

July 20, 2021

The Honorable Nancy Pelosi
H-204, The Capitol
Washington, DC 20515

The Honorable Kevin McCarthy
H-204, The Capitol
Washington, DC 20515

The Honorable Gregory Meeks
2310 Rayburn House Office Building
Washington, DC 20515

The Honorable Michael McCaul
2120 Rayburn House Office Building
Washington, DC 20515

Re: Support for Section 3310 of the U.S. Innovation and Competition Act of 2021¹

Dear Speaker Pelosi, Leader McCarthy, Chairman Meeks, and Ranking Member McCaul,

The undersigned organizations, a broad and diverse group committed to ensuring integrity of our government institutions through increased transparency and accountability, write to urge your support of Section 3310 of the U.S. Innovation and Competition Act of 2021 (“Section 3310”), which passed the Senate by a bipartisan vote last month.

Section 3310 modifies Section 310 of the Strategic Competition Act of 2021, which received overwhelming bipartisan support from the Senate Foreign Relations Committee (SFRC) and has been lauded by transparency and accountability scholars as providing “the most significant improvement in the transparency of international agreements since the enactment of the Case Act in 1972.”² Concerns that section 3310 would undermine the United States’ ability to conduct diplomacy are unfounded because the modifications in Section 3310 ensure the executive branch

¹ Section 3310 of the U.S. Innovation and Competition Act of 2021, S.1260, is a modified version of section 310 of the Strategic Competition Act of 2021, S. 1169, which was reported out of the Senate Foreign Relations Committee by a vote of 21-1.

² Curtis Bradley, et. al., *An Opportunity for Congress to Improve Transparency of the Executive’s International Agreements*, Lawfare (April 21, 2021), <https://www.lawfareblog.com/opportunity-congress-improve-transparency-executives-international-agreements>

has the tools to protect the flexibility and confidentiality needed for international negotiations, including Presidential waiver authority and the ability to provide information in a classified format, while maintaining critical improvements in accountability to Congress and public transparency.

Our constitutional democracy acknowledges the importance of congressional oversight of the executive's major foreign policy actions; for example, the Constitution provides the Senate the duty to approve, by a two-thirds vote, treaties that have been negotiated by the executive branch.³ This advice and consent requirement provides a critical check on the executive's ability to unilaterally commit our nation to agreements with foreign nations. Without this requirement, one of the most significant functions of our government — advancing the interests of the American people through foreign policy — would happen without the ability for meaningful congressional oversight or public inspection.

The Case-Zablocki Act (“Case Act”) was enacted in 1972 to prevent such an undemocratic consequence when the executive branch began to shift its foreign negotiations away from the use of treaties to executive agreements that do not require the advice and consent of the Senate.⁴[4]

Under the Case Act, the Secretary of State is required to transmit to Congress the text of international agreements no later than sixty days after their entry into force; however, the current regime does not require the executive branch to make international agreements public, nor does it impose any notice or transparency requirements on non-binding arrangements.

Nearly fifty years after enactment of the Case Act, the executive branch has shifted again — this time toward greater use of non-binding arrangements and other instruments, such as the recent U.S. peace deal with the Taliban. This most recent shift has resulted in another transparency gap that has once again left Congress without the ability to conduct the oversight that our system of checks and balances requires and the ability to inspect that the American people must possess in order to be a well-informed citizenry.

The last several years have shown the vulnerability to abuse attributable to the Case Act's outdated model. For example, the State Department and the Department of Homeland Security (DHS) both refused to be responsive to Congress on agreements/arrangements related to Guatemala, El Salvador, and Honduras (collectively referenced as “the Northern Triangle countries”). Despite repeated requests for copies of all agreements/arrangements and implementing materials for the dozen or so instruments the executive branch negotiated with the Northern Triangle countries, the State Department, DHS, and the White House largely refused to provide them to Congress or the public. In 2020, the State Department concluded an agreement with Sudan that sought to restore Sudan's sovereign immunity while simultaneously terminating thousands of 9/11 victim family claims pending in federal court. The Department approached Congress only after the contours of

³ U.S. Const art. II, § 2

⁴ 1 U.S.C. § 112b

the deal had already been negotiated with Sudan, and the Department failed to point out the serious negative implications of the deal for 9/11 families. The Department's deal with Sudan came perilously close to collapsing over this issue. In June 2019, the State Department concluded the U.S.-Mexico Joint Declaration and Supplementary Agreement. The text of the Joint Declaration was published on the State Department's website, but the Supplementary Agreement remained inaccessible to Congress and the public.

We applaud the Senate Foreign Relations Committee for working on a bipartisan basis to update the Case Act. Congress must have access to basic information about international agreements and arrangements so it can formulate proper inquiries for oversight and analysis. Section 3310 modernizes the Case Act by adding a legislative regime for congressional notice and publication that is balanced with classification and waiver options to protect the executive branch's need for flexibility and confidentiality in its diplomatic relations.

The updated Case Act would require that the Secretary of State provide a monthly "look back" to the congressional committees of applicable jurisdiction that includes a list of international agreements and certain non-binding instruments approved for negotiation, along with a description of the intended subject matter and parties or participants to each such agreement or instrument; and a list of international agreements and certain non-binding instruments finalized in the prior month, along with the relevant text and legal authority relied upon. There is no requirement that agreements or applicable arrangements be disclosed to the public prior to conclusion, and information or text of agreements and other instruments can be provided in a classified form. Furthermore, the President can waive the written congressional notification requirements for certain highly-sensitive negotiations, while providing for a strictly-limited "gang-of-eight" briefing in those situations. The updates also add a required annual unclassified report to Congress that must be made public and include a list of all unclassified agreements and certain non-binding instruments that entered into force or became operative during the prior year. These modest but critical notice and publication requirements are necessary to restore the Case Act to function in accordance with its original purpose of ensuring the transparency of international arrangements in our modern foreign policy landscape.

The undersigned groups are aligned in our belief that protecting our democracy requires balancing the need for flexible and confidential international negotiations with improvements in accountability and transparency such as those set forth in Section 3310. Accordingly, we respectfully urge your support of this provision as the U.S. Innovation and Competition Act of 2021 continues to advance.

Sincerely,

Citizens for Responsibility and Ethics in Washington (CREW)
American Oversight
Government Accountability Project

Government Information Watch
National Security Archive
Open the Government
Protect Democracy
Transparency International - U.S. Office

cc: House Foreign Affairs Committee