U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

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The Honorable James E. Risch
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 H.R. 133, the "United States-Mexico Economic Partnership Act," as passed by the Senate. As we explain below, H.R. 133, as amended, would raise constitutional concerns related to the President's authority to formulate foreign policy and conduct diplomacy.

Section 3 of the amended bill would declare that "[i]t is the policy of the United States" to (among other things) "prioritize and expand educational and professional exchange programs with Mexico." Section 4 would require the Secretary of State to "develop a strategy to carry out the policy described in section 3, to include prioritizing and expanding educational and professional exchange programs with Mexico." The Constitution commits to the President the primary responsibility for conducting the foreign relations of the United States, *see, e.g., Dep't of Navy v. Egan*, 484 U.S. 518, 529 (1988) (The Supreme Court has "recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive'") (quoting *Haig v. Agee*, 453 U.S. 280, 293–94 (1981)); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705–06 n.18 (1976) ("[T]he conduct of [foreign policy] is committed primarily to the Executive Branch"), and the exclusive responsibility for determining whether, when, and to what end to negotiate with foreign nations, *see, e.g., United States v. Louisiana*, 363 U.S. 1, 35 (1960) (The President is "the constitutional representative of the United States in its dealings with foreign nations"); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (The President "makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."). Because the formation of exchange programs would require diplomatic engagement with Mexico, both section 3's statement of policy and section 4's requirement to develop an implementing strategy would infringe upon the President's foreign-relations authority. We recommend rephrasing section 3 to indicate that it expresses the "sense of Congress" rather than the "policy of the United States," and that section 4 be made precatory by, for instance, replacing each use of "shall" with "should."

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