



MAY 14 2018

The Honorable Bob Corker
Chairman
Committee on Foreign Relations
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on S. 2060, the “Burma Human Rights and Freedom Act of 2018.” A number of provisions in the bill raise significant constitutional concerns. Below, we recommend changes to address these concerns.

1. Command and Control of the Armed Forces (Section 8(a))

Section 8(a) would interfere with the President’s constitutional authority as Commander-in-Chief to provide guidance and direction to military commanders. Specifically, this section provides that “the President may not furnish any security assistance or . . . engage in any military-to-military programs with the armed forces of Burma, including training or observation or participation in regional exercises, until the Secretary of State, in consultation with the Secretary of Defense, certifies to the appropriate congressional committees that the Burmese military has demonstrated significant progress in abiding by international human rights standards and is undertaking meaningful and significant security sector reform,” as determined by the criteria of the statute.

In certain circumstances, this provision would contravene the President’s indefeasible authority as Commander-in-Chief “to make and to implement the decisions that he deems necessary or advisable for the successful conduct of military missions in the field.” *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182, 185 (1995). While the Congress has broad authority to regulate the structure and composition of the military, the Constitution commits to the President alone the responsibility to command the military forces that the Congress has created. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring). To address this concern, we recommend changing “the President may not” to “the President should not.”

2. Requiring Regular Congressional Consultations (Section 8(g))

Section 8(g) provides that “[a]ny new program or activity in Burma initiated under this section shall be subject to prior consultation with the appropriate congressional committees.”

But the Executive Branch cannot constitutionally be obliged to consult with the Congress as a mandatory precondition to the execution or enforcement of the law, at least to the extent that “consult” means more than providing briefings or reports. *See Bowers v. Synar*, 478 U.S. 714, 733-34 (1986) (“[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly — by passing new legislation.”); *INS v. Chadha*, 462 U.S. 919, 951-52 (1983) (“To . . . maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded.”); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 826-27 (D.C. Cir. 1993) (holding that Congress could not constitutionally require the presence of even non-voting congressional appointees on the Federal Election Commission, because Congress could not give its agents any role in the enforcement of the laws). We thus recommend amending section 10(g) so that it requires “notice to” rather than “prior consultation with.”

3. Reception of Foreign Officials (Section 10)

Section 10 would intrude on the President’s exclusive diplomatic powers and, accordingly, we recommend revising the provision to include an exception that accommodates the President’s exercise of diplomatic authorities. Section 10(a) would require that the President “submit to the appropriate congressional committees a list of senior officials of the military and security forces of Burma that the President determines have knowingly played a direct and significant role in the commission of human rights violations in Burma.” Section 10(b)(1) would further require that the “Secretary of State shall deny a visa to, and the Secretary of Homeland Security shall exclude from the United States, any individual included” on the President’s list.

In certain circumstances, these provisions would interfere with the President’s plenary authority to “receive Ambassadors and other public Ministers.” U.S. Const. art. II, § 3. This “right of reception extends to ‘all possible diplomatic agents which any foreign power may accredit to the United States.’” *Presidential Power Concerning Diplomatic Agents and Staff of the Iranian Mission*, 4A Op. O.L.C. 174, 180 (1980) (quoting *Ambassadors and Other Public Ministers of the United States*, 7 Op. Atty. Gen. 186, 209 (1855)). Thus, if S. 2060 rendered statutorily inadmissible any foreign officials whom the President wished to receive as diplomatic agents, it would conflict with the President’s exercise of his exclusive diplomatic powers.

We recognize that section 10(e) would allow the President to waive sanctions on a case-by-case basis if the Secretary of State, in consultation with the Secretary of the Treasury, certified to the Congress that a waiver was “important to the national security interests of the United States.” But section 10(e) would not allow the President to waive sanctions for purely diplomatic reasons, and thus still would encroach on his plenary authority over the reception of ambassadors and other foreign officials. Section 10(e) also would condition the President’s exercise of his exclusive diplomatic authorities on decisions made by subordinate officials in the Executive Branch. *Cf., e.g., Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers*, 39 U.S. Op. Atty. Gen. 484, 490 (1940) (“[T]o prohibit action by the constitutionally created Commander in Chief except upon authorization of a statutory officer subordinate in rank

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is of questionable constitutionality.”). To address these concerns, we recommend amending the waiver authorization in section 10(e) as follows (insertions in *italics*; deletions in ~~strikeout~~):

The President may waive a requirement of this section if ~~he the Secretary of State,~~
~~in consultation with the Secretary of the Treasury,~~ determines and reports to the
appropriate congressional committees that the waiver is *in important* to the
~~national security~~ interests of the United States.

Thank you for the opportunity to present our views. We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration’s program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in cursive script that reads "Prim Scalona / fme".

Stephen E. Boyd
Assistant Attorney General

cc: The Honorable Benjamin L. Cardin
Ranking Member