U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D. C. 20530

June 9, 2017

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 ("the Department") on S. 722, the "Countering Iran's Destabilizing Activities Act of 2017." As to the general desirability of the legislation, the Department defers to other agencies. However, as we explain below, several provisions of the bill raise constitutional concerns.

1. Restrictions on Entry into the United States

Certain provisions of S. 722 would require the President to impose sanctions on aliens that include denying them entry into the United States. If that provision prevented the President from receiving diplomatic representatives of a foreign country, it would intrude on the President's constitutional authority under Article II, Section 3 to receive ambassadors and other public ministers. To address this concern, we propose adding an additional exception for activities necessary for the fulfillment of a constitutional authority of the President, including the receipt of ambassadors and other public ministers under Article II, Section 3.

Section 4 would require the President to impose sanctions on certain persons connected to Iran's ballistic missile program. Section 7 would require the President to impose sanctions on certain persons involved in Iran's conventional arms. The bill would require the Secretary of State to deny a visa to, and the Secretary of Homeland Security to exclude from the United States, any alien subject to sanctions under these provisions. S. 722, §§ 4(c)(2), 7(b)(2).

Section 12(a) would allow the President to make short-term case-by-case waivers where doing so was "vital to the national security interests of the United States." Section 7 would provide an exception based on the President's making certain certifications to the Congress, which must include, for example, a certification that Iran no longer presents a significant threat to U.S. national security. However, the bill would not include an exception or waiver for aliens whom the President wished to receive for diplomatic purposes.

Article II, Section 3 of the Constitution grants the President express authority to "receive Ambassadors and other public ministers." *Cf. Zivotofsky ex. rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2085 (2015) (noting that the Reception Clause "direct[s] the President alone to receive ambassadors"). "As the Attorney General noted over a century and a half ago, the President's 'right of reception extends to "all possible diplomatic agents which any foreign power may accredit to the United States."'" *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 *5 (Sept. 19, 2011) (quoting *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))). As a result, Presidents have regularly objected to legislation purporting to bar the entry of particular foreign officials. *See, e.g.*, *Statement on Signing the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*, 32 Weekly Comp. Pres. Doc. 479, 479 (Mar. 12, 1996) (observing that "[a] categorical prohibition on the entry of [certain individuals who confiscate or traffic in expropriated property] could constrain the exercise of my exclusive authority under Article II of the Constitution to receive ambassadors and to conduct diplomacy"); *Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991*, 26 Weekly Comp. Pres. Doc. 266, 267 (Feb. 16, 1990) (objecting on constitutional grounds to provisions restricting expenditure of funds for discussion with representatives of the Palestine Liberation Organization whom the President knew to be directly involved in terrorist activity and purporting to bar admission to the United States of foreign representatives to the United Nations who had been found to have engaged in certain espionage activities directed against the United States or its allies).

We do not believe that the waivers currently provided in this bill are broad enough to cover the full range of potential diplomatic activities. To address this concern, we recommend adding an additional exception for activities necessary for the fulfillment of a constitutional authority of the President, including the receipt of ambassadors and other public ministers under Article II, Section 3.

2. Reporting Requirements

Certain reporting requirements in the bill are broad enough to encompass diplomatic communications and national security information. In those applications, the reporting requirements could intrude upon the President's constitutional authority to maintain the confidentiality of information. We do not ask that the reporting requirements be deleted or amended, because they are constitutional on their face and we understand that decisions to withhold particular national security or diplomatic information from the Congress are best made through case-by-case accommodation. We do wish to notify the Congress that we would construe these reporting requirements consistently with the President's constitutional authority to protect the confidentiality of sensitive national security information and diplomatic communications.

The reporting requirements that raise this concern are the following:

- Section 3, which would require members of the Executive Branch to submit a report to the Congress on "a strategy for deterring conventional and asymmetric Iranian activities and threats." The information to be included in the report includes a "summary of the capabilities and contributions of individual countries to shared efforts to counter Iran's destabilizing activities, and a summary of additional actions or contributions that each country could take to further contribute"; assessments of Iran's conventional force, biological, and chemical capabilities and plans to upgrade these capabilities; an assessment of Iran's asymmetric activities; and a summary of U.S. actions "unilaterally and in cooperation with foreign governments, to counter destabilizing Iranian activities."

- Section 10, which would require the President to report periodically to the Congress on U.S. citizens detained by Iran or groups supported by Iran. The report is to include information on Iranian officials involved in the detentions and a summary of efforts by the U.S. government to secure release.

- Section 12, which would permit the President to make short-term, case-by-case waivers of sanctions if he determined and reported to the Congress that the waiver was "vital to the national security interests of the United States." The report to the Congress would be required to include "a specific and detailed rationale for the determination that the waiver is vital"; " a description of the activity that resulted in the person being subject to sanctions"; "an explanation of any efforts made by the United States, as applicable, to secure the cooperation of the government with primary jurisdiction over the person or the location where the activity . . . occurred"; and "an assessment of the significance of the activity . . . in contributing to the ability of Iran" to threaten the United States or its allies, develop weapons of mass destruction, support terrorism, or violate human rights.

These provisions potentially intrude upon the President's constitutional authority to maintain the confidentiality of diplomatic communications or national security information. *See Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 94–95 (1998) ("Indeed, Presidents since George Washington have determined on occasion, albeit very rarely, that it was necessary to withhold from Congress, if only for a limited period of time, extremely sensitive information with respect to national defense and foreign affairs."); Memorandum from John R. Stevenson, Legal Adviser, Department of State, and William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: The President's Executive Privilege To Withhold Foreign Policy and National Security Information* at 7 (Dec. 8, 1969) ("It is therefore concluded that the President has the power to withhold from the Senate information in the field of foreign relations or national security if in his judgment disclosure would be incompatible with the public interest."). Although in practice presidents have tried, whenever possible, to provide information to the Congress that will assist it in the performance of its legislative duties, they consistently have reserved the right not to disclose national security information and diplomatic

communications outside the Executive Branch, and the Congress has historically acknowledged this right. We would not consider this bill to disturb this historical practice.

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,

Samuel R. Ramer

Samuel R. Ramer
Acting Assistant Attorney General

cc: The Honorable Benjamin L. Cardin
Ranking Member