U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

NOV 21 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. 3257, the "Sanctioning the Use of Civilians as Defenseless Shields Act." As we discuss below, the bill raises both constitutional and policy concerns.

I. Constitutional Concerns

Section 3 of the bill would require the President to impose sanctions against certain foreign nationals — specifically, persons affiliated with Hizballah or Hamas who knowingly order, control, or direct "the use of civilians . . . to shield military objectives from attack," S. 3257 § 3(b)(1)–(2), and persons who, though not affiliated with Hizballah or Hamas, knowingly and materially support, order, control, direct, or enable persons affiliated with Hizballah or Hamas to make such use of civilians, *id.* § 3(b)(3). The mandatory sanctions against covered foreign nationals would include denying them "visa[s] or other documentation to enter the United States" and revoking any visas or entry documentation already issued to them. *Id.* § 3(d)(2)(A)–(B). Those sanctions would not apply if admitting a foreign national to the country were "necessary to permit the United States to comply with the Agreement regarding the Headquarters of the United Nations . . . or [any] other applicable international obligations." *Id.* § 3(d)(2)(C). Moreover, the President could waive those sanctions if he "determine[d] and report[ed] to the appropriate congressional committees that such waiver [would be] in the national security interest of the United States." *Id.* § 3(g).

To the extent an official of a foreign government whom the President wishes to receive in the United States for diplomatic purposes falls within the class of covered foreign nationals, section 3 is unconstitutional as applied to that official. Under Article II, section 3 of the Constitution, the President has express authority to "receive Ambassadors and other public Ministers." We have described that authority as "unfettered" and have accordingly advised that similar sanctions provisions are unconstitutional as applied to "high-ranking officials [of a foreign government admitted] for the purpose of engaging in diplomatic relations." Memorandum to Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, from Randolph D. Moss, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: S. 810, A Bill to Impose*

Certain Sanctions on the People's Republic of China (June 25, 1997). That constitutional infirmity persists even if the sanctions provisions allowed the President to admit foreign officials under certain circumstances — e.g., where doing so promoted national security — because the President must be free to conduct diplomacy when such circumstances do not exist. *Id.* Here, section 3 does not explicitly exclude officials of foreign governments from the class of persons the President would be required to sanction. As applied to those officials, the visa-related sanctions would be unconstitutional. And the exceptions that allow the President to comply with international agreements and promote national security would not cure the constitutional defect.

We therefore recommend adding the following sentence to the end of section 3(d)(2)(C): "Nor shall the sanctions under this paragraph be imposed on any individual whom the President determines should be admitted for diplomatic purposes."

II. Policy Concerns

Entry into the United States

Section 3(d)(2)(A)(iii) of the bill would make those aliens that the Secretary of State or the Secretary of Homeland Security determined as meeting any of the criteria set forth in sections 3(b) and 3(c) "otherwise ineligible to be . . . paroled into the United States . . . under the [Immigration and Nationality Act]." We strongly oppose this broad limitation on the use of parole.

Acting on behalf of prosecutors and their law enforcement partners, our Criminal Division's Office of International Affairs routinely seeks parole under the Immigration and Nationality Act ("INA") (8 U.S.C § 1182(d)(5)) in order to ensure that alien fugitives located abroad, including terrorists, can face criminal charges in the United States or serve penal sentences here, if they already are convicted. Section 3(d)(2)(A)(iii) would eliminate our ability to bring into the United States alien fugitives charged with criminal offenses who are members of Hamas or Hizballah and who have been designated by the President as ordering, controlling or directing the use of human shields; or those individuals who materially support such human shield use as designated by the President. Bringing these individuals into the United States is necessary so that they can face prosecution or serve their sentences.

Additionally, this 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.

For these reasons, at a minimum, we believe that it is essential to add to the bill an explicit, mandatory law enforcement exception, perhaps to section 3(d)(C). It is also necessary to insert the word "paroling" after "admitting" in section 3(d)(C). This is critical because the

alien fugitives and witnesses described above are "paroled" into the United States, as opposed to the legally different status of being "admitted" in this country. We suggest redrafting subsection (C) along the following lines:

> (C) EXCEPTIONS--The sanctions under this paragraph shall not be imposed on an individual if admitting or paroling that individual to the United States is
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> (1) necessary to permit the United States to comply with the Agreement between the United Nations and the United States regarding the Headquarters of the United Nations signed June 26, 1947, at Lake Success, and entered into force November 21, 1947, or with other applicable international obligations; or
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> (2) in connection with any authorized law enforcement, national security, or intelligence activity of the United States.

The inclusion of amended section 3(d)(C), with its explicit law enforcement exception and the addition of the phrase "or paroling," as noted above, also would make clear that U.S. Government officials, including Department of Justice and other law enforcement personnel, in their efforts to return fugitives to the United States to face justice, or to facilitate other vital criminal legal assistance, could not be subjected to the potential criminal sanctions of section 3(e) of this bill.

Submission of Sensitive Information

Finally, we note that section 3(f) of the bill provides for the submission of classified information *ex parte*, but does not allow for other types of protected information to be submitted *ex parte*.

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 Robert Menendez
Ranking Member