to the extent allowed by law and consistent with national security interests." Without such a qualification, these provisions could be read as purporting to authorize commission activities that would infringe upon the President's constitutional authority over national security and other types of privileged information, the disclosure of which could

which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the President's constitutional duties as Chief Executive and Commander-in-Chief. *See, e.g., Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988).

Separation of Powers and Due Process. Several provisions of section 1539 purport to give the commission the authority to determine whether particular individuals or entities have violated United States or international laws. *See* subparagraphs 1539(a)(3)(C)(iv) ("the Commission shall assess . . . the extent to which *those responsible* for . . . waste, fraud, abuse, or mismanagement have been held financially or legally accountable") (emphasis added); 1539(a)(3)(C)(vi) ("the *Commission shall assess . . . the extent of* the misuse of force and *violations of the laws of war or Federal law by contractors*"); 1539(a)(5)(G)(ii) ("The Commission may refer to the Attorney General any *violation* or potential violation of law identified by the Commission in carrying out its duties.") (emphasis added). Although the bill does not expressly provide that the Commission's "assessments" or "identifications" would have legal effect, these provisions impermissibly purport to authorize the commission to perform functions constitutionally assigned to the Executive and Judicial branches. *See Quinn v. United States*, 349 U.S. 155, 161 (1955) (Congress's "power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary.").

The provisions authorizing the Commission to determine whether individuals have "violated" Federal or international law also raise due process concerns. It is vital for the Government to protect the rights and reputations of persons who have not been tried and convicted of offenses against the harm and stigma that would flow from public pronouncements by a Government-created commission that certain individuals or entities have "violated" the law. To avoid these concerns, the bill should be revised to provide that the commission is authorized only to report suspected or potential violations, to disclose confidentially to appropriate Government entities only (not to the public) the identities of potential violators, and simply to refer cases of possible illegality to the Department of Justice for further investigation. *See Proposed Legislation to Grant Additional Power to the President's Commission on Organized Crime*, 7 Op. OLC 128, 138 (August 24, 1983) ("Whichever powers are sought, care should be taken that their use does not raise any suggestion that the Commission is targeting particular individuals. [A Government commission's] prudential use of whichever powers are granted should protect against accusations that the Commission is being used as a stalking horse for the [Justice] Department's own investigations.").

Reports on Justice Department Referrals. Subparagraph 1539(a)(5)(G)(ii) would require the Attorney General to "submit to Congress a report on each prosecution, conviction, resolution, or other disposition that results from a referral" of any potential violation of law identified by the commission and transmitted to the Department of Justice. This provision raises separation of powers concerns.

Article II places the power to enforce the laws solely in the President, and the decision to charge a particular offense is a core Executive function. Accordingly, legislative attempts to invade the deliberative processes that lie at the core of the Executive branch's exercise of prosecutorial discretion present separation of powers concerns. *See, e.g., Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 125 (1984) ("[T]he constitutionally prescribed separation of powers requires that the Executive retain discretion with respect to whom it will prosecute for violations of the law."). This position accords with the judicial view of prosecutorial discretion expressed by the Supreme Court. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (prosecutorial decision to indict "has long been regarded as the special province of the Executive Branch"); *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("the Executive Branch has the exclusive authority and absolute discretion to decide whether to prosecute a case.").

The reporting requirement in subparagraph 1539(a)(5)(G)(ii) raises concerns regarding the confidentiality of law enforcement files, the need to maintain the Executive branch's prosecutorial discretion, and the rights of innocent persons under investigation, particularly insofar as the provision would require the Attorney General to submit reports concerning settlement decisions and decisions not to prosecute. *See generally Congressional Requests for Information from Inspectors General Concerning Open Criminal Investigations*, 13 Op. OLC 77, 83 n.9 (March 24, 1989) (explaining that "the executive branch has a long-term institutional interest in maintaining the confidentiality of the prosecutorial decisionmaking process" and that even "much of the information in a closed criminal enforcement file — such as unpublished details of allegations against particular individuals and details that would reveal confidential sources and investigative techniques and methods — would continue to need protection"; and concluding that "[i]t is therefore important to weigh the potential 'chilling effect' of a disclosure of details of the prosecutorial deliberative process in a closed case against the immediate needs of Congress"). We believe this provision should be limited to reporting on public prosecutions only. At the very least, the provision should be amended to eliminate reporting on settlement decisions and decisions not to prosecute.

Recommendations Clause. Subparagraph 1539(a)(4)(C)(iii) provides that the commission's final report shall include "specific recommendations" for improving the use of contractors in conducting wartime operations. To the extent the commission includes members of the Executive branch (and not just private persons appointed by members of the Executive branch), this provision would raise Recommendations Clause concerns. *See Status of the Commission on Railroad Retirement Reform for Purposes of the Applicability of Ethics Laws*, 13 Op. OLC 285, 287-88 (September 14, 1989) ("It has been the longstanding view of the Department of Justice that Article II, Section 3 of the Constitution vests in the President plenary and exclusive discretion concerning legislative proposals submitted by the executive branch to the Congress. Thus, Congress may not require executive branch officials to submit legislative proposals to the Congress."). To avoid these concerns, the bill should clarify that the commission is authorized only to study and report its views on contracting practices and potential improvements thereto, not to recommend legislative measures to Congress.

Detailees. Subparagraph 1539(a)(5)(E) provides that "[a]ny employee of the Federal Government may be detailed to Commission" and that any such detailee "shall retain the rights, status, and privileges of his or her regular employment without interruption." For detailees who hail from Executive branch, the provision authorizing the detailee to "retain the rights, status and privileges of his or her regular employment without interruption" raises concerns to the extent it purports to authorize the detailee to retain access to classified national security or other privileged Executive branch information while serving the Commission. *See Detail of Law Enforcement Agents to Congressional Committees*, 12 Op. OLC 184, 184-85 (September 13, 1988). Most Executive branch agencies have policies and procedures in place to address such concerns. To avoid the foregoing constitutional concerns and prevent any confusion about whether section 1539 purports to override Executive branch detailee policies designed to address those concerns, we recommend amending subparagraph 1539(a)(5)(E) to say, "... without interruption to the extent allowed by law and the policies applicable to the detailee's regular employment at the time of the detail."

2. Section 1539: Special Inspector General for Iraq Reconstruction

Appointments Clause. Paragraph 1539(b)(1) of the Senate version provides that the Special Inspector General for Iraq Reconstruction ("SIGIR") "shall ... conduct a series of audits to identify potential waste, fraud, abuse, or mismanagement" on the part of Federal government contractors providing services to support Operations *Iraqi Freedom* and *Enduring Freedom*. Congress's decision to vest the SIGIR with new responsibilities is constitutionally permissible provided that the new duties are "germane" to the SIGIR's existing responsibilities. *Shoemaker v. United States*, 147 U.S. 282, 301 (1893); *see also The Constitutional Separation of Powers Between the President and Congress*, 20 Op. OLC 124, 157-59 (May 7, 1996). We assume that Paragraph 1539(b)(1)'s reference to Operation *Enduring Freedom*, which pertains to operations in Afghanistan, represents a drafting error. The SIGIR's existing statutory jurisdiction does not encompass Operation *Enduring Freedom*, and we do not read Paragraph 1539(b) (or any other provision of the bill) as an attempt to extend SIGIR jurisdiction to operations in Afghanistan for two reasons. First, such an extension would raise concerns under the "germaneness" inquiry described above. Second, such an extension would seem inconsistent with the jurisdiction of the separate Special Inspector General for Afghanistan Reconstruction (SIGAR) the bill purports to create. For these reasons, we recommend that the reference to Operation *Enduring Freedom* in Paragraph 1539(b)(1) be removed entirely or decoupled from any reference to the SIGIR. To the extent the paragraph, in conjunction with other provisions of the bill, seeks to expand the SIGIR's jurisdiction to include additional investigations related to Operation *Iraqi Freedom*, we believe the expansion (at least as described herein) would likely satisfy the germaneness test. However, the Administration notes that the SIGIR's responsibilities should be construed narrowly in order to avoid constitutional problems in this regard.

Determinations of "Unlawful" Activity. Subparagraph 1539(b)(3)(F) would authorize the SIGIR to focus his or her audits on, among other subjects, the "nature and extent of any

incidents of misconduct or unlawful activity by contractor employees." As we noted with regard to the commission provisions in section 1539, the Constitution generally, and the Due Process Clause in particular, limits the manner in which Government entities may determine that specific individuals have "violated" a law. *See Quinn v. United States*, 349 U.S. 155, 161 (1955); *Proposed Legislation to Grant Additional Power to the President's Commission on Organized Crime*, 7 Op. OLC 128, 138 (August 24, 1983). Accordingly, the bill should be revised to eliminate the provisions purporting to authorize the SIGIR to issue conclusive determinations of the "illegality" of conduct under investigation, and to require the SIGIR to refrain from identifying investigated persons by name in public reports. *See Congressional Requests for Information from Inspectors General Concerning Open Criminal Investigations*, 13 Op. OLC at 85 (noting Senate Committee's view, with respect to inspector general reports issued under a different statute, that "[i]t would be highly improper and often a violation of due process for an IG's report to list the names of those under investigation or to describe them with sufficient precision to enable the identities of the targets to be easily ascertained"); *cf.* Section 1542(e)(1)(G) (listing "investigation of ... *potential* unethical or illegal actions of Federal . . . contractors . . . and referral of such reports, as necessary, to the Department of Justice" as one of the duties of the Special Inspector General for Afghanistan Reconstruction) (emphasis added).

3. Section 1542: Special Inspector General for Afghanistan

Referrals to the Department of Justice. The bill states that the SIGAR will refer potential wrongdoing to the Department of Justice "to ensure further investigations, prosecutions, recovery of further funds, or other remedies." Subparagraph 1542(e)(1)(G); *see also* Paragraph 1542(l)(2) (SIGAR shall prepare and submit to Congress a final accountability report on all referrals of potential wrongdoing "to ensure further investigations, prosecutions, or remedies"). This provision raises separation of powers concerns to the extent that it suggests that the Department of Justice must take investigative or prosecutorial actions upon referrals identified by the SIGAR. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 832 (1985 (a prosecutor's decision not to indict "has long been regarded as the special province of the Executive Branch"); *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"). To avoid such concerns, we recommend amending subparagraph 1542(e)(1)(G) to state that the referrals will be made "to ensure that the Department may undertake, as appropriate, further investigations, prosecutions, recovery of further funds, or other remedies."

4. Section 1218: Missile Defense Against Iran

Section 1218 of the Senate version provision purports to infringe upon the President's constitutional authority to conduct foreign affairs by declaring the policy of the "United States" with respect to developing and deploying missile defense against Iran. Article II of the Constitution commits to the President responsibility for conducting foreign affairs that exists independent of Congress's Article I authority. *See, e.g., Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767-68 (1971).

Legislative provisions like section 1218, which purport to set "United States" foreign policy that could constrain or undermine the President's diplomatic efforts or negotiations with foreign nations, raise separation of powers concerns. To avoid these concerns, this section should be amended to reflect the sense of Congress.

5. Section 1531: Iraqi Oil Resources

Section 1531 of the Senate version would prohibit the use of appropriated funds for the exercise of United States "control of the oil resources of Iraq." This provision may impermissibly interfere with the President's constitutional authority as Commander in Chief to conduct and direct military operations in Iraq, because in combat operations, taking temporary control over a particular oil resource might be a tactical necessity. Accordingly, we recommend that the provision be amended to contain some qualifying language, such as that the prohibition on control applies unless the President determines or certifies that such control is necessary for national security or military reasons.

6. Section 1023: Hate Crimes

The Department reiterates the Administration's position that all violent crimes are unacceptable, regardless of the victims, and should be punished firmly. However, the Department also reiterates the Administration's strong opposition to the unnecessary and constitutionally questionable prohibition of certain "hate crimes" by section 1023 of the Senate-passed bill. Specifically, the section's proposed paragraph 249(a)(1) of title 18 raises constitutional concerns. Federalization of criminal law concerning the violence prohibited by the bill would be constitutional only if done in the implementation of a power granted to the Federal government, such as the power to protect Federal personnel, to regulate interstate commerce, or to enforce equal protection of the laws. Paragraph 249(a)(1) is not by its terms limited to the exercise of such a power, and it is not at all clear that a sufficient basis exists to uphold this provision of the bill. If the President were presented a bill that included this provision, his senior advisors would recommend that he veto the bill.

7. Sections 233, 876 and 1802: Mandatory Budget Recommendations

Sections 233 and 876, and paragraph 1802(c)(3) all purport to require that certain Executive branch matters or proposals be included in the President's budget submission or in other legislative proposals to Congress. There is no question that an Executive branch budget request qualifies as a legislative recommendation to Congress. *See, e.g.*, Memorandum to Robert W. Minor, Acting Deputy Attorney General, from Frederick W. Ford, Acting Assistant Attorney General, Office of Legal Counsel, *H. J. Res. 346* (Aug. 16, 1955). Accordingly, the bill's requirement that subordinate Executive branch officials submit such requests to Congress conflicts with the President's constitutional authority under the Recommendations Clause, U.S. Const. art. II, sec. 3, to recommend to Congress only such measures as he considers necessary and expedient, and also conflicts with general separation of powers principles. *See id.; see also*

Authority of the Special Counsel of the Merit Systems Protection Board to Litigate and Submit Legislation to Congress, 8 Op. O.L.C. 30, 36 (1984); *see also Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress*, 6 Op. O.L.C. 632, 639-41 (1982).

8. Section 931: Defense Department Consideration of Climate Change

Section 931 of the Senate version would mandate the inclusion of a study on global climate change in the National Security Strategy, National Defense Strategy, and Quadrennial Defense Review. The Department reiterates the Administration's opposition to this provision. This section sets a harmful precedent and raises constitutional questions because it could be viewed as a statutory authorization for external, non-governmental entities to influence United States national security and defense policy. The content of the products referenced in the provision should not be reflected in law, particularly in a manner that could impinge upon the flexibility of national security professionals and policy officials to determine the most appropriate subjects for these strategy documents.

9. Section 5201: Technical Corrections

Section 5201 of the Senate version provides (emphasis added),"The amendments made by this title make no substantive changes in existing law and *may not be construed as making a substantive change in existing law.*" Insofar as the italicized portion of this provision purports to prohibit the Federal courts from duly interpreting a statute in the exercise of the judicial power under Article III of the Constitution, it would conflict with that constitutional authority and with the constitutional separation of powers. To avoid this concern, the provision could be amended to replace "may not" with "should not."

10. Section 861: Protected Disclosures by Contractor Employees

The Administration strongly opposes section 861 of the Senate version. This provision should be deleted from the bill. Section 861would amend 10 U.S.C. § 2409 to provide additional whistleblower protections to employees of Federal contractors who disclose certain information to, *inter alia*, Members of Congress, representatives of congressional committees, and the Government Accountability Office. This provision purports to authorize disclosures that would clearly infringe the President's constitutional authority to protect the disclosure of national security and other privileged information, as well as his constitutional authority to supervise Executive branch personnel and Executive branch communications to Congress. *See, e.g., Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 154-57 (1989); Whistleblower Protections for Classified Disclosures, Statement Before the Permanent Select Committee on Intelligence, U.S. House of Representatives, by Randolph Moss, Deputy Assistant Attorney General, Office of Legal Counsel (May 20, 1998); Letter Opinion for Alex M. Azar, II, General Counsel, Department of Health and Human Services, from Jack L. Goldsmith, III, Assistant Attorney General, Office of Legal Counsel, *Re: Authority of Agency*

Officials to Prohibit Employees from Providing Information to Congress, at 2-3 (May 21, 2004), http://www.usdoj.gov/olc/crsmemoresponsese.htm ("*Azar Opinion*").

11. Section 1042: Reports on Threats from Ungoverned Areas

Section 1042 of the Senate version purports to require the Secretaries of Defense and State to submit a report to Congress that describes (1) the intelligence capabilities of certain terrorist groups and (2) "the schedule for implementing any actions" "to be taken to improve the capabilities and skills of the Department of Defense and the Department of State" in response to the terrorists' intelligence capabilities. § 1042(b)(4). This provision threatens to infringe upon the "President's authority to conduct covert activities abroad pursuant to the President's constitutional responsibilities, including his responsibility to safeguard the lives and interests of Americans abroad." *Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions*, 13 Op. O.L.C. 258, 258 (1989). To avoid these concerns, we recommend amending the reporting requirement in subsection (b) to provide that the Secretaries of Defense and State "may provide the following information to Congress, as appropriate under law."

12. Section 1043: National Security Recommendations by Independent Organization

Section 1043 of the Senate version would require the Secretary of Defense to enter into a contract with an "independent, non-profit, non-partisan organization," which shall be responsible for issuing a report that contains recommendations to Congress and the President regarding changes to the "national security interagency system." The Administration strongly opposes this provision and urges that it be removed, first and foremost, because it raises separation of powers concerns in attempting legislatively to constrain the President's ability to set national security policy in the manner he believes best serves his obligation to protect the country. In addition, the provision raises more discrete constitutional concerns. To the extent the recommendations of the "independent organization" referenced in Section 1043, recommendations which would be prepared pursuant to a Defense Department contract and funded with Federal appropriations, could be attributed to the Secretary or the Department of Defense, section 1043 raises concerns under the Recommendations Clause, U.S. Const. art. II, § 3, which vests in the President alone, and not his subordinates, the power to "recommend" legislative measures to Congress. Section 1043 could avoid this concern by clarifying that the contracted organization's report — including any recommendations contained therein — either: (1) is subject to presidential review and approval prior to its transmission to Congress; or (2) does not represent the recommendations of the Secretary, the Department of Defense, or the Executive branch. That said, the Administration remains of the view that the entire provision should be deleted as inconsistent with separation of powers principles and the President's authority and responsibility over matters of national security.

13. Section 1063: Direct Reporting Requirements for Elements of the Intelligence Community

Section 1063 of the Senate version purports to require the "Director of the National Counterterrorism Center, the Director of a national intelligence center, or the head of any department, agency, or element of the intelligence community" to respond to Armed Services Committee requests for intelligence reports, including legal opinions, within 15 days of receiving such a request. The provision further provides that no reporting entity may withhold any information covered by the request unless the President certified "that such document or information is not being provided because the President is asserting a privilege pursuant to the Constitution of the United States." And the provision purports to prohibit Executive branch officers, including the President, from supervising "the head of any department, agency, or element of the intelligence community, or any designate of such a head" who wishes to provide, or has been asked to provide, "testimony, legislative recommendations, or comments" to the Armed Services committees.

Section 1063 is constitutionally objectionable and must be revised or removed for several reasons. First, the requirement that covered entities respond fully within 15 days to the requests at issue in the provision unless the President certified his assertion of a constitutional privilege is not only unreasonable, but would infringe upon the President's constitutional authority to protect from disclosure national security and other privileged information. *See, e.g., Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). Second, and more fundamentally, decades of precedent spanning many Administrations make clear that section 1063's attempt to authorize Executive branch subordinates to provide information and legislative recommendations to the Congress regardless of presidential approval or objection violates the Recommendations Clause of the Constitution and the separation of powers by attempting to negate the President's constitutional authority under Article II to supervise Executive branch subordinates and protect against the unauthorized disclosure of national security and other information subject to executive privilege. As the Department of Justice advised Congress during the Clinton Administration in objecting to a similar reporting provision, such reporting requirements are constitutionally objectionable because they "would interfere with the President's control over the executive branch and with his legitimate interest in overseeing the presentation of the executive branch's views to Congress." *Letter to William V. Roth, Chairman, Committee on Finance, United States Senate, and Bill Archer, Chairman, Committee on Ways and Means, United States House of Representatives, from L. Anthony Sutin, Acting Assistant Attorney General, Office of Legislative Affairs* at 4 (June 8, 1998). The Clinton Administration issued a Statement of Administration Policy ("SAP") to the same effect regarding a bill that purported to give employees in the intelligence community a right to disclose classified information to Congress without authorization. That SAP stated that:

> This provision is clearly contrary to the Supreme Court's explicit recognition of the President's constitutional authority to protect national security and other privileged information. Congress may not vest lower-ranking personnel in the Executive branch with a "right" to furnish national security or other privileged information to a member of

> Congress without receiving official authorization to do so. By seeking to divest the President of his authority over the disclosure of such information, S. 1668 would unconstitutionally infringe upon the President's constitutional authority.

This position was more fully articulated in the Office of Legal Counsel testimony before Congress that same year. *See Whistleblower Protections for Classified Disclosures, Statement Before the Permanent Select Committee on Intelligence, U.S. House of Representatives, by Randolph Moss, Deputy Assistant Attorney General, Office of Legal Counsel* (May 20, 1998). And the principles that the Office of Legal Counsel and the Clinton Administration cited in 1998 have been cited by Administrations both before and since to oppose similar provisions. *See, e.g.*, Letter Opinion for Alex M. Azar, II, General Counsel, Department of Health and Human Services, from Jack L. Goldsmith, III, Assistant Attorney General, Office of Legal Counsel, Re: Authority of Agency Officials to Prohibit Employees from Providing Information to Congress, at 2-3 (May 21, 2004), available at http://www.usdoj.gov/olc/crsmemoresponsese.htm ("Azar Opinion") (statutory provisions requiring subordinate officers to communicate directly with Congress "unconstitutionally limit[] the President's ability to supervise and control the work of subordinate officers and employees of the Executive Branch"); *Authority of the Special Counsel of the Merit Systems Protection Board to Litigate and Submit Legislation to Congress*, 8 Op. O.L.C. 30, 31 (1984) (concluding that "to permit Congress to authorize or require an Executive Branch officer to submit budget information and legislative recommendations directly to Congress, prior to their being reviewed and cleared by the President or another appropriate reviewing official, would constitute precisely the kind of interference in the affairs of one Branch by a coordinate Branch which the separation of powers was intended to prevent").

As stated in the SAP issued on July 10, 2007, for the Senate version of H.R. 1585, if this provision were ultimately presented to the President, his senior advisors would recommend that he veto the bill.

14. Sections 1065 and 1066: Security Clearance Procedures

Sections 1065 and 1066 of the Senate version purport to require the President, the Secretary of Defense, and the Director of National Intelligence to adopt certain procedures and programs regarding the issuance of security clearances for access to classified information. As the Supreme Court has long recognized, *see, e.g., Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988), Article II of the Constitution vests in the President the authority and the duty to safeguard access to national security information, *see also Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92 (1998) (citing cases); *Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 154-57 (1989) (discussing cases and Executive Branch practice since the Founding). To avoid a conflict with this constitutional authority, sections 1065 and 1066 should be deleted or, at the very least, made precatory.

15. Section 1087: Foreign Sovereign Immunities

Section 1087 of the Senate version would create an exception to immunity under the Foreign Sovereign Immunities Act ("FSIA") for foreign nations and foreign officials acting in their official capacities (a status that — under the bill — would render nations vicariously liable for their officials' actions). Section 1087 conflicts with principles of official immunity under customary international law even under the restrictive view of such immunity adopted by the United States, because section 1087 would abrogate immunity for civil claims premised upon a broader range of sovereign state acts, and a much broader category of acts by foreign state officials, than international law, as recognized by the United States and codified in FSIA, has ever permitted. *See* 28 U.S.C. §§ 1602, 1605-1607; *Restatement (Third) on Foreign Relations Law* § 451 cmt. a (1987); *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993); *Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352, 2356-57 (2007). We believe that section1087 merits very careful scrutiny because it conflicts not just with international law, but with international law on immunity principles that the United States long has recognized because they serve and protect important United States interests.

In abandoning settled principles of official immunity, section 1087 could, if applied in certain circumstances, constrain the President in his role as the "sole organ of the federal government in the field of international relations," *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936), by making it more difficult for him to deal with, or host, foreign officials who fear (or have been targeted by) lawsuits authorized under the bill, *cf.* Art. II, § 3 (granting the President the exclusive power to "receive Ambassadors and other public Ministers"). The clear relationship between the President's ability to conduct foreign affairs and sovereign immunity for official acts by foreign nations and their officials explains why judicial recognition of official immunity claims traditionally turned on Executive branch suggestions, a tradition that FSIA did not disturb with respect to head of state immunity. *See, e.g., United States v. Noriega*, 117 F.3d 1206, 1211 (11th Cir. 1997). Section 1087 would disturb the tradition of official immunity by extending FSIA's statutory abrogation of immunity to official foreign acts that, unlike the acts currently covered by the FSIA, the United States has long treated as immune in accordance with international law absent an Executive branch recommendation to the contrary. For these legal reasons, as well as many policy reasons, we have grave concerns about whether this provision should be enacted. If it is not deleted altogether, we believe that it should at least contain a provision that expressly excepts from its general abrogation of immunity individuals or states who the President advises should be considered immune.

16. Section 871.

Section 871 of the Senate version would require the Secretary of Defense to promulgate excessive and burdensome regulations for any private contractor performing services in an area of combat operations where personnel are required to carry weapons in the performance of their duties. This provision raises separation of powers concerns because such

regulations could undermine the effectiveness of United States military activities and operations in theatres of ongoing armed conflict that are essential to national security. To avoid this concern, we recommend revising section 871 to make the requirement for regulations precatory, or to provide greater flexibility to the Secretary in designing and implementing the regulations.

B. House-passed Version

In addition to the specific concerns we note below, we incorporate by reference the concerns identified in the Administration's May 2007 Statement of Administration Policy on the House-passed text.

1. Section 703: Pharmacy Benefits Pricing

Section 703 of the House version would confer apparently significant sovereign authority, *i.e.*, the authority to exclude pharmaceutical agents from the pharmacy benefits program, upon a committee established under 10 U.S.C. § 1074g without apparent compliance with the Appointments Clause, U.S. Const. art. II, sec. 2, cl. 2.

2. Section 807: Procurement from Native Hawaiian-Serving Institutions

Section 807 of the House version would add Native Hawaiian-Serving Institutions to the race and national origin-based institutional categories for which Government contract preferences are imposed. This addition does not appear to be supported by a "strong basis in evidence" that contracting preferences for Native Hawaiian-Serving Institutions are necessary to serve a compelling government interest.

3. Section 932: Technical Amendments

Section 932 of the House version would infringe upon the Opinions Clause of the Constitution, U.S. Const. art. II, sec. 2, cl. 1, which authorizes the President to "require the opinion . . . of the principal Officer in each of the executive Departments, upon any subject relating to the duties of their respective offices." Section 932 would interfere with this unqualified constitutional authority by purporting to bar the Secretary of Defense from making recommendations to the President for nominees to fill certain vacancies unless he first obtained the concurrence of the Director of National Intelligence.

4. Section 951: Imposition of IPCC Projections

Section 951 of the House version would, like section 931 of the Senate version, mandate the inclusion of a study on global climate change in the National Security Strategy, National Defense Strategy, and Quadrennial Defense Review. The Administration opposes this provision. This section sets a harmful precedent and raises constitutional questions because it could be viewed as a statutory authorization for external, non-governmental entities to influence United

States national security and defense policy. The content of the products referenced in the provision should not be reflected in law, particularly in a manner that could impinge upon the flexibility of national security professionals and policy officials to determine the most appropriate subjects for these strategy documents.

5. Section 1222: United States Control over Iraqi Oil Resources

Section 1222 of the House version provides for the continuation of the existing prohibition against the use of appropriated funds for the exercise of United States control "over any oil resource" in Iraq. This provision may interfere impermissibly with the President's constitutional authority as Commander-in-Chief to conduct and direct military operations in Iraq, because circumstances could arise in combat operations where taking temporary control over a particular oil resource might become a tactical necessity.

6. Section 1231: Special Inspector General for Afghanistan Reconstruction

National Security and Other Privileged Information. The bill purports to give the Special Inspector General for Afghanistan ("SIGAR") broad authority to inquire into any kind of contract related to United States operations in Afghanistan, including intelligence and security contracts. *See* Paragraph 1231(f)(1). We do not object to this provision on the understanding that it will be construed consistent with the President's constitutional authority over information the disclosure of which could impair national security, foreign relations, or the performance of the President's constitutional duties as Chief Executive and Commander in Chief. *See, e.g., Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988).

Collaboration between the SIGAR and other Inspectors General. Paragraph 1231(f)(4) provides that the SIGAR "shall coordinate with, and receive the cooperation of, the Inspector General of the Department of Defense." We do not object to this collaboration requirement on the understanding that it will be construed consistent with the President's constitutional authority to supervise the unitary Executive branch.

7. Recommendation Clause Concerns

A number of provisions in the House version would require what appear to be legislative recommendations or measures to be submitted to the Congress by the Executive branch, in conflict with the Recommendations Clause, U.S. Const. art. II, sec. 3, which reserves to the President the discretion to submit to Congress only such recommendations as he deems "necessary and expedient." These provisions include subsection 222(b), subparagraph 222(d)(2)(C), paragraph 354(b)(4), subparagraph 516(d)(3)(C), sections 946 and 952, and subsection 1012(b).

8. Mandatory Disclosure of Classified National Security Information

In addition to section 1231, several other provisions of the House version appear to require the disclosure of classified or otherwise highly sensitive national security information to Congress, congressional committees, or other entities in a manner that may conflict with the President's constitutional authority to control the disclosure and dissemination of such information. These provisions include sections 221, 1224, 1225, and 1232-1233.

9. Unitary Executive/Micromanagement Concerns

Several provisions of the House version would interfere unduly with the President's constitutional authority to supervise the Executive branch, or would improperly micromanage the internal deliberative processes and organization of the Executive branch. In particular, sections 324-330 would unduly micromanage the processes used by the Office of Management and Budget and the Department of Defense to determine whether to use a contractor in lieu of public employment and undermine the President's control over the operations of the Executive branch, such as by requiring consultation with relevant Defense Department employees regarding whether to use a contractor (subparagraph 324(b)(2)(B) and subsection 330(a)), prohibiting the Secretary of Defense from seeking to use a contractor "by reason of any direction or requirement provided by the OMB" and prohibiting the Office of Management and Budget from "direct[ing] or requir[ing]" the Department of Defense to use a contractor for a Defense Department function (subsection 328(a) and (b)), and permitting Federal employees, represented by their union, to intervene in litigation challenging the use of a contractor to perform a Defense Department function (subsections 329(a) and (b)).

II. Policy Concerns

A. Senate-passed Version

1. Section 366: Employee Challenges to Contracting Out

Section 366 of the Senate version would provide Federal employees a right to challenge agency determinations to contract out work. Specifically, it would authorize Federal employees to file administrative cases against their agencies regarding contracting decisions and permit Federal employees to participate in court proceedings involving agency decisions to award contracts. We oppose this provision. It would reverse a 2001 judicial interpretation that Congress intended to waive sovereign immunity only to allow disappointed private bidders to challenge Government contract awards. To allow Government employees a right to file protests against their employing agencies would complicate the Government's defense of agency decision making in the award of contracts. For these same reasons, we oppose the corresponding provision in the House version, section 329.

2. Section 824: Purchases from the Federal Prison Industries

Section 824 of the Senate version would establish various conditions to be met before the Secretary of Defense could purchase products manufactured through the Federal Prison Industries program ("FPI") in the Justice Department's Bureau of Prisons. We support the goal of providing Federal agencies with the flexibility through competition to purchase quality goods and services at fair and reasonable prices with the expectation of timely performance. However, section 824 would attempt to accomplish that goal by greatly reducing Federal inmate work opportunities through the FPI program, the Bureau of Prisons' most successful tool in reducing recidivism. Any proposal to curtail the FPI program must be accompanied by cost-effective proposals to increase Federal inmate work opportunities. We oppose section 824 and recommend that it be deleted.

3. Sections 1023 and 1024: Hate Crimes

As we note in Part I of this letter, the Administration believes that all violent crimes are unacceptable, regardless of the victims, and should be punished firmly. However, Sections 1023 and 1024 raise a number of policy concerns in addition to the constitutional concern we discussed above. Section 1023 would prohibit willfully causing or attempting to cause bodily injury to any person based upon the person's actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability. These prohibitions would leave other classes (such as the elderly, members of the military, police officers, and victims of prior crimes) without similar special status. In addition, State and local criminal laws already provide criminal penalties for the violence addressed by the proposed Federal crime defined in section 1023, and many of these laws carry stricter penalties (including mandatory minimums and the death penalty) than section 1023 would impose. For all of these reasons, we believe the bill's hate crimes provisions are unnecessary and objectionable on policy grounds. If the President were presented a bill that included these provisions, his senior advisors would recommend that he veto the bill.

The bill's hate crimes provisions also raise several other concerns. Paragraph 1024(c)(5) of the Senate version would require the Attorney General, in consultation with the National Governors' Association ("NGA"), to conduct an audit on the effectiveness of certain Justice Department grants distributed for the investigation and prosecution of hate crimes. We oppose this provision.

It is not appropriate for the National Governor's Association to assume a formal, statutorily-required role in the auditing of the Department's grants. We recommend deleting this provision. Alternatively, we recommend amending it either to provide that the Attorney General may consult with the NGA for these purposes or to provide that the NGA conduct its own evaluation of the impacts of the grants.

In addition, subsection 1024(a) would require the Comptroller General, in consultation with the NGA, to collect certain data relating to hate crimes. We note that this provision may well lack the stringent data privacy and confidentiality statutes that would govern if this initiative were undertaken by the Justice Department's Office of Justice Programs ("OJP"). The OJP's expertise in data collection, analysis, reporting, and evaluation better positions it — as opposed to the collaboration currently envisioned — to undertake these functions. We believe that the data collection and analysis envisioned would require substantial expertise because subparagraph 1024(a)(1)(A)'s expanded definition of hate crimes has not been utilized in prior Federal data collection efforts.

4. Section 861: Protected Disclosures by Contractor Employees

As noted above, section 861 of the Senate version would provide additional whistleblower protections to employees of Federal contractors who disclose certain information to, *inter alia*, Members of Congress, representatives of congressional committees, and the Government Accountability Office. Notably, section 861 of would establish a cause of action for contractor employees making these disclosures.

We oppose this provision. It would authorize an employee of a Federal contractor to file suit against a Government contractor in Federal district court if the employee were aggrieved by agency action or a failure to act in regard to the disclosure. However, existing law already authorizes any person aggrieved by an agency order to seek review in a United States Court of Appeals. The new provision is unnecessary in light of the existing protections for whistleblowers in the private sector, including Government contractor employees. It would impose undue burdens upon the Government and could subject the Government to allegations of breach of contract if an agency were required to withhold funds otherwise due under a Government contract.

5. Section 1054: Repeal of Clarification of Insurrection Act

The Department strongly opposes section 1054 of the House version, as it does section 1022 of the Senate version, because section 1054 could be perceived as significantly restricting the statutory authority for the President to direct the Secretary of Defense to preserve life and property, and would limit imprudently the President's authority to call upon the Reserves. Such a result would be detrimental to the President's ability to employ the Armed Forces effectively to respond to the major public emergencies contemplated by the statute.

6. Sections 1064 and 1065: Issuance of Security Clearances

Section 1064 of the Senate version would limit the individuals to whom a security clearance could be granted and prohibit the use of mental health counseling as a per se disqualifier, and section 1065 would require a demonstration project applying "new and innovative approaches to improve the processing of requests for security clearances." These

provisions would intrude piecemeal into presidentially-approved adjudicative guidelines for access to classified information. They do not alter these guidelines in any substantive way and simply add burdensome reporting requirements. We are unaware of any need for these provisions and believe that any changes to the guidelines should not be effected in a piecemeal manner.

7. Section 1087: Foreign Sovereign Immunities

As noted above, section 1087 of the Senate version would replace current paragraph 1605(a)(7) of the Foreign Sovereign Immunities Act, the terrorism exception to foreign sovereign immunity, with a new provision, section 1605A. The amendment would recreate at section 1605A this terrorism exception to FSIA immunity for foreign nations and foreign officials acting in their official capacities (a status that the bill provides would render the nations the officials represent vicariously liable for the officials' actions). We agree with the many concerns that other Administration components have raised regarding this legislation, and wish to note the following legal and practical problems we perceive with the amendment.

First, section 1087 seems to remove the Attorney General's authority to get a court to stay discovery that would interfere with a related criminal case or national security operation. *See* 28 U.S.C. § 1605(g). We object to any elimination of the § 1605(g) authority to limit discovery.

Second, section 1087 would change the terrorism waiver in current law that requires (a) that the foreign state be a state sponsor of terrorism, (b) that the victim-claimant be a United States national, and (c) that the claimant give the foreign state a chance to arbitrate first, if the act occurred in the foreign state. Section 1087 apparently — possibly inadvertently — would change these concurrent conditions into alternatives (and add military members, and employees and contractors of United States), so that there would be a terrorism waiver if any one of these conditions were met. In other words, claims with no nexus to the United States and no state sponsor of terrorism designation could be brought in United States courts.

We note in particular that proposed new paragraph 1605A(a)(1)(B)(ii)-(iii) would extend the jurisdiction of courts beyond United States nationals, to members of the United States Armed Forces and to employees of the Government or its contractors (whether United States nationals or not). This could substantially expand the number of suits filed under the provision. The states designated as state sponsors of terrorism, as a group, have very few assets in the United States, and so creating an exponentially larger number of potential judgment creditors would expand the number of people with claims to the limited assets that do exist and enhance the inequitable "race to the courthouse" mentality that has characterized this litigation. Moreover, many of these assets — for example, those of Iran — are protected by United States treaty obligations that the United States Government then must appear in litigation to defend. In addition, creating the possibility of a large pool of judgment creditors whose judgments cannot be satisfied raises the possibility that pressure will mount to satisfy the judgment from United States Government funds (as, in fact, occurred several years ago when Congress appropriated hundreds of millions

of dollars to pay judgments against Iran, but even then only paid some, and not all, of the existing judgment holders). This is inequitable both to those plaintiffs who are not included in these sorts of remedial schemes and to the American taxpayer who must foot the bill. The Department has objected repeatedly to litigation-centered solutions to these sorts of problems because of their substantial inequities, and expanding the scope of potential claimants only increases those inequities.

Moreover, to the extent other countries applied a similar standard to the United States, the expansion of current law to cover non-United States nationals who are employees of the United States or of our contractors will also expand the potential liability of the United States for allegedly tortious acts affecting foreign citizens who are not nationals of their chosen forum.

Third, proposed new subsection 1605A(c) would amend the FSIA to provide that the statute of limitations for cases runs on the latter of 10 years after the original enactment of the terrorism exception (April 24, 1996), or 10 years from the date on which the cause of action arose. Taken together with subsection (d) of section 1087, which would make the new provisions applicable to pending claims, these provisions would extend the statute of limitations applicable in some pending lawsuits in which courts have found claims to be late-filed, where the acts giving rise to the suit arose more than 10 years before date of filing of lawsuit, but within 10 years of date of enactment of 1605(a)(7). *See e.g., Vine v. Iraq*, 459 F. Supp. 2d 10, 20-21 (D.D.C. 2006); *Buonocore v. Libya*, 2007 WL 2007509 (D.D.C. 2007). Changing the statute of limitation period would upset the balance struck at the time paragraph 1605(a)(7) of the FISA was originally enacted.

Fourth, proposed new subsection 1605A(d) would create a Federal cause of action under the FSIA. A Federal cause of action is unnecessary, as victims are free to pursue claims under State and local law, and the courts are able to decide those claims based upon normal conflict of laws analysis. Additionally, a provision creating a cause of action should not be cast as an amendment to the FSIA, which has traditionally been viewed as only a jurisdictional grant. Adding substantive provisions to the FSIA could have unintended consequences for litigation involving the scope of the FSIA in a wide variety of contexts.

Fifth, proposed new subsection 1605A(d) provides for the assessment of punitive damages against foreign states and their officials, agents, or employees. International law does not recognize punitive damages against foreign sovereigns. Therefore, this provision could have repercussions in cases against the United States abroad. Additionally, the assessment of punitive damages against foreign sovereigns would allow individual judges, rather than the Executive branch, to address matters that should be addressed in the context of foreign policy.

Sixth, proposed new subsection 1605A(d) provides that a foreign state shall be vicariously liable for the acts of its agents, officials, or employees. The intent of this provision is not clear; if it is intended to impose some form of automatic liability regardless of whether the state remedies the act or renounces it, it could pose obstacles to United States foreign policy

goals of allowing states to regulate their own citizens. Moreover, it could have ramifications for defenses associated with principles of international comity and *forum non conveniens*, which the United States Government often supports.

Seventh, proposed new subsection 1605A(f) would allow the district court to appoint special masters to hear damages claims. The intent of this provision is not clear, as district courts have inherent power to appoint magistrate judges or special masters as necessary in any case.

Eighth, proposed new paragraph 1605A(f)(2) would direct the Attorney General to transfer funds from the account created by the Victims of Crime Act to the administrator of the district court in which a case under paragraph 1605(a)(7) was pending, in order to "carry out Orders of [District Courts] appointing Special Masters." The intent of this provision is not clear. However, Victims of Crime Act funds have designated purposes and are intended to assist victims of all crimes, not just victims of terrorism. These funds should not be diverted if the size of the payments authorized by proposed new paragraph 1605(f)(2) are so high that they would deplete these funds.

Ninth, proposed new subsection 1605A(g) would limit appeals in cases under this section to appeals from final judgments, unless the appeal were certified under 28 U.S.C. § 1292(b) as an interlocutory appeal. This provision would insert obstacles into the appeal process for foreign sovereigns, as orders denying sovereign immunity ordinarily are treated as collateral orders subject to appeal without prior certification. Thus, it would alter a critical aspect of the current balance achieved by the FSIA. Additionally, we note that the United States relies on its ability to take immediate interlocutory appeals when its assertions of immunity are denied at first instance. We would be greatly prejudiced by reciprocal treatment abroad.

Tenth, the proposed new subsection 1605(A)(h) would allow any claimant filing suit to obtain a pre-judgment *lis pendens* lien on any property of a foreign sovereign located within the jurisdiction where the suit was filed, simply by filing a notice with the clerk of court. This provision would allow pre-judgment attachment of foreign sovereign property before any determination of immunity or liability was made, posing substantial obstacles to the sovereign's control over that property. This would result in significant foreign policy difficulties for the United States and limit foreign sovereign use of property in violation of international law.

Additionally, the provision makes no exception for property that we have treaty obligations to protect (for example, property subject to obligations under diplomatic or consular treaties or conventions). Attachment of such property and interference with a foreign sovereign's use or disposition of such property would violate United States Government treaty obligations. We have particular concerns about the provision in subsection (h) creating a lien by the filing a notice of pending action, when service of a complaint need not be effected for months. This provision potentially allows the equivalent of *ex parte* injunctions against foreign states, which is contrary to generally accepted practices of international law and would subject

the operation of the United States Government overseas to great risk if it were adopted by other countries. Given the breadth of our involvement in litigation in foreign courts and the vast amount of United States government property located abroad, any expansion of a court's authority to attach or execute against sovereign property of foreign states beyond what is recognized by international law would put the United States at great risk.

Eleventh, proposed new subsection 1605(A)(c) would amend the FSIA to add a new paragraph 1610(g)(1). This new provision would allow the attachment of the property of an agency or instrumentality of a foreign sovereign in satisfaction of a judgment against the foreign sovereign without regard for the factors the Supreme Court has determined should be applied before allowing enforcement of judgments in such a manner. *See First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983) ("*Bancec*").

This provision may raise due process and Fifth Amendment takings problems. Although the Supreme Court's analysis in *Bancec* was based on "equitable" factors and did not purport to be constitutionally derived, there may well be constitutional implications to making property of one separate juridical entity available to satisfy judgments entered against a separate juridical entity. Making juridically separate agencies or instrumentalities subject to liability for the acts of their home governments is not recognized at international law (or in any other context in domestic law), and could lead to significant international repercussions against United States-citizen owned properties and interests abroad. This provision would expose every minority shareholder and creditor of a company majority-owned by a foreign government (including any United States citizen shareholders or creditors) to the risk that the assets of the company may be seized to satisfy obligations of that foreign government. If the intent of this provision is to deter foreign governments from creating "sham" entities to shield assets, the *Bancec* factors would seem to allow for consideration for such an effort, rendering the provision unnecessary.

Twelfth, proposed new subsection 1610(g)(2) (in subsection (c) of the bill) provides that any property of a foreign state sought in connection with a judgment under proposed new subsection 1605A "shall not be immune from execution" because the property is regulated by the United States Government by reason of an action taken by the United States under the Trading with the Enemy Act ("TWEA") or the International Emergency Economic Powers Act ("IEEPA"). While this provision appears, from its title, to be an attempt to waive United States Government sovereign immunity, its intent is not clear. Property regulated under TWEA or IEEPA is not necessarily rendered immune under United States Government immunity, except when it is seized or held by the United States. In this instance, it is not the property that is immune but rather the United States Government which is immune, in the sense that it cannot be compelled by a Court to turn it over. Property regulated under TWEA or IEEPA can be rendered immune from judicial process as a consequence of the regulation. That immunity is not derivative of United States sovereign immunity but rather as a result of the authority granted by those statutes.

If the intent of the section is to eliminate the Executive's power to render property regulated under TWEA or IEEPA immune, the provision infringes to a significant extent on the power of the Executive to make foreign policy determinations regarding the property of foreign sovereigns located in the United States and to establish regulatory regimes intended to have certain foreign policy effects.

Thirteenth, paragraph (d)(1) of section 1087 provides that the revisions made by section 1087 are applicable to all pending cases. At paragraph (d)(2), section 1087 provides that the revisions are "to be given affect" in any case re-filed within 60 days of enactment, where the case had been "adversely affected" on the grounds that the FSIA failed to create a cause of action, where that case remained pending on appeal or on a motion for relief under Federal Rule 60(b). As to such cases, the defenses of *res judicata*, collateral estoppel, and statutes of limitations would be waived.

Paragraph (d)(1) might have significant effect on pending cases and raise complicated issues in cases where some of these issues have already been decided. The second part of this provision, paragraph (d)(2), seems intended to revive a case against Iraq, which — while dismissed for failure to state a cause of action — remains pending on a Rule 60(b) motion in district court. Reinstatement of this case would result in the resuscitation of asserted claims of almost a billion dollars against the Government of Iraq, which could disrupt current foreign policy economic recovery initiatives in that region. Additionally, it is not clear whether Congress has the authority to resuscitate a claim that has already gone to final judgment in this manner or whether it has the authority to eliminate the assertions of defenses by the Government of Iraq that otherwise would apply to a claim filed by these plaintiffs. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). Further, it is inequitable to provide relief by a statute clearly directed at only one set of plaintiffs.

8. Section 1539: Wartime Contracts and Contracting Processes in Operations *Iraqi Freedom* and *Enduring Freedom*

As noted above, section 1539 of the Senate version would establish a Commission on Wartime Contracting ("the commission") to "study and investigate" and report on contracting by Federal agencies for the reconstruction of Iraq and Afghanistan, and for the performance of security, intelligence, and logistical support for Operations *Iraqi Freedom* and *Enduring Freedom*. § 1539(a)(1), (3), (4). The content that section 1539 would require the commission's final report to contain suggests that the commission's focus would be to address and make recommendations for improving a variety of contracting processes. *See, e.g.*, 1539(a)(4) (C) (iii) (calling for recommendations for improvements for wartime contracting in various contract "process[es]," including requirements definition, award, management, identifying inherently governmental functions; and holding contractors accountable for fraud, waste, abuse, and mismanagement.)

Section 1539 could complicate further the investigation of potential waste, fraud, abuse, and mismanagement. The commission's performance of certain of its duties[1] suggests the possibility that the commission could collect evidence and make findings concerning particular cases of potential fraud, waste, abuse, or mismanagement. Case-specific investigation and findings by the commission could interfere with ongoing civil and criminal law enforcement efforts concerning the same or similar matters. This would include investigations, criminal prosecutions, and civil litigation to recover losses resulting from waste, fraud, abuse, or mismanagement. It also would include the investigative activity for which subsection 1539(b) calls, such investigations via a "series of audits" by the Special Inspector General for Iraq Reconstruction, in collaboration with various inspector generals.

Section 1539 also lacks provisions to promote both the investigation of waste, fraud, abuse, and mismanagement, and the redress of resulting Government losses. Subsection 1539(b) would require the SIGIR, in collaboration with the inspectors general of the Department of Defense, the Department of State, and USAID to conduct a "series of audits" focused on "a specific contract, task order, or site of performance under a contract or task order." The purpose of these audits would be to identify potential waste, fraud, abuse, or mismanagement in the performance of Defense Department contracts and subcontracts for the logistical support of coalition forces in Operations *Iraqi Freedom* and *Enduring Freedom*. Additionally, subsection 1539(b) would require the SIGIR to audit other Federal agency contracts for the performance of security and reconstruction. § 1539(b)(1), (2). However, the provisions governing the audits do not include any specific direction to SIGIR to quantify, as appropriate, any potential losses to the Government. Such a direction would facilitate efforts by the Department of Justice and other Federal agencies to recover losses and overpayments. Additionally, subsection 1539(b) does not contain any express requirement (such as that contained in subparagraph 1542(e)(1)(G), relating to the Special Inspector General for Afghanistan Reconstruction) that, as appropriate, SIGIR refer the findings and evidence collected through its audits to the Department of Justice for further investigation, prosecution, recovery of funds or the pursuit of other remedies.

Section 1539 does not contain express exceptions for the withholding and treatment of law enforcement information and sensitive litigation-related information. Paragraph 1539(a)(5) would authorize the commission to "secure directly" from any Federal department or agency "any information or assistance that the commission consider[ed] necessary to enable the commission to carry out the requirements of this subsection" and would require the commission to report to Congress without delay whenever information or assistance was "unreasonably refused." Insofar as the commission might be assessing the extent of fraud, waste, abuse, and mismanagement, and the extent to which the responsible parties have been held accountable, the commission might seek sensitive law enforcement information directly from the Department of

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[1]Specifically, these duties include the duty to "assess" and to make "findings" concerning "(iii) the extent of waste, fraud, abuse, or mismanagement under such contracts; (iv) the extent to which those responsible . . . have been held financially or legally accountable . . ." Senate Version § 1539(3)(C) and (4).

Justice, various inspectors general, or other agencies. Paragraph 1539(a)(5) does not contain an express exemption from providing the commission with information the disclosure of which is prohibited by another provision of law (*e.g.*, classified or grand jury materials or *qui tam* actions still under seal) or that is part of an ongoing civil or criminal investigation. Although refusing to produce information on these bases could not be said to constitute an "unreasonable" refusal, an express exception might be helpful. Likewise, the subparagraph does not expressly limit the commission from publicly disclosing sensitive law enforcement information whose public disclosure may not be otherwise prohibited by law. We recommend adding a limitation on public disclosure similar to that set forth in paragraph 1542(h)(7) of the Senate version.

9. Section 1542: Special Inspector General for Afghanistan Reconstruction

Paragraph 1542(h)(7) of the Senate version, establishing the Special Inspector General for Afghanistan Reconstruction, would limit the public disclosure of information that was "part of an ongoing criminal investigation." We recommend expanding this limitation to protect information relating to the investigation of civil fraud and to the investigations of violations of the False Claims Act.

10. Section 1022: Repeal of Clarification of Insurrection Act Authority

The Department reiterates the Administration's opposition to section 1022 of the Senate version, which could be perceived as significantly restricting the statutory authority for the President to direct the Secretary of Defense to preserve life and property, and would limit imprudently the President's authority to call upon the Reserves. Such a result would be detrimental to the President's ability to employ the Armed Forces effectively to respond to the major public emergencies contemplated by the statute.

B. House-passed Version

1. Section 329: Employee Challenges to Contracting Out

Section 329 of the House version would provide Federal employees a right to challenge agency determinations to contract out work. For the reasons set forth above with respect to section 366 of the Senate version, we oppose this provision.

2. Section 1056: Background Investigations for Civilian Access to Military Bases

Section 1056 of the House version would require background investigations of any unescorted civilians, including non-Department of Defense Federal employees, seeking access to military bases. Homeland Security Presidential Directive 12 ("HSPD-12") provides uniform standards for access to all Federal facilities and logistical systems. Section 1056 would add a needless layer to this process and undermine efforts to establish uniform and reciprocal access procedures across the Federal government. And, because section 1056 calls for a background

investigation less stringent than HSPD-12 requires, the provision would add this additional layer while adding no additional value to the screening process.

III. Errata

Subsection 1082(a) of the Senate version of the bill references tetrachloroethylene as "PCE." We believe that the intended reference is "TCE."

Thank you for the opportunity to present our views. 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,

Michael B. Mukasey
Attorney General

cc: The Honorable John McCain
Ranking Minority Member

IDENTICAL LETTER SENT TO THE HONORABLE IKE SKELTON, CHAIRMAN, COMMITTEE ON ARMED SERVICES, HOUSE OF REPRESENTATIVES; WITH A COPY TO THE HONORABLE DUNCAN HUNTER, RANKING MINORITY MEMBER.