U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUL 27 2020

The Honorable Michael D. Crapo
Chairman
Committee on Banking, Housing, and Urban Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on S. 1060, the "Defending Elections from Threats by Establishing Redlines Act of 2019." The bill raises three constitutional concerns.

I. Reception Clause

Section 202(a)(5)(A)(ii) of the bill would require the President to deny a visa to, and exclude from the United States, any "senior foreign political figure or oligarch in the Russian Federation" identified in a report required under Public Law 115-44, if Russia is found to have interfered in a United States election. If the President wished to receive any of these individuals as diplomats, that provision would interfere with the President's plenary authority to "receive Ambassadors and other public Ministers." U.S. Const. art. II, § 3. This "right of reception extends to 'all possible diplomatic agents which any foreign power may accredit to the United States.'" *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)). In these circumstances, the bill would conflict with the President's exercise of his exclusive diplomatic powers.

Section 202(c)(2) would create an exception where "the admission of an alien to the United States" was necessary to comply with the U.N. Headquarters Agreement or other international agreements. Section 202(f) would authorize the President to waive the application of sanctions following a determination that the waiver is in the vital national security interest of the United States and that failing to use the waiver will cause significant adverse harm to the vital national security interests of the United States. The U.N. exceptions and the waiver authority would not accommodate all instances in which the President might wish to receive a diplomat. To address this concern, we recommend revising section 202(f) to permit the

President to waive section 202(a)(5)(A)(ii) when he determines that doing so is "in the national interest." Absent such a change, we would treat section 202(a)(5)(A)(ii) as precatory.

II. Bicameralism and Presentment

Section 203 of the bill would amend section 216 of Public Law 115-44, codified at 22 U.S.C. § 9511, which limits the President's authority to take certain actions that might favor the Russian Federation, to add as actions subject to this provision the termination, waiver, or suspension of sanctions imposed by the bill. As a result, before terminating, waiving, or suspending these sanctions, the President would be required to "submit to the appropriate congressional committees and leadership a report that describes the proposed action and the reasons for that action." 22 U.S.C. § 9511(a)(1). The President then would have to wait a prescribed period of time, during which he could not take the proposed action unless the Congress enacted a joint resolution of approval. *Id.* § 9511(b)(3).

The prescribed waiting period would be 30 days — or 60 days if the President were to submit the report between July 10 and September 7. 22 U.S.C. § 9511(b)(1)–(2). At the end of that waiting period, the President would be free to exercise whatever authority he enjoys under existing law to terminate, waive, or suspend sanctions, unless both houses of Congress had passed a joint resolution of *dis*approval. If they had, the President could not terminate or waive sanctions until 12 calendar days after the date of passage of the joint resolution of disapproval. *Id.* § 9511(b)(4). Thus, if both house of Congress were to have passed a joint resolution of disapproval on the 30th day following the President's report, the waiting period would extend to 42 days.

In addition, if the President were to veto such a joint resolution of disapproval, the waiting period would be extended by another 10 calendar days. 22 U.S.C. § 9511(b)(5). If the joint resolution of disapproval were to become law (most likely, by a vote of two-thirds of each chamber of Congress to override a presidential veto, *see* U.S. Const. art. I, § 7), the President could not take the proposed action at all. 22 U.S.C. § 9511(b)(6).

Thus, section 203 would amend a provision, 22 U.S.C. § 9511, that is largely a constitutionally permissible report-and-wait requirement. It requires the President to delay taking action until the Congress has had an opportunity to approve or disapprove of his proposed action via a joint resolution, which may be either by presidential signature or by supermajorities of Congress over a presidential veto. But, as the President indicated in his statement on signing the bill that included 22 U.S.C. § 9511, *Statement on Signing the Countering America's Adversaries Through Sanctions Act*, 2017 Daily Comp. Pres. Doc. No. 00559 (Aug. 2, 2017) ("CAATSA Signing Statement"), section 9511 has two constitutional flaws: (1) it would extend that waiting period if the two houses of Congress were to pass a joint resolution; and (2) it would further extend that period if the President were to veto the joint resolution. These provisions would give legislative effect to congressional and presidential actions that do not satisfy the requirements for lawmaking in Article I, Section 7: bicameralism and presentment followed by

either presidential assent or an overridden veto. *See INS v. Chadha*, 462 U.S. 919, 951 (1983) (striking down one-house veto; "[i]t emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."); *Bowsher v. Synar*, 478 U.S. 714, 726–27 (1986) ("[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly — by passing new legislation.").

The President explained in the CAATSA Signing Statement that, despite the constitutional flaws, he "expect[ed] to honor the bill's extended waiting periods to ensure that the Congress will have a full opportunity to avail itself of the bill's review procedures." That remains the Administration's position. But we would still recommend curing the constitutional flaws by amending section 203 of S. 1060, so that it further amends 22 U.S.C. § 9511(b)(4) and (b)(5) to make those subsections precatory.

III. Executive Privilege

Sections 101, 102, and 201 of the bill would require the Director of National Intelligence, the Secretary of the Treasury, and the President, respectively, to submit reports to the Congress containing various information on foreign interference in United States elections or on financial information relating to certain foreign persons. Section 101 would require the Director of National Intelligence, among other things, to submit a report within 60 days of a United States election on whether a foreign government, or any foreign person acting as an agent of or on behalf of that government, knowingly interfered in that election, and, if the determination were that such interference did occur, the "identification of the government or foreign person that engaged in such interference." Additional details would be required if the determination were that the Government of the Russian Federation, or any foreign person acting as an agent of or on behalf of that Government, engaged in such interference. In turn, sections 102 and 201 would require the Secretary of the Treasury and the President to submit reports to the Congress containing financial information relating to certain senior foreign political figures and other individuals in the Russian Federation, including their estimated net worth and information on how their funds were acquired or used.

These reporting requirements could unconstitutionally intrude on the President's authority to control the dissemination of national security information. *See Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) (the President's "authority to classify and control access to information bearing on national security . . . flows principally from th[e] constitutional investment of [the Commander in Chief] power in the President" and the "authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief"); *Access to Classified Information*, 20 Op. O.L.C. 402, 404 (1996) (stating "that a congressional enactment would be unconstitutional if it were interpreted to divest the President of his control over national security information in the Executive Branch"). If enacted, we would treat these provisions 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,

Stephen E. Boyd
Assistant Attorney General

cc: The Honorable Sherrod Brown
Ranking Member