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OLC REPORTING ACT OF 2008

DECEMBER 11 (legislative day, DECEMBER 10), 2008.—Ordered to be printed

Mr. LEAHY, from the Committee on the Judiciary,
submitted the following

R E P O R T

[To accompany S. 3501]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 3501), to ensure that Congress is notified when the Department of Justice determines that the Executive Branch is not bound by a statute, having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

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I. BACKGROUND AND PURPOSE OF THE OLC REPORTING ACT OF 2008

The purpose of the OLC Reporting Act of 2008 (“the Act”) is to provide a targeted response to a particularly problematic manifestation of “secret law”—secret legal opinions issued by the Department of Justice (DOJ) that effectively exempt the executive branch from compliance with federal statutes. The Act requires the Attorney General to report to Congress when DOJ issues such an opinion, thus allowing Congress to assess the Department’s interpretation and respond, where necessary, through legislation or oversight.

It is a basic tenet of democracy that the people have a right to know the law. The notion of “secret law” has been described in court opinions and law treatises as “repugnant” and “an abomination.”¹ In keeping with this principle, the laws passed by Congress and the case law developed by the courts have historically been matters of public record. When it became apparent in the middle of the 20th century that federal agencies were increasingly creating a body of non-public administrative law, Congress passed several statutes requiring this law to be made public—including the Federal Register Act, the Administrative Procedure Act, and the Freedom of Information Act—for the express purpose of preventing a regime of “secret law.”

The law that applies in this country, however, includes more than just statutes, case law, and agency regulations. It includes certain controlling legal interpretations issued by the executive branch—in particular, legal opinions issued by DOJ’s Office of Legal Counsel (OLC).

An opinion issued by OLC is not just a piece of legal advice, such as the advice individuals or corporations might solicit from their lawyers. An OLC opinion binds the entire executive branch, just like the ruling of a court. If a court were to reach a different interpretation than OLC, the court’s interpretation would prevail—but many OLC opinions concern matters that courts never have the chance to decide. On those matters, OLC essentially is the final interpreter of the law. In the words of Jack Goldsmith, former head of OLC under President Bush: “These executive branch precedents are ‘law’ for the executive branch.”²

Opinions by OLC are “law” in another sense, as well. Attorney General Mukasey has stated that DOJ will not prosecute a government actor for criminal conduct if he or she relied on an OLC opinion.³ Thus, even if a court overturns OLC’s interpretation, the opinion may grant retroactive immunity for past violations of the law.

The Bush administration has relied heavily on secret OLC opinions in a broad range of matters involving core constitutional rights and civil liberties. The administration’s policies on interrogation of detainees were justified by OLC opinions that were withheld from Congress and the public for several years. The President’s warrantless wiretapping program was justified by OLC opinions that, to this day, have been seen only by a select few members of Congress. And, when it was finally made public this year, the March 2003 memorandum on torture written by John Yoo was filled with references to other OLC memos that Congress and the public have never seen—on subjects ranging from the government’s ability to detain U.S. citizens without congressional authorization to the government’s ability to operate outside the Fourth Amendment in domestic military operations.

The few opinions whose content has been made public share a notable characteristic: They conclude that various laws enacted by

¹ *Torres v. Immigration and Naturalization Serv.*, 144 F.3d 472, 474 (7th Cir. 1998) (“The idea of secret laws is repugnant.”); Kenneth Davis, *Administrative Law Treatise* 137 (1970) (“Secret law is an abomination.”).

² Jack Goldsmith, *The Terror Presidency* 36 (2007).

³ Oversight of the Department of Justice: Hearing Before the S. Comm. on the Judiciary, 110th Cong. (July 9, 2008) (forthcoming) (testimony of Michael B. Mukasey, Attorney General of the United States: “Any CIA official who acted in good faith reliance on an opinion by the Department of Justice that his or her conduct was lawful cannot and should not be prosecuted . . .”).

Congress do not apply to the conduct of the executive branch. The March 2003 Yoo torture memo took the alarming position that the executive branch was not bound by the criminal statute prohibiting torture when interrogating detainees. Similarly, former acting OLC head Steve Bradbury has acknowledged that the President's warrantless wiretapping program was supported by OLC opinions claiming that the President's wiretapping authority was not limited by the constraints of the Foreign Intelligence Surveillance Act. The titles of other OLC opinions referenced in the March 2003 Yoo torture memo strongly suggest that other statutory constraints have been disregarded in a similar manner.

The secrecy of these opinions cannot be justified or explained away by a wholesale claim of privilege. To be sure, there are sound arguments for shielding from public disclosure deliberations among OLC lawyers, and some OLC opinions. But once a final OLC opinion is issued and adopted as the basis for an executive branch policy, that opinion is no longer mere legal advice or a deliberative document—it is effectively the law. John P. Elwood, the Deputy Assistant Attorney General for OLC, acknowledged in testimony before the Constitution Subcommittee that the confidentiality interest in OLC opinions is “completely different” for opinions that have been implemented as policy, and that such opinions should be made public “as fast as possible.”

The case law reflects this distinction between legal advice or deliberations, on the one hand, and final opinions that support agency policy or action, on the other. The Supreme Court has held that “opinions and interpretations which embody [an] agency’s effective law and policy” are not privileged, precisely because agencies otherwise would be operating under “secret law.”⁴ The Second Circuit has applied this analysis to the particular context of OLC opinions, and has held that the attorney-client privilege does not apply to OLC opinions if those opinions have been adopted as, or incorporated into, an agency’s policy.⁵

There is an even stronger interest in disclosure when an OLC opinion concludes that the executive branch is not bound by a federal statute. In such cases, the executive branch is no longer operating according to the rules that are on the books. Such opinions create a separate—and sometimes conflicting—regime of secret law. Moreover, Congress has an institutional and constitutional interest in knowing when DOJ opines that the executive branch is not bound by a statute, and the reasons for that opinion. If DOJ concludes that a statute is unconstitutional, Congress may wish to challenge that position, or it may decide to rewrite the law to avoid the perceived constitutional problem. Similarly, if DOJ concludes that Congress did not intend for a statute to apply to the executive branch, then Congress should have the opportunity to assess that conclusion and revise the law, if necessary, to make its intent clear. None of this can happen when Congress is denied access to the opinion.

Recognizing Congress’s strong interest in knowing when DOJ takes issue with its enactments, current law requires the Attorney

⁴*National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

⁵See *National Council of La Raza v. Department of Justice*, 411 F.3d 350 (2d Cir. 2005) (the three-judge panel was unanimous and the Department of Justice did not seek Supreme Court review).

General to report to Congress when DOJ decides that it will not enforce or defend a statute because it considers the statute unconstitutional. This reporting provision, however, does not reach situations in which OLC stops short of declaring a statute unconstitutional and, instead, construes the statute not to apply to the executive branch in order to avoid a finding of unconstitutionality. At an April 30, 2008, Constitution Subcommittee hearing entitled “Secret Law and the Threat to Democratic and Accountable Government,” Dawn E. Johnsen, who served as Acting Assistant Attorney General for OLC for two years under President Clinton, and Bradford A. Berenson, who served as counsel to President Bush from 2001 through 2003, agreed that the law should be amended to require reporting to Congress in these situations as well.

The OLC Reporting Act of 2008 grew out of this bipartisan agreement. It was drafted with the substantial assistance and input of Johnsen, Berenson, and a group of former OLC officials and attorneys, many of whom are constitutional scholars.⁶ The aim was to craft targeted legislation that would allow Congress to be sufficiently informed when OLC determines that a particular statute does not bind the executive branch, without encroaching on the institutional interests and prerogatives of OLC or the executive branch more generally. The result is legislation that takes a measured and balanced approach to the problem.

The bill adds a new disclosure requirement to 28 U.S.C. 530D, the statutory provision that requires the Attorney General to report to Congress if DOJ decides not to enforce or defend a statute on the ground that it is unconstitutional. Under the bill, the Attorney General must also report to Congress under four circumstances:

First, a report is required if DOJ issues an opinion that concludes that a federal statute is unconstitutional. Current law requires reporting only when DOJ decides not to defend or enforce a statute, which does not necessarily reach cases in which an agency policy conflicts with a statute but DOJ is not presented with the opportunity for an enforcement action and the policy has not been challenged in court.

Second, a report is required if DOJ relies on the so-called “doctrine of constitutional avoidance” and cites Article II or the separation of powers. In other words, a report is required if DOJ determines that applying a statute to executive branch officials would raise constitutional problems but that it will be construed not to apply. Regardless of the validity of this determination, the effect is to exempt executive branch officials from the statute’s reach—a result that Congress should know.

Third, a report is required if DOJ relies on a legal presumption against applying a statute to the executive branch. For example, the March 2003 Yoo torture memo relied on the legal presumption that laws of general applicability, such as those prohibiting torture, do not apply to the conduct of the military during wartime. The criterion of a legal presumption, as used in the bill, serves to keep the reporting requirement narrowly tailored: It captures situations in which the executive branch is exempted from a statute categorically, without requiring reporting in more run-of-the-mill cases

⁶Johnsen and Berenson’s joint letter in support of the bill appears at the end of this report.

where a particular executive action simply does not fall within the statute.

Fourth, a report is required if DOJ determines that a statute has been superseded by a later enactment, when the later enactment does not expressly say it is intended to supersede an earlier statute. This provision would address situations like OLC's conclusion that the Authorization for Use of Military Force superseded the constraints of the Foreign Intelligence Surveillance Act. In such cases, reporting to Congress gives Congress the opportunity to clarify its intent.

These reporting requirements are accompanied by several provisions to ensure scrupulous respect for executive privileges and prerogatives. The Attorney General may not be required to disclose the OLC opinion itself, as long as the report to Congress includes the information already required under 28 U.S.C. § 530D whenever DOJ decides not to enforce or defend a statute—namely, a complete and detailed statement of the relevant issues and background. Furthermore, the bill leaves intact section 530D's provision allowing the Attorney General to exclude privileged information from the statement. The only information that could not be excluded is the date of the opinion, the statute at issue, and within which of the four reporting categories the opinion falls. No report would be required if officials expressly declined to adopt or act on the opinion, thus protecting from disclosure opinions that are truly advisory in nature.

The bill also protects the security of classified information. Information that could harm the national security if disclosed publicly could be provided to Congress in a classified annex. Classified information involving intelligence activities would be reported to the House and Senate Intelligence and Judiciary Committees—or, where covert actions are at issue, a more narrow group of senators, to parallel the more limited disclosure provisions of the National Security Act for information about covert actions.

Needless to say, the bill does not represent a perfect or complete solution to the problem of secret law. For example, it would not reach the now-infamous OLC conclusion that the infliction of pain does not constitute “torture” unless it approaches the level associated with “death, organ failure, or serious impairment of body functions”—an interpretation that effectively exempted the executive branch from the full scope of the anti-torture statute. Moreover, under the provisions of the bill allowing the Attorney General to withhold privileged information, Congress may well be forced to operate under a significant informational handicap. Many believe that Congress should have unimpeded access to all significant OLC opinions construing federal statutes, and that any claim of executive privilege is counterbalanced by Congress's need to have this information in order to fulfill its own constitutional responsibilities. The goal of this bill, however, is not to address the need for disclosure of OLC opinions generally, but to tackle a particularly problematic category of withholdings. The narrow reporting requirements of this bill reflect that goal, but should not be construed as an indication that further reporting is unnecessary or unwarranted.

Indeed, as Senator Feingold said at the Constitution Subcommittee hearing he chaired:

When it comes to the law that governs the executive branch's actions, Congress, the courts, and the public have the right and the need to know what law is in effect. An Executive that operates pursuant to secret law makes a mockery of the democratic principles and freedoms on which this country was based.

II. HISTORY OF THE BILL AND COMMITTEE CONSIDERATION

A. INTRODUCTION OF THE BILL

The OLC Reporting Act of 2008, S. 3501, was introduced on September 16, 2008, by Senator Feingold and Senator Feinstein. Representative Brad Miller introduced an identical measure as part of a larger bill, H.R. 6929, on September 17, 2008, in the House of Representatives.

B. COMMITTEE CONSIDERATION

On April 30, 2008, Senator Feingold chaired a hearing of the Constitution Subcommittee on "Secret Law and the Threat to Democratic and Accountable Government." Testifying at the hearing were John P. Elwood, Deputy Assistant Attorney General for the Office of Legal Counsel; Dawn E. Johnsen, Professor at Indiana University School of Law—Bloomington and former Acting Assistant Attorney General for the Office of Legal Counsel; Bradford A. Berenson, partner at Sidley Austin LLP and former counsel to President George W. Bush; J. William Leonard, former Director of the Information Security Oversight Office; David Rivkin, partner at Baker Hostetler; Heidi Kitrosser, Associate Professor of Law at the University of Minnesota Law School; and Steven Aftergood, Director of the Project on Government Secrecy at the Federation of American Scientists. In addition to the prepared statements of the witnesses, the following materials were submitted for the record: May 7, 2008, letter to Senators Feingold and Brownback from Anne L. Weismann, Chief Counsel, Citizens for Responsibility and Ethics in Washington; May 7, 2008, letter to Senators Feingold and Brownback from James P. Harrison, Director, The Identity Project.

The bill was listed on the Judiciary Committee's agenda and considered by the Committee on September 25, 2008. Senator Feingold provided an overview of the bill and Senator Brownback spoke in support of it. The Committee then voted to report S. 3501 favorably, without amendment, by unanimous consent.

III. SECTION-BY-SECTION SUMMARY OF THE BILL

Section 1. Short title

This section provides that the legislation may be cited as the "OLC Reporting Act of 2008".

Section 2. Reporting

This section amends section 530D of title 28, United States Code, as follows:

Subsection (a)(1) is amended to include a new subparagraph (C) that requires the Attorney General to submit a report to Congress whenever the Department of Justice issues an authoritative legal interpretation of any provision of a federal statute that (1) con-

cludes that the provision is unconstitutional or would be unconstitutional in a particular application; (2) relies in whole or in part on a determination that another interpretation of the provision would raise constitutional concerns under Article II of the Constitution or separation of powers principles; (3) relies in whole or in part on a legal presumption against applying the provision, whether during wartime or otherwise, to the executive branch or any of its officers or employees (including the President and members of the military); or (4) concludes that the provision has been impliedly superseded or wholly or partially deprived of effect by a later enactment. In accordance with a new paragraph (3) of subsection (b), the report must be submitted not later than 30 days after the authoritative legal interpretation is issued. In accordance with a new paragraph (3) of subsection (a), the report would be optional, rather than mandatory, if the President or other responsible official has expressly directed that no action be taken or withheld, or no policy implemented or stayed, on the basis of the interpretation.

The provision of subsection (c)(2)(A) regarding the reporting of national security and classified information is amended to require that any classified information shall be provided in a classified annex, which shall be handled in accordance with the security procedures established under the National Security Act. In addition, a new paragraph (4) in subsection (a) specifies that, with respect to classified information relating to intelligence activities, the reporting requirement may be satisfied by providing the information to the Senate and House Judiciary and Intelligence Committees; and that, with respect to certain classified information relating to covert actions, the reporting requirement may be satisfied by providing the information to the chairmen and ranking members of the Senate and House Judiciary Committees, the chairmen and ranking members of the Senate and House Judiciary and Intelligence Committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate.

Subsection (c) is amended to include a new paragraph (2) requiring any report made pursuant to subsection (a)(1)(A), (B), or (C) to specify the federal law at issue and the paragraph and the clause of subsection (a)(1) that describes the action being reported. This information, along with the date of the action being reported, must be included in the report and may not be withheld on privilege grounds, in accordance with subsection (c)(3)(B).

Subsection (e) is amended to remove the qualification that section 530D's reporting requirements apply to the President only with respect to the promulgation of unclassified executive orders or similar memoranda or orders. Instead, any report that relates to classified Presidential orders or memoranda is subject to the amended requirements for the handling of classified information.

IV. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Committee sets forth, with respect to the bill, S. 3501, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

OCTOBER 1, 2008.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 3501, the OLC Reporting Act of 2008.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

PETER R. ORSZAG.

Enclosure.

S. 3501—OLC Reporting Act of 2008

S. 3501 would require the Office of Legal Counsel (OLC) within the Department of Justice, under certain circumstances, to submit a report to the Congress when it issues an authoritative legal interpretation that:

- Determines that a provision of federal law is unconstitutional or raises constitutional concerns under Article II of the Constitution or separation of powers principles;
- Relies on a legal presumption against applying a provision of federal law; or
- Concludes that a provision of federal law has implicitly been deprived of effect by a subsequently enacted statute.

CBO expects that the number of such reports would be relatively small, and we estimate that any additional costs to the OLC would not be significant. Enacting the bill would not affect direct spending or revenues.

S. 3501 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Mark Grabowicz. This estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

V. REGULATORY IMPACT EVALUATION

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S. 3501.

VI. CONCLUSION

The OLC Reporting Act of 2008, S. 3501, respects the privileges and prerogatives of the executive branch while ensuring that Congress has information it needs in order to responsibly fulfill its constitutional duties. Prompt passage and enactment of the bill will help to curb secret law and to restore the proper balance of power among the branches of government.

VII. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 3501, as reported, are shown as follows (existing law proposed to be omitted

is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

28 U.S.C. 530D

(a) REPORT.—

(1) IN GENERAL.—The Attorney General shall submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice—

(A) establishes or implements a formal or informal policy to refrain—

(i) from enforcing, applying, or administering any provision of any Federal statute, rule, regulation, program, policy, or other law whose enforcement, application, or administration is within the responsibility of the Attorney General or such officer on the grounds that such provision is unconstitutional; or

(ii) within any judicial jurisdiction of or within the United States, from adhering to, enforcing, applying, or complying with, any standing rule of decision (binding upon courts of, or inferior to those of, that jurisdiction) established by a final decision of any court of, or superior to those of, that jurisdiction, respecting the interpretation, construction, or application of the Constitution, any statute, rule, regulation, program, policy, or other law whose enforcement, application, or administration is within the responsibility of the Attorney General or such officer;

(B) determines—

(i) to contest affirmatively, in any judicial, administrative, or other proceeding, the constitutionality of any provision of any Federal statute, rule, regulation, program, policy, or other law; or

(ii) to refrain (on the grounds that the provision is unconstitutional) from defending or asserting, in any judicial, administrative, or other proceeding, the constitutionality of any provision of any Federal statute, rule, regulation, program, policy, or other law, or not to appeal or request review of any judicial, administrative, or other determination adversely affecting the constitutionality of any such provision; **[or]**

(C) *except as provided in paragraph (3), issues an authoritative legal interpretation (including an interpretation under section 511, 512, or 513 by the Attorney General or by an officer, employee, or agency of the Department of Justice pursuant to a delegation of authority under section 510) of any provision of any Federal statute—*

(i) that concludes that the provision is unconstitutional or would be unconstitutional in a particular application;

(ii) that relies for the conclusion of the authoritative legal interpretation, in whole or in the alternative, on a determination that an interpretation of the provision other than the authoritative legal interpretation would raise constitutional concerns under Article II of the Constitution of the United States or separation of powers principles;

(iii) that relies for the conclusion of the authoritative legal interpretation, in whole or in the alternative, on a legal presumption against applying the provision, whether during a war or otherwise, to—

(I) any department or agency established in the executive branch of the Federal Government, including the Executive Office of the President and the military departments (as defined in section 101(8) of title 10); or

(II) any officer, employee, or member of any department or agency established in the executive branch of the Federal Government, including the President and any member of the Armed Forces; or

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

(D) approves (other than in circumstances in which a report is submitted to the Joint Committee on Taxation, pursuant to section 6405 of the Internal Revenue Code of 1986) the settlement or compromise (other than in bankruptcy) of any claim, suit, or other action—

(i) against the United States (including any agency or instrumentality thereof) for a sum that exceeds, or is likely to exceed, \$2,000,000, excluding prejudgment interest; or

(ii) by the United States (including any agency or instrumentality thereof) pursuant to an agreement, consent decree, or order (or pursuant to any modification of an agreement, consent decree, or order) that provides injunctive or other nonmonetary relief that exceeds, or is likely to exceed, 3 years in duration: *Provided*, That for purposes of this clause, the term “injunctive or other nonmonetary relief” shall not be understood to include the following, where the same are a matter of public record—

(I) debarments, suspensions, or other exclusions from Government contracts or grants;

(II) mere reporting requirements or agreements (including sanctions for failure to report);

(III) requirements or agreements merely to comply with statutes or regulations;

(IV) requirements or agreements to surrender professional licenses or to cease the practice of professions, occupations, or industries;

(V) any criminal sentence or any requirements or agreements to perform community service, to serve probation, or to participate in supervised release from detention, confinement, or prison; or

(VI) agreements to cooperate with the government in investigations or prosecutions (whether or not the agreement is a matter of public record).

(2) SUBMISSION OF REPORT TO THE CONGRESS.—[For the purposes of paragraph (1)] *Except as provided in paragraph (4), a*

report shall be considered to be submitted to the Congress for the purposes of paragraph (1) if the report is submitted to—

(A) the majority leader and minority leader of the Senate;

(B) the Speaker, majority leader, and minority leader of the House of Representatives;

(C) the chairman and ranking minority member of the Committee on the Judiciary of the House of Representatives and the chairman and ranking minority member of the Committee on the Judiciary of the Senate; and

(D) the Senate Legal Counsel and the General Counsel of the House of Representatives.

(3) *DIRECTION REGARDING INTERPRETATION.*—*The submission of a report to Congress based on the issuance of an authoritative legal interpretation described in paragraph (1)(C) shall be discretionary on the part of the Attorney General or an officer described in subsection (e) if—*

(A) *the President or other responsible officer of a department or agency established in the executive branch of the Federal Government expressly directs that no action be taken or withheld or policy implemented or stayed on the basis of the authoritative legal interpretation; and*

(B) *the directive described in subparagraph (A) is in effect.*

(4) *CLASSIFIED INFORMATION.*—

(A) *Submission of report containing classified information regarding intelligence activities. Except as provided in subparagraph (B), if the Attorney General submits a report relating to an instance described in paragraph (1) that includes a classified annex containing information relating to intelligence activities, the report shall be considered to be submitted to the Congress for the purposes of subparagraph (1) if—*

(i) *the unclassified portion of the report is submitted to each officer specified in subparagraph (2); and*

(ii) *the classified annex is submitted to the Select Committee on Intelligence and the Committee on the Judiciary of the Senate and the Permanent Select Committee on Intelligence and the Committee on the Judiciary of the House of Representatives.*

(B) *SUBMISSION OF REPORT CONTAINING CERTAIN CLASSIFIED INFORMATION ABOUT COVERT ACTIONS.*—

(i) *IN GENERAL.*—*In a circumstance described in clause (ii), a report described in that clause shall be considered to be submitted to the Congress for the purposes of subparagraph (1) if—*

(I) *the unclassified portion of the report is submitted to each officer specified in subparagraph (2); and*

(II) *the classified annex is submitted to—*

(aa) *the chairman and ranking minority member of the Select Committee on Intelligence of the Senate;*

(bb) the chairman and ranking minority member of the Committee on the Judiciary of the Senate;

(cc) the chairman and ranking minority member of the Permanent Select Committee on Intelligence of the House of Representatives;

(dd) the chairman and ranking minority member of the Committee on the Judiciary of the House of Representatives;

(ee) the Speaker and minority leader of the House of Representatives; and

(ff) the majority leader and minority leader of the Senate.

(ii) CIRCUMSTANCES.—A circumstance described in this clause is a circumstance in which—

(I) the Attorney General submits a report relating to an instance described in paragraph (1) that includes a classified annex containing information relating to a Presidential finding described in section 503(a) of the National Security Act of 1947 (50 U.S.C. 413b(a)); and

(II) the President determines that it is essential to limit access to this information described in subclause (I) to meet extraordinary circumstances affecting vital interests of the United States.

(b) DEADLINE.—A report shall be submitted—

(1) under subsection (a)(1)(A), not later than 30 days after the establishment or implementation of each policy;

(2) under subsection (a)(1)(B), within such time as will reasonably enable the House of Representatives and the Senate to take action, separately or jointly, to intervene in timely fashion in the proceeding, but in no event later than 30 days after the making of each determination; and

(3) under subsection (a)(1)(C)—

(A) not later than 30 days after the Attorney General, the Office of Legal Counsel, or any other officer of the Department of Justice issues the authoritative interpretation of the Federal statutory provision; or

(B) if the President or other responsible officer of a department or agency established in the executive branch of the Federal Government issues a directive described in subsection (a)(3) and that directive is subsequently rescinded, not later than 30 days after the President or other responsible officer rescinds that directive; and

(4) under subsection (a)(1)(D), not later than 30 days after the conclusion of each fiscal-year quarter, with respect to all approvals occurring in such quarter.

(c) CONTENTS.—A report required by subsection (a) shall—

(1) specify the date of the establishment or implementation of the policy described in subsection (a)(1)(A), of the making of the determination described in subsection (a)(1)(B), of the issuance of the authoritative legal interpretation described in subsection (a)(1)(C), or of each approval described in subsection (a)(1)(C)(D);

(2) *with respect to a report required under subparagraph (A), (B), or (C) of subsection (a)(1), specify the Federal statute, rule, regulation, program, policy, or other law at issue, and the paragraph and clause of subsection (a)(1) that describes the action of the Attorney General;*

(3) include a complete and detailed statement of the relevant issues and background (including a complete and detailed statement of the reasons for the policy, *authoritative legal interpretation*, or determination, and the identity of the officer responsible for establishing or implementing such policy, *issuing such authoritative legal interpretation*, making such determination, or approving such settlement or compromise), **[except]** *provided that—*

(A) *any classified information shall be provided in a classified annex, which shall be handled in accordance with the security procedures established under section 501(d) of the National Security Act of 1947 (50 U.S.C. 413(d));*

(B) *except for information described in paragraphs (1) and (2), such details may be omitted as may be absolutely necessary to prevent improper disclosure of **[national-security- or classified information, or any]** information subject to the deliberative-process-, executive-, attorney-work-product-, or attorney-client privileges, or of any information the disclosure of which is prohibited by section 6103 of the Internal Revenue Code of 1986, or other **[law]** statute or any court order if the fact of each such omission (and the precise ground or grounds therefor) is clearly noted in the statement: *Provided*, That this subparagraph shall not be construed to deny to the Congress (including any House, Committee, or agency thereof) any such omitted details (or related information) that it lawfully may seek, subsequent to the submission of the report; and—*

[(B)] (C) *the requirements of this paragraph shall be deemed satisfied—*

(i) *in the case of an authoritative interpretation described in subsection (a)(1)(C), if a copy of the Office of Legal Counsel or other legal opinion setting forth the interpretation is provided;*

(ii) *in the case of an approval described in subsection (a)(1)**[C]**(D)(i), if an unredacted copy of the entire settlement agreement and consent decree or order (if any) is provided, along with a statement indicating the legal and factual basis or bases for the settlement or compromise (if not apparent on the face of documents provided); and*

[(ii)] (iii) *in the case of an approval described in subsection (a)(1)**[C]**(D)(ii), if an unredacted copy of the entire settlement agreement and consent decree or order (if any) is provided, along with a statement indicating the injunctive or other nonmonetary relief (if not apparent on the face of documents provided); and*

(3) *in the case of a determination described in subsection (a)(1)(B) or an approval described in subsection (a)(1)(C), indicate the nature, tribunal, identifying information, and status of the proceeding, suit, or action.*

(d) DECLARATION.—In the case of a determination described in subsection (a)(1)(B), the representative of the United States participating in the proceeding shall make a clear declaration in the proceeding that any position expressed as to the constitutionality of the provision involved is the position of the executive branch of the Federal Government (or, as applicable, of the President or of any executive agency or military department).

(e) APPLICABILITY TO THE PRESIDENT AND TO EXECUTIVE AGENCIES AND MILITARY DEPARTMENTS.—The reporting, declaration, and other provisions of this section relating to the Attorney General and other officers of the Department of Justice shall apply to the President [(but only with respect to the promulgation of any unclassified Executive order or similar memorandum or order),]; to the head of each executive agency or military department (as defined, respectively, in sections 105 and 102 of title 5, United States Code) that establishes or implements a policy described in subsection (a)(1)(A), *issues an authoritative legal interpretation described in subsection (a)(1)(C)*, or is authorized to conduct litigation[**],** and to the officers of such executive agency.

