



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

May 9, 2007
(House)

STATEMENT OF ADMINISTRATION POLICY

H.R. 1684 – Department of Homeland Security Authorization Act for Fiscal Year 2008

(Rep. Thompson (D) Mississippi and 10 cosponsors)

The Administration strongly opposes House passage of H.R. 1684 because it includes provisions that would interfere with the Department of Homeland Security (DHS) Secretary's management authorities, hinder the Department's ability to implement its various missions, and conflict with the President's Budget. The Administration looks forward to working with Congress to address these and other concerns before any final action on this legislation. Specific concerns with the bill as reported include the following.

Human Capital

The Administration strongly opposes provisions in H.R. 1684 that would repeal the personnel flexibilities provided in the Homeland Security Act of 2002. DHS needs a human resources management system designed to meet the diverse personnel requirements faced by the Department. As conveyed during consideration of the Department's original authorization in 2002, the Administration believes that DHS personnel management must strike a careful balance between the flexibility needed to defend against a ruthless enemy and the fairness needed to ensure employee rights. This legislation threatens that balance. Flexibility is needed given the Department's role in preparing for and responding to ever-changing homeland security threats. Eliminating these authorities would significantly diminish the Department's ability to respond quickly to security threats and would negatively impact the security of the Nation. Repealing these flexibilities would also have the effect of infringing on the President's authority to address national security concerns by eliminating a waiver related to bargaining unit exclusions for national security purposes. The Administration strongly opposes any attempt to deny the President authority to manage Executive Branch employees when faced with national security concerns. Should these provisions remain in the bill presented to the President, his senior advisors would recommend that he veto the bill.

Procurement

The Administration strongly opposes provisions in Title IV of the bill that would create burdensome and, in some cases, unworkable agency-specific policies and reporting requirements to replace balanced and effective governmentwide policies in the Federal Acquisition Regulation (FAR) and existing Departmental policies. For example, the bill would mandate expansive and costly reviews of a prospective contractor's past performance on any activities, in lieu of FAR policies that appropriately focus on information relevant to the work to be performed. This provision would also unnecessarily expand current FAR and Department policies addressing

foreign ownership to track and verify information at subcontracting tiers, which could be especially onerous for small businesses. The bill would also establish new domestic sourcing restrictions for certain items that would reduce competition and create new barriers to entry that would be inconsistent with our international obligations. The Administration also strongly opposes a provision in the bill that would create a separate acquisition training program for the Department, undermining efforts by the Office of Federal Procurement Policy to standardize competency and training requirements that are improving mobility and career advancement opportunities across the defense and civilian workforce so the government can recruit and retain the best talent.

Public Health Authorities and the National Biosurveillance Integration Center

The Administration is concerned that certain provisions in H.R. 1684 could conflict with the recently enacted Pandemic and All-Hazards Preparedness Act, which clarified and codified Department of Health and Human Services (HHS) authorities for public health emergency preparedness. The Administration looks forward to working with Congress to clarify public health and medical preparedness and response roles and responsibilities, and maintain the current division of public health authorities and responsibilities.

The Administration applauds the House's support for the National Biosurveillance Integration Center (NBIC). However, the Administration is strongly opposed to the designation of the Center as a public health authority. NBIC's mission is to aggregate data from multiple participating agencies in order to rapidly identify and characterize a biological event; its mission is not a public health mission of preventing or controlling disease, injury, or disability. Such a designation would result in NBIC's encroachment upon public health biosurveillance programs administered by other Federal agencies. Moreover, designation as a public health authority could improperly extend to NBIC direct access to private medical information. The absence of this designation would not preclude NBIC from receiving mission-critical information from HHS's Centers for Disease Control and Prevention, the Department of Agriculture, and other public health and veterinary agencies.

Improving the Material Threats Process

The Administration supports the improvements in the Material Threat Determination (MTD) Process outlined in the bill. However, the Administration strongly recommends that the deadline in the bill for completion of the MTDs be changed from December 31, 2007, to September 30, 2008. This change is necessary because future MTDs will be based on the integrated Chemical, Biological, Radiological and Nuclear risk assessments required to be completed under the bill by June 2008. The MTDs and other threat assessments should be due no sooner than three months after that date. In addition, the Administration believes that this language should be clarified to maintain the current division of responsibilities between HHS and DHS.

National Bio and Agro-defense Facility

The Administration strongly supports provisions in H.R. 1684 to authorize the National Bio and Agro-defense Facility (NBAF). The bill provides appropriate direction and authorities for the Science and Technology Directorate to successfully establish a world-class facility. The Administration recommends, however, that provisions prescribing minimum acreage and square

footage for the facility be eliminated. DHS should have the flexibility to select a site that presents the best opportunities for the government to design a facility that is most suitable for the research mission. Since the site selection and design phases of this program are still in progress, Congress should not determine these factors in advance. Principal responsibility for research and development activities relating to human countermeasures lies with HHS for the civilian populations and the Department of Defense (DOD) for the military. The bill should be revised to avoid any duplication or confusion of missions.

Other Provisions of Title VI – Biopreparedness Improvements

The Administration has concerns about other provisions within Title VI of the bill - including provisions creating a new Office of Health Affairs - and looks forward to working with Congress on these concerns as the bill moves through the legislative process.

Customs and Border Protection Officer Pay

The Administration has serious concerns regarding provisions in H.R. 1684 that would grant “law enforcement officer” status for the purposes of determining retirement benefits to certain Customs and Border Protection (CBP) Officers whose duties include inspection for compliance with customs, immigration, or agriculture laws. The definition of “law enforcement officer” under the Federal Employees’ Retirement System and the Civil Service Retirement System differs from the commonly understood concept of the phrase. CBP officers, while performing an important and necessary function, do not fit this definition and therefore should be accorded the same treatment as similarly-situated employees throughout the Federal government. The provision also has significant cost implications.

Federal Protective Service

The bill would prohibit the Secretary from furloughing the workforce of the Federal Protective Service (FPS) until the Government Accountability Office completes a report and congressional committees hold hearings. The Department is currently restructuring FPS to enhance the execution of its Federal building security mission. This will be accomplished through realigning the FPS workforce and permitting some law enforcement officers to transfer and support immigration enforcement and other law enforcement missions within the Department. The realignment plan will use voluntary opportunities for career enhancement and early retirement for those interested FPS staff. DHS has no plan to conduct a furlough or reduction in force of FPS employees and is concerned this language would be wrongly interpreted by FPS employees and its customers. While the Administration supports the House’s desire to ensure the security of Federal buildings, this reporting and hearing requirement will unnecessarily delay the transformation of FPS.

Re-employed Annuitants

The Administration opposes language that would authorize a cadre of reemployed annuitants who could receive retirement pay and annuities without offset outside of existing authority requiring the approval of the Office of Personnel Management. Instead, the Administration urges Congress to adopt the more limited proposal developed by the Administration that would authorize Federal agencies to reemploy Federal employees on a limited basis without offset of

their annuity from salary.

Grants

The Administration opposes the separate authorization of the Metropolitan Medical Response System (MMRS) Grant Program contained in the bill. The Administration supports the continuation of the MMRS capability; however, MMRS should be consolidated and integrated within the overall homeland security funding made available under the Homeland Security Grant Program (HSGP) and the Urban Area Security Initiative (UASI), which are allocated on the basis of risk, are integrated with State and local homeland security strategies, and can be used to maintain medical surge support capabilities. In addition, given that a major focus of the MMRS is public health and medical planning at the local level, MMRS should be required to consult with HHS to ensure coordinated public health and medical planning.

Military Recruiting

The Administration opposes as unnecessary a provision in the bill that would prohibit the award of a grant or contract to an institution of higher education that prohibits, by policy or practice, U.S. Coast Guard recruitment on its campus. This provision is unnecessary because it duplicates current authority found in 10 USC § 983, which covers U.S. Coast Guard recruitment efforts, more robustly protects such efforts, and ensures that student financial assistance is not adversely affected. Under Section 983, DHS is already prohibited from awarding grants or contracts to educational institutions that do not allow the Coast Guard to recruit on campus. Additionally, this language could adversely affect the higher education activities of U.S. Coast Guard officers as the language does not include the Title 10 exception for funding that supports student financial assistance. The Administration, therefore, strongly recommends deletion of this provision.

Information Sharing

Although the Administration appreciates Congress's concern and desire to improve the DHS State and Local Fusion Center Program, the specific nature of the curriculum included in the proposed bill may conflict with State and local requirements, thus preventing the Department from having the flexibility to best meet the needs of state and local officials. Further, codifying the curriculum in statute with very specific limitations would only reduce the Department's ability to prioritize and adapt to the changing threat environment.

Terrorist Watch List and Immigration Status Review at High-Risk Critical Infrastructure

The Administration is concerned with provisions that authorize funding for DHS to require each owner or operator of a Tier I or Tier II critical infrastructure site, as selected for the Buffer Zone Protection Program (BZPP), to conduct checks of their employees against available terrorist watch lists and immigration status databases. The prospect of these checks would involve a large regulatory impact to a significant number of U.S. employers and their workforce. Special population vetting against terrorist watch lists, as well as immigration status checks, would require financial resources that should not be funded through appropriations, but rather through a fee-based approach, similar to such programs as the Transportation Worker Identification Card. Additionally, the BZPP program, which focuses on perimeter improvements, would serve as a

poor vehicle for determining covered facilities.

US-VISIT

The bill includes language that purports to prohibit the transfer of US-VISIT to the National Protection and Preparedness Directorate (NPPD) until the Secretary submits to Congress an action plan for implementation of the exit component of US-VISIT at all ports of entry. However, the transfer of US-VISIT to NPPD already has occurred. All staff integration, consolidated financial systems, and new reporting relationships, as well as all other integration activities, were completed as of March 31, 2007. If this provision signals the intent of the House to remove US-VISIT from NPPD legislatively, the Administration strongly believes that yet another reorganization would further drain the time and resources of the Department at the expense of the core missions of DHS.

Interoperability Grants

The Administration supports the House's recognition that meaningful improvements to public safety communications interoperability require a comprehensive approach through each of the elements of the DHS SAFECOM Interoperability Continuum, including governance, standard operating procedures, training and exercises, usage, and technology.

Cybersecurity and Communications

The Administration is concerned that provisions in the bill relating to the response and reconstitution of cyber and communications systems do not adequately take into account the role of the private sector, which owns and operates the majority of these systems. Further, the provisions relating to cyber activities under the National Response Plan are premature, as that plan is currently being revised.

Congressional Oversight of DHS

The Administration appreciates inclusion of the provision in the bill expressing the Sense of Congress that the House of Representatives and the Senate should implement the recommendation of the 9/11 Commission regarding designation of one committee in each body with exclusive oversight and review of homeland security and DHS activities. More than 80 congressional committees and subcommittees have jurisdiction over DHS, resulting in an unnecessarily duplicative oversight environment. The Administration strongly urges Congress to complete implementation of this vital reform.

Under Secretary for Policy

The Administration strongly supports language in the bill establishing an Under Secretary for Policy. However, this language appears to include an inadvertent deletion of Sections 401, 402, and 403 of the Homeland Security Act of 2002. These sections contain provisions related to the Department's border, immigration, maritime, and transportation security authorities and the transfer of a number of legacy components to the Department. This error should be corrected and affected provisions renumbered accordingly prior to enactment of the bill.

Protection of DHS Name, Insignia, and Seal

The Administration strongly supports inclusion in the bill of authority prohibiting the misuse of the DHS name, initials, insignia, and seal. The protection guaranteed by this provision will provide important protection from individuals who would mislead members of the public. Similar protection already exists under current law with respect to the Defense Intelligence Agency, the National Reconnaissance Office, the National Geospatial-Intelligence Agency, the Marine Corps, the Federal Bureau of Investigation, the Drug Enforcement Administration, the U.S. Marshals Service, the U.S. Mint, the U.S. Secret Service, and the Central Intelligence Agency. The Administration believes the House should consider expanding the enforcement to include criminal penalties, in addition to civil penalties, as provided in other similar authorities.

Limitation of Executive Authority

The Administration opposes language that would limit executive authority, including provisions that infringe on the President's constitutional authority over the unitary executive branch. For example, the bill includes provisions that would purport to require the Secretary of Homeland Security to consult actively with Congress with regard to all of the Department's operations and require the establishment of an authorization liaison officer within the office of the Chief Financial Officer and such officer's provision to congressional authorizing committees of DHS budget and other information provided to appropriations committees. To the extent that this provision would require the Secretary to disclose sensitive and classified national security information to various congressional committees, it would infringe upon the President's constitutional responsibilities to control access to national security information and to protect against the untimely disclosure of such information. Moreover, these provisions would improperly micromanage the Department of Homeland Security and undermine the Secretary's ability to execute the functions entrusted to him by statute. The bill also would require the Secretary to delegate line authority to particular officers of DHS, including chief operating officers and the Assistant Secretary for Legislative Affairs, including over such matters as personnel management, operations, training, and budget resources. Prescribing such requirements in statute would unnecessarily obstruct the Secretary's ability to manage DHS.

Additional Constitutional Concerns

The Administration opposes language in several provisions of the bill that would raise serious constitutional questions. For example, the bill would set forth qualifications for the Chief Medical Officer of the DHS in a manner that is inconsistent with the requirements of the Appointments Clause of the Constitution, by unduly limiting the field of potentially qualified candidates from which the President may appoint, with the advice and consent of the Senate, an individual to be Chief Medical Officer.

The Administration supports provisions to identify and eliminate barriers to employment of qualified minorities, women, and people with disabilities and is pleased with the bill's effort to support existing initiatives. However, the Administration opposes provisions in the bill that would require additional reporting requirements and the development of a barrier removal plan, which would be duplicative of existing Equal Employment Opportunity Commission requirements and ongoing DHS efforts. In addition, the Administration strongly opposes basing efforts to identify and remove barriers to employment based on the concept of

“underrepresentation” of any particular demographic group. The term is easily susceptible to the interpretation that it requires racial or gender quotas, which would raise serious Equal Protection concerns, and it might well be legally indefensible and give rise to liability. For those same reasons, the Administration also opposes provisions in the bill that would impose similar requirements with respect to the Department’s contracts with small businesses and selection of colleges and universities for the Centers of Excellence Program.

Finally, to the extent that a provision of the bill requiring the Secretary to conduct an evaluation of potential programs to share information regarding critical infrastructure also would require the Secretary to submit legislative recommendations to Congress, that provision would violate the Recommendations Clause of the Constitution.

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