

110TH CONGRESS
2D SESSION

S. 3501

To ensure that Congress is notified when the Department of Justice determines that the Executive Branch is not bound by a statute.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 16, 2008

Mr. FEINGOLD (for himself and Mrs. FEINSTEIN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To ensure that Congress is notified when the Department of Justice determines that the Executive Branch is not bound by a statute.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “OLC Reporting Act
5 of 2008”.

6 **SEC. 2. REPORTING.**

7 Section 530D of title 28, United States Code, is
8 amended—

9 (1) in subsection (a)—

10 (A) in paragraph (1)—

1 (i) in subparagraph (B), by striking
2 “or” at the end;

3 (ii) by redesignating subparagraph
4 (C) as subparagraph (D); and

5 (iii) by inserting after subparagraph
6 (B) the following:

7 “(C) except as provided in paragraph (3),
8 issues an authoritative legal interpretation (in-
9 cluding an interpretation under section 511,
10 512, or 513 by the Attorney General or by an
11 officer, employee, or agency of the Department
12 of Justice pursuant to a delegation of authority
13 under section 510) of any provision of any Fed-
14 eral statute—

15 “(i) that concludes that the provision
16 is unconstitutional or would be unconstitu-
17 tional in a particular application;

18 “(ii) that relies for the conclusion of
19 the authoritative legal interpretation, in
20 whole or in the alternative, on a deter-
21 mination that an interpretation of the pro-
22 vision other than the authoritative legal in-
23 terpretation would raise constitutional con-
24 cerns under article II of the Constitution

1 of the United States or separation of pow-
2 ers principles;

3 “(iii) that relies for the conclusion of
4 the authoritative legal interpretation, in
5 whole or in the alternative, on a legal pre-
6 sumption against applying the provision,
7 whether during a war or otherwise, to—

8 “(I) any department or agency
9 established in the executive branch of
10 the Federal Government, including
11 the Executive Office of the President
12 and the military departments (as de-
13 fined in section 101(8) of title 10); or

14 “(II) any officer, employee, or
15 member of any department or agency
16 established in the executive branch of
17 the Federal Government, including
18 the President and any member of the
19 Armed Forces; or

20 “(iv) that concludes the provision has
21 been superseded or deprived of effect in
22 whole or in part by a subsequently enacted
23 statute where there is no express statutory
24 language stating an intent to supersede the
25 prior provision or deprive it of effect; or”;

1 (B) in paragraph (2), by striking “For the
2 purposes” and all that follows through “if the
3 report” and inserting “Except as provided in
4 paragraph (4), a report shall be considered to
5 be submitted to the Congress for the purposes
6 of paragraph (1) if the report”; and

7 (C) by adding at the end the following:

8 “(3) DIRECTION REGARDING INTERPRETA-
9 TION.—The submission of a report to Congress
10 based on the issuance of an authoritative legal inter-
11 pretation described in paragraph (1)(C) shall be dis-
12 cretionary on the part of the Attorney General or an
13 officer described in subsection (e) if—

14 “(A) the President or other responsible of-
15 ficer of a department or agency established in
16 the executive branch of the Federal Govern-
17 ment, including the Executive Office of the
18 President and the military departments (as de-
19 fined in section 101(8) of title 10), expressly di-
20 rects that no action be taken or withheld or pol-
21 icy implemented or stayed on the basis of the
22 authoritative legal interpretation; and

23 “(B) the directive described in subpara-
24 graph (A) is in effect.

25 “(4) CLASSIFIED INFORMATION.—

1 “(A) SUBMISSION OF REPORT CONTAINING
2 CLASSIFIED INFORMATION REGARDING INTEL-
3 LIGENCE ACTIVITIES.—Except as provided in
4 subparagraph (B), if the Attorney General sub-
5 mits a report relating to an instance described
6 in paragraph (1) that includes a classified
7 annex containing information relating to intel-
8 ligence activities, the report shall be considered
9 to be submitted to the Congress for the pur-
10 poses of paragraph (1) if—

11 “(i) the unclassified portion of the re-
12 port is submitted to each officer specified
13 in paragraph (2); and

14 “(ii) the classified annex is submitted
15 to the Select Committee on Intelligence
16 and the Committee on the Judiciary of the
17 Senate and the Permanent Select Com-
18 mittee on Intelligence and the Committee
19 on the Judiciary of the House of Rep-
20 resentatives.

21 “(B) SUBMISSION OF REPORT CONTAINING
22 CERTAIN CLASSIFIED INFORMATION ABOUT
23 COVERT ACTIONS.—

24 “(i) IN GENERAL.—In a circumstance
25 described in clause (ii), a report described

1 in that clause shall be considered to be
2 submitted to the Congress for the purposes
3 of paragraph (1) if—

4 “(I) the unclassified portion of
5 the report is submitted to each officer
6 specified in paragraph (2); and

7 “(II) the classified annex is sub-
8 mitted to—

9 “(aa) the chairman and
10 ranking minority member of the
11 Select Committee on Intelligence
12 of the Senate;

13 “(bb) the chairman and
14 ranking minority member of the
15 Committee on the Judiciary of
16 the Senate;

17 “(cc) the chairman and
18 ranking minority member of the
19 Permanent Select Committee on
20 Intelligence of the House of Rep-
21 resentatives;

22 “(dd) the chairman and
23 ranking minority member of the
24 Committee on the Judiciary of
25 the House of Representatives;

1 “(ee) the Speaker and mi-
2 nority leader of the House of
3 Representatives; and

4 “(ff) the majority leader and
5 minority leader of the Senate.

6 “(ii) CIRCUMSTANCES.—A cir-
7 cumstance described in this clause is a cir-
8 cumstance in which—

9 “(I) the Attorney General sub-
10 mits a report relating to an instance
11 described in paragraph (1) that in-
12 cludes a classified annex containing
13 information relating to a Presidential
14 finding described in section 503(a) of
15 the National Security Act of 1947 (50
16 U.S.C. 413b(a)); and

17 “(II) the President determines
18 that it is essential to limit access to
19 the information described in subclause
20 (I) to meet extraordinary cir-
21 cumstances affecting vital interests of
22 the United States.”;

23 (2) in subsection (b)—

24 (A) in paragraph (2), by striking “and” at
25 the end;

1 (B) by redesignating paragraph (3) as
2 paragraph (4);

3 (C) by inserting after paragraph (2) the
4 following:

5 “(3) under subsection (a)(1)(C)—

6 “(A) not later than 30 days after the date
7 on which the Attorney General, the Office of
8 Legal Counsel, or any other officer of the De-
9 partment of Justice issues the authoritative
10 legal interpretation of the Federal statutory
11 provision; or

12 “(B) if the President or other responsible
13 officer of a department or agency established in
14 the executive branch of the Federal Govern-
15 ment, including the Executive Office of the
16 President and the military departments (as de-
17 fined in section 101(8) of title 10), issues a di-
18 rective described in subsection (a)(3) and the
19 directive is subsequently rescinded, not later
20 than 30 days after the date on which the Presi-
21 dent or other responsible officer rescinds that
22 directive; and”;

23 (D) in paragraph (4), as so redesignated,
24 by striking “subsection (a)(1)(C)” and inserting
25 “subsection (a)(1)(D)”;

1 (3) in subsection (c)—

2 (A) in paragraph (1), by striking “or of
3 each approval described in subsection
4 (a)(1)(C)” and inserting “of the issuance of the
5 authoritative legal interpretation described in
6 subsection (a)(1)(C), or of each approval de-
7 scribed in subsection (a)(1)(D)”;

8 (B) by redesignating paragraphs (2) and
9 (3) as paragraphs (3) and (4), respectively;

10 (C) by inserting after paragraph (1) the
11 following:

12 “(2) with respect to a report required under
13 subparagraph (A), (B), or (C) of subsection (a)(1),
14 specify the Federal statute, rule, regulation, pro-
15 gram, policy, or other law at issue, and the para-
16 graph and clause of subsection (a)(1) that describes
17 the action of the Attorney General or other officer
18 of the Department of Justice;”;

19 (D) in paragraph (3), as so redesignated—

20 (i) by striking “reasons for the policy
21 or determination” and inserting “reasons
22 for the policy, authoritative legal interpre-
23 tation, or determination”;

1 (ii) by inserting “issuing such authori-
2 tative legal interpretation,” after “or im-
3 plementing such policy,”;

4 (iii) by striking “except that” and in-
5 sserting “provided that”;

6 (iv) by redesignating subparagraphs
7 (A) and (B) as subparagraphs (B) and
8 (C), respectively;

9 (v) by inserting before subparagraph
10 (B), as so redesignated, the following:

11 “(A) any classified information shall be
12 provided in a classified annex, which shall be
13 handled in accordance with the security proce-
14 dures established under section 501(d) of the
15 National Security Act of 1947 (50 U.S.C.
16 413(d));”;

17 (vi) in subparagraph (B), as so reded-
18 igned—

19 (I) by inserting “except for infor-
20 mation described in paragraph (1) or
21 (2),” before “such details may be
22 omitted”;

23 (II) by striking “national-
24 security- or classified information, of
25 any”; and

1 (III) by striking “or other law”
2 and inserting “or other statute”;

3 (vii) in subparagraph (C), as so redesi-
4 gnated—

5 (I) by redesignating clauses (i)
6 and (ii) as clauses (ii) and (iii), re-
7 spectively;

8 (II) by inserting before clause
9 (ii), as so redesignated, the following:

10 “(i) in the case of an authoritative
11 legal interpretation described in subsection
12 (a)(1)(C), if a copy of the Office of Legal
13 Counsel or other legal opinion setting forth
14 the authoritative legal interpretation is
15 provided;”;

16 (III) in clause (ii), as so redesi-
17 gnated, by striking “subsection
18 (a)(1)(C)(i)” and inserting “sub-
19 section (a)(1)(D)(i)”;

20 (IV) in clause (iii), as so redesi-
21 gnated, by striking “subsection
22 (a)(1)(C)(ii)” and inserting “sub-
23 section (a)(1)(D)(ii)”;

1 (E) in paragraph (4), as so redesignated,
2 by striking “subsection (a)(1)(C)(i)” and insert-
3 ing “subsection (a)(1)(D)(i)”; and
4 (4) in subsection (e)—
5 (A) by striking “(but only with respect to
6 the promulgation of any unclassified Executive
7 order or similar memorandum or order)”; and
8 (B) by inserting “issues an authoritative
9 interpretation described in subsection
10 (a)(1)(C),” after “policy described in subsection
11 (a)(1)(A),”.

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