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 Jerrold Nadler
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 5408, the "Ukraine Religious Freedom Support Act." As we explain below, the bill raises two constitutional issues.

First, section 3(1) of the bill would state that it "is the policy of the United States" to regard "any alien who, while serving as an official of the Government of Russia, was responsible for or directly or indirectly carried out particularly severe violations of religious freedom" in the part of Ukraine that Russia "occupies and controls" as having committed a "particularly severe violation of religious freedom" for purposes of section 212(a)(2)(G) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(2)(G). That provision of the INA states that "[a]ny alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom . . . is inadmissible."

Section 3(1), as applied to those Russian officials who "were responsible for or directly" carried out such violations, would compound an already problematic feature of INA § 212(a)(2)(G). And, as applied to Russian officials who "indirectly carried out" such violations, section 3(1) would purport, at least, to expand upon the group of individuals deemed inadmissible under section 212(a)(2)(G). When section 212(a)(2)(G) renders inadmissible a foreign agent whom the President wishes to receive as a diplomatic agent, it interferes with the President's plenary authority to "receive Ambassadors and other public Ministers." U.S. Const. art. II, § 3 (Reception Clause). 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. Att'y Gen. 186, 209 (1855)). Thus, section 3(1) would emphasize and expand section 212(a)(2)(G)'s applicability to a category of individuals whom the President would be constitutionally entitled to admit to the United States if they were serving as foreign diplomats.

Second, section 3(2) would seem designed to expand the applicability of the admission bar in section 212(a)(2)(G). Currently, section 212(a)(2)(G) does not bar the admission of the spouse or child of a "foreign government official" who has committed a "particularly severe violation of religious freedom." Section 3(2) would state that it is the policy of the United States

to regard "the spouse and children, if any," of an alien official covered by section 3(1) as also having committed a "particularly severe violation of religious freedom" for purposes of INA § 212(a)(2)(G).

Section 3(2) would not, however, deem the spouse or child to be a "foreign government official" for purposes of INA § 212(a)(2)(G). Without this additional condition, it would not have what might be its intended effect of barring the admission of that spouse or child. If it were understood otherwise, or were revised to deem the spouse or child a "foreign government official," it would suffer from the same as-applied concern as that which we have identified above. Even when the Congress "may rely on its own constitutional authority to seek to guide and constrain presidential choices, it may not impose constraints in the areas that the Constitution commits exclusively to the President." *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182, 184 (1996). By allowing the President to receive foreign officials only when they come to the United States without their families — a limit likely to hamper any prolonged embassy presences — section 3(2) would impermissibly burden the President's exclusive Reception Clause authority. *See id.* at 187 ("Congress cannot . . . burden or infringe the President's exercise of a core constitutional power by attaching conditions precedent to the exercise of that power.").

We take no position on whether INA § 212(a)(2)(G) should be revised generally to bar the admission of the families of foreign government officials outside of the diplomatic context. We do, however, recommend adding a provision to section 212(a)(2)(G) permitting the President to waive the application of the admission bar when "in the national interest" or when necessary for the conduct of diplomacy, so as to permit the President to exercise his Reception Clause authority. Absent such a change, we would continue to regard section 212(a)(2)(G) as non-binding in circumstances in which it interferes with the President's reception of diplomats, including by operation of this bill.

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,

Mary Blanche Hankey / FOR

Stephen E. Boyd
Assistant Attorney General

cc: The Honorable Jim Jordan
Ranking Member