



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

OCT 19 2018

The Honorable Bob Corker
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 the substitute amendment to S. 2736, the "Asia Reassurance Initiative Act of 2018." While the substance of U.S. foreign policy closely aligns with many of the goals enumerated in the bill, as we explain below, the bill presents three constitutional concerns.

Authority to Conduct Foreign Affairs, Including Diplomacy (Various Provisions)

Several provisions of the bill would raise constitutional concerns by interfering with the President's constitutional authority to conduct foreign affairs, including diplomacy. These provisions should be deleted or made precatory to remove these concerns. If the bill were enacted in its current form, we would not treat these provisions as constraining the President's exclusive authorities. Such provisions include the following:

- Section 101 would declare that "[i]t is the policy of the United States to develop, and to commit to, a long-term strategic vision and a comprehensive, multifaceted, and principled United States policy for the Indo-Pacific Region."
- Section 102 would declare that "[i]t is the diplomatic strategy of the United States" to work with U.S. allies to achieve certain goals, to strengthen relationships with certain partners, to support "functional problem-solving regional architecture, including" through certain international organizations, to emphasize the commitment of the United States to certain goals, to "pursue diplomatic measures to achieve complete, verifiable, and irreversible denuclearization of North Korea," to improve civil society and the rule of law, to grow the economy through private sector partnerships with foreign partners, to pursue trade agreements, to work with Indo-Pacific countries to achieve certain ends, and to "sustain a strong military presence in the Indo-Pacific region and strengthen security relationships with allies and partners throughout the region."

- Section 201 would authorize appropriations that “shall be used” for purposes including “conduct[ing] regular bilateral and multilateral engagements” with allies and partners, and “increas[ing] maritime domain awareness programs” by, among other things, “expanding cooperation with democratic partners” and “through multilateral engagements.”
- Section 202 would reiterate the commitment of the United States to various treaties and “call[] for the strengthening and broadening of diplomatic, economic, and security ties” between the United States and Japan, the Republic of Korea, and Australia.
- Section 203 would declare that the U.S. Government “expresses grave concerns” with certain Chinese actions, “encourages China to play a constructive role in world affairs,” “seeks to build a positive, cooperative, and comprehensive relationship with China,” and is “committed to working with China on shared regional and global challenges.”
- Section 204 would reiterate the commitment of the United States to agreements with India and “call[] for the strengthening and broadening of diplomatic, economic, and security ties between the United States and India.”
- Section 208 would reiterate the commitment of the United States Government to various bilateral agreements with Indonesia, Malaysia, Singapore, and Vietnam.
- Section 209 would declare that “[i]t is the policy of the United States . . . to support the close economic, political, and security relationship between Taiwan and the United States,” “to faithfully enforce all existing United States Government commitments to Taiwan,” and to “counter efforts to change the status quo and to support peaceful resolution acceptable to both sides of the Taiwan Strait.”
- Section 210 would declare that “[i]t is the policy of the United States to continue to impose sanctions” on North Korea consistent with certain Executive Orders and that “[i]t is the policy of the United States that the objective of negotiations” regarding North Korea’s missile programs “be the complete, verifiable, and irreversible dismantlement of such programs”; it also would require the Secretary of State to report to Congress on actions taken to address North Korea’s threats and capabilities.
- Section 211 would reiterate the commitment of the United States Government to various bilateral agreements with New Zealand.
- Section 213 would declare that “[i]t is the policy of the United States — (1) to conduct . . . regular freedom of navigation, and overflight operations in the Indo-Pacific region . . . and (2) to promote multilateral negotiations to peacefully resolve maritime disputes in the South China Sea.”

- Section 216 would declare that the U.S. Government “recognizes that the spread of nuclear and other weapons of mass destruction . . . constitutes a threat to international peace and security,” “seeks to peacefully address the unique challenge posed to regional and global stability by the illicit use, and the proliferation to and from North Korea,” of weapons of mass destruction, and “recognizes the legitimate pursuit by many countries in the Indo-Pacific region of nuclear energy” for peaceful purposes.
- Section 306 would require the President to “establish a comprehensive, integrated, multiyear strategy to encourage the efforts of Indo-Pacific countries to implement national power strategies and cooperation with United States energy companies to develop an appropriate mix of power solutions to provide access to sufficient, reliable, and affordable power.”
- Section 406 would require the Secretary of State to submit to Congress a strategy “to increase cooperation with ASEAN to promoted human rights, democracy, and good governance in Southeast Asia.”

By purporting to dictate the position of the United States, these provisions could be read to require the President to adopt foreign policy consistent with these positions, and, if so, they 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).

In addition, many of these provisions — including sections 201, 202, 203, 204, 205, 210, 213, 215, and 406 — would purport to require the President and members of the executive branch to engage foreign governments. As we have previously explained, “[o]ne 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) (citation and internal quotation marks omitted), <https://www.justice.gov/file/18346/download>. In particular, some of these provisions would intrude on the President’s exclusive constitutional authority to “determine the time, scope, and objectives of international negotiations.” *Id.* at *4 (citation and internal quotation marks omitted).

To avoid infringing upon these constitutional authorities of the President, such provisions in this bill should be deleted or made precatory (e.g., by changing “shall” in each provision to “should,” or changing statements of the “policy of the United States” or commitment of the United States to the “sense of Congress”).

Authority as Commander in Chief

In addition to raising concerns with the President's foreign affairs powers, some provisions also implicate the President's role as Commander in Chief. Such provisions include the following:

- Section 201 would authorize funds that “shall” be used for, among other things, “expanding the scope of naval and coast guard training efforts with Southeast Asian countries.”
- Section 213 would declare that “[i]t is the policy of the United States . . . to conduct . . . regular freedom of navigation, and overflight operations in the Indo-Pacific region.”

While Congress has broad authority to regulate the structure and composition of the military, the Constitution commits to the President alone the “supreme command over all the military forces — such supreme and undivided command as would be necessary to the prosecution of a successful war.” *United States v. Sweeney*, 157 U.S. 281, 284 (1895); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring). “Through, or under, his orders, therefore, all military operations in times of peace, as well as war, are conducted. He has within his control the disposition of the troops, the direction of the vessels of war and the planning and execution of campaigns.” 3 Westel Woodbury Willoughby, *The Constitutional Law of the United States* 1566 (1929). We have interpreted that authority, as a general matter, to extend to tactical military decisions about how best to deploy military personnel and equipment. “[I]t is for the President alone, as Commander in Chief, to decide whether, how, and in what circumstances the Armed Forces are to make best use of” their resources. Memorandum for Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, from Randolph D. Moss, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: S. 495*, at 2 (Apr. 17, 1997); *see also Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) (As the Commander in Chief, the President “is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them *in the manner he may deem most effectual* to harass and conquer and subdue the enemy.” (emphasis added)).

For these reasons, we recommend deleting these provisions or revising the language to authorize the operations rather than require them. If the bill were enacted in its current form, we would treat these provisions in a manner consistent with the President's authority as Commander in Chief.

Executive Privilege

Certain provisions of the bill also may interfere with the President's authority to control the dissemination and disclosure of information regarding confidential diplomatic communications or bearing on national security. *See, e.g., 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, 269 (1996); *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988). Such provisions include the following:

- Section 210 would require the Secretary of State to report to Congress on the reason for the termination of sanctions relating to North Korea, including an explanation of the relationship between the termination and the cessation of activity that violates UN Security Council resolutions; it also would require the Secretary of State to report to Congress on actions taken to address North Korea's threats and capabilities.
- Section 214 would require the Secretary of State to provide to Congress an "assessment of the current and future capabilities and activities of ISIS-linked, al-Qaeda-linked, and other violent extremist groups in Southeast Asia that pose a significant threat to the United States, its allies, and its citizens interests abroad."

We recommend deleting these provisions or making them precatory. If the bill were enacted in its current form, we would treat these provisions in a manner consistent with the President's authority to control the dissemination of classified and other privileged material.

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 E. Escalona
Principal Deputy Assistant Attorney General

cc: The Honorable Robert Menendez
Ranking Member