U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D. C. 20530

JAN 09 2018

The Honorable Ed Royce
Chairman
Committee on Foreign Affairs
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 3329, the "Hizballah International Financing Prevention Amendments Act of 2017," as passed by the House of Representatives. We have both constitutional and policy concerns.

I. Constitutional Concerns

A. Section 101: Conduct of Diplomacy

Recommendation: Section 101(a) of the bill would amend section 101 of the Hizballah International Financing Prevention Act of 2015 (Public Law 114–102; 50 U.S.C. § 1701 note). We recommend making the sanctions set out in proposed section 101(b)(1)(B) discretionary by, for example, amending proposed section 101(a) to state that the President "shall impose the sanctions described in subsection (b)(1)(A) and may impose the sanctions described in (b)(1)(B)."

Explanation: Proposed section 101 would require the President to impose sanctions on persons who assist, sponsor, or support certain entities or individuals connected to Hizballah. One of the sanctions would render a sanctioned individual inadmissible to the United States and ineligible to receive a visa to enter the United States, be admitted to the United States, or receive other benefits under the Immigration and Nationality Act ("INA"). Proposed § 101(b)(1)(B). Section 101 would permit the President to waive sanctions if he certified to the Congress that a waiver was "in the national security interests of the United States." Proposed § 101(d)(1). Both before and after issuing a waiver, the President would be required to notify and brief congressional committees on activities of the individual related to sanctionable conduct. Proposed § 101(d)(2).

Article II, Section 3 of the Constitution grants the President express authority to "receive Ambassadors and other public ministers." *Cf. 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) ("*OSTP*") (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))), https://www.justice.gov/opinion/file/847181/download. As a result, Presidents have regularly objected to legislation purporting to bar the entry of particular foreign officials without appropriate exceptions. *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); *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 waiver provided in the bill is broad enough to cover the full range of potential diplomatic activities. We therefore recommend adding the following text to section 101(a) after "subsection (b)": ", to the extent compatible with the President's discretion to receive ambassadors and other diplomatic officials of his choosing."

B. Section 204: Legislative Recommendations

Recommendation: We recommend making section 204 of the bill discretionary by inserting "as appropriate" after "action."

Explanation: Section 204(b)(4) would require the Executive Branch to make "[r]ecommendations for legislative or administrative action needed to address the threat of illicit tobacco trafficking networks." As currently phrased, section 204(b)(4) would require executive branch officials under plenary presidential supervision to recommend legislative measures to the Congress where necessary to address the specified threat. In other words, the Executive could not satisfy these reporting requirements by recommending administrative measures only. Thus, this provision would contravene the President's discretion to "recommend to [Congress's] Consideration such Measures *as he shall judge* necessary and expedient," U.S. Const. art. II, § 3 (emphasis added); *see also Application of the Recommendations Clause to Section 802 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003*, 40 Op. O.L.C. __ (Aug. 25, 2016), https://www.justice.gov/opinion/file/929881/download.

C. Section 105: Authority to Conduct Foreign Affairs

Recommendation: Section 105(a) would require the Executive Branch to submit to the Congress "a strategy to prevent hostile activities by Iran and disrupt and degrade Hizballah's illicit networks in the Western Hemisphere." We recommend deleting this reporting requirement because it intrudes on the President's authority over foreign affairs.

Explanation: Section 105(a) would require the Executive Branch to submit to the Congress "a strategy to prevent hostile activities by Iran and disrupt and degrade Hizballah's illicit networks in the Western Hemisphere." This provision could be read to require the President to adopt a foreign policy consistent with this strategy, and, if so, it would interfere with the President's responsibility to "determine[] and articulate[] the Nation's foreign policy." *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 256 (1989); *The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the National Security Act*, 10 Op. O.L.C. 159, 160 (1986) (noting the President's "authority to represent the United States and to pursue its interests outside the borders of the country").

D. Section 105: Conduct of Diplomacy

Recommendation: Section 105(c)(1) of the amendment offered by Rep. Duncan would purport to require the Executive Branch to engage in a variety of diplomatic activities. We recommend making this hortatory by changing "shall" to "should."

Explanation: Section 105(c)(1) of the amendment would purport to require the President to instruct the Secretary of State, the U.S. Permanent Representative to the Organization of American States, the U.S. Ambassador to the Organization for Security and Cooperation in Europe, and U.S. diplomats to engage in a variety of diplomatic activities and take certain positions in international fora. It would thus intrude on the President's exclusive authority under the Constitution "to determine the time, scope, and objectives of international negotiations." *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 *4 (Sept. 19, 2011) (citation and internal quotation marks omitted), https://www.justice.gov/file/18346/download.

II. Policy Concerns

Section 101(a): Mandatory Sanctions

As noted above, section 101(a) of the bill would amend section 101 of the Hizballah International Financing Prevention Act of 2015 ("HIFPA"). On its face, proposed section 101(a)(3) of H.R. 3329 would appear to require the President to impose sanctions on an entity that knowingly provided material support to another entity, if the President found that the other

entity conducted fundraising or recruiting for Hizballah. The provision would not require expressly that the first entity had knowledge that the other entity is engaged in that conduct. It seems unlikely that the drafters intended this result. We recommend amending proposed new section 101(a)(3) to state the following:

> (3) for Hizballah's fundraising or recruitment activities; or

Further, we have recommended amending proposed section 101(a) to make the sanctions in proposed new section 101(b)(1)(B) discretionary, in order to accommodate the President's constitutional authority to conduct diplomatic activities. *Supra*, at 1-2. Entirely separate from this constitutional issue, we believe that discretion is necessary in order to ensure that law enforcement agencies continue to have the tools necessary to investigate and prosecute transnational organized criminal networks, including Hizbollah and its affiliates. If the sanctions are not made discretionary, the Congress should, at a minimum, include an express exception. We believe that a new section 101(b)(1)(B)(iii) containing language along the following lines would accommodate the interests of law enforcement as well as address our constitutional concern:

> (iii) Exception. — The President may exempt any person defined in subsection (a) from the sanctions described in subsection (b) in order to further a law enforcement interest or to protect the national security of the United States, or when necessary for the fulfillment of his constitutional duties.

We note that making the provision discretionary, as we propose *supra*, at pages 1-2, in order to address our constitutional concern, also would address the law enforcement and national security concerns we raise here.

Further, proposed section 101(b)(B)(i)(III) of H.R. 3329 would make those aliens who violate section 101(a) "ineligible to be …paroled into the United States under the [INA]." We oppose this broad limitation on the use of parole. This provision should be deleted.

Acting on behalf of prosecutors, the Department's Office of International Affairs ("OIA") routinely seeks parole under the INA (8 U.S.C § 1182(d)(5)) in order to ensure that alien fugitives located abroad, including terrorists, can face the charges in the United States or serve penal sentences here, if they already are convicted. Proposed section 101(b)(B)(i)(III) essentially would eliminate the ability of the Department of Justice to bring alien fugitives charged with providing material support to Hizballah and with related offenses into the United States so that they might face prosecution or serve their sentences.

Additionally, the provision would not permit parole for those aliens who must be brought into the United States to provide vital legal assistance in criminal cases, *e.g.*, testifying as a witness at a criminal trial pursuant to a request under a mutual legal assistance treaty. This assistance is critical to United States criminal investigations and prosecutions.

We also oppose proposed section 101(b)(1)(B)(ii) of H.R. 3329 to the extent that its revocation of any "other entry documentation issued to an alien" could adversely affect the ability of an alien to be paroled into the United States.

Finally, proposed section 101(f)(7) of the H.R. 3329 unnecessarily includes a definition of a "United States person" in an area where the Executive Branch has previously retained interpretive flexibility. Because adopting a definition legislatively could present challenges and additional litigation risk, we recommend that the definition of "United States person" be omitted or that the legislation define "United States person" to be "as defined in 31 CFR Part 594."

Section 202: Report on Hizballah Racketeering Activities

Section 202 of the bill would amend section 202 of the Hizballah International Financing Prevention Act of 2015. It would require various Executive Branch officials to submit a series of five annual reports to the Congress on racketeering activity in which Hizballah has engaged. We oppose this provision.

Section 202 would require the reporting of "racketeering activities," as the term is defined in 18 U.S.C. § 1961(1). Section 1961(1) defines the term to include includes dozens of Federal and State law offenses. The Department of Justice does not have statistics on State investigations or prosecutions, and therefore would not be in a position to report this information. It is unclear to us as to how such information would be obtained from the States.

Additionally, it is unclear whether the reporting requirement is intended to apply to instances in which members, agents, or affiliates of Hizballah have been convicted of such crimes, instances in which they have been charged with such crimes, or instances in which they are under investigation for committing such crimes. Further, it is unclear if this reporting requirement is intended to encompass

(a) only instances in which an indictment, information, or criminal complaint actually alleges Hizballah to be the racketeering enterprise;

(b) instances in which the investigation or prosecution targets Hizballah as the enterprise or motivating force behind the illegal activity; or

(c) instances in which an individual with any kind of alleged connection to Hizballah is alleged to have committed any one of the many Federal and State offenses defined as "racketeering activity," without regard to or proof of the role that Hizballah or the individual's alleged connection to Hizballah might have played in the commission of the offense.

We note that, as a matter of policy, the Department of Justice does not comment on pending investigations. We further note that the Federal Rules of Criminal Procedure may limit what information any component of the Department may disclose about any RICO cases. *See* Fed. R. Crim. P. 6(e). Finally, we note that the section makes no provision for dissemination controls on the unclassified report.

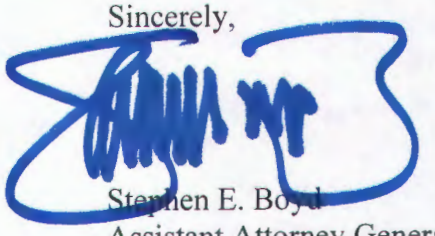
Section 302: Review of Classified Information

Section 302 of the bill would add a new section 104(c)(1) to the HIFPA. The new provision would establish procedures for the judicial review of classified information. We recommend amending this provision to track the language in the International Emergency Economic Powers Act ("IEEPA"), Title II of Pub.L. 95–223, 91 Stat. 1626, relating to *ex parte* evidence. First, we recommend that proposed section 104(c)(1) expressly authorize a court to review *ex parte* evidence (and not simply authorize the President to submit it). Second, we recommend that this measure expressly provide that the *ex parte* submission of evidence and a court's *in camera* review of evidence does not constitute a waiver by the Government of any applicable privileges, such as the state secrets privilege. To accomplish this, we recommend amending proposed new section 104(c)(1) to state the following:

> In any judicial review of a finding, or a prohibition, condition, or penalty imposed as a result of any such finding, if the determination was based on classified information (as defined in section 1(a) of the Classified Information Procedures Act), information may be submitted to the reviewing court ex parte and in camera, and the court may review and rely on such ex parte submissions. The submission of information to the reviewing court ex parte and in camera shall not be construed as a waiver of the state secrets privilege or any other applicable privilege. This subsection does not confer or imply any right to judicial review.

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,



Stephen E. Boyd
Assistant Attorney General

cc: The Honorable Eliot L. Engel
Ranking Member