



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

FEB 11 2020

The Honorable Eliot 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 the amendment in the nature of a substitute to H.R. 2529, the "Richard G. Lugar and Ellen O. Tauscher Act to Maintain Limits on Russian Nuclear Forces." As we explain below, the amendment raises a constitutional concern.

Sections 4(b) and 5(3) of H.R. 2529 would contravene the diplomatic-communications component of executive privilege. Section 4(b) would require the Secretary of State, in consultation with the Secretary of Defense, to brief certain congressional committees on "diplomatic interactions with Chinese government officials on arms control, including a description of formal offers made by the United States for an agreement, the responses by Chinese officials, and the dates of these interactions." Section 5(3) would require the President, if the New START Treaty were to expire without a replacement, to submit a certification to the same congressional committees describing "consultations undertaken with European and Asian Allies in advance of the Treaty's expiration, including dates and reactions."

The President has the constitutional prerogative to keep secret the existence of particular international negotiations. "The Supreme Court has acknowledged the settled application of executive privilege with respect to 'diplomatic secrets,' . . . stating that '[a]s to th[is] area[] of Art[icle] II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.'" *Assertion of Executive Privilege for Documents Concerning Conduct of Foreign Affairs with Respect to Haiti*, 20 Op. O.L.C. 5, 6 (1996) ("*Conduct of Foreign Affairs with Respect to Haiti*") (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)). "[I]t is elementary that the successful conduct of international diplomacy . . . require[s] both confidentiality and secrecy. . . . [I]t is the constitutional duty of the Executive . . . to protect the confidentiality necessary to carry out its responsibilities in the field[] of international relations" *New York Times Co. v. United States*, 403 U.S. 713, 728-30 (1971) (Stewart, J., concurring). "History is replete with examples of the Executive's refusal to produce to Congress diplomatic communications and related documents because of the prejudicial impact such

The Honorable Eliot Engel
Page 2

disclosure could have on the President's ability to conduct foreign relations." *Conduct of Foreign Affairs with Respect to Haiti*, 20 Op. O.L.C. at 6 (citing *History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. O.L.C. 751 (1982)). We therefore recommend deleting sections 4(b) and 5(3) from the 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,

A handwritten signature in cursive script that reads "Prim Escalona".

Prim F. Escalona
Principal Deputy Assistant Attorney General

cc: The Honorable Michael McCaul
Ranking Member