

**Calendar No. 1083**110<sup>TH</sup> CONGRESS  
2<sup>D</sup> 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.

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## 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

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**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)”; and

1 (IV) in clause (iii), as so redesignated,  
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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