U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

NOV 16 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 the amendment in the nature of a substitute to S. 3233, the "Nicaragua Human Rights and Anticorruption Act of 2018." As we explain below, the bill raises both constitutional and policy concerns.

I. Constitutional Concerns

Section 6(c) of the bill, in conjunction with section 6(a), would provide that the "Secretary [of State] shall consult with the appropriate congressional committees" in preparing an annual report on the activities of the Nicaraguan government. The requirement to consult with Congress while preparing the annual report would violate the separation of powers, at least to the extent that "consult" means more than providing briefings. The Congress may not interfere with the exercise of executive authority other than through enactment of new legislation that complies with bicameralism and presentment. *See Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986). Consequently, the Congress may not require that it be given any role in executing the law, including by requiring consultation as a mandatory condition of executive action, where those consultations would provide Congress a meaningful opportunity to influence the action in question, even if the Congress has no formal authority to approve or prevent such action. *See FEC v. NRA Political Victory Fund*, 6 F.3d 821, 826–27 (D.C. Cir. 1993) (holding that Congress could not constitutionally require the presence of even non-voting congressional appointees on the Federal Election Commission, because Congress could not give its agents any role in the enforcement of laws). To avoid these concerns, we suggest that the consultation requirement be revised to be hortatory and refer to a briefing for the appropriate committees, by replacing "shall consult" with "should brief."

II. Policy Concerns

Section 5 of the bill would require — rather than authorize — asset blocking, exclusion from the United States, and the revocation of "any visa or other documentation" for an alien participating in activities described in section 5(b). The word "parole" does not appear in the text. However, to the extent that section 5(c)(1)(B) of the bill would place any limitation upon the use of immigration parole in any United States criminal cases involving persons responsible for violence, human rights abuses, or corruption in Nicaragua, the Department would find it extremely problematic.

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 those charged with corruption or other offenses, can face criminal charges in the United States or serve penal sentences here, if they already are convicted. It is imperative that nothing interfere with our ability to bring into the United States alien fugitives charged with criminal offenses. Bringing these individuals into the United States is necessary so that they can face prosecution or serve their sentences.

Additionally, parole is necessary 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.

Because the phrase "or any other documentation" might be deemed to include the revocation of parole, it should be deleted from section 5(c)(1)(B). Further, we recommend adding to the bill an explicit exemption for law enforcement. We suggest redrafting section 5(c)(4) along the following lines:

> (4) EXCEPTIONS—Sanctions under paragraph (1)(B) shall not apply to an alien if admitting or paroling the alien into the United States is in connection with any of the following:
>
> (a) Any authorized intelligence, law enforcement, or national security activity of the United States;
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> (b) Any transaction necessary to comply with United States obligations under the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations signed at Lake Success June 26, 1947 and entered into force November 21, 1947; or
>
> (c) Any other international obligation.

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