

MEMORANDUM FOR JOHN PODESTA

DRAFT

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SUBJECT: Proposed biological terrorism provisions in the omnibus crime bill

Purpose

To determine the Administration's position on the proposed biological terrorism provisions of the Omnibus Crime Bill

Background

There is consensus within the Administration that serious gaps exist in current federal bioterrorism laws. In contrast to chemical, nuclear or radiological weapons, there are currently few laws in place designed to limit the availability of hazardous biological materials to the general public. While current laws are adequate to punish perpetrators after they unleash biological agents, they are not designed to ensure that these substances are kept out of the wrong hands in the first place. Additionally, bioterrorism is a growing concern in Congress and we believe that many on both sides of the aisle will be watching to see if the Administration will produce a draft bill with a strong law enforcement focus before introducing their own proposals.

The Department of Justice (DOJ) goal in proposing legislation is to ensure that potentially hazardous biological materials do not fall into the wrong hands. HHS agrees with this goal, but has raised concerns that some of the proposed restrictions could chill vital scientific research into these agents that may be necessary to safeguard public health, and may cause concern within the medical and scientific community. With these dual concerns in mind, there is interagency agreement that the proposed Crime Bill include new provisions establishing criminal penalties for:

- Possession of biological agents not justified by a peaceful purpose.
- Unsafe handling of harmful biological agents.
- Unregistered possession and unauthorized transfer of selected biological agents.
- Knowingly perpetrating a hoax regarding the use of biological agents.

Issues for Resolution

While there was relatively early agreement among the agencies on the above provisions, there has been longstanding disagreement over one remaining set of issues. Disagreement over these provisions has resulted in significant delay in the transmittal of the Crime Bill to Congress.

In general, the provisions in dispute address categories of individuals who would be prohibited from possessing dangerous select biological agents, absent some form of waiver.

In order to address safety and security concerns, Justice believes that it is necessary to enact provisions which would criminalize the possession of dangerous biological agents by certain classes of individuals. The categories proposed by DOJ are similar to those that are applied to firearms, including individuals who are: (1) convicted of a felony crime; (2) under indictment for a felony crime; (3) unlawful users or addicts of any controlled substance; or (4) adjudicated as mentally defective or committed to a mental institution. DOJ believes that these provisions, which permit employer waivers to be issued in most circumstances, would be only minimally intrusive on the legitimate research community.

While HHS accepts the principle of prohibiting categories of “restricted individuals” from working with select biological agents, it believes that the DOJ provisions DOJ are too restrictive and could chill valid scientific research. HHS supports a narrower definition of “restricted individual” that it believes will sufficiently limit access to dangerous agents while proving less disruptive to the nation’s research institutions.

The agencies also disagree over the waiver provisions. Under the Justice proposal, the employer would be permitted to grant waivers for individuals in the prohibited categories in most circumstances. HHS believes that employers would be reluctant to grant waivers for fear of incurring liability for waived individuals. HHS instead would prefer that DOJ provide the waiver, instead of employers. DOJ does not object to a federal agency role in granting waivers, but would prefer that the agency is left to Presidential designation.

Finally, the most difficult area of disagreement emerged over the DOJ proposed provision to prohibit any non-permanent resident alien from handling select biological agents unless the U.S. Government provided a waiver. This would include many visiting students and scientists admitted under temporary visas. HHS strongly opposed the proposal over concern that it could cast suspicion over foreign nationals in general, and diminish our ability to continue to attract world-class scientists to this field of research. While the agencies disagreed over the breadth of the proposal, both agencies agreed it is appropriate for a federal agency to provide waivers for this category of individuals.

Consensus positions

On September 9, we held a deputies meeting to resolve the areas of disagreement. In addition to the Departments of Justice and Health and Human Services, many interested EOP offices also attended including DPC, NSC, OMB, WH Counsel, OSTP, OVP, and the Chief of Staff’s Office. During the meeting, the EOP offices reached a consensus position on the prohibited persons categories and disputed waiver provisions. Based on follow up discussions led by OMB, we have also arrived at a position on the visiting foreign nationals issue that has the support of all interested EOP offices.

A. Prohibited persons categories:

Within the prohibited persons categories, we agreed that the legislation should include:

- Individuals convicted of a felony crime or dishonorably discharged from the military.
- Individuals under indictment for any felony crime.
- Individuals who are unlawful users of any controlled substance. We agreed to drop language which would have also prohibited individuals who are “addicted to” any controlled substance.

We also agreed to exclude individuals who have been adjudicated as mental defective or committed to mental institutions from the list of prohibited persons.

B. Waivers

To address employer liability concerns about waivers for the above listed prohibited persons, we agreed that HHS should issue guidance on how to grant waivers to the relevant scientific community. HHS has existing relationships with the scientific community and can work with DOJ to draft the best practices guidance. We believe this is preferable to giving DOJ waiver authority, as suggested by HHS.

[If HHS continues to strongly object to this compromise, we could require federal agency waivers for these provisions as well. We could draft the proposal to allow the President to designate the appropriate agency upon passage of the legislation. Based on informal conversations we have had during this process, HHS, DOJ and other EOP offices would likely be amenable to this compromise.]

C. Foreign nationals admitted under temporary visas

As an alternative to DOJ's original proposal, ^{to} generally bar *any* non-permanent resident alien from handling select biological agents absent a federal government waiver, we agreed upon a narrower provision that would focus on the countries with which we have greatest national security concerns. The compromise provision would require federal government waivers for non-permanent resident aliens from any country designated by the State Department as a state sponsor of terrorism (7 countries). It was determined that this would effect only a small fraction of the total number of students and scientists admitted under temporary visas, and should not have a significant impact on current research activities.