U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

November 1, 2011

The Honorable Ileana Ros-Lehtinen
Chairman
Committee on Foreign Affairs
United States House of Representatives
Washington, D.C. 20515

Dear Madame Chairman:

This letter presents the views of the Department of Justice on H.R. 1905, the "Iran Threat Reduction Act of 2011," as introduced on May 13, 2011. We have several constitutional comments on this bill.

a. Subsection 3(2), Section 103, and section 202 (declaring the "policy of the United States" in foreign affairs)

In three provisions of this bill, Congress purports to declare the "policy of the United States" in an area of foreign affairs that would encompass diplomatic positions taken by the United States. We recommend that these provisions be made precatory.

First, subsection 3(2) states,

> It shall be the policy of the United States to . . . fully implement all multilateral and bilateral sanctions against Iran in order to compel the Government of Iran to — (A) abandon and verifiably dismantle its nuclear capabilities; (B) abandon and verifiably dismantle its ballistic missile and unconventional weapons programs; and (C) cease all support for Foreign Terrorist Organizations and other activities aimed at undermining and destabilizing its neighbors and other nations.

Implementing "multilateral and bilateral sanctions" against Iran would require the cooperation of other nations, which in turn would almost certainly require the United States to take diplomatic initiatives to secure that cooperation.

Second, section 103 states,

> Congress declares that it is the policy of the United States to deny Iran the ability to support acts of foreign terrorist organizations and extremists and develop unconventional weapons and ballistic missiles. A critical means of achieving that goal is sanctions that

> limit Iran's ability to develop its energy resources, including its ability to explore for, extract, refine, and transport by pipeline its hydrocarbon resources, in order to limit the funds Iran has available for pursuing its objectionable activities.

Although there are non-diplomatic means of preventing Iran from supporting terrorist activity, including by means of the unilateral sanctions authorized in other parts of this bill, section 103 purports to state a general national policy that would encompass positions taken by the United States in international discussions and negotiations.

Third, section 202 states,

> It shall be the policy of the United States to support those individuals in Iran seeking a free, democratic government that respects the rule of law and protects the rights of all citizens.

Although there are non-diplomatic means of supporting such individuals, including by supplying financial assistance to appropriate individuals and organizations (*see* section 203), a provision purporting to establish a general national policy of supporting individuals in Iran who seek to change the form of their government might be construed to interfere with the President's discretion to engage in negotiations with the current Iranian government.

Thus, these three provisions would infringe upon the President's exclusive authority over diplomacy and his exclusive authority to determine the time, scope, and objectives of international negotiations. Memorandum for Joan E. Donoghue, Acting Legal Adviser, Department of State, from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Constitutionality of Section 7054 of the Fiscal Year 2009 Department of State, Foreign Operations, and Related Programs Appropriations Act* at 8 (June 1, 2009); *see also Earth Island Inst. v. Christopher*, 6 F.3d 648, 652-53 (9th Cir. 1993) (Congress may not require the Executive to "initiate discussion with foreign nations"); *see also, e.g., Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 41 (1990) (quoting II Pub. Papers Ronald Reagan 1541, 1542 (Dec. 22, 1987) (President Reagan's statement on signing the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989)); 35 Weekly Comp. Pres. Doc. 1927, 1930 (Oct. 5, 1999) (President Clinton's statement on signing the National Defense Authorization Act for Fiscal Year 2000) ("Congress may not direct that the President initiate discussions or negotiations with foreign governments"); 35 Weekly Comp. Pres. Doc. 2305, 2305 (Nov. 8, 1999) (President Clinton's statement on signing Legislation to Locate and Secure the Return of Zachary Baumel, a United States Citizen, and Other Israeli Soldiers Missing in Action) ("To the extent that this provision can be read to direct the Secretary of State to take certain positions in communications with foreign governments, it interferes with my sole constitutional authority over the conduct of diplomatic negotiations").

Therefore, we recommend making these provisions precatory. For example, subsection 3(2) and section 202 could be revised in the following manner: "It ~~shall~~ *should* be the policy of

the United States . . . ." Section 103 could be revised in the following way: "~~Congress declares that it is~~ *It should be* the policy of the United States to deny Iran . . . ."

b. Subsection 104(a) (requiring reports on countries that have agreed to impose sanctions against Iran and recommendation of measures to induce other countries also to agree)

Subsection 104(a) of the bill would "urge" the President "immediately to initiate diplomatic efforts" in international fora such as the United Nations to expand multilateral sanctions against Iran. Because it is hortatory, this directive does not infringe upon the President's diplomatic prerogatives, but subsection 104(b) then would require the President periodically to "submit to the appropriate congressional committees a report on the extent to which diplomatic efforts described in subsection (a) have been successful." "Each report shall include" a list of the countries that have agreed or not agreed to take action against Iran, H.R. 1905, § 104(b)(1), and a statement of "other measures the President recommends that the United States take to further the objectives of section 103 with respect to Iran." *Id.* § 104(b)(2).

Like subsections 205(a) and 303(a) above, the requirement to recommend other diplomatic "measures" to further the objectives of section 103 with respect to Iran would interfere with the President's prerogatives to determine the time, scope, and objectives of international diplomacy and to recommend such measures as he shall judge necessary and expedient.

In addition, the requirement to identify countries that have or have not agreed to take action against Iran could require the disclosure of confidential information gained through diplomatic negotiations. In practice, all Presidents have, whenever possible, voluntarily provided considerable information to the Congress about diplomatic communications. However, the conduct of diplomatic negotiations is a function committed to the President by the Constitution, and a requirement to disclose diplomatic communications to the Congress impermissibly intrudes on the President's ability to maintain the confidentiality of sensitive diplomatic discussions. *See* Memorandum to Andrew Fois, AAG/OLA, from Randolph D. Moss, DAAG/OLC, *Re: National Defense Authorization Act* (Aug. 2, 1996); *see also* Memorandum for Jon P. Jennings, Acting AAG/OLA, from Cornelia T.L. Pillard, DAAG/OLC, *Re: H.R. 2415, American Embassy Security Act/Foreign Relations Authorization Act, As Passed by the House and Senate* (Aug. 26, 1999) (requirements that the Executive Branch disclose diplomatic communications to Congress "impermissibly intrude on the President's negotiation power and also impermissibly intrude on the President's ability to maintain the confidentiality of documents concerning sensitive diplomatic negotiations.").

Therefore, we recommend making the reporting requirement in subsection 104(b) precatory, by changing "Each report shall include" to "Each report should include".

c. Subsection 110(a) (requiring reports on countries that have agreed to impose sanctions against Iran and recommendation of measures to induce other countries also to agree)

Subsection 110(a) would require the President to make reports to the Congress every 180 days describing the following:

> (1) the efforts of the President to mount a multilateral campaign to persuade all countries to pressure Iran to cease its nuclear, chemical, biological, and missile weapons programs and its support of acts of international terrorism;
>
> (2) the efforts of the President to persuade other governments to ask Iran to reduce in the countries of such governments the presence of Iranian diplomats and representatives of other government and military or quasi-governmental institutions of Iran, and to withdraw any such diplomats or representatives who participated in the takeover of the United States Embassy in Tehran, Iran, on November 4, 1979, or in the subsequent holding of United States hostages for 444 days;
>
> (3) the extent to which the International Atomic Energy Agency has established regular inspections of all nuclear facilities in Iran, including those facilities currently under construction; and
>
> (4) Iran's use of Iranian diplomats and representatives of other government and military or quasi-governmental institutions of Iran to promote acts of international terrorism or to develop or sustain Iran's nuclear, chemical, biological, or missile weapons programs.

These reporting requirements also could require the disclosure of confidential information gained through diplomatic negotiations and therefore should be made precatory by revising the opening clause of section 104(a) to state the following:

> Not later than 180 days after the date of the enactment of this Act and every 180 days thereafter, the President ~~shall~~ *should* transmit to the appropriate congressional committees a report describing . . . .

d. Subsection 105(a) and (b) (requiring reports to Congress on investigations into whether persons should be sanctioned for supporting Iran)

Subsections 105(a) and (b) of this bill authorize the President to impose sanctions on persons who take certain steps to help Iran develop its petroleum resources and acquire weapons of mass destruction. Subsection 104(d) would structure the procedure by which the President would conduct investigations leading to sanctions. As part of that procedure, the Secretary of State would be required to "brief the appropriate congressional committees regarding investigations initiated under this subsection," H.R. 1905, § 104(d)(3)(A), and "to provide to the

appropriate congressional committees all requested information relating to investigations or reviews initiated under this title," *id.*, § 104(d)(4)(A).

These provisions should be revised to accommodate the Executive Branch's need to maintain the confidentiality of national security information and of ongoing law enforcement investigations. *See, e.g., Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 94-95 (1998) ("Presidents since George Washington have determined on occasion, albeit very rarely, that it was necessary to withhold from Congress, if only for a limited period of time, extremely sensitive information with respect to national defense or foreign affairs"); *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 117 (1984) ("Since the early part of the 19th century, Presidents have steadfastly protected the confidentiality and integrity of investigative files from untimely, inappropriate, or uncontrollable access by the other branches, particularly the legislature."). This could be accomplished by inserting a new paragraph (7) at the end of section 104(d):

> Notwithstanding any other provision of this section, the President is not required to disclose information if doing so would compromise an ongoing law enforcement investigation or cause damage to the national security of the United States, including through the divulgence of sources and methods of intelligence or other critical classified information.

e. Section 105 (authorizing or requiring President to impose unilateral sanctions)

Section 105 would authorize (and, in some instances, require) the President to impose some combination of the sanctions listed in section 106 on persons who provide specified forms of support to Iran. Some of these potential sanctions would implicate significant property interests, including by prohibiting banking transactions that are "subject to the jurisdiction of the United States and involve any interest of the sanctioned person" (*id.* § 106(a)(7), and prohibiting persons from "acquiring, holding, withholding, using, transferring, withdrawing, transporting, importing, or exporting any property that is subject to the jurisdiction of the United States" (*id.* § 106(a)(8)). At least as applied to property located in the United States, such sanctions likely would implicate the Due Process Clause of the Fifth Amendment. ("No person shall be ... deprived of life, liberty, or property, without due process of law"). However, the bill does not provide expressly for administrative review of sanctions determinations and, as discussed below, section 111 of the bill would bar judicial review of such determinations. Therefore, if section 105 were enacted into law, we would construe it to authorize the President to establish administrative review procedures, consistent with due process requirements. *See Mathews v. Eldridge*, 424 U.S. 319 (1976) (setting forth factors to determine whether individual received process due under Constitution). We also would recommend that the Administration implement appropriate procedures; in our view, a post-deprivation process is likely to be adequate, particularly given the likelihood that some persons subject to sanctions would take steps to evade the law if given prior notice of the Government's intentions. *See, e.g., FDIC v. Mallen*, 486

U.S. 230, 240 (1988) ("An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation.") That said, given the significant interests owners have in the use and transfer of property, the Government would be required to demonstrate that pre-deprivation notice and hearing would "impinge upon the security and other foreign policy goals of the United States," *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 208 (D.C. Cir. 2001). Accordingly, a court might find that the Government must provide pre-deprivation notice and a hearing.

f. Section 111 (barring judicial review)

Section 111 states that "a determination to impose sanctions under this title shall not be reviewable in any court." Courts are very reluctant to construe statutes to preclude constitutional claims. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592, 603 (1988) (stating that "serious constitutional question . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim"); *Johnson v. Robison*, 415 U.S. 361, 367, 373-74 (1974) (finding that a statute stating that an official's decisions "on any question of law or fact . . . shall be conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision" was not "clear and convincing evidence of congressional intent" to preclude review of constitutional claims) (internal quotation marks omitted); 3 Richard J. Pierce, Jr., Administrative Law Treatise § 17.9, at 1663 (5th 2010) (explaining that the Court has never interpreted a statute to prevent review of a credible constitutional claim). Accordingly, policymakers should be aware that courts would likely not read section 111 to preclude a constitutional challenge, such as one based upon the due process concerns we expressed above, to a sanction imposed under this bill.

g. Section 204 (restricting issuance of visas to Iranian government officials)

Section 204 would require the President to impose sanctions on numerous Iranian officials, "including the Supreme Leader, the President, Members of the Cabinet, Members of the Assembly of Experts, Members of the Ministry of Intelligence Services, or any Member of the Iranian Revolutionary Guard Corps with the rank of brigadier general and above, including members of paramilitary organizations such as Ansar-e-Hezbollah and Basij-e Mostaz'afin," unless, as to a particular official, "the President determines and certifies to the appropriate congressional committees that such person, based on credible evidence, is not responsible for or complicit in ... the commission of serious human rights abuses against citizens of Iran or their family members on or after June 12, 2009[.]" The sanctions that the President would be required to impose would be "ineligibility for a visa to enter the United States and sanctions pursuant to [IEEPA], including blocking of property and restrictions or prohibitions on financial transactions and the exportation and importation of property." However, these sanctions would be "subject to such regulations as the President may prescribe, including regulatory exceptions to permit the United States to comply with the [UN Headquarters Agreement], and other applicable international obligations."

If this provision were enacted into law, we would construe it to authorize the President to promulgate regulations permitting Iranian government officials to enter the United States for diplomatic purposes, in such circumstances as he deems appropriate. By its plain terms, section 204 indicates that it is not intended to bar Iranian officials from entering the United States in circumstances contemplated by the U.N. Headquarters Agreement, or any other relevant international accord. It also is clear from the text of the bill that these express exceptions are merely illustrative – the President's authority under this section *"includ[es]"* discretion to allow Iranian officials to enter the United States to engage in diplomacy at the U.N., or as other international obligations require. Therefore, we think that section 204 can be fairly construed as also authorizing the President to grant visa entry to Iranian officials for other diplomatic purposes.

Moreover, this construction would avoid a serious constitutional concern that would arise if section 204 were read to prohibit the President from granting Iranian officials visas to enter the United States for diplomatic purposes. Article II, section 3 grants the President express authority to "receive Ambassadors and other public ministers." We previously have described that authority as "unfettered," and, accordingly, we have construed a similar sanctions provision "not to reach the entry of high-ranking [foreign government] officials for the purpose of engaging in diplomatic relations." *See* Memorandum to Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, from Randolph D. Moss, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: S. 810, A Bill to Impose Certain Sanctions on the People's Republic of China* (June 25, 1997); *see also* Memorandum for Jon P. Jennings, Acting Assistant Attorney General, Office of Legislative Affairs, from William Michael Treanor, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Serbian Democratization Act of 1999* (June 29, 1999) (concluding that similar visa restrictions "would be unconstitutional" insofar as they would "preclude[e] the President from inviting an Ambassador or public minister who fell within a proscribed category from visiting the United States").

Thank you for the opportunity to present our views. 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,

Ronald Weich
Assistant Attorney General

cc: The Honorable Howard L. Berman
Ranking Minority Member