



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUL 15 2019

The Honorable Raúl M. Grijalva
Chairman
Committee on Natural Resources
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 1568, the “Scientific Assistance for Very Endangered North Atlantic Right Whales Act.” Due to constitutional concerns with provisions of this bill, we would recommend those provisions be amended as described below.

I. Two provisions of H.R. 1568 would unconstitutionally intrude on the President’s exclusive authority over the conduct of diplomatic relations. Section 101(c)(2) would require the Secretary of Commerce, in considering whether to approve proposals for projects for the conservation of North Atlantic right whales, to “consult with respect to the proposal with the government of each . . . foreign country in which the project is to be conducted” and to “provide written notification of the approval or disapproval” of the proposal to each foreign country. Section 201(b)(4) would require the Northeast Fisheries Science Center, a component of the National Oceanic and Atmospheric Administration, to “coordinate with the Government of Canada to develop a transboundary understanding of plankton abundance and distribution,” to “the extent practicable.”

The Constitution commits to the President alone the responsibility to engage in diplomacy and formulate the position of the United States in international fora. *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”). “The President’s exclusive prerogatives in conducting the Nation’s diplomatic relations are grounded in both the Constitution’s system for the formulation of foreign policy, including the presidential powers set forth in Article II of the Constitution, and in the President’s acknowledged preeminent role in the realm of foreign relations throughout the Nation’s history.” *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 *4 (Sept. 19, 2011). Thus, the President has “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) (quoting *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 41 (1990)). Congress may not contravene this authority by requiring him or other Executive Branch officials to, for example, “initiate discussion with foreign nations.” *Earth Island Inst. v. Christopher*, 6 F.3d 648, 652 (9th Cir. 1993).

Accordingly, Congress could not require Executive Branch officials to consult or coordinate with foreign governments, or to submit notifications to foreign governments about the Secretary’s decisions. We recommend making these provisions precatory, by, for example, including “if the Secretary deems it appropriate” before each instance of “foreign country” in section 101(c)(2) and before “coordinate” in section 201(b)(4).

II. Section 103 would require the Secretary to submit annual reports to Congress that include “recommendations concerning how this title might be improved.” This requirement to recommend legislative measures would violate the Recommendations Clause, which gives the President the constitutional responsibility to “recommend to [Congress’s] Consideration such Measures as *he shall judge necessary and expedient*.” U.S. Const. art. II, § 3 (emphasis added). It precludes Congress from requiring the President or his subordinates to recommend legislation without regard to whether the President deems the legislation necessary and expedient. See *Application of the Recommendations Clause to Section 802 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003*, 40 Op. O.L.C. __, at *19 (Aug. 25, 2016). We recommend making this requirement precatory by, for instance, adding “if any” after “recommendations.”

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 Rob Bishop
Ranking Member