



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D. C. 20530

AUG 13 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 the amendment in the nature of a substitute to H.R. 1697, the “Israel Anti-Boycott Act.” As to the general desirability of the legislation, we defer to other Departments. However, as we discuss below, the bill raises constitutional concerns.

Foreign Affairs and the Conduct of Diplomacy

Section three of H.R. 1697 purports to “declare[] . . . the policy of the United States” in matters of foreign affairs. In particular, section 3(1) states that it is the policy of the United States “to oppose restrictive trade practices or boycotts fostered by any international governmental organization against other countries friendly to the United States,” including by opposing a resolution concerning Israel adopted by the U.N. Human Rights Council on March 24, 2016.

To the extent that section three would require the President to adopt a prescribed foreign policy or to take particular positions before international bodies, the provision would unconstitutionally interfere with the President’s “authority to represent the United States” in foreign affairs “and to pursue its interests outside the borders of the country.” *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), <https://www.justice.gov/file/23891/download>; *see also Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 256 (1989) (noting that it is the President’s responsibility to “determine[] and articulate[] the Nation’s foreign policy”); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (recognizing “the President’s ‘vast share of responsibility for the conduct of our foreign relations’”).

This provision should be made precatory (e.g., by changing “is” to “should be” in the opening phrase of section 3) or amended to express a sense of Congress, as in section two of the bill. If enacted without change, we would treat the provision as advisory and non-binding.

Executive Privilege

Section 5(3) of the bill would require the President to provide Congress with “a detailed summary of United States diplomatic initiatives taken to oppose and influence the implementation of” a particular U.N. Human Rights Council resolution. The provision would potentially intrude on the President’s constitutional authority to maintain the confidentiality of diplomatic communications. *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.”). We recommend revising this requirement to permit the withholding of privileged information. If enacted without revision, we would treat the reporting requirement in a manner consistent with the President’s constitutional authority to control the dissemination of information protected by executive privilege, including by withholding information where necessary.

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,



Prim F. Escalona
Principal Deputy Assistant Attorney General

cc: The Honorable Eliot L. Engel
Ranking Member