U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

OCT 19 2018

The Honorable Ed Royce
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. 5819, the "Burma Unified through Rigorous Military Accountability Act of 2018." As we explain below, the bill raises both constitutional and policy concerns.

I. Constitutional Concerns

Several provisions of section 202 raise significant constitutional concerns. Below, we recommend changes to address these concerns.

A. Command and Control of the Armed Forces (Section 202(a))

Section 202(a) would interfere with the President's constitutional authority as Commander-in-Chief to provide guidance and direction to military commanders. Specifically, this section provides that "the United States may not provide any security assistance or engage in any security cooperation with the military or security forces of Burma until the date on which the Secretary of State certifies to the appropriate congressional committees . . . that the military and security forces of Burma have demonstrated significant progress in abiding by international human rights standards and are undertaking meaningful and significant security sector reform," as determined by the criteria of the statute.

In certain circumstances, this provision would contravene the President's indefeasible authority as Commander-in-Chief "to make and to implement the decisions that he deems necessary or advisable for the successful conduct of military missions in the field." *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182, 185 (1995). While the Congress has broad authority to regulate the structure and composition of the military, the Constitution commits to the President alone the responsibility to command the military forces that the Congress has created. *See Youngstown Sheet & Tube Co.*

v. Sawyer, 343 U.S. 579, 641 (1952) (Jackson, J., concurring). To address this concern, we recommend changing the relevant text in section 202(a) from "the United States may not" to "the United States should not."

B. Foreign Affairs and Conduct of Diplomacy (Section 102)

Section 102 states that it "shall be the policy of the United States to," among other things, "pursue a strategy of calibrated engagement with Burma," guided by a number of principles outlined in the section. But requiring the Executive Branch to pursue "calibrated engagement" with foreign authorities would infringe on the President's "exclusive authority to determine the time, scope, and objectives of international negotiations or discussions." *Constitutionality of Section 7054 of the Fiscal Year 2009 Department of State, Foreign Operations, and Related Programs Appropriations Act*, 33 Op. O.L.C. __, at *8 (June 1, 2009) (internal quotation marks omitted); *see Earth Island Inst. v. Christopher*, 6 F.3d 648, 652–53 (9th Cir. 1993) (Congress may not require the Executive Branch to "initiate discussions with foreign nations" or "orde[r] the Executive to negotiate and enter into treaties"). Congress may not dictate when, with whom, or to what end the President will enter into negotiations with other countries. We recommend that section 102 be amended by replacing "shall be" with "should be," or revised to express the sense of Congress rather than "the policy of the United States." If enacted without change, we would treat section 102 as advisory.

C. Requiring Regular Congressional Consultations (Section 202(f))

Section 202(f) provides that "[a]ny new program or activity carried out under this section shall be subject to prior consultation with the appropriate congressional committees." But the Executive Branch cannot constitutionally be obliged to consult with the Congress as a mandatory precondition to the execution or enforcement of the law, at least to the extent that "consult" means more than providing briefings or reports. *See Bowsher v. Synar*, 478 U.S. 714, 733-34 (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."); *INS v. Chadha*, 462 U.S. 919, 951–52 (1983) ("To . . . maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded."); *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 the laws). We thus recommend amending section 202(f) so that it requires "notice to" rather than "prior consultation with."

D. Reception of Foreign Officials (Section 203)

Section 203 would intrude on the President's exclusive diplomatic powers and, accordingly, we recommend deleting section 203(f)(1)(B) so that the bill more fully accommodates the President's authorities. Section 203(a) would require that the President

impose sanctions on, among others, any foreign person that the President determines "is a current or former senior official of the military or security forces of Burma who knowingly" perpetrated human rights abuses or took "serious steps to impede investigations or prosecutions of" those abuses perpetrated by a subordinate. Section 203(b)(2) would make sanctioned persons ineligible to receive a visa and otherwise inadmissible to the United States.

In certain circumstances, these provisions 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)). Thus, if the bill rendered statutorily inadmissible any foreign officials whom the President wished to receive as foreign officials or representatives, it would conflict with the President's exercise of his exclusive diplomatic powers.

We recognize that section 203(f)(1)(A) would allow the President to waive sanctions on a case-by-case basis if he "determines that such waiver is in the national interest of the United States." Standing alone, we would construe this waiver provision as sufficiently broad to accommodate the President's plenary reception authority. But section 203(f)(1)(B) would additionally require that, when waiving the application of sanctions, the President, "not later than the date on which such waiver will take effect, submit[] to the [relevant] congressional committees . . . a notice of and justification for such waiver." Because the constitutional authority to receive foreign officials and representatives resides solely with the President — and may be exercised under emergency circumstances — the Congress cannot require that the President provide advance notice of, or a justification for, his reception decisions. To address this concern, we recommend deleting section 203(f)(1)(B).

II. Policy Concerns

Section 203(a) presents several ambiguities that could undermine its effectiveness. To begin, if section 203(a) is intended to authorize sanctions for the conduct listed in each of subparagraphs (1), (2), and (3), section 203(a) should be revised by replacing the "and" before subparagraph 203(a)(3) with an "or." With that change, section 203(a)(1) would require that the President impose sanctions on, among others, any foreign person that the President determines "is a current or former senior official of the military or security forces of Burma who knowingly" perpetrated human rights abuses or failed to investigate those perpetrated by a subordinate. Section 203(a)(3) would then independently require sanctions for individuals who have "knowingly provided or received significant financial, material, or technological support to or from a foreign person, including the immediate family members of such person, described in paragraph (1) for any of the acts described in subparagraph (A) or (B) of such paragraph."

We also recommend deleting or clarifying the phrase "including the immediate family members of such person" in section 203(a)(3) and clarifying the required purpose of support. As drafted, section 203(a)(3) is susceptible to multiple readings, including, for example, that the objectionable support identified in section 203(a)(3) extends to family members of designated persons only if those family members separately meet the criteria set out in section 203(a)(1). Section 203(a)(3) is also susceptible to a reading that requires sanctions for foreign persons who provided support to or received support from family members of already-designated persons, even if those family members were not designated or could not themselves be designated under section 203(a)(1). In all events, it is unclear whether the person providing support under section 203(a)(3) must have the specific intent to further the acts described in section 203(a)(1)(A) or (B), or need only know about the support they provided. The latter reading could provoke legal challenges. At least in the context of provision of support to family members, we suggest clarifying the linkage between such support and an intent to further an act described in section 203(a)(1)(A) or (B).

As we have noted above, section 203(b)(2) of the bill would make sanctioned persons ineligible to receive a visa and otherwise inadmissible to the United States. We strongly oppose such broad limitations without an available exception for law enforcement purposes and functions, and particularly object to limits on the use of parole set forth in section 203(b)(2)(A)(iii). We strongly recommend providing a law enforcement exception to "further important United States law enforcement objectives and functions," and recommend eliminating the phrase "or paroled" from the provision.

Acting on behalf of prosecutors, the Department's Office of International Affairs routinely seeks parole under the Immigration and Nationality Act (8 U.S.C § 1182(d)(5)) in order to ensure that alien fugitives located abroad, including terrorists and transnational organized criminals, can face the charges in the United States or serve penal sentences here if they already have been convicted. Section 203(b)(2)(A)(iii) of the bill would eliminate the ability of the Department of Justice to bring alien fugitives designated under section 203(a) into the United States so that they might face prosecution or serve their sentences.

Additionally, the provision would not permit parole or visas 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; in civil matters, *e.g.*, participating in settlement negotiations in civil forfeiture actions conducted by the Criminal Division's Money Laundering and Asset Recovery Section; or in a variety of investigations. This assistance—and the ability quickly to procure it—is critical to United States law enforcement investigations and prosecutions.

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 Escalona

Prim F. Escalona
Principal Deputy Assistant Attorney General

cc: The Honorable Eliot L. Engel
Ranking Member