

NLWJC - Kagan

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Crime - Bioterrorism

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HHS POSITION ON BIOTERRORISM SECTIONS OF THE OMNIBUS CRIME BILL

Research in the public, commercial and academic sectors—including development of drugs, vaccines, and medical knowledge—is essential to arm the Nation against bioterrorism. We must not, in our zeal to enact laws that punish wrongdoers, chill the very scientific endeavor needed. Moreover, proposing criminal penalties that impinge on scientific research before consulting the scientific community risks insulting that community and embroiling the bill in needless conflict.

Criminal penalties on unsafe use and handling of select agents are inappropriate.

HHS supports the proposed criminal sanctions on possession of select agents in circumstances and/or quantities and for reasons not justified by peaceful, protective or prophylactic purposes. Such possession, even by a scientist in a legitimate laboratory outside the scope of appropriate scientific endeavor, should be swiftly and vigorously punished. Those with no legitimate basis for possession could be prosecuted without requiring proof of wrongful intent.

The proposal to criminalize reckless use and handling of select agents, on the other hand, strikes at the work of legitimate science. Properly trained scientists who are using and handling such agents in legitimate research should not face criminal penalties for accidents or errors in their bench science work. An accident resulting in harm risks being seen, after the fact, as the result of reckless handling, thus offering no meaningful limit on the inhibition this proposal effects.

The requirement for Brady Bill background checks is inappropriate.

First, the Brady Bill “list” is inapposite. A requirement to ask intrusive personal questions should focus on matters reasonably supporting inferences that the individuals concerned would likely behave irresponsibly in a laboratory or engage in terrorist acts. Brady Bill factors such as a misdemeanor conviction for domestic violence, addiction to a controlled substance (such as a prescription medication for chronic back pain), or any hospitalization for a mental condition, are not useful indicators of whether an individual is a security risk.

Second, subjecting the employer to criminal penalties for an employee’s unlawful possession or handling of a select agent will in effect exclude from this work qualified scientists who are not security risks but who have some episode in their past (e.g., hospitalization for depression after a child’s death) involving a Brady Bill factor. DOJ notes that the bill permits the employer to waive the exclusion, and argues that the employer has nothing to fear if he took action to reasonably assure himself that the Brady Bill criterion was no longer a problem. But in practice, given the criminal penalties and the extra background checks required, the employer in many cases would simply conclude that the risks and burdens were unacceptable and reject the applicant.

Recommendation

Propose now only the criminal penalties for unlawful possession and hoax. After consulting the scientific community, propose additional non-criminal measures (statutory or regulatory) well calculated to improve our ability to identify and respond effectively to real security risks.

The Justice Department's proposed legislation aims to enable law enforcement agents to prevent potentially catastrophic acts of biological terrorism. It addresses a critical gap in existing law, which is best suited to punishing perpetrators after they commit their offenses, through measures designed to keep dangerous biological substances out of the hands of those who do not have the need or training to possess them, or who have a documented history of irresponsible conduct. The legislation affords law enforcement an essential edge in preventing biological terrorism by allowing early intervention in the sequence of events leading to such catastrophic acts.

The legislative proposal pursues a highly tailored approach which is minimally intrusive on the legitimate research community. It does not criminalize the actions of persons within the scientific community except where their conduct so deviates from accepted safety standards as to be reckless or where it involves complicity in sharing lethal agents with persons known to be barred from possessing such agents.

The proposed reckless handling provision captures conscious, gross deviations from accepted norms in the handling of biological agents. Currently, no federal criminal penalties attach to such conduct, although more stringent criminal provisions relate to radioactive materials and pharmaceutical products. The proposed provision reaches, for example, home laboratories operating with grossly inadequate safeguards and the reckless removal of agents from legitimate facilities.

The provision regarding notification of the possession of select agents recognizes that authorities should be aware of who is handling the most deadly biological agents. This is a logical extension of the current CDC transfer regulations and any additional reporting burden will be minimal for scientific facilities currently complying with these regulations. The proposal does, however, plug an important gap by capturing those currently exempt from the CDC transfer regulations, such as the individual who cultivates ricin at home.

The prohibition on possession of select agents by certain individuals recognizes that factors such as a felony record or past mental impairment raise significant questions regarding the suitability to possess deadly biological agents. With respect to most of the grounds of disability, exemptions are permitted under appropriate circumstances.

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Perhaps the most serious form of terrorism that the U.S. could encounter relates to the use of a biological weapon. Yet, among the substances that comprise potential weapons of mass destruction, this is the area in which our laws leave us most vulnerable. In the Justice Department's judgment, the proposed legislative provisions are critically needed to address this highly dangerous gap in current law.

examples
can still come