

Calendar No. 1083

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

SEPTEMBER 25 (legislative day, SEPTEMBER 17), 2008

Reported by Mr. LEAHY, without amendment

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”.

1 **SEC. 2. REPORTING.**

2 Section 530D of title 28, United States Code, is
3 amended—

4 (1) in subsection (a)—

5 (A) in paragraph (1)—

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

8 (ii) by redesignating subparagraph
9 (C) as subparagraph (D); and

10 (iii) by inserting after subparagraph
11 (B) the following:

12 “(C) except as provided in paragraph (3),
13 issues an authoritative legal interpretation (in-
14 cluding an interpretation under section 511,
15 512, or 513 by the Attorney General or by an
16 officer, employee, or agency of the Department
17 of Justice pursuant to a delegation of authority
18 under section 510) of any provision of any Fed-
19 eral statute—

20 “(i) that concludes that the provision
21 is unconstitutional or would be unconstitu-
22 tional in a particular application;

23 “(ii) that relies for the conclusion of
24 the authoritative legal interpretation, in
25 whole or in the alternative, on a deter-
26 mination that an interpretation of the pro-

1 vision other than the authoritative legal in-
2 terpretation would raise constitutional con-
3 cerns under article II of the Constitution
4 of the United States or separation of pow-
5 ers principles;

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

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

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

23 “(iv) that concludes the provision has
24 been superseded or deprived of effect in
25 whole or in part by a subsequently enacted

1 statute where there is no express statutory
2 language stating an intent to supersede the
3 prior provision or deprive it of effect; or”;

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

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

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

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

1 “(B) the directive described in subpara-
2 graph (A) is in effect.

3 “(4) CLASSIFIED INFORMATION.—

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

14 “(i) the unclassified portion of the re-
15 port is submitted to each officer specified
16 in paragraph (2); and

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

1 “(B) SUBMISSION OF REPORT CONTAINING
2 CERTAIN CLASSIFIED INFORMATION ABOUT
3 COVERT ACTIONS.—

4 “(i) IN GENERAL.—In a circumstance
5 described in clause (ii), a report described
6 in that clause shall be considered to be
7 submitted to the Congress for the purposes
8 of paragraph (1) if—

9 “(I) the unclassified portion of
10 the report is submitted to each officer
11 specified in paragraph (2); and

12 “(II) the classified annex is sub-
13 mitted to—

14 “(aa) the chairman and
15 ranking minority member of the
16 Select Committee on Intelligence
17 of the Senate;

18 “(bb) the chairman and
19 ranking minority member of the
20 Committee on the Judiciary of
21 the Senate;

22 “(cc) the chairman and
23 ranking minority member of the
24 Permanent Select Committee on

1 Intelligence of the House of Rep-
2 resentatives;

3 “(dd) the chairman and
4 ranking minority member of the
5 Committee on the Judiciary of
6 the House of Representatives;

7 “(ee) the Speaker and mi-
8 nority leader of the House of
9 Representatives; and

10 “(ff) the majority leader and
11 minority leader of the Senate.

12 “(ii) CIRCUMSTANCES.—A cir-
13 cumstance described in this clause is a cir-
14 cumstance in which—

15 “(I) the Attorney General sub-
16 mits a report relating to an instance
17 described in paragraph (1) that in-
18 cludes a classified annex containing
19 information relating to a Presidential
20 finding described in section 503(a) of
21 the National Security Act of 1947 (50
22 U.S.C. 413b(a)); and

23 “(II) the President determines
24 that it is essential to limit access to
25 the information described in subclause

1 (I) to meet extraordinary cir-
2 cumstances affecting vital interests of
3 the United States.”;

4 (2) in subsection (b)—

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

7 (B) by redesignating paragraph (3) as
8 paragraph (4);

9 (C) by inserting after paragraph (2) the
10 following:

11 “(3) under subsection (a)(1)(C)—

12 “(A) not later than 30 days after the date
13 on which the Attorney General, the Office of
14 Legal Counsel, or any other officer of the De-
15 partment of Justice issues the authoritative
16 legal interpretation of the Federal statutory
17 provision; or

18 “(B) if the President or other responsible
19 officer of a department or agency established in
20 the executive branch of the Federal Govern-
21 ment, including the Executive Office of the
22 President and the military departments (as de-
23 fined in section 101(8) of title 10), issues a di-
24 rective described in subsection (a)(3) and the
25 directive is subsequently rescinded, not later

1 than 30 days after the date on which the Presi-
2 dent or other responsible officer rescinds that
3 directive; and”;

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

7 (3) in subsection (c)—

8 (A) in paragraph (1), by striking “or of
9 each approval described in subsection
10 (a)(1)(C)” and inserting “of the issuance of the
11 authoritative legal interpretation described in
12 subsection (a)(1)(C), or of each approval de-
13 scribed in subsection (a)(1)(D)”;

14 (B) by redesignating paragraphs (2) and
15 (3) as paragraphs (3) and (4), respectively;

16 (C) by inserting after paragraph (1) the
17 following:

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

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

1 (i) by striking “reasons for the policy
2 or determination” and inserting “reasons
3 for the policy, authoritative legal interpre-
4 tation, or determination”;

5 (ii) by inserting “issuing such authori-
6 tative legal interpretation,” after “or im-
7 plementing such policy,”;

8 (iii) by striking “except that” and in-
9 serting “provided that”;

10 (iv) by redesignating subparagraphs
11 (A) and (B) as subparagraphs (B) and
12 (C), respectively;

13 (v) by inserting before subparagraph
14 (B), as so redesignated, the following:

15 “(A) any classified information shall be
16 provided in a classified annex, which shall be
17 handled in accordance with the security proce-
18 dures established under section 501(d) of the
19 National Security Act of 1947 (50 U.S.C.
20 413(d));”;

21 (vi) in subparagraph (B), as so redesi-
22 gnated—

23 (I) by inserting “except for infor-
24 mation described in paragraph (1) or

1 (2),” before “such details may be
2 omitted”;

3 (II) by striking “national-
4 security- or classified information, of
5 any”; and

6 (III) by striking “or other law”
7 and inserting “or other statute”;

8 (vii) in subparagraph (C), as so redesi-
9 gnated—

10 (I) by redesignating clauses (i)
11 and (ii) as clauses (ii) and (iii), re-
12 spectively;

13 (II) by inserting before clause
14 (ii), as so redesignated, the following:

15 “(i) in the case of an authoritative
16 legal interpretation described in subsection
17 (a)(1)(C), if a copy of the Office of Legal
18 Counsel or other legal opinion setting forth
19 the authoritative legal interpretation is
20 provided;”;

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

1 (IV) in clause (iii), as so redesignig-
2 nated, by striking “subsection
3 (a)(1)(C)(ii)” and inserting “sub-
4 section (a)(1)(D)(ii)”; and

5 (E) in paragraph (4), as so redesignated,
6 by striking “subsection (a)(1)(C)(i)” and insert-
7 ing “subsection (a)(1)(D)(i)”; and

8 (4) in subsection (e)—

9 (A) by striking “(but only with respect to
10 the promulgation of any unclassified Executive
11 order or similar memorandum or order)”; and

12 (B) by inserting “issues an authoritative
13 interpretation described in subsection
14 (a)(1)(C),” after “policy described in subsection
15 (a)(1)(A),”.

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