



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

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(Senate)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

S. 2452 –National Homeland Security and Combating Terrorism Act of 2002

(Sen. Lieberman (D) Connecticut and 5 cosponsors)

America must be protected from terrorist attack. This obligation is at once immediate and long-term. It will occupy future Presidents, future heads of agencies, and future Congresses. It is critical that the Congress swiftly establish a Department of Homeland Security that will provide the best protection for the American people.

The Administration applauds the speed with which the Senate has proceeded on legislation to establish the Department of Homeland Security and looks forward to working with the Congress to enact legislation that will make a significant and lasting contribution to the security of the American homeland.

Although the Administration believes that S. 2452 moves in the right direction by including many of the major structural elements of the President's proposal such as the Federal Emergency Management Agency, the U.S. Coast Guard, the Immigration and Naturalization Service, the U.S. Customs Service, and the Transportation Security Administration, there are numerous issues with the Senate bill that must be resolved before the bill is acceptable to the President.

Simply transferring existing entities into a single Department is insufficient; the agencies must be able to function more efficiently and effectively than under the existing structure. S. 2452 would create an inflexible and inefficient bureaucracy that could hinder rather than improve our ability to protect the Nation. The bill also includes several unacceptable limitations on existing presidential authorities and prerogatives, and contains a number of unwarranted extraneous provisions.

If S. 2452 were presented to the President in its current form, the President would veto the bill. The President will not sign the bill unless: (1) the new restrictions on the President's existing national security authorities are removed; (2) the intrusive new statutory White House office with a Senate-confirmed director is eliminated; and, (3) the Secretary of Homeland Security is provided with the real personnel, budgetary, and reorganization flexibility that is needed to manage the new Department effectively, integrate its constituent parts, and provide the best security for the American people. Specific areas of concern are detailed below.

No Reorganization Authority

The President believes that the United States must have an agile and responsive organization to meet the 21st century threat of terrorism. Through a variety of separate provisions, S. 2452 would prohibit any meaningful reorganization or consolidation of the entities or functions it would transfer to the new Department. It would preclude, for example, even the most basic consolidation of Federal inspectors at the border ports of entry. Section 191 of the proposed bill expressly prohibits any combination or reorganization of almost every entity being transferred into the new Department and effectively forbids reassignment or delegation of the functions performed by each of those entities. The bill would provide the Secretary of Homeland Security with far less statutory reorganization authority than Congress provided to the Secretary of Energy and the Secretary of Education when those departments were created. It is incongruous that a department responsible for reacting quickly and decisively against terrorists is given less rather than more reorganization authority than these departments.

No Transfer Authority

S. 2452 provides no transfer authority to the Secretary of Homeland Security. Under this bill's structure, if new intelligence were to reveal the need to enhance the protection of a particular kind of target or to stockpile a particular kind of medicine that was not already explicitly funded by a prior Act of Congress, then the Secretary would have to ask the President to submit a supplemental budget request to the Congress and then wait until Congress acts on the request. The long delays that frequently result from this process present grave risks because terrorist threats can pose immediate dangers, putting the lives of the American people at risk.

There is ample precedent for providing a Cabinet Secretary authority to transfer limited funds between appropriations accounts. Presently, such authority is available to numerous departments including the Department of Health and Human Services, the Department Agriculture, and the Department of Energy. These Departments are granted authority to transfer between 1% and 7% of appropriated funds between appropriations accounts with notification to the Appropriations Committees. S. 2452 does not even permit this limited amount of transfer authority to the new Department.

Moreover, S. 2452 does not authorize the transfer of money to the new Department during the transition period, and as a result to finance the new Department's start up and transition process would require a second Act of Congress. This is unacceptable because the Nation is under the continuing threat of a terrorist attack and cannot afford a delay of unknown duration in the establishment and operations of the new Department.

Lack of Personnel Management Flexibility

The new Department cannot function properly without motivated, talented employees. The President believes that the Department's personnel system must protect vital employee rights, including, but not limited to, collective bargaining, minority recruitment, guaranteed health insurance, appeals, veterans' preferences, and whistleblower protections. In addition, the Department's employees should continue to be covered by generally applicable employment laws such as the Civil Rights Act, the Fair Labor

Standards Act, and the Social Security Act. At the same time, to provide the best security for America, the Secretary must also have flexibility to develop improved and sensible rules in areas relating to the hiring, compensation, assignment, and discipline of employees.

The legislation establishing the new Department must strike a careful balance between the flexibility needed to defend against a ruthless enemy and the fairness needed to ensure employee rights. S. 2452 fails to strike this balance. The current legislation compels the new Secretary to work with a rigid, statutorily-mandated personnel system that will hinder any effort to build a Department capable of responding to an adaptable terrorist enemy. The bill, in fact, would provide significantly less flexibility to the new Department of Homeland Security than that currently available to most other agencies in the Federal government. In addition, it would deny the Secretary of Homeland Security the ability to integrate the twenty-two different personnel systems potentially slated for the new Department. And it would severely limit managerial innovation aimed at ensuring the Department's ability to hire and retain the highly qualified individuals necessary to secure the nation and hold them accountable for critical homeland security functions.

Creation of a Statutory Office Within the White House

S. 2452 would create an Office for Combating Terrorism within the Executive Office of the President, headed by a Senate-confirmed Director, and subject to over twenty pages of detailed statutory tasks. The Administration is strongly opposed to Title II of S. 2452.

While the Administration understands and respects the role of Congress, the Constitution requires that the President be permitted to exercise control over his own staff as it assists him in carrying out his constitutional responsibilities as the head of a coordinated branch of government. S. 2452 seeks to interject Congress into the daily operations of the Executive Office of the President by requiring the director and a senior advisor to the President, within the President's own executive office, to report directly to Congress and participate in agency budget processes in a statutorily mandated fashion that is unacceptable. The creation of this Office represents undue interference with Presidential prerogatives and management of his own staff and support structures. The legislation would also produce a confusing structure within the Executive Branch that would muddle authority for a vital mission that requires clear lines of command. In so doing, S. 2452 would weaken this and future Presidents' ability to secure the homeland.

Limiting Established Presidential National Security Authorities

Every President since Jimmy Carter has had the statutory authority to exempt from the operation of the Federal Labor Relations Management Act particular agencies involved in important intelligence, investigative, or national security work, when necessary to protect national security. S. 2452 unwisely chooses to sharply curtail this authority in an Act establishing a Department whose primary mission is to protect the homeland against terrorist attack. No sound reason exists to provide labor unions located in the new Department rights beyond those enjoyed by other Federal employee unions.

Separation of Immigration Enforcement from Border Security

The new Department should provide a genuinely seamless border security system to protect against terrorist infiltration, and provide fair, humane, and efficient treatment to those who enter our country. To achieve these two goals, immigration enforcement operations should be separated from immigration services, while ensuring that the two functions remain closely coordinated.

S. 2452 as currently drafted would essentially reestablish one of the seams in America's border security that the Department of Homeland Security was intended to correct. The roles of Customs, INS, and USDA at the border overlap significantly as all three agencies are responsible for ensuring that persons and cargo do not illegally enter the United States. The new Secretary should have the flexibility to establish "one face" at the border to efficiently, effectively, and humanely process all people and cargo seeking entry into the country. S. 2452 would make this critical task virtually impossible by creating two separate directorates - and two separate Under Secretaries - within the Department of Homeland Security with responsibility for securing our borders. The bill would thus establish a "Border and Transportation Protection" directorate that specifically excludes the Border Patrol and immigration inspectors. The bill's proposed remedy for this fissure - requiring the Secretary to meet four times a year with his two Under Secretaries in a statutorily-established "Border Coordination Working Group" - plainly is insufficient to accomplish the needed integration and epitomizes the type of unwieldy coordinating mechanisms the new Department is designed to eliminate.

Fragmented Administration of Immigration Law

S. 2452 fundamentally alters governmental authority and implementation of immigration policy. It would abolish the Executive Office for Immigration Review and create within the Department of Justice what amounts to an independent agency for administrative immigration courts. This provision would undermine the national executive's time-honored and vital role in exercising firm, uniform control over immigration policy and the execution of immigration law - and would do so at precisely the time when we can least afford to weaken control over our immigration system. Moreover, S. 2452's creation of this new agency will result in duplicative and potentially conflicting interpretations of the immigration laws given that the Secretary of Homeland Security and the new quasi-judicial agency within the Department of Justice will both be implementing the same laws. In short, this legislation presents serious risks of unintended consequences and will complicate the fair and efficient administration of U.S. immigration law.

Disconnected Analysis of Threats and Vulnerabilities

The Administration's review of the Federal government's homeland security efforts revealed a key need - the ability to map the nation's critical infrastructure vulnerabilities against analysis of terrorist threats. Threat analysis, vulnerability assessments, and risk assessments must occur simultaneously, as each logically informs the other. It is a serious mistake to construct bureaucratic walls between these linked analytic disciplines. S. 2452 would do so by creating three separate units with responsibilities in this area.

Under S. 2452, the Under Secretaries for Intelligence, Critical Infrastructure Protection, and Science

and Technology (which would contain a separate Office of Risk Analysis and Assessment) would each have some responsibility for evaluating terrorist threat information, analyzing and assessing risks, and performing vulnerability assessments. This bureaucratic structure would hinder rather than benefit the unified analysis of terrorist threats and vulnerabilities that is fundamental to the new Department's mission. The Administration believes that these are critically interrelated functions and does not support the creation of separate "stovepipe" directorates for information analysis, critical infrastructure protection, and risk assessment. Also, S. 2452's provisions for access to information are both overinclusive and underinclusive. The bill appears to mandate a flood of immaterial "raw data" going to the Department while, at the same time, not explicitly providing that all vulnerabilities-related information go to the Secretary to support this key mission. Finally, S. 2452 does not allow the President sufficient flexibility to calibrate carefully the information flow to the Department to protect intelligence sources and methods.

Other Issues

In addition to these major problems with S. 2452, the bill also contains numerous other provisions that the Administration does not support, either because they represent unsound policy choices or because they are extraneous to the central purpose of the bill and should not be addressed through this legislation. These provisions include the first ever blanket expansion of Davis-Bacon wage guarantees to an entire department where instead existing law should control, failure to make the new Department the lead agency for bioterrorism preparedness and response, NSC membership for the Secretary, restrictions on organizational flexibility for the Coast Guard and Customs Service, limiting the number of Assistant Secretaries to seven, micromanagement of the Science and Technology Directorate, failure of Section 303(e) to recognize the requirement to protect confidential statistical information, and Amtrak funding.
