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April 6, 2005

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
House of Representatives

Subject: Review of Issues Relating to a Study on Expedited Removal Pursuant to the International Religious Freedom Act of 1998

Dear Mr. Chairman:

This responds to your letter dated February 4, 2005, concerning the study issued by the United States Commission on International Religious Freedom (USCIRF) under section 605 of the International Religious Freedom Act of 1998 (IRFA).[1] Specifically, you asked us to analyze: (1) whether USCIRF's appropriation was available to fund the study, and (2) whether USCIRF requested that the Attorney General invite the experts designated by the Commission to conduct the study, as described in section 605, and what actions were taken in response to such request. In order to respond to this inquiry, we obtained information and documents from USCIRF and analyzed both issues under relevant law.

As explained more fully below, USCIRF's use of carryover funds to fund the study was permissible under title II of IRFA and the relevant appropriations laws. Section 208(c)(2) of IRFA directed the Commission to provide the funds for the Section 605 study, subject to the availability of appropriations. In annual appropriations acts, Congress appropriated funds for necessary expenses of the Commission, as authorized by title II of IRFA, and provided that the funds were to be available indefinitely, without fiscal year limitation. The funds that USCIRF set aside and used for the study were therefore available for that purpose.

With respect to the invitation of experts, USCIRF requested the invitations contemplated by section 605 of IRFA from both the Attorney General and the Secretary of Homeland Security. There was no statutory requirement that either the request or the invitations be in writing. Both agencies communicated extensively with the experts through their lead representative and provided written protocols for the experts' access to the immigration proceedings, records, and other information

[1] Pub. L. No. 105-292, 112 Stat. 2787, 2814 (1998) (codified at 22 U.S.C. § 6474).

needed to conduct the study. By extending cooperation to the USCIRF-designated experts and facilitating their performance of the study, both agencies invited them to conduct the study within the meaning of section 605 of IRFA.

Background

USCIRF was established by title II of IRFA. Section 605 of IRFA, which appears in title VI of the act, authorized experts designated by USCIRF to study the effect of the expedited removal provisions of the Immigration and Nationality Act on aliens seeking asylum. With respect to this study, section 605(a)(1) of IRFA states:

> "If the Commission so requests, the Attorney General shall invite experts designated by the Commission, who are recognized for their expertise and knowledge of refugee and asylum issues, to conduct a study, in cooperation with the Comptroller General of the United States, to determine whether immigration officers . . . are engaging in [specified forms of conduct with respect to aliens seeking asylum]."[2]

Section 605(c)(1) of IRFA requires the Attorney General to permit, in the case of a Commission request under section 605(a)(1), the experts designated under that section generally to have "unrestricted access to all stages of all proceedings conducted under section 235(b) [the expedited removal provision] of the Immigration and Nationality Act."[3]

Section 208(c)(2) of IRFA, added in August 1999,[4] authorizes USCIRF to provide funds for the study. Specifically, section 208(c)(2) states: "In the case of a study requested under section 605 of this Act, the Commission may, subject to the availability of appropriations, contract with experts and shall provide the funds for such a study." In each fiscal year from 1999 through 2005 (with the exception of fiscal year 2001),[5] Congress appropriated sums ranging from $2 million to $3 million "[f]or necessary expenses for the United States Commission on International Religious Freedom, as authorized by title II of the International Religious Freedom Act of 1998 . . . to remain available until expended."[6]

Analysis

USCIRF's Authority to Fund the Study

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[2] 22 U.S.C. § 6474(a)(1).
[3] *Id.* § 6474(c)(1).
[4] Pub. L. No. 106-55, 13 Stat. 401, 404 (1999) (codified at 22 U.S.C. § 6435a(c)(2)).
[5] USCIRF received its fiscal year 2000 appropriation on July 13, 2000, and its fiscal year 2002 appropriation on November 28, 2001, but did not receive an appropriation for fiscal year 2001. According to USCIRF budget documents submitted to Congress, it had adequate carryover funds from its fiscal year 1999 and 2000 appropriations to cover its fiscal year 2001 expenses.
[6] Pub. L. No. 108-447, 118 Stat. 2809, 2907 (2004); Pub. L. No. 108-199, 118 Stat. 3, 87 (2004); Pub. L. No. 108-7, 117 Stat. 11, 94 (2003); Pub. L. No. 107-77, 115 Stat. 748, 792 (2001); Pub. L. No. 106-246, 114 Stat. 511, 544 (2000); Pub. L. No. 106-31, 113 Stat. 57, 88 (1999).

According to USCIRF, the Commission relied on section 208(c)(2) of IRFA for its authority to provide the funds for the section 605 study. It set aside funds for the study over several fiscal years, beginning in fiscal year 2000, and expended these funds as it prepared for and conducted the study, which was completed during fiscal year 2005. According to USCIRF budget documents submitted to Congress, by the end of fiscal year 2004, the Commission had expended a total of $944,512 on the study and anticipated spending $299,412 to complete it in fiscal year 2005.

Appropriated funds may be used only for purposes for which they were appropriated.[7] For fiscal years 1999 through 2005 (with the exception of 2001),[8] Congress appropriated funds to USCIRF for "necessary expenses . . . as authorized by title II of [IRFA] . . . to remain available until expended." Since the relevant appropriations acts refer to title II of IRFA, this is the first place to look to identify the functions and activities for which the acts appropriated funds. Section 208(c)(2) of IRFA appears in title II of the act. It specifically authorized USCIRF to contract with experts and required the Commission to provide the funds for the study, if it decided to proceed with the study as described in section 605 of the act. USCIRF therefore was authorized to expend its appropriated funds for expenses necessary to conduct the study, provided that such funds were available.[9]

An appropriation that, like USCIRF's appropriations, is "to remain available until expended" is available for obligation for an indefinite period, without fiscal year limitation, and is called a "no-year appropriation."[10] Unless rescinded by another law, there are no time limits as to when no-year funds may be obligated and expended and the funds remain available for their original purposes until expended.[11] The availability of the prior appropriation cannot be changed by a later act "except in such respects and to such extent as is expressly stated or clearly implied by such act."[12] USCIRF set aside and carried over enough funds over the course of several fiscal years to cover the expenses of the section 605 study, and the availability of these funds was not expressly or impliedly changed by any subsequent act. Because these carryover funds came from no-year appropriations and had not been expended for any other purpose when USCIRF used them for the study, they were available within the meaning of section 208(c)(2) of IRFA.

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[7] 31 U.S.C. § 1301(a).
[8] *See supra* note 5.
[9] *Cf.* 71 Comp. Gen. 527, 528 (1992) (where there was no law specifically authorizing the use of appropriated funds for the purpose at issue, it was necessary to analyze whether an expense for such purpose was in direct support of the agency's mission and therefore constituted a "necessary expense" within the meaning of the appropriation). Had title II of IRFA not been amended with a specific provision authorizing USCIRF to fund the study, it would be necessary to address whether USCIRF's necessary expenses under its appropriation would include expenses related to activities conducted under title VI of the act. *See* B-223608, Dec. 19, 1988 (noting that "[w]here a given expenditure is neither specifically provided for nor prohibited, the question is whether it bears a reasonable relationship to fulfilling an authorized purpose or function of the agency" and that "whether appropriated funds are available for a particular purpose must be evaluated in light of the specific circumstances and statutory authorities involved"). We do not need to address this issue because USCIRF's authority to fund the study is specified within title II of IRFA.
[10] 43 Comp. Gen. 657, 661 (1964); 40 Comp. Gen. 694, 696 (1961); B-271607, June 3, 1996.
[11] 43 Comp. Gen. at 661; 40 Comp. Gen. at 696-97; B-279886, April 28, 1998; B-271607, June 3, 1996.
[12] 40 Comp. Gen. at 697.

Invitation of the USCIRF-Designated Experts to Conduct the Study

Section 605(a)(1) required the Attorney General to invite experts designated by the Commission to conduct the study, if the Commission so requested. According to USCIRF, the Commission contacted both the Attorney General and the Secretary of Homeland Security regarding its request under section 605. It did so because most of the immigration functions relevant to the study as described in section 605(a)(2) were transferred from the Department of Justice (DOJ) to the Department of Homeland Security (DHS) in March of 2003.[13]

USCIRF Interactions with DHS

According to USCIRF, the following communication and cooperation took place between USCIRF and DHS. In May 2003, USCIRF staffer Mark Hetfield, who was also the Commission's lead expert for the study, contacted DHS staff regarding the study. In June 2003, the Chair of USCIRF sent a formal letter to DHS Secretary Ridge noting that it had decided to proceed with the section 605 study and requesting a meeting with the Secretary or another DHS official in a position to ensure the cooperation of the relevant DHS bureaus in conducting the study. The letter stated that "[t]he Commission is anxious to begin the study, but we cannot do so until DHS and its three relevant Bureaus take steps to fulfill their obligations pursuant to [IRFA]."

In August 2003, DHS staff contacted Mr. Hetfield and convened a meeting that included representatives from DHS Office of General Counsel, Bureau of Immigration and Customs Enforcement (ICE), Bureau of Customs and Border Protection (CBP), and the Office of Asylum within U.S. Citizenship and Immigration Services (USCIS). In the same month, a number of components (including USCIS, ICE and the Office of Immigration Statistics) each appointed a point of contact to ensure that the experts, working through Mr. Hetfield, would have access to observe and collect information on the various stages of expedited removal proceedings. On October 3, 2003, CBP officials met with Mr. Hetfield and another expert, and according to USCIRF, agreed to invite the experts to conduct the study. At that time, CBP provided written guidelines for the experts to observe immigration inspections at ports of entry and to collect information through interviews and other means.

Throughout these discussions, DHS officials worked with Mr. Hetfield, the lead expert and representative for the other experts, to establish and implement the process under which the Commission-designated experts would collect information for the study. Each time the experts required access to expedited removal proceedings or to a particular detention facility, asylum office or port of entry, Mr. Hetfield would notify the appropriate DHS point of contact to inform them which expert required such access, and DHS would respond to the request. USCIRF indicated that DHS extended full cooperation to the Commission-designated experts by arranging for their access to proceedings at ports of entry, detention facilities, personnel, files, statistics, and other materials as needed to conduct the study.

[13] The Department of Homeland Security was created by the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002). The Department of Homeland Security Reorganization Plan, required under section 1502 of the act, specified that the transfer of immigration functions to DHS was to occur on March 1, 2003.

USCIRF Interactions with DOJ

In November 2003, when Mr. Hetfield contacted DOJ regarding USCIRF's decision to proceed with the section 605 study, the Executive Office for Immigration Review (EOIR) confirmed that USCIRF had correctly contacted DHS with its request to invite the designated experts to conduct the study. An EOIR official stated in an email message to Mr. Hetfield dated November 21, 2003, that DOJ believed "that the request to invite the experts pursuant to IRFA section 605(a)(1) is best addressed to Secretary Ridge at [DHS] since the study will concentrate primarily on functions under the responsibility of DHS." With regard to the immigration functions that remained with DOJ, in a letter dated December 22, 2003, the General Counsel of EOIR responded in detail to USCIRF's request "for access for [USCIRF]-designated experts under section 605 of [IRFA], to conduct a study of the effect of Expedited Removal provisions on asylum claims." The letter outlined a process for providing the experts access to immigration court proceedings, records, and data. According to USCIRF, from the time of the Commission's initial contact with EOIR, "the Commission and its designated experts enjoyed the complete cooperation of the Department of Justice and EOIR."

Nature of the Invitation Contemplated by the Statute

The starting point for determining whether the actions of USCIRF and the Attorney General were consistent with section 605(a)(1) is the plain meaning of the statutory language.[14] As written, the statute authorizes USCIRF to request that the Attorney General invite the experts designated by the Commission to conduct the study. If such a request is made, the statute requires the Attorney General to invite the designated experts to conduct the study. The statute does not prescribe, however, the form or manner of the Commission's request or of the Attorney General's invitation.

USCIRF requested that the designated experts be invited to conduct the study, as contemplated by section 605(a)(1). As discussed above, a Commission staffer, who was the lead expert for the study, orally requested that DOJ invite the designated experts to conduct the study. According to USCIRF, it also contacted the Secretary of Homeland Security regarding the study, met with the relevant components of the new department, and worked out the details regarding the experts' access to DHS facilities and records. The Commission thus followed the letter of the statute in making its request to the Attorney General and also pursued a similar request with the Secretary of Homeland Security in light of the transfer of most immigration functions to DHS.

The next question is whether DOJ (and DHS) invited the designated experts to conduct the study within the meaning of section 605(a)(1). As noted above, the

[14] *See Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself."); *Caminetti v. United States*, 242 U.S. 470, 486 (1917) ("Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.").

statute states that the Attorney General "shall invite" the experts to conduct the study, but it does not require a written invitation.[15] Both DOJ and DHS had extensive interactions with the lead expert designated by USCIRF, Mr. Hetfield, after the Commission requested that the experts be invited to conduct the study. In addition to communicating with the experts through their lead representative, both agencies provided written protocols recognizing the USCIRF-designated experts as conducting the section 605 study and arranging for their access to immigration proceedings, as required under section 605(c)(2). The grant of access to these proceedings was a necessary precondition to the commencement of the study, and DOJ's and DHS's legal obligation to provide such access was triggered only if the experts had been properly designated and invited under section 605(a)(1). The statutory invitation requirement, which thus served as a mechanism for ensuring that the study proceeded in an orderly manner once USCIRF had made its request, was therefore met by the agencies' actions.[16]

If you or your staff have any questions concerning this matter, please call Ms. Lynn Gibson, Associate General Counsel, at 202-512-8153, or Ms. Jan Montgomery, Assistant General Counsel, at 202-512-5484.

Sincerely yours,

/signed/

Anthony H. Gamboa
General Counsel

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[15] There is nothing in the legislative history to indicate that Congress contemplated any particular form of invitation. The provision was added to the bill in the Senate as part of a larger substitute amendment for the House-passed version of the bill, *see* 144 Cong. Rec. S11992, S12000 (daily ed. Oct. 8, 1998) (Nickles Amendment No. 3789), and the bill then passed both the Senate and the House without discussion of the relevant language. The House-passed version of the bill contained a provision requiring the Attorney General to invite the United Nations High Commissioner on Refugees to conduct the study, but there was no mention of USCIRF or USCIRF-designated experts. H.R. 2431, 105th Cong. § 9(c)(2)(A)(i) (1998). After IRFA was enacted, Senator Nickles, who sponsored the substitute amendment that ultimately became law, included a statement in the Congressional Record commenting on the act, which stated that "[u]nder section 605, the Commission on International Religious Freedom may invite outside experts to cooperate with the U.S. General Accounting Office in studying and reporting on the effect of the expedited removal process on potential asylees." 144 Cong. Rec. S12999, S13001 (daily ed. Nov. 12, 1998).

[16] *See Erhardt v. Schroeder*, 155 U.S. 124, 129-30 (1894) (holding that public officer's actions complied with a statutory requirement that protected the government, not the rights of individuals, by providing guidance for the conduct of official business) (citing *French v. Edwards*, 80 U.S. 506, 511 (1871)); *Trinity Episcopal School Corp. v. Karlen*, 523 F.2d 88, 95 (2d Cir. 1975) (holding that officials' actions, taken as a whole, complied with a statutory procedural requirement).