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United States Government Accountability Office
Washington, DC 20548

B-309928

December 20, 2007

The Honorable John Conyers, Jr.
Chairman, Committee on the Judiciary
United States House of Representatives

The Honorable Robert C. Byrd
Chairman, Committee on Appropriations
United States Senate

Subject: *Presidential Signing Statements—Agency Implementation of Ten Provisions of Law*

This letter responds to your request that we examine how agencies have executed ten provisions of law to which the President took exception in signing statements.¹ We contacted nine agencies responsible for implementing the ten provisions to determine how the agencies were carrying out the provisions. One of the ten provisions applies to two different agencies, and two agencies were responsible for implementing two different provisions. Accordingly, we examined agency implementation in eleven instances.

We found that, in six of the eleven instances we examined, the responsible agencies—the Department of Defense (DOD), the Office of the Director of National Intelligence, the Special Inspector General for Iraq Reconstruction, the Institute of Education Sciences, and the Nuclear Regulatory Commission (NRC)—reported either that they had taken actions to implement the provisions as written or that they had experienced no interference in carrying out their responsibilities as required by law. In two instances, the provisions—to be implemented by the Department of the Interior (Interior) and the Department of Veterans Affairs (VA)—were not triggered. In the remaining three instances, we found that the Department of Energy (DOE) and

¹ For information on presidential signing statements generally and those accompanying the fiscal year 2006 appropriations acts and how the federal courts have treated signing statements in their published opinions, see B-308603, June 18, 2007.

the Federal Emergency Management Agency (FEMA) had not yet implemented the provisions for which they are responsible, although in all three instances each agency indicated that it was planning to implement the provision.

Although we found that three provisions have not yet been implemented, we cannot conclude that agency noncompliance was the result of the President's signing statements.

BACKGROUND

You asked us to examine ten provisions to which the President took exception in signing statements. These provisions are listed below, arranged by the basis on which the President objected.²

Related to the Fifth Amendment

The Due Process Clause of the Fifth Amendment prohibits the federal government from depriving any person of life, liberty, or property without due process of law.³ In the signing statements, the President stated that the executive branch shall construe the provisions in the acts relating to race, ethnicity, gender, and state residency "in a manner consistent with the requirements of the Due Process Clause of the Fifth Amendment."⁴ The President objected to the following provisions on this basis:

Section 623 of the Department of Homeland Security Appropriations Act, 2007, which requires FEMA to create a graduate-level homeland security education program and to take steps to ensure diversity in the student body. Pub. L. No. 109-295, 120 Stat. 1355, 1418 (Oct. 4, 2006).

Section 697 of the Department of Homeland Security Appropriations Act, 2007, which requires FEMA to create a registry of contractors willing to perform debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities. Pub. L. No. 109-295, 120 Stat. 1355, 1461 (Oct. 4, 2006).

Section 8048 of the Department of Defense Appropriations Act, 2007, which requires DOD contractors in Hawaii and Alaska to hire residents of those states. Pub. L. No. 109-289, 120 Stat. 1257, 1284 (Sept. 29, 2006).

² Our June 18, 2007 opinion, B-308603, discussed in detail most of these bases of presidential objection or concern found in the signing statements at issue here.

³ U.S. Const. amend. V.

⁴ See, e.g., *Statement on Signing the Department of Homeland Security Appropriations Act, 2007*, 42 Weekly Comp. Pres. Doc. 1742 (Oct. 9, 2006).

Section 1011(a) of the Intelligence Reform and Terrorism Prevention Act of 2004, which requires the Director of National Intelligence to ensure that the personnel of the intelligence community are sufficiently diverse for purposes of collection and analysis of intelligence. Pub. L. No. 108-458, 118 Stat. 3638, 3644 (Dec. 17, 2004).

Related to the Theory of the Unitary Executive

The second basis for the President's objections rests on the theory of the unitary executive. Under this theory, the President, as head of the executive branch, may control employees and officers of the executive branch without outside interference. This theory is rooted in Article II of the Constitution, which grants the President the executive power and instructs the President to "take Care that the Laws be faithfully executed."⁵ The theory of the unitary executive holds that these responsibilities necessarily vest in the President the power to control executive branch employees and officers free of interference from the other government branches.⁶ The President objected to the following provisions on this basis:

Section 629 of the Energy Policy Act of 2005, which grants additional whistleblower protections to DOE and NRC employees and to NRC contractors. Pub. L. No. 109-58, 119 Stat. 594, 785 (Aug. 8, 2005).

Section 186 of the Education Sciences Reform Act of 2002, which created the Institute of Education Sciences and provides for the office to carry out its mission free of interference from the Secretary of Education or any other office of the Department of Education. Pub. L. No. 107-279, 116 Stat. 1940, 1973 (Nov. 5, 2002).

Section 108 of the Veterans Benefits Improvement Act of 2004, which provides that VA may conduct a 3-year pilot program of training for VA employees to become claims adjudicators. Pub. L. No. 108-454, 118 Stat. 3598, 3604 (Dec. 10, 2004).

Related to the Commander-in-Chief Power

The President's third basis of objection asserts congressional interference with his power as Commander-in-Chief.⁷ The President is the head of the Armed Forces, and

⁵ U.S. Const. art. II, § 3.

⁶ Letter Opinion for the General Counsel, Department of Health and Human Services, *Authority of Agency Officials to Prohibit Employees from Providing Information to Congress*, OLC Opinion, May 21, 2004, *available at* www.usdoj.gov/olc/crsmemoresponsesese.htm (last visited December 12, 2007).

⁷ U.S. Const. art. II, § 2, cl. 1.

these objections claim interference with this role on the part of Congress. The President objected to the following provisions on this basis.⁸

Section 1205 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, which requires DOD to issue guidance on how DOD shall manage contractor personnel supporting deployed forces, and to submit a report to the Armed Services committees regarding the guidance. Pub. L. No. 108-375, 118 Stat. 1811, 2083 (Oct. 28, 2004).

Title III of the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, which created the Special Inspector General for Iraq Reconstruction and provides for the office to be free from interference in conducting its investigations from officials of the Coalition Provisional Authority, DOD, the Department of State or the United States Agency for International Development. Pub. L. No. 108-106, 117 Stat. 1209, 1234 (Nov. 6, 2003).

Related to the Appointments Clause

Another basis for the President's objections in his signing statements is that one provision interferes with his authority under the Constitution's Appointments Clause, which requires officers of the United States to be appointed by the President, the courts, or executive department heads.⁹ In his signing statement, the President says that such provisions may not disqualify from consideration for appointment individuals best suited to fill a particular office, unless the office will perform "functions that are advisory only."¹⁰ The President objected to the following provision on this basis:

Section 4 of the Rio Grande Natural Area Act, which creates the Rio Grande Natural Area Commission. Pub. L. No. 109-337, 120 Stat. 1777, 1777-78 (Oct. 12, 2006).

We inquired as to how the responsible agencies were implementing these provisions in light of the President's signing statements.¹¹ We contacted nine agencies: DOD,

⁸ The President also objected to these provisions under the theory of the unitary executive.

⁹ U.S. Const. art II, § 2, cl. 2.

¹⁰ *Statement on Signing the Rio Grande Natural Area Act*, 42 Weekly Comp. Pres. Doc. 1815 (Oct. 16, 2006).

¹¹ For a complete description of the scope and methodology used for this opinion, see the scope and methodology of our first opinion on presidential signing statements, B-308603, June 18, 2007.

Interior, VA, DOE, the Office of the Director of National Intelligence, NRC, the Special Inspector General for Iraq Reconstruction, FEMA, and the Institute of Education Sciences.

RESULTS

Two provisions, to which the President objected on Commander-in-Chief and unitary executive grounds, respectively, restricted certain types of interference with the activities of the two entities: the Special Inspector General for Iraq Reconstruction and the Institute of Education Sciences. The Office of the Special Inspector General for Iraq Reconstruction reported that it has experienced no interference in the conduct of its activities from any officers of the Coalition Provisional Authority, DOD, the Department of State, or the United States Agency for International Development. Similarly, the Director of the Institute of Education Sciences stated that no Department of Education officials have sought to comment on or disapprove publication of the Institute's research.

In four instances, we found that agencies have taken actions to implement the relevant provisions. The President objected to two of these provisions on the basis of the Fifth Amendment; to one provision on the basis of the Commander-in-Chief power; and the last provision on the basis of the theory of the unitary executive. For the two provisions to which the President objected on the basis of the Fifth Amendment, we found that the Office of the Director of National Intelligence has taken steps to ensure that the personnel of the intelligence community are sufficiently diverse for purposes of the collection and analysis of intelligence. We also found that DOD has issued regulations requiring each contract awarded in Alaska and Hawaii to include a provision requiring the contractor to employ residents of those states. Regarding the provision to which the President objected on Commander-in-Chief grounds, DOD issued guidance on how DOD will manage contractor personnel supporting deployed forces. Concerning the provision to which the President objected based on the theory of the unitary executive, NRC has notified its employees of additional whistleblower protections they enjoy and has included a clause in its contracts requiring that its contractors notify their employees that the employees enjoy the same protections. While NRC has implemented the relevant provision, it did so more than 2 years after the provision was enacted.

Two provisions were not triggered. The President objected to these provisions on the basis of the Appointments Clause and the theory of the unitary executive, respectively. In the first instance, Interior has not yet appointed members to a commission, so the provisions regarding the qualifications and duties of the commission members have not yet been triggered. In the other, VA decided not to develop a pilot program, so the portion of the provision governing the reporting on the results of the pilot program and making recommendations was not triggered.

Two agencies have not implemented three provisions we examined. The first is DOE. The Energy Policy Act of 2005 extended additional whistleblower protections to DOE employees and requires that DOE post information about the new protections in DOE

facilities. Pub. L. No. 109-58, § 629. The President objected to this provision under the theory of the unitary executive. DOE has not yet posted such information for its employees. DOE's Web site and posters in DOE facilities do advise employees of their whistleblower rights under the Whistleblower Protection Act of 1989 but do not mention the additional protections now afforded DOE employees. DOE says that its Web site and posters "should be updated with references to" the new whistleblower protection provisions, but did not say when the materials would be updated.

FEMA was responsible for implementing the remaining two provisions, both of which the President objected to on Fifth Amendment grounds. One provision requires FEMA to create a graduate-level homeland security education program and to take reasonable steps to ensure diversity in the program's student body. Pub. L. No. 109-295, § 623. FEMA created the program but has not yet taken measures to ensure diversity within the program. Instead, FEMA states that it currently ensures diversity within the student body by following existing laws prohibiting discrimination. FEMA says that the Department of Homeland Security's Office of the Chief Learning Officer and the Training Leaders Council¹² are in the process of developing guidelines to support diversity.

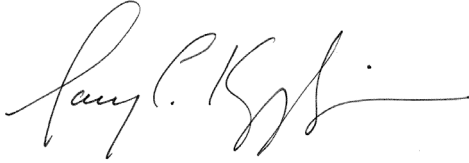
FEMA also was required to create a registry of contractors willing to perform debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief services. Pub. L. No. 109-295, § 697. The registry must include for each contractor the name, location, area served, type of services provided, and bonding level. FEMA has not created this registry. FEMA states that an existing government-wide registry already contains all of the required information except the areas served and the bonding levels of the contractors. FEMA plans to add this information to the existing registry in the future.

In this review, we did not assess the merits of the President's objections, nor did we examine the constitutionality of the provisions to which the President objected. A complete summary of our findings with regard to each of the ten provisions appears as an enclosure to this letter. We hope you find this information useful. Should you

¹² The Training Leaders Council consists of senior training leaders from each of the Department of Homeland Security's components as well as representatives from several department-level headquarters staff and support organizations. GAO, *Department of Homeland Security, Strategic Management of Training Important for Successful Transformation*, GAO-05-888 (Washington, D.C.: Sept. 2005), at 15-16.

have any questions, please contact Susan A. Poling, Managing Associate General Counsel, at 202-512-2667.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Gary L. Kepplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Kepplinger
General Counsel

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AGENCY ACTIONS

The following summary of agency action regarding the ten provisions we examined is arranged by category of the President's objection. Although we found that two agencies have not yet implemented provisions, we cannot conclude that agency noncompliance was the result of the President's signing statements. In this review, we did not assess the merits of the President's objections, nor did we examine the constitutionality of the provisions to which the President objected. We also have not evaluated the effectiveness of the agency actions and programs described in this summary.

PROVISIONS RELATED TO THE FIFTH AMENDMENT

Section 623 of the Department of Homeland Security Appropriations Act, 2007— Federal Emergency Management Agency

This provision instructed the Federal Emergency Management Agency (FEMA) to create a graduate-level homeland security education program. Pub. L. No. 109-295, § 623, 120 Stat. 1355, 1418 (Oct. 4, 2006). In relevant part, the provision directed the Administrator to take “reasonable steps to ensure that the student body represents racial, gender, and ethnic diversity.” *Id.*

Upon signing the act, the President stated, “The executive branch shall construe provisions of the Act relating to race, ethnicity, and gender, such as section[] 623 . . . of the Act, in a manner consistent with the requirements of the Due Process Clause of the Fifth Amendment.” *Statement on Signing the Department of Homeland Security Appropriations Act, 2007*, 42 Weekly Comp. Pres. Doc. 1742 (Oct. 9, 2006).

According to FEMA, the Homeland Security Academy, managed by the Department of Homeland Security (DHS) Chief Learning Officer, was established in response to section 623. According to FEMA, students for the program are currently chosen on the basis of five weighted criteria: academic credentials, a self-assessment essay, experience narratives, communication skills, and letters of recommendation. FEMA has not developed mechanisms designed to ensure diversity in the student body.

Instead, FEMA says that diversity is ensured in this program by adhering to existing prohibitions of discrimination by the federal government. As cited by FEMA, these instruct agencies to provide training without regard to race, creed, color, national origin, sex, or other factors unrelated to the need for training.¹³ FEMA states that these existing prohibitions of government discrimination ensure the diversity called for by section 623. FEMA says it does not have information about the current racial, gender, or ethnic makeup of the student body.

¹³ 5 U.S.C. § 2301(b); 5 C.F.R. § 410.302(a)(1); Exec. Order No. 11,348, *Providing for the Further Training of Government Employees*, 32 Fed. Reg. 6335 (Apr. 20, 1967).

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FEMA states that the DHS Training Leaders Council and the Office of the Chief Learning Officer are developing guidelines that will support racial, gender, and ethnic diversity of the student body and of the candidate selection panels. However, FEMA has not provided us with these guidelines and has not provided a date when they may become effective. Based on the foregoing, we conclude that FEMA has not yet taken “reasonable steps” to ensure diversity as required by this provision.

Section 697 of the Department of Homeland Security Appropriations Act, 2007— FEMA

Section 697 requires FEMA to create a registry of contractors willing to perform debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities. Pub. L. No. 109-295, § 697(b)(1), 120 Stat. 1355, 1461 (Oct. 4, 2006). The provision requires that the registry include for each contractor the name, location, area served, type of good or service provided, and bonding level. *Id.* § 697(b)(2)(A)–(E). The registry is also to include whether the contractor is a small business concern, a small business concern owned and controlled by socially or economically disadvantaged individuals, a small business concern owned and controlled by women, or a small business concern owned and controlled by service-disabled veterans. *Id.* § 697(b)(F).

Upon signing the act, the President stated, “The executive branch shall construe provisions of the Act relating to race, ethnicity, and gender, such as section[] 697 . . . of the Act, in a manner consistent with the requirement of the Due Process Clause of the Fifth Amendment to the Constitution.” *Statement on Signing the Department of Homeland Security Appropriations Act, 2007*, 42 Weekly Comp. Pres. Doc. 1742 (Oct. 9, 2006).

FEMA does not yet have a registry as required by this statute. FEMA states that it intends to fulfill the requirements of this provision by working with the DHS Office of the Chief Procurement Officer and the Office of Federal Procurement Policy to modify the Central Contracting Registry (CCR), which already exists. The CCR already contains information about whether the contractors are small business concerns and whether they are owned and controlled by socially or economically disadvantaged individuals, by women, or by service-disabled veterans. According to FEMA, the CCR will satisfy the requirements of section 697 once information regarding the areas served by and bonding levels of contractors are added. FEMA says it is “working to modify” the CCR, but gave no date as to when this modification would be complete. Thus, FEMA has not yet implemented this provision.

Section 8048 of the Department of Defense Appropriations Act, 2007—Department of Defense

Section 8048 provides that each contract the Department of Defense (DOD) awards for construction or services performed “in a State . . . which is not contiguous with another State and has an unemployment rate in excess of the national average rate” shall include a provision requiring the contractor to employ, for the purpose of

performing that portion of the contract in the particular state, individuals who are residents of those states. Pub. L. No. 109-289, § 8048, 120 Stat. 1257, 1284 (Sept. 29, 2006). The Secretary of Defense may waive this requirement on a case-by-case basis in the interest of national security. *Id.*

The President said in his signing statement that the “executive branch shall construe provisions of the Act relating to race, ethnicity, gender, and *State residency*, such as [section 8048], in a manner consistent with the requirement to afford equal protection of the laws under the Due Process Clause of the Constitution’s Fifth Amendment.” *Statement on Signing the Department of Defense Appropriations Act*, 42 Weekly Comp. Pres. Doc. 1703 (Oct. 9, 2006) (emphasis added).

This is a recurring provision in the DOD authorization acts. It is implemented in the Defense Acquisition Regulations System (DFARS) at section 252.222-7000, which requires that each contract DOD awards in a state contemplated by section 8048 contain a clause providing that the contractor will employ individuals who are residents of the state as called for by section 8048. The regulation has been in effect since August 2000.

DOD states that the number of contracts covered by section 8048 and its predecessors likely exceeds 100,000. DOD says it has no means available to electronically search the contracts to determine whether each contains the clause called for by section 8048. DOD says a manual search of such a large volume of contracts would be impractical. DOD states that it has been unable to identify any waivers by the Secretary of Defense of the requirement of section 8048. Based on the foregoing, we conclude that DOD has implemented section 8048.

Section 1011(a) of the Intelligence Reform and Terrorism Prevention Act of 2004—
Office of the Director of National Intelligence

Section 1011(a) amended the National Security Act of 1947 by striking sections 102–104 of that Act and adding numerous new provisions, including section 102A(f)(3)(A)(iv). Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004). Section 102A(f)(3)(A)(iv) provides that the Director of National Intelligence shall “ensure that the personnel of the intelligence community are sufficiently diverse for purposes of the collection and analysis of intelligence through the recruitment and training of women, minorities, and individuals with diverse ethnic, cultural, and linguistic backgrounds.”

In his signing statement for the Act, the President stated that the executive branch would “construe provisions of the Act that relate to race, ethnicity, or gender in a manner consistent with the requirement that the Federal Government afford equal protection of the laws under the Due Process Clause of the Fifth Amendment to the Constitution.” *Statement on Signing the Intelligence Reform and Terrorism Prevention Act of 2004*, 40 Weekly Comp. Pres. Doc. 2993 (Dec. 27, 2004).

According to the Office of the Director of National Intelligence, it has several initiatives in place meant to ensure a sufficiently diverse workforce within the intelligence community for the purposes of collection and analysis of information. These efforts have included the “Treat Diversity as a Strategic Mission Imperative” initiative focusing on the recruitment, employment, and retention of women, minorities, and heritage community members. Part of the Director’s Heritage Recruitment and Retention Strategy is a requirements-driven approach to recruiting individuals with heritage community languages or cultural, regional, or ethnic knowledge. The Office of the Director of National Intelligence also administers a scholarship program with emphasis on students from diverse backgrounds, with awardees receiving a full-time position in the intelligence community upon graduation from college. Based on the foregoing we conclude that the Office of the Director of National Intelligence has taken actions to implement this provision.

PROVISIONS RELATED TO THE THEORY OF THE UNITARY EXECUTIVE

Section 629 of the Energy Policy Act of 2005—Department of Energy and Nuclear Regulatory Commission

This provision amended section 5851 of title 42 of the United States Code to extend certain whistleblower protections to employees of the Department of Energy (DOE) and the Nuclear Regulatory Commission (NRC), as well as employees of NRC contractors and subcontractors.¹⁴ Pub. L. No. 109-58, § 629, 119 Stat. 594, 785 (Aug. 8, 2005). Section 5851 provides that no employer covered by the statute may discharge or otherwise discriminate against an employee who notifies an employer of an alleged violation of the Atomic Energy Act of 1954 or the Energy Reorganization Act of 1974, refuses to engage in a practice made illegal by either of those acts, testifies before a federal or state proceeding regarding any provision of those acts, commences or causes to commence a proceeding for the administration of enforcement of any requirement imposed under those acts, or participates in such a proceeding. 42 U.S.C. § 5851(a)(1). Section 5851 also requires that all employers covered by the statute prominently post information about the statute in their facilities. 42 U.S.C. § 5851(i). Any employee who believes that he or she has been discriminated against in violation of the statute may file a complaint with the Department of Labor (DOL). 42 U.S.C. § 5851(b)(1). After DOL receives such a complaint, it notifies the agencies. *Id.*

In his signing statement the President said that the “executive branch shall construe [section 629], as [it] relate[s] to dissemination of official information by employees of the Department of Energy and the Nuclear Regulatory Commission, in a manner consistent with the President’s constitutional authority to supervise the unitary executive branch.” *Statement on Signing the Energy Policy Act of 2005*, 41 Weekly Comp. Pres. Doc. 1267 (Aug. 15, 2005).

¹⁴ Employees of DOE contractors were already covered by section 5851.

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Although the law was enacted in August 2005, DOE says that it has not yet notified its employees that they are covered by the whistleblower protections of section 5851. DOE's Web site and posters in DOE facilities advise employees of their whistleblower rights under the Whistleblower Protection Act of 1989 but do not mention the additional protections afforded by section 5851.¹⁵ DOE acknowledges that its Web site and posters "should be updated with references to the provisions of section [5851]," but did not state when it plans to effect such an update.

NRC told us it has notified its employees that they are covered by section 5851. However, NRC says that it did not provide its employees with this information until September 2007, more than 2 years after passage of section 629. NRC says it posted information in its facilities in January and February 2007 regarding some of the whistleblower protections enjoyed by NRC employees. According to NRC, staff responsible for these postings believed the postings informed NRC employees of their new rights under section 5851. On August 10, 2007, DOL promulgated regulations that included an example of a posting which would satisfy the statutory requirement.¹⁶ NRC says its legal staff examined its postings in September 2007 after receiving our inquiry regarding NRC's implementation of section 629. The legal staff determined that its postings did not, in fact, inform NRC employees of their new rights under section 5851. According to NRC, it promptly revised the postings to conform to the example in DOL's regulations.

NRC also issued an internal memorandum on July 13, 2006 stating that all contracts executed by NRC must include a clause informing contractors that they are covered by section 5851, and instructing contractors to inform their employees of the protections of section 5851. This memorandum also provides for modification of existing contracts to include this clause.

According to NRC, it has not received any whistleblower complaints from DOL since passage of the Energy Policy Act. DOE reports that DOL has notified DOE of six complaints since passage of the Energy Policy Act. None of the six complaints have resulted in a finding of discrimination by DOE but DOE settled one case and two are still being appealed.

¹⁵ The Whistleblower Protection Act forbids retaliation by an agency against an employee who discloses information that the employee believes shows a violation of any law, rule or regulation or shows gross mismanagement, fraud, waste, or abuse. 5 U.S.C. § 2302. Individuals may file complaints under the act with the Merit Systems Protection Board or the Office of Special Counsel. 5 U.S.C. § 7701; 5 U.S.C. §§ 1211–1215. Section 5851, as discussed above, protects employees with regard to the Atomic Energy Act and Energy Reorganization Act and covers actions outside the scope of the Whistleblower Protection Act.

¹⁶ 29 C.F.R. pt. 24, app. A; 72 Fed. Reg. 44,963 (Aug. 10, 2007).

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We conclude that NRC has implemented section 629, albeit in an untimely fashion, and DOE has not implemented section 629.

Section 186 of the Education Sciences Reform Act of 2002—Institute of Education Sciences

The Education Sciences Reform Act of 2002 established the Institute of Education Sciences. Pub. L. No. 107-279, § 111, 116 Stat. 1940, 1944 (Nov. 5, 2002). The Institute’s mission “is to provide national leadership in expanding fundamental knowledge and understanding of education from early childhood through post-secondary study.” *Id.* To carry out this mission, the Institute compiles statistics, develops products, and conducts research and evaluation in the educational arena. *Id.*

Section 186(a) of the Education Sciences Reform Act provides the Director of the Institute the power to conduct and publish research “as needed to carry out the priorities of the Institute without the approval of the Secretary [of Education] or any other office of the Department [of Education].” Section 186(b) also requires the Institute to provide its publications in advance to the Department of Education and submit the publications to rigorous peer review.

In his signing statement, the President said:

“The executive branch shall construe [section 186] in a manner consistent with the President’s constitutional authority to supervise the unitary executive branch In addition, the Director of the Institute of Education Sciences shall implement section 186(a) of the Act subject to the supervision and direction of the Secretary of Education.”

Statement on Signing Legislation to Provide for Improvement of Federal Education Research, Statistics, Evaluation, Information, and Dissemination, and for Other Purposes, 38 Weekly Comp. Pres. Doc. 1995 (Nov. 11, 2002).

According to the Director, he “has not sought the approval of the Secretary [of Education] or other officials with respect to conducting particular research projects or with respect to publishing any item.” The Director has sought the Secretary of Education’s approval of broad programs through the annual budget process. Nevertheless, neither the Secretary nor any other Department of Education official has sought to approve or disapprove an Institute item prior to publication, according to the Director. Nor has the Secretary or any other Department official sought to edit or change an item prior to its publication. Consistent with section 186(b), the Institute provides its publications in advance to the Department, but advance copies “are in final form and not subject to editing or revisions as a result of comments by the Secretary or other officials in the Department.” Based on the foregoing, we conclude that no interference prohibited by this provision has occurred.

Section 108 of the Veterans Benefits Improvement Act of 2004—Department of Veterans Affairs

Section 108 provides that the Secretary of Veterans Affairs (VA) “*may* conduct” a 3-year pilot program of on-the-job training for VA employees to become qualified claims adjudicators for compensation, dependency and indemnity compensation, and pension. Pub. L. No. 108-454, § 108, 118 Stat. 3598, 3604 (Dec. 10, 2004) (emphasis added). Section 108 also required the Secretary, within 3 years of the program’s establishment, to submit an initial report to Congress assessing the program’s usefulness in recruiting and retaining VA personnel and the program’s value as a training program. Within 18 months of submitting the initial report, the Secretary was to submit a final report to Congress, including recommendations with respect to continuation of the pilot program and expansion of the types of claims VA employees should be trained to adjudicate.

The President said in his signing statement that section 108—

“purports to require the Secretary of Veterans Affairs to make a recommendation to the Congress on whether to continue a specified pilot project beyond its statutory expiration date, which would require enactment of legislation. . . . The executive branch shall implement [section 108] in a manner consistent with the President’s constitutional authority to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as the President judges necessary and expedient.”

Statement on Signing the Veterans Benefits Improvement Act of 2004, 40 Weekly Comp. Pres. Doc. 2933 (Dec. 13, 2004).

Section 108 provides the Secretary of VA with discretion to conduct the pilot program; it does not mandate the program. VA states that it has no plans to conduct the pilot program. Therefore, the provisions of this Act addressed in the accompanying signing statement were not triggered.

PROVISIONS RELATED TO THE COMMANDER-IN-CHIEF POWER

Section 1205 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005—DOD

Section 1205 requires the Secretary of Defense to issue guidance on how DOD shall manage contractor personnel who support deployed forces. Pub. L. No. 108-375, § 1205, 118 Stat. 1811, 2083 (Oct. 28, 2004). The guidance was to address 10 specific issues, as identified in section 1205(b). The Secretary of Defense also was to submit a report on the guidance to the congressional Armed Services committees.

The President noted in his signing statement that the “executive branch shall construe . . . [section 1205] . . . in a manner consistent with the President's

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constitutional authority as Commander in Chief and to supervise the unitary executive branch.” *Statement on Signing the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005*, 40 Weekly Comp. Pres. Doc. 2673-74 (Nov. 1, 2004).

DOD issued Instruction 3020.41 on October 3, 2005, almost a year after the in response to section 1205. Instruction 3020.41 addresses 9 of the 10 specific issues listed in section 1205(b). DOD addressed the tenth issue in Table E4.T1 of DOD Instruction 7730.64, issued on December 11, 2004. On January 23, 2006, DOD submitted a report to the congressional Armed Services committees regarding this guidance, as directed by section 1205. We conclude that DOD has implemented this provision.

Title III of the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004—Special Inspector General for Iraq Reconstruction

Title III of the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, created an Inspector General of the Coalition Provisional Authority. Pub. L. No. 108-106, title III, 117 Stat. 1209, 1234 (Nov. 6, 2003). Section 3001(e)(2) of the Act states, “Neither the head of the Coalition Provisional Authority, any other officer of the Coalition Provisional Authority, nor any other officer of the Department of Defense, the Department of State, or the United States Agency for International Development shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation.”

The Presidential signing statement addressing the Act states that title III of the Act will be construed in “a manner consistent with the President’s constitutional authorities to conduct the Nation’s foreign affairs, to supervise the unitary executive branch, and as Commander in Chief of the Armed Forces.” *Statement on Signing the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004*, 39 Weekly Comp. Pres. Doc. 1549 (Nov. 10, 2003). Specifically, the signing statement directs the Inspector General to refrain from “initiating, carrying out, or completing an audit or investigation, or from issuing a subpoena, which requires access to sensitive operation plans, intelligence matters, counterintelligence matters, ongoing criminal investigations, by other administrative units of the Department of Defense related to national security, or other matters the disclosure of which would constitute a serious threat to national security. The Secretary of Defense may make exceptions to the foregoing direction in the public interest.” *Id.*

According to the Office of the Special Inspector General for Iraq Reconstruction, which is the successor to the Inspector General of the Coalition Provisional Authority, no party within the federal government has prevented or attempted to prevent the Special Inspector General from initiating, carrying out, or completing an

audit or investigation or from issuing a subpoena. The Office stated that it has not been denied access to any information on the basis that it related to “sensitive operation plans, intelligence matters, counterintelligence matters, ongoing criminal investigations by other DOD administrative units related to national security, or other matters the disclosure of which would constitute a serious threat to national security.” Nor has it refrained from any investigation on the basis of the signing statement or the grounds cited therein. The Office advised us that, as an investigative agency, it has withheld actions on the request of other law enforcement agencies to avoid interference in other law enforcement agencies’ investigations. Based on the foregoing, we conclude that no interference prohibited by this provision has occurred.

PROVISION RELATED TO THE APPOINTMENTS CLAUSE

Section 4 of the Rio Grande Natural Area Act—Department of the Interior

The Rio Grande Natural Area Act established the Rio Grande Natural Area (Natural Area) and the Rio Grande Natural Area Commission (Commission). Pub. L. No. 109-337, §§ 3–4, 120 Stat. 1777, 1777–78 (Oct. 12, 2006). The Commission is to advise the Secretary of the Interior (Secretary) with respect to the Natural Area and to prepare a management plan relating to nonfederal land in the Natural Area. *Id.* §§ 3(b)(2), 6(b)(2)(A). This management plan is to be submitted to the Secretary, who then may approve or disapprove of the plan. *Id.* § 6(b)(2)(B)(i). If the Secretary disapproves it, he is to notify the Commission of the reasons for disapproval and allow the Commission an opportunity to make revisions. *Id.* § 6(b)(2)(B)(ii). The Commission also has the power to call hearings, enter into cooperative agreements, and assist the Secretary in implementing the management plan. *Id.* § 5. Commission meetings are to be held quarterly, to be open to the public, and are to be announced by published notice in advance. *Id.* § 4(g). The Commission is to prepare its management plan for nonfederal lands by October 12, 2010. *Id.* § 6(a).

The Act directed the Secretary to appoint the nine Commission members, each of whom is to have certain qualifications. *Id.* § 4(c). One member is to represent the Colorado State Director of the Bureau of Land Management. *Id.* § 4(c)(1). One member is to be the manager of the Alamosa National Wildlife Refuge, *ex officio*.¹⁷ *Id.* § 4(c)(2). Three members are to be appointed based on the recommendation of the Governor of Colorado, of whom one member would represent each of the following: the Colorado Division of Wildlife, the Colorado Division of Water Resources, and the Rio Grande Water Conservation District.¹⁸ *Id.* § 4(c)(3). The

¹⁷ This term means “by virtue or because of an office.” *Black’s Law Dictionary* 616 (8th ed. 2004). Whichever individual filling the post of manager of the Alamosa Wildlife Refuge is thus automatically a member of the commission.

¹⁸ The Rio Grande Water Conservation District is a governmental entity created by the Colorado General Assembly to manage water resources in Colorado’s San Luis Valley (. . . continued)

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remaining four members are to represent the general public, be citizens of the local region of the Natural Area, and to “have knowledge and experience in the fields of interest relating to the preservation, restoration, and use of the Natural Area.” *Id.* § 4(c)(4).

Upon signing this act, the President noted in his signing statement that the—

“Act limits the qualifications of the pool of persons from whom the Secretary may select appointees to the Commission in a manner that rules out a large portion of those persons best qualified by experience and knowledge to fill the positions, which the Appointments Clause of the Constitution does not permit if the appointees exercise significant governmental authority. To faithfully execute the Act to the maximum extent consistent with the Appointments Clause, the executive branch shall construe the provisions of the Act specifying functions for the Commission as specifying functions that are advisory only.”

Statement on Signing the Rio Grande Natural Area Act, 42 Weekly Comp. Pres. Doc. 1815 (Oct. 16, 2006).

According to the Department of the Interior (Interior), the Secretary has not yet appointed any of the nine members of the Commission. On September 20, 2007, the Rio Grande Water Conservation District forwarded to the Secretary the names and qualifications of six individuals for the four positions on the Commission representing the general public. The Governor of Colorado has not yet submitted any recommendations for the State of Colorado’s three appointments to the Commission. Interior states that one position will be filled by an employee of the Colorado Office of the Bureau of Land Management and one position will be filled by the manager of the Alamosa National Wildlife Refuge, *ex officio*. Interior notes that the Rio Grande Water Conservation District has advised Interior that it has had difficulty finding volunteers to serve as unpaid members of the Commission. Since the Commission, as yet unformed, has had no meetings and has taken no actions, it is premature to determine whether the Commission will take on functions that are advisory only. Therefore, the provisions of this Act addressed in the accompanying signing statement have not yet been triggered.

Rio Grande Water Conservation District, *History*, available at www.rgwcd.org/Pages/History.htm (last visited Dec. 12, 2007).