



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

SEP 09 2019

The Honorable Eliot L. Engel
Chairman
Committee on Foreign Affairs
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 1850, the "Palestinian International Terrorism Support Prevention Act of 2019." Several provisions of the bill relating to the President's foreign relations authority and executive privilege raise constitutional concerns. Below, we suggest changes to the bill to address those concerns.

1. Foreign Relations Authority

Numerous provisions of H.R. 1850 would interfere with the President's constitutional authority over foreign relations, including his authority to establish foreign policy and manage international negotiations.

a. Authority to Establish Foreign Policy

Section 2 would purport to set "the policy of the United States" with respect to " Hamas, the Palestinian Islamic Jihad, or any affiliate or successor" organizations — namely, (i) that those organizations' attempts to "access[] [their] international support networks" should be "prevent[ed]," H.R. 1850 § 2(1), and that their "attempt[s] to use goods, including medicine and dual use items, to smuggle weapons and other materials to further acts of terrorism" should be "oppose[d]," *id.* § 2(2). Because that provision would purport to dictate the "policy of the United States," it is inconsistent with the President's exclusive constitutional authority to formulate the Nation's foreign policy. See *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 is the sole organ of the nation in its external relations, and its sole representative with foreign nations." (citation and internal quotation marks omitted)). The Congress may not contravene that authority by declaring a particular policy, as a matter of law, or by directing the President to adopt a particular policy. As a remedy, we recommend rephrasing section 2 to indicate that it expresses "the sense of Congress" rather than "the policy of the United States."

b. Authority to Manage International Negotiations

Section 4(b)(1)(B) would provide that “[t]he Secretary of the Treasury shall instruct the United States Executive Director to each appropriate international financial institution to oppose, and vote against, for a period of one year, the extension by such institution of any loan or financial or technical assistance” to foreign governments that meet certain criteria. H.R. 1850 § 4(b)(1)(B). “One well-established component of the President’s foreign affairs power is the basic authority to conduct the Nation’s diplomatic relations.” *Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011*, 35 Op. O.L.C. ___, at *3 (Sept. 19, 2011) (internal quotation marks omitted). Accordingly, the President has the “exclusive authority to determine the time, scope, and objectives’ of international negotiations or discussions . . . including in the context of potential engagement with international fora.” *Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act*, 33 Op. O.L.C. ___, at *8 (June 1, 2009) (quoting *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 41 (1990)). Section 4(b)(1)(B) would infringe on that authority by mandating that executive branch officials take particular positions, and cast particular votes, in international fora. As a remedy, we recommend making section 4(b)(1)(B) precatory by, for example, inserting “if the President deems it appropriate” after “shall.”

2. Executive Privilege

Numerous provisions of H.R. 1850 would raise constitutional concerns by requiring the Executive Branch to supply the Congress with information related to foreign relations or national security. Those provisions include:

- Section 3(a), which would require a series of reports identifying “each foreign person or agency or instrumentality of a foreign state” that the President determines either (i) assisted in, sponsored, or provided specific forms of support for the “terrorist activities” of certain persons affiliated with Hamas, the Palestinian Islamic Jihad, or affiliate or successor organizations, H.R. 1850 § 3(a)(1)(A), (2); or (ii) “engaged in a significant transaction with” those persons, *id.* § 3(a)(1)(B), (2).
- Section 3(b)(3)(B), which would exempt from sanctions a foreign person or entity covered by section 3(a) if (among other conditions) the President “certifies in writing” that he “received reliable assurances from the foreign person or [entity] that it will not carry out any activities or transactions for which sanctions may be imposed pursuant to this subsection in the future.” *Id.* § 3(b)(3)(B).
- Section 4(a), which would require a series of reports identifying “[e]ach government of a foreign country” that the Executive Branch determines either (i) repeatedly supported terrorism and “provided direct or indirect material support for the terrorist activities” of Hamas, the Palestinian Islamic Jihad, or affiliate or successor organizations, *id.* § 4(a)(1)(A); or (ii) “contribute[d] knowingly and materially” to another government’s support of those organizations by “engag[ing] in a significant transaction” with that government, *id.* § 4(a)(1)(B).

- Section 4(f), which would authorize the President to terminate sanctions against a foreign government covered by section 4(a) if (among other conditions) the President notified the Congress that the foreign government “provided assurances to the United States Government that it will not carry out the [sanctionable] activities or transactions in the future.” *Id.* § 4(f).
- Section 6(a), which would require a report identifying (among other things) foreign countries that “support” Hamas, the Palestinian Islamic Jihad, or affiliate or successor organizations, *id.* § 6(a)(1)(A); countries in which those organizations “conduct[] significant fundraising, financing, or money laundering activities,” *id.* § 6(a)(1)(C); and countries from which those organizations “acquire[] surveillance equipment, electronic monitoring equipment, or other means to inhibit communication or political expression in Gaza,” *id.* § 6(a)(1)(E).
- Section 6(b), which would require a series of briefings on “the disposition of the assets and activities . . . related to fundraising, financing, and money laundering” of Hamas, the Palestinian Islamic Jihad, or affiliate or successor organizations. *Id.* § 6(b).

Those provisions would unconstitutionally intrude on the President’s authority to control the dissemination of national security information and diplomatic communications. *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 primarily 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”); *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. O.L.C. 253, 267 (1996) (“Interwoven with the President’s constitutional authority to conduct diplomatic relations is his constitutional authority to determine whether to disclose the content of international negotiations . . .”). If enacted, we would treat those 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

The Honorable Eliot L. Engel
Page 4

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,

A handwritten signature in cursive script that reads "Prim Escalona". The signature is written in black ink and is positioned above the printed name and title.

Prim F. Escalona
Principal Deputy Assistant Attorney General

cc: The Honorable Michael McCaul
Ranking Member