

EFFECTIVE PROSECUTION OF POSSESSION OF
 BIOLOGICAL TOXINS AND AGENTS ACT OF 2019

JULY 9, 2019.—Committed to the Committee of the Whole House on the State of
 the Union and ordered to be printed

Mr. NADLER, from the Committee on the Judiciary,
 submitted the following

R E P O R T

[To accompany H.R. 1986]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1986) to amend section 175b of title 18, United States Code, to correct a scrivener’s error, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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Purpose and Summary

H.R. 1986, the “Effective Prosecution of Biological Toxins and Agents Act of 2019,” is designed to correct a “scrivener’s error” in section 175b of title 18 of the United States Code to ensure that the statute prohibits the shipment, transportation, possession or receipt of the complete list of biological toxins and agents that Con-

gress intended to prohibit. The legislation also reorganizes the physical structure of section 175b by adding certain titles and subtitles and adjusting margins to make clear precisely what conduct and which toxins and agents are covered by the statute, as well as the penalty associated with contravening the statute.

Background and Need for the Legislation

BACKGROUND

Section 175 of title 18 of the United States Code codified the “Biological Weapons Anti-Terrorism Act of 1989.”¹ That Act was enacted to attach criminal penalties to the development, production, stockpiling, transfer, acquisition, retention or possession of any biological agents, toxins, or delivery systems for use as a weapon. Section 175b, which H.R. 1986 would amend, was added to the Code in the aftermath of the September 11, 2001 terrorist attacks as part of the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001” (USA PATRIOT Act).² In general, section 175b makes it a crime, with penalties of up to ten years of imprisonment, for certain “restricted persons” or “unregistered persons” to possess any biological agent or toxin listed as a “select agent” by the Secretary of Health and Human Services (“HHS”).³ As originally enacted, section 175b specified that the select agents targeted by the legislation were set forth “in subsection (j) or section 72.6 of title 42, Code of Federal Regulations [(“CFR”).”⁴

In 2002, Congress amended section 175b to include subsection (c)(1), which criminalized the unregistered possession of select agents by any person.⁵ Congress also revised the list of agents and toxins prohibited by statute by shifting its reference from 42 C.F.R. § 72.6(j) to “Appendix A of part 72 of Title 42” of the CFR,⁶ which consisted of a list of select agents HHS identified pursuant to new requirements under the Public Health Service Act (42 U.S.C. § 262a).⁷

In 2004, as part of the “Intelligence Reform and Terrorism Prevention Act,” Congress changed the reference from “Appendix A of part 72” to “Part 73,” a new section of HHS’s regulations governing select agents and toxins.⁸ This amendment changed the statute to prohibit possession of “a non-overlap or overlap select biological agent or toxin in sections 73.4 and 73.5 of Title 42” of the CFR.⁹ Three months later, however, HHS re-formatted its regulations, which resulted in its list of select agents and toxins being moved to a section of the CFR (section 73.3) that is not referenced in 18 U.S.C. 175b.¹⁰

¹ Pub. L. No. 101–298, 104 Stat. 201 (1990).

² Pub. L. No. 107–56, 115 Stat. 272 (2001).

³ 18 U.S.C. § 175b.

⁴ Pub. L. No. 107–56, § 817, 115 Stat. 385–86 (2001); *see also* 42 C.F.R. § 72.6(j).

⁵ Pub. L. No. 107–188, § 231, 116 Stat. 660 (2002).

⁶ *Id.* at 661.

⁷ *See* July 1, 1944, c. 373, Title III, § 351A, as added Pub. L. No. 107–188, tit. II, § 201(a), 116 Stat. 637 (2002); amended Pub. L. No. 107–296, tit. XVII, § 1709(a), 116 Stat. 2318 (2002).

⁸ *See* Pub. L. No. 108–458, § 6802(d), 188 Stat. 3638 (2002).

⁹ *See id.*

¹⁰ *See* Possession, Use, and Transfer of Select Agents and Toxins, 70 Fed. Reg. 13294–01 (Mar. 18, 2005).

The HHS re-formatting had the unintended consequence of leaving some biological agents and toxins off the prohibited list. Among these, is ricin, which is a poison found in castor beans.¹¹ Ricin is inexpensive, easy to make, and very toxic—it can kill by just by inhalation.¹² This result is clearly not what Congress intended.

NEED FOR THE LEGISLATION

The “scrivener’s error” that is corrected by H.R. 1986 has had real-life negative consequences as exemplified by its impeding the prosecution of at least one person, William Christopher Gibbs, who possessed and may have manufactured ricin. This legislation corrects the error to ensure the effective prosecution of individuals who carry out these kinds of activities.

On January 17, 2017, Gibbs was stopped for running a stop sign in Fannin County, Georgia and, pursuant to a consensual search, law enforcement located “some seeds” in a bag in the glove compartment of his vehicle.¹³ Gibbs was given a verbal warning and the seeds were returned to him.¹⁴ On February 2, 2017, the Fannin County Sheriff’s Office “responded to a call at the Fannin Regional Hospital concerning a suspect who had tried to make ricin, gotten it on himself, and drove to the hospital.”¹⁵ Gibbs was questioned at the hospital and law enforcement obtained consent to search his vehicle,¹⁶ wherein they located a substance that tested positive for ricin, in a bottle on the floorboard of the driver’s side.¹⁷

On February 22, 2017, Gibbs was charged with knowingly possessing ricin in violation of 18 U.S.C. § 175b(c).¹⁸ According to the indictment in the case, ricin “is a select agent for which the defendant had not obtained a registration required by regulations under section 351A(c) of the Public Health Service Act.”¹⁹ After Gibbs’s arrest, the Southern Poverty Law Center identified him as claiming membership in a white supremacist group, the “Georgia Church of Creativity,” which professes race as a religion and that “the white race is nature’s finest.”²⁰

Gibbs moved to dismiss the indictment on the theory that the unregistered possession of ricin is not a crime under section 175b(c). Under 18 U.S.C. § 175b(c), it is a federal crime to “knowingly possess[] a biological agent or toxin where such agent or toxin is a select agent for which such person has not obtained a registration required by regulations under section 351A(c) of the Public Health Service Act. . . .”²¹ A “select agent” is one “to which subsection (a)

¹¹ *Facts About Ricin*, Ctr. for Disease Control & Prevention, Emergency Preparedness and Response, available at <https://emergency.cdc.gov/agent/ricin/facts.asp>.

¹² See Matt Vasilogambros and Nat’l J., *Why Ricin Is the Domestic Terrorist’s Toxin of Choice*, The Atlantic, available at <https://www.theatlantic.com/politics/archive/2013/05/why-ricin-is-the-domestic-terroristss-toxins-of-choice/438180/>.

¹³ *United States v. Gibbs*, Order and Report and Recommendation, CR 17–00005 (N.D. Ga. Mar. 14, 2017) (Doc. 44), at 6.

¹⁴ *Id.*

¹⁵ *Id.* at 18.

¹⁶ *Id.* at 22.

¹⁷ *Id.* at 24.

¹⁸ *United States v. Gibbs*, Indictment, CR 17–00005 (N.D. Ga. Feb. 22, 2017) (Doc. 1), at 1–2.

¹⁹ *Id.*

²⁰ Jim White, *In Dismissing Ricin Charge Against White Supremacist, Judge Throws Enforcement of Bioterrorism Law Into Chaos*, Empty Wheel, Oct. 4, 2018, <https://www.emptywheel.net/2018/10/04/in-dismissing-ricin-charge-against-white-supremacist-judge-throws-enforcement-of-bioterrorism-law-into-chaos/?print=print>.

²¹ 18 U.S.C. § 175b(c)(1) (2019).

applies.”²² Subsection (a)—which criminalizes shipping, transporting, and possessing certain biological agents and toxins—applies “if the biological agent or toxin is listed . . . in section 73.4 and 73.5 of title 42” of the CFR.²³

Section 73.4 of Title 42 of the CFR includes a list of overlap select agents and toxins that HHS has determined pose potential threats to public health and safety. Section 73.5 contains exemptions. As the court found in *Gibbs*, however, neither section 73.4 nor section 73.5 mentions ricin.²⁴ Upon analyzing the plain language of the statute, the court held that the term “select agent” under 18 U.S.C. § 175b does not include ricin²⁵ and, accordingly, dismissed the indictment against *Gibbs*.²⁶ Under current law, the government cannot bring cases against individuals who possess or distribute biological toxins or agents that should be, but are not, included in the HHS list of prohibited substances. As the court in *Gibbs* admonished, because “§ 175b cannot be read to criminalize the unregistered possession of ricin”²⁷ it now “falls to Congress to . . . amend [the law] if [it] yields unfair or unwanted results.”²⁸

Hearings

No legislative hearings were held on H.R. 1986.

Committee Consideration

On June 12, 2019, the Committee met in open session and ordered the bill, H.R. 1986, favorably reported, without amendment, by voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that no rollcall votes occurred during the Committee’s consideration of H.R. 1986.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

²² *Id.* at § 175b(d)(1).

²³ *Id.* at § 175b(a)(1).

²⁴ *United States v. Gibbs*, Order, CR 17–00005 (N.D. Ga. Sep. 21, 2018) (Doc. 71), at 6.

²⁵ *Id.*

²⁶ *Id.* at 10.

²⁷ *Id.* at 8.

²⁸ *Id.* at 9.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1986, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 26, 2019.

Hon. JERROLD NADLER,
*Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1986, the Effective Prosecution of Possession of Biological Toxins and Agents Act of 2019.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

MARK P. HADLEY
(For Phillip L. Swagel, Director).

Enclosure.

H.R. 1986, Effective Prosecution of Possession of Biological Toxins and Agents Act of 2019			
As ordered reported by the House Committee on the Judiciary on June 12, 2019			
By Fiscal Year, Millions of Dollars	2019	2019-2024	2019-2029
Direct Spending (Outlays)	0	*	*
Revenues	0	*	*
Deficit Effect	0	*	*
Spending Subject to Appropriation (Outlays)	0	0	0
Statutory pay-as-you-go procedures apply?	Yes	Mandate Effects	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2030?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No
* = between -\$500,000 and \$500,000			

H.R. 1986 would broaden the coverage of current laws against misuse of certain toxins. People who violate the bill's provisions could be subject to criminal fines, so the federal government might collect additional fines under the legislation. Criminal fines are recorded in the budget as revenues, deposited in the Crime Victims Fund, and later spent without further appropriation action. CBO expects that any additional revenues and associated direct spending would not be significant because relatively few additional cases would probably be affected.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 1986 establishes or reauthorizes a program of the Federal government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1986 would ensure the effective prosecution of unauthorized or unregistered persons who possess or distribute the biological toxins and agents, the possession or distribution of which Congress intended to prohibit.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1986 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1. Short Title. Section 1 sets forth the short title of the legislation as the “Effective Prosecution of Possession of Biological Toxins and Agents Act of 2019”.

Section 2. Prohibition on the Possession of Biological Toxins and Agents. Section 2 amends section 175b of title 18 to make clear that the agents and toxins covered by the statute are those listed as “non-overlap or overlap select biological agent[s] or toxin[s] under Part 73 of Title 42 of the Code of Federal Regulations.” The bill also reorganizes the visual structure of section 175b by changing certain margins and adding certain titles and subtitles to make clear: (1) that it shall be unlawful for a restricted person to ship, transport, possess or receive in or affecting interstate or foreign commerce any covered biological agent or toxin; (2) where in the Code of Federal Regulations the complete list of covered agents and toxins can be found; (3) the penalty associated with violating the statute; and (4) its relevant definitions.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, H.R. 1986, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no changes are proposed is shown in roman):

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill,

as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

PART I—CRIMES

* * * * *

CHAPTER 10—BIOLOGICAL WEAPONS

* * * * *

§ 175b. Possession by restricted persons

[(a)](1) No restricted person shall ship or transport in or affecting interstate or foreign commerce, or possess in or affecting interstate or foreign commerce, any biological agent or toxin, or receive any biological agent or toxin that has been shipped or transported in interstate or foreign commerce, if the biological agent or toxin is listed as a non-overlap or overlap select biological agent or toxin in sections 73.4 and 73.5 of title 42, Code of Federal Regulations, pursuant to section 351A of the Public Health Service Act, and is not excluded under sections 73.4 and 73.5 or exempted under section 73.6 of title 42, Code of Federal Regulations.]

(a) OFFENSE.—

(1) IN GENERAL.—*It shall be unlawful for a restricted person to—*

(A) *ship, transport, or possess in or affecting interstate or foreign commerce any biological agent or toxin described in paragraph (2); or*

(B) *receive any biological agent or toxin described in paragraph (2) that has been shipped or transported in interstate or foreign commerce.*

(2) AGENTS AND TOXINS COVERED.—*A biological agent or toxin described in this paragraph is a biological agent or toxin that—*

(A) *is listed as a non-overlap or overlap select biological agent or toxin under part 73 of title 42, Code of Federal Regulations, pursuant to section 351A of the Public Health Service Act (42 U.S.C. 262a); and*

(B) *is not excluded or exempted under part 73 of title 42, Code of Federal Regulations.*

[(2) Whoever] (3) PENALTY.—*Whoever knowingly violates this section shall be fined as provided in this title, imprisoned not more than 10 years, or both, but the prohibition contained in this section shall not apply with respect to any duly authorized United States governmental activity.*

(b) TRANSFER TO UNREGISTERED PERSON.—

(1) SELECT AGENTS.—*Whoever transfers a select agent to a person who the transferor knows or has reasonable cause to believe is not registered as required by regulations under subsection (b) or (c) of section 351A of the Public Health Service*

Act shall be fined under this title, or imprisoned for not more than 5 years, or both.

(2) CERTAIN OTHER BIOLOGICAL AGENTS AND TOXINS.—Whoever transfers a biological agent or toxin listed pursuant to section 212(a)(1) of the Agricultural Bioterrorism Protection Act of 2002 to a person who the transferor knows or has reasonable cause to believe is not registered as required by regulations under subsection (b) or (c) of section 212 of such Act shall be fined under this title, or imprisoned for not more than 5 years, or both.

(c) UNREGISTERED FOR POSSESSION.—

(1) SELECT AGENTS.—Whoever knowingly possesses a biological agent or toxin where such agent or toxin is a select agent for which such person has not obtained a registration required by regulations under section 351A(c) of the Public Health Service Act shall be fined under this title, or imprisoned for not more than 5 years, or both.

(2) CERTAIN OTHER BIOLOGICAL AGENTS AND TOXINS.—Whoever knowingly possesses a biological agent or toxin where such agent or toxin is a biological agent or toxin listed pursuant to section 212(a)(1) of the Agricultural Bioterrorism Protection Act of 2002 for which such person has not obtained a registration required by regulations under section 212(c) of such Act shall be fined under this title, or imprisoned for not more than 5 years, or both.

(d) DEFINITIONS.— In this section:

(1) The term “select agent” means a biological agent or toxin to which subsection (a) applies. Such term (including for purposes of subsection (a)) does not include any such biological agent or toxin that is in its naturally-occurring environment, if the biological agent or toxin has not been cultivated, collected, or otherwise extracted from its natural source.

(2) The term “restricted person” means an individual who—

(A) is under indictment for a crime punishable by imprisonment for a term exceeding 1 year;

(B) has been convicted in any court of a crime punishable by imprisonment for a term exceeding 1 year;

(C) is a fugitive from justice;

(D) is an unlawful user of any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(E) is an alien illegally or unlawfully in the United States;

(F) has been adjudicated as a mental defective or has been committed to any mental institution;

(G)(i) is an alien (other than an alien lawfully admitted for permanent residence) who is a national of a country as to which the Secretary of State, pursuant to section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of chapter 1 of part M of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), or section 40(d) of chapter 3 of the Arms Export Control Act (22 U.S.C. 2780(d)), has made a determination (that remains in effect) that such country has repeatedly provided support for acts of international terrorism, or (ii) acts for or on behalf

of, or operates subject to the direction or control of, a government or official of a country described in this subparagraph;

(H) has been discharged from the Armed Services of the United States under dishonorable conditions; or

(I) is a member of, acts for or on behalf of, or operates subject to the direction or control of, a terrorist organization as defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi)).

(3) The term "alien" has the same meaning as in section 101(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(3)).

(4) The term "lawfully admitted for permanent residence" has the same meaning as in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)).

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