



**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

**JAN 29 2020**

The Honorable James E. Risch  
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 the amendment in the nature of a substitute to S. 1102, the “Eastern Mediterranean Security and Energy Partnership Act of 2019.” As we explain below, the bill raises several constitutional concerns.

**Authority to Conduct Foreign Relations, Including Diplomacy**

Certain provisions of the bill would raise constitutional concerns by interfering with the President’s constitutional authority to conduct foreign relations, including diplomacy:

- Section 3 would declare that “[i]t is the policy of the United States,” among other things, to “continue to actively participate in the trilateral dialogue on energy, maritime security, cybersecurity and protection of critical infrastructure conducted among Israel, Greece, and Cyprus;” to “support diplomatic efforts with partners and allies to deepen energy security cooperation among Greece, Cyprus, and Israel;” to “strongly support” the completion of natural gas infrastructure projects as a “means of diversifying regional energy needs away from the Russian Federation;” to “develop deeper security cooperation with Greece” and “deepened security cooperation with the Republic of Cyprus;” to “support efforts to counter Russian Federation interference and influence in the Eastern Mediterranean through increased security cooperation with Greece, Cyprus, and Israel, to include intelligence sharing, cyber, and maritime domain awareness;” to “strongly oppose any actions that would trigger mandatory sanctions pursuant to section 231 of the Countering America’s Adversaries Through Sanctions Act;” to “continue robust official strategic engagement with Israel, Greece, and Cyprus;” and to “urge

countries in the region to deny port services to Russian Federation vessels deployed to support the government of Bashar Al-Assad in Syria.”

- Section 10 would provide that the Secretary of State “shall submit to the appropriate congressional committees a strategy on enhanced security and energy cooperation with countries in the Eastern Mediterranean region, including Israel, the Republic of Cyprus, and Greece.”

By purporting to dictate the “policy” of the United States in foreign affairs, section 3 would infringe on the Constitution’s commitment to the President alone of the responsibility to formulate the position of the United States in the field of foreign relations. *See United States v. Louisiana*, 363 U.S. 1, 35 (1960) (the President is “the constitutional representative of the United States in its dealings with foreign nations”); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (“The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”). The Congress may not contravene this authority by declaring a certain foreign policy as a matter of law, thereby tying the President’s hands in future interactions with foreign countries. Moreover, although section 10 does not specifically dictate what the Secretary’s “strategy” must be, that section is inconsistent with the foregoing principles to the extent that it nonetheless requires the Secretary to take a specific position on a foreign policy matter.

In addition, certain elements of the above provisions — such as those calling for the United States to “actively participate” in ongoing international dialogues or to develop deeper security relationships with other countries — would require the President or members of the executive branch to engage with foreign governments. “One well-established component of the President’s foreign affairs power is the basic authority to conduct the Nation’s diplomatic relations.” *Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011*, 35 Op. O.L.C. \_\_\_, at \*3 (Sept. 19, 2011) (citation and internal quotation marks omitted). Accordingly, the President has the “exclusive authority to determine the time, scope, and objectives’ of international negotiations or discussions.” *Constitutionality of Section 7054 of the Fiscal Year 2009 Department of State, Foreign Operations, and Related Programs Appropriations Act*, 33 Op. O.L.C. \_\_\_, at \*8 (June 1, 2009) (quoting *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 41 (1990)).

To avoid these concerns, we recommend revising section 3 to express the “sense of Congress” rather than the “policy of the United States,” and making section 10 precatory by changing “shall” to “should.”

### **Authority as Commander in Chief**

In addition to raising concerns regarding the President's foreign affairs powers, certain provisions of the bill implicate the President's role as Commander in Chief. Such provisions include the following:

- Section 3 would declare that “[i]t is the policy of the United States” to “maintain a robust United States naval presence and investments in the naval facility at Souda Bay, Greece” and to cooperate with Greece “through the recent MQ–9 [unmanned aerial vehicle] deployments to the Larissa Air Force Base and United States Army helicopter training in central Greece;” to “support robust International Military Education and Training (IMET) programming with Greece and the Republic of Cyprus;” and to “support joint military exercises among Israel, Greece, and Cyprus.”
- Section 6 would authorize appropriations that “shall be made available” for assistance to Greece and Cyprus for the purpose of, among other things, “[e]stablishing a rapport between the United States military and the [other] country’s military to build alliances for the future” and “[e]nhanc[ing] interoperability and capabilities for joint operations.”

Although the Congress has broad authority to regulate the structure and composition of the military, the Constitution commits to the President alone the “supreme command over all the military forces — such supreme and undivided command as would be necessary to the prosecution of a successful war.” *United States v. Sweeney*, 157 U.S. 281, 284 (1895); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring). “Through, or under, his orders, therefore, all military operations in times of peace, as well as war, are conducted. He has within his control the disposition of the troops, the direction of the vessels of war and the planning and execution of campaigns.” 3 Westel Woodbury Willoughby, *The Constitutional Law of the United States* 1566 (1929). We have interpreted the President’s authority to extend to tactical military decisions about how best to deploy military personnel and equipment. “[I]t is for the President alone, as Commander in Chief, to decide whether, how, and in what circumstances the Armed Forces are to make best use of” their resources. Memorandum for Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, from Randolph D. Moss, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: S. 495*, at 2 (Apr. 17, 1997); *see also Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) (explaining that the President “is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them *in the manner he may deem most effectual* to harass and conquer and subdue the enemy.” (emphasis added)).

For these reasons, provisions of the bill such as those identified above — which purport to direct the deployment or other activities of United States military forces — would impede the President’s constitutional authority. Accordingly, we recommend either deleting the provisions

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of the bill described above or revising their language to authorize — rather than require — the relevant operations and military exercises.

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 black ink that reads "Prim Escalona". The signature is written in a cursive, flowing style.

Prim F. Escalona  
Principal Deputy Assistant Attorney General

cc: The Honorable Robert Menendez  
Ranking Member