U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAR 27 2019

The Honorable James E. Risch
Chairman
Committee on Foreign Relations
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on S. 398, the "Saudi Arabia Accountability and Yemen Act of 2019." We strongly oppose this legislation. As we explain below, the bill raises both constitutional and policy concerns. Most significantly, provisions of the bill limiting parole into the United States would eliminate our ability to bring into the United States alien fugitives charged with criminal offenses who meet certain criteria set forth in the bill. Bringing these individuals into the United States is necessary so that they can face prosecution, serve their sentences, and provide vital assistance to law enforcement in criminal cases.

I. Constitutional Concerns

The bill presents several constitutional concerns.

Military and Foreign Affairs

1. Section 101 of the bill would state that it is "the policy of the United States" to support UN-led efforts for a political settlement in Yemen, to insist on the urgent need for a political solution in Yemen, to reject advocacy for a military solution in Yemen, and to encourage U.S. partners to take the lead in confidence-building measures in Yemen. Section 103 would require the Secretary of State to report to the Congress on the progress of the U.S. strategy to end the war in Yemen. These provisions would interfere with the President's "authority to represent the United States" in foreign affairs "and to pursue its interests outside the borders of the country." *The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the National Security Act*, 10 Op. O.L.C. 159, 160 (1986); *see also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414–15 (2003). Sections 101 and 103 should be deleted or made precatory to remove these concerns.

2. Section 106(a) would provide that "[n]o Federal funds may be obligated or expended under section 2342 of title 10, United States Code, or under any other applicable statutory authority, to provide in-flight refueling of Saudi or Saudi-led coalition non-United States aircraft conducting missions as part of the ongoing civil war in Yemen." We have concerns that such prohibitions, if they specifically overrode a presidential determination to commit the armed forces to tactical ends such as in-flight refueling, would contravene the President's constitutional authority as Commander in Chief. Restrictions on the particular manner in which the U.S. military conducts operations, including operations in support of U.S. allies, 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 (1996). Although section 106(a) is couched as a spending prohibition, *see Veto of the War Powers Resolution*, Pub. Papers 893, 895 (Oct. 24, 1973) ("The authorization and appropriations process is one of the ways in which [Congress's] influence [on foreign policy questions] can be exercised."), we are not confident that this distinction is dispositive with respect to tactical determinations of the President in the exercise of his authority as Commander in Chief. Section 106(a) should be deleted or made precatory to remove these concerns.

3. Sections 107(b) would require the President to impose sanctions on persons who hindered humanitarian relief or undermined efforts to end the conflict and promote stabilization in Yemen. Section 108(b) would similarly require the President to impose sanctions on persons who provided support for the Houthi movement in Yemen. One of the required sanctions in each of these provisions would exclude a sanctioned individual from the United States and require revocation of any existing entry documentation. S. 398, §§ 107(c)(1)(B); 108(c)(1)(B). Similarly, section 201(a)(3) would require the President to impose sanctions under the Global Magnitsky Human Rights Act on individuals he determined to be responsible for or involved in the death of Jamal Khashoggi. These sanctions would again include rendering the sanctioned individual ineligible to receive a visa to the United States and revoking any existing visas or documentation.

Article II, Section 3 of the Constitution grants the President express authority to "receive Ambassadors and other public ministers." *Cf. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2085 (2015) (noting that the Reception Clause "direct[s] the President alone to receive ambassadors"). 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 these provisions rendered statutorily inadmissible any foreign officials or representatives whom the President wished to receive, they would conflict with the President's exercise of his exclusive diplomatic powers. To address this concern, we recommend adding an exception to the sanctions regimes

above for activities necessary for the fulfillment of a constitutional authority of the President, including the receipt of ambassadors and other public ministers under Article II, Section 3.

Aggrandizement

Section 105 of the bill would restrict certain arms sales to Saudi Arabia. Section 105(d) would permit the President to waive restrictions under certain circumstances, but it would appear to require the President to wait to grant the waiver until 30 days after two events had occurred: (1) the President's submission of a certification to the Congress; and (2) "not later than 45 days" after the President's certification, the Comptroller General's submission of a report to Congress assessing the certification.

Section 105(d) would constitute an unconstitutional aggrandizement of the legislative branch by making executive actions contingent upon actions taken by the Comptroller General. The Supreme Court held in *Bowsher v. Synar* that "[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' that complies with the bicameralism and presentment requirements of Article I of the Constitution." 478 U.S. 714, 733–34 (1986); *cf. INS v. Chadha*, 462 U.S. 919, 951–52 (1983) (explaining bicameralism and presentment restrictions on legislative power). Accordingly, it is an unconstitutional aggrandizement of the legislative branch for the Congress to vest "a congressional agent," such as the Comptroller General, "with the power to exercise policy-making control over the post-enactment decisions of executive officials." *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 171 (1996) (citing *Bowsher*); *see also Bowsher*, 478 U.S. at 728 (noting that the Comptroller General is "removable only at the initiative of Congress"). We recommend revising the provision to clarify that the start of the 30-day waiting period is not contingent on the actions of the Comptroller General.

II. Policy Concerns

We have very significant policy concerns about provisions of the bill limiting parole into the United States because these provisions do not include an explicit law enforcement exception. Specifically, sections 107(c)(1)(B) and 108(c)(1)(B) of the bill would make aliens determined by the Secretary of State or the Secretary of Homeland Security as meeting any of the criteria set forth in sections 107(b) and 108(b) ineligible for parole into the United States under the Immigration and Nationality Act ("INA"). The provisions inadvertently would prevent the United States from prosecuting those designated as hindering humanitarian access and threatening the peace and stability of Yemen, as well as those supporting the Houthi movement in Yemen, for offenses committed against the United States. They would do so by impeding the presence in the United States of designated individuals who had been charged with very serious offenses or whose presence in the United States was necessary to further other law enforcement and national security interests. We strongly oppose this broad limitation on the use of parole,

absent a clear exception that accommodates the needs of the law enforcement community to bring such persons into the United States.

Acting on behalf of prosecutors and their law enforcement partners, our Criminal Division's Office of International Affairs routinely seeks parole under the INA, 8 U.S.C § 1182(d)(5), in order to ensure that alien fugitives located abroad, including terrorists, can face criminal charges in the United States or serve penal sentences here, if they already are convicted. Sections 107(c)(1(B) and 108(c)(1)(B) would eliminate the Department of Justice's ability to bring into the United States alien fugitives charged with criminal offenses who have been designated by the President as hindering humanitarian access and threatening the peace and stability of Yemen, as well as those supporting the Houthi movement in Yemen. Bringing these individuals into the United States is necessary so that they can face prosecution or serve their sentences. The unintended effect of this provision would be that individuals who commit such heinous crimes could never be brought to justice in the United States.

Additionally, the provisions would preclude parole for those individuals who must be brought into the United States to provide vital assistance to law enforcement in criminal cases, *e.g.*, assisting in a criminal investigation or testifying as a witness at a criminal trial.

For these reasons, we believe that it is absolutely essential to add to sections 107 and 108 of the bill explicit, mandatory law enforcement exemptions, along the following lines:

> EXEMPTIONS--The following activities shall be exempt from the sanctions under sections 107(c) and 108(c) of this Act:
>
> (1) any authorized law enforcement, national security, or intelligence activity of the United States.

The inclusion of an explicit law enforcement exception also would make clear that, in their efforts to return fugitives to the United States to face justice or to facilitate other vital criminal law enforcement assistance, United States Government officials, including Department of Justice and other law enforcement personnel could not be subjected to the potential criminal sanctions of sections 107(c)((3) and 108(c)((3) 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,

Stephen E. Boyd
Assistant Attorney General

cc: The Honorable Robert Menendez
Ranking Member