Description of document:	Copies of certain Department of Justice (DOJ) views letters from the 109th, 110th, 111th and the 112th Congresses, 2005-2007
Requested date:	24-December-2012
Released date:	22-April-2013
Posted date:	01-February-2016
Source of document:	FOIA Request Chief, Initial Request Staff Office of Information Policy Department of Justice Suite 11050 1425 New York Avenue, NW Washington, DC 20530-0001 Fax: (202) 514-1009 Online FOIA Request Form

U.S. Department of Justice
Office of Information Policy
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

April 22, 2013

Re: OLA/13-01337 (F)
VRB:DRH:ND

This responds to your Freedom of Information Act (FOIA) request dated December 24, 2012, and received in this Office on January 2, 2013, for copies of certain views letters from the 109th, 110th, 111th, and 112th Congresses. This response is made on behalf of the Office of Legislative Affairs.

Please be advised that a search has been conducted in the Office of Legislative Affairs and two documents, totaling six pages, were located that are responsive to your request. I have determined these documents, which provide the Department's views on the Protection of Lawful Commerce in Arms Act of 2005 and the Preserving United States Attorney Independence Act of 2007, are appropriate for release without excision and copies are enclosed. For your information, we did not locate views letter pertaining to any of the other legislation listed in your request letter.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy, United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through this Office's eFOIA portal at http://www.justice.gov/oip/efoia-portal.html. Your appeal must be received within sixty days from the date of this letter. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

Vanessa R. Brinkmann
Counsel, Initial Request Staff

Enclosures

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 26, 2005

The Honorable Bill Frist, M.D.
Majority Leader
United States Senate
Washington DC 20510

Dear Mr. Leader:

We understand that an amendment may be offered during the Senate's consideration of S. 397 to prohibit persons listed in terrorist watch lists from acquiring firearms. We write to express the strong opposition of the Department of Justice to any such amendment, because it may adversely affect our ability to investigate and collect intelligence on terrorists and their associates in the United States and jeopardize ongoing investigations.

The Department of Justice believes that the adoption of any amendment on this subject would be premature and could actually be counterproductive to the nation's intelligence, law enforcement, and counter-terrorism interests. Such a proposal must be carefully considered to ensure that it does not have any such adverse effects. We are especially concerned about requiring that a firearms transfer be denied to all persons listed in the watch list, because that requirement would alert the person that he or she is in the watch list. Alerting the person could damage an ongoing investigation. In addition, current law gives the person a right to appeal or file a lawsuit challenging the denial, and that could allow the person an opportunity to respond to the listing. In order to do so, the person would need to know the basis on which the FBI listed him or her in the watch list, thereby running a strong risk of compromising sources of information.

Before addressing the amendment, we want to summarize briefly the process by which the Federal Bureau of Investigation's (FBI) National Instant Background Check Systems (NICS) handles firearms transactions by persons on the FBI's terrorist watch list.

On November 17, 2003, the then-Acting Deputy Attorney General directed the FBI to begin delaying NICS background checks that hit on records in the FBI terrorist watch list. Under the Brady Act, the firearms dealer must wait three business days for a response from the NICS regarding prohibitive information before transferring the firearm. The delay in all prospective firearms transfers to persons on the watch list allows the FBI to coordinate with field personnel

who may have information about the person not yet posted in the automated databases demonstrating that he or she is ineligible to possess a gun.

Pursuant to this directive, on February 3, 2004, the FBI began delaying NICS transactions hitting on terrorist watch list records. Until February 3, 2004, because suspected or actual membership in a terrorist organization does not by itself prohibit a person from receiving or possessing a firearm, NICS checks hitting only on a watch-list record did not result in a delay or denial of the transaction. Under the new process, if prohibiting information is developed through contact with field personnel, the transaction is denied; if no prohibiting information is developed, however, the sale may proceed.

Earlier this year, the Attorney General established a working group to review the issues posed by the fact that a prospective firearms purchaser is included in a terrorist watch list is not a basis on which the FBI may deny the sale. That working group, which includes the FBI, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, the Criminal Division, and the Office of Legal Policy, has considered a number of options.

Based on the recommendations of this working group, the FBI has already taken or is in the process of taking a number of steps to improve its use of information derived as a result of the current process for checking prospective firearms transferees listed in a terrorist watch list. First, the FBI now processes all such transactions, even when they occur in point-of-contact States (*i.e.*, those States that would normally process firearms-purchaser background checks on firearms transactions within those States). In addition, the FBI has created a process by which counter-terrorism officials can analyze, for investigative and intelligence purposes, information derived from such transactions. The FBI has also moved to improve information-sharing on a need-to-know basis with other law enforcement agencies in cases in which a person listed in the watch list attempts to acquire a firearm.

On the other hand, we believe we are taking steps to enhance the ability of law enforcement agencies to collect and share relevant information and improve our ability to investigate cases and take appropriate action without prematurely alerting persons on the that they are on the watch list or compromising ongoing investigations or intelligence-collection operations.

The Department's working group continues to study whether any further legislation is warranted and, if so, how best to structure it. There are many challenges to addressing this issue in a manner that will not have any adverse effects on our ability to investigate and collect intelligence on terrorists and their associates in the United States. Before any such proposal is finalized, we want to be certain it will not be counter-productive. We cannot say that about the proposed amendments we understand the Senate may consider.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the President's Program. If we can be of further assistance in this matter, please do not hesitate to contact this Office.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Cc: Honorable Harry Reid
Honorable Arlen Specter
Honorable Patrick J. Leahy

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 2, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is to advise you of the Department of Justice's strong opposition to S. 214, the "Preserving United States Attorney Independence Act of 2007." S. 214 would significantly alter the manner in which U.S. Attorney vacancies are filled by completely removing the Attorney General's authority to appoint interim U.S. Attorneys and allocating that authority to an entirely different branch of government. Under S. 214, the Attorney General would have no authority whatsoever to fill a U.S. Attorney vacancy on an interim basis—even one of short duration. Instead, only the district court would have this authority.

United States Attorneys are at the forefront of the Department of Justice's law-enforcement efforts. They lead the charge to protect America from acts of terrorism; to reduce violent crime, including gun crime and gang crime; to fight illegal drug trafficking; to enforce immigration laws; to combat crimes that endanger children and families, including child pornography, obscenity, and human trafficking; and to ensure the integrity of government and of the marketplace by prosecuting corrupt government officials and perpetrators of corporate fraud. In pursuit of these objectives, U.S. Attorneys play a pivotal role coordinating with federal, State, and local law enforcement officials on many of these law enforcement issues. Additionally, they have significant administrative responsibilities, such as managing large offices of federal prosecutors and reporting directly to the Deputy Attorney General and the Attorney General. Importantly, U.S. Attorneys represent the Attorney General as the chief federal law enforcement officer in their respective communities. For these reasons, the Department is committed to having the best person possible discharging the responsibilities of the U.S. Attorney at all times and in every district.

The Department's principal objection to S.214 is that it would be inappropriate, and inconsistent with sound separation of powers principles, to vest federal courts with the authority to appoint a critical Executive Branch officer such as a United States Attorney under the circumstances described in the bill. Indeed, the Department is unaware of any other federal agency for which federal judges have such authority. As soon as a vacancy occurs, the federal court would be enabled to appoint a person of its choosing whose tenure would continue through the entire period needed for both a Presidential nomination and Senate confirmation. That judicial appointee would have authority for litigating the entire federal criminal and civil docket for this period before the very district court to whom he was beholden for his appointment. Such an arrangement at a minimum gives rise to an appearance of potential conflict that undermines the performance of not just the Executive Branch, but also the Judicial one. Furthermore, prosecutorial authority should be exercised by the Executive Branch in a unified manner, with consistent application of criminal enforcement policy under the supervision of the Attorney General. The U.S. Attorneys, unlike the court-appointed independent counsel whose appointment survived separation of powers challenge in *Morrison v. Olson*, 487 U.S. 654 (1988), have wide-ranging, extensive authority over any number of matters. Among other things, they have played, and continue to play, a crucial role in investigations and prosecutions in the ongoing war on terrorism, where close coordination is critical. S. 214 would tend to fragment the exercise of such authority, thereby undermining the effort to achieve a unified and consistent approach to prosecutions and federal law enforcement.

S. 214 would supersede last year's amendment to 28 U.S.C. § 546 that authorized the Attorney General to appoint an interim U.S. Attorney to serve until a person fills the position by being confirmed by the Senate and appointed by the President. Last year's amendment was intended to ensure continuity of operations in the event of a U.S. Attorney vacancy that lasts longer than expected. S. 214 would institute a new appointment regime without allowing the Attorney General's authority under current law to be tested in practice.

Before last year's amendment, the Attorney General could appoint an interim U.S. Attorney for only 120 days; thereafter, the district court was authorized to appoint an interim U.S. Attorney. In cases in which a Senate-confirmed U.S. Attorney could not be appointed within 120 days, the limitation on the Attorney General's appointment authority resulted in several recurring problems. For example, some district courts—recognizing the oddity of members of one branch of government appointing officers of another and the conflicts inherent in the appointment of an interim U.S. Attorney who would then have many matters before the court—refused to exercise the court's statutory appointment authority. Such refusals required the Attorney General to make multiple 120-day appointments. In contrast, other district courts—ignoring the oddity and inherent conflicts—sought to appoint as interim U.S. Attorney wholly unacceptable candidates who did not have the appropriate qualifications or the necessary clearances. S. 214 fails to ensure that such problems do not recur and, indeed, would exacerbate those problems by making appointment by the district court the exclusive means of filling U.S. Attorney vacancies.

S. 214 appears to be aimed at addressing a problem that has not arisen. The Administration has repeatedly demonstrated its commitment to having a Senate-confirmed U.S. Attorney in every federal district. To be sure, when a U.S. Attorney vacancy occurs, the Department must first determine who will serve temporarily as interim U.S. Attorney until a new Senate-confirmed U.S. Attorney is appointed. Often, the Department looks to the First Assistant U.S. Attorney or another senior manager in the office to serve as U.S. Attorney on a temporary, interim basis. When neither the First Assistant U.S. Attorney nor another senior manager in the office is able or willing to serve as interim U.S. Attorney, or when the appointment of either would not be appropriate in the circumstances, the Department has looked to other, qualified Department employees. At no time, however, has the Administration sought to avoid the Senate confirmation process by appointing an interim U.S. Attorney and then refusing to move forward, in consultation with home-State Senators, on the selection, nomination, confirmation and appointment of a new U.S. Attorney. The appointment of U.S. Attorneys by and with the advice and consent of the Senate is unquestionably the appointment method preferred by the Senate and the one that the Administration follows.

Thank you for the opportunity to present the Department's views on S. 214. The Office of Management and Budget advises that it has no objection to the presentation of this response from the standpoint of the Administration's program and that enactment of S. 214 would not be in accord with the program of the President. If we may be of additional assistance, please do not hesitate to contact this office.

Sincerely,

Richard A. Hertling

Richard A. Hertling
Acting Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member

The Honorable John Cornyn