

110TH CONGRESS
2D SESSION

H. R. 6929

To amend title 28 of the United States Code to require reporting on certain authoritative legal interpretations issued by the Department of Justice, including the Office of Legal Counsel, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 17, 2008

Mr. MILLER of North Carolina introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 28 of the United States Code to require reporting on certain authoritative legal interpretations issued by the Department of Justice, including the Office of Legal Counsel, and for other purposes.

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 “Office of Legal Counsel
5 Reporting Act of 2008”.

6 **SEC. 2. FINDINGS.**

7 Congress makes the following findings:

1 (1) To fulfill the constitutional duty of the execu-
2 utive branch to act lawfully, the President must have
3 access to a reliable source of legal advice.

4 (2) To fulfill its legislative and oversight duties
5 under the Constitution, Congress must have access
6 to information about how and whether the executive
7 branch is implementing the laws of the United
8 States.

9 (3) The Attorney General has delegated to the
10 Office of Legal Counsel in the Department of Jus-
11 tice the function of providing legal advice to guide
12 the actions of the President and the executive
13 branch.

14 (4) By virtue of regulation and tradition, the
15 legal interpretations made by the Office are consid-
16 ered binding and must be followed within the execu-
17 tive branch.

18 **SEC. 3. REPORTING ON AUTHORITATIVE LEGAL INTERPRE-**

19 **TATIONS BY THE DEPARTMENT OF JUSTICE.**

20 (a) INCLUSION OF AUTHORITATIVE LEGAL INTER-
21 PRETATIONS IN EXISTING REPORT REQUIREMENTS.—
22 Section 530D(a)(1) of title 28, United States Code, is
23 amended—

24 (1) by striking “or” at the end of subparagraph

25 (B)(ii);

1 (2) by striking the period at the end of sub-
2 paragraph (C)(ii)(VI) and inserting “; or”; and

3 (3) by adding at the end the following:

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

12 “(i) concludes that such provision is
13 unconstitutional or would be unconstitu-
14 tional in a particular application;

15 “(ii) that relies for its conclusion, in
16 whole or in the alternative, on a deter-
17 mination that an interpretation of the pro-
18 vision other than the authoritative legal in-
19 terpretation of the provision would raise
20 constitutional concerns under Article II of
21 the Constitution of the United States or
22 separation of powers principles;

23 “(iii) that relies for its conclusion, in
24 whole or in the alternative, on a legal pre-

1 sumption against applying the provision,
2 whether during wartime or otherwise, to—

3 “(I) any department or agency
4 established in the executive branch of
5 the Federal Government, including
6 but not limited to the Executive Office
7 of the President and the military de-
8 partments (as defined in section
9 101(8) of title 10, U.S. Code); or

10 “(II) any officer, employee, or
11 member of any department or agency
12 established in the executive branch of
13 the Federal Government (including
14 but not limited to the President) and
15 any member of the Armed Forces; or

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

22 (b) SUBMISSION OF AUTHORITATIVE LEGAL INTER-
23 PRETATIONS AND CLASSIFIED INFORMATION.—Section
24 530D(a) of such title is amended by adding at the end
25 the following:

1 “(3) DIRECTION REGARDING INTERPRETA-
2 TION.—The submission of a report to Congress
3 based on the issuance of an authoritative legal inter-
4 pretation described in paragraph (1)(D) shall be dis-
5 cretionary on the part of the Attorney General or an
6 officer described in subsection (e) if—

7 “(A) the President or other responsible of-
8 ficer of a department or agency established in
9 the executive branch of the Federal Government
10 or a responsible member of the Armed Forces
11 issues a directive stating that no action shall be
12 taken or withheld or no policy shall be imple-
13 mented or stayed on the basis of the authori-
14 tative legal interpretation; and

15 “(B) the directive described in subpara-
16 graph (A) is in effect.

17 “(4) CLASSIFIED INFORMATION.—

18 “(A) SUBMISSION OF REPORT CONTAINING
19 CLASSIFIED INFORMATION REGARDING INTEL-
20 LIGENCE ACTIVITIES.—Except as provided in
21 subparagraph (B), if the Attorney General sub-
22 mits a report relating to an instance described
23 in paragraph (1) that includes a classified
24 annex containing information relating to intel-
25 ligence activities, the report shall be considered

1 to be submitted to Congress for the purposes of
2 paragraph (1) if—

3 “(i) the unclassified portion of the re-
4 port is submitted to each officer specified
5 in paragraph (2); and

6 “(ii) the classified annex is submitted
7 to the Select Committee on Intelligence
8 and the Committee on the Judiciary of the
9 Senate and the Permanent Select Com-
10 mittee on Intelligence and the Committee
11 on the Judiciary of the House of Rep-
12 resentatives.

13 “(B) SUBMISSION OF REPORT CONTAINING
14 CERTAIN CLASSIFIED INFORMATION ABOUT
15 COVERT ACTIONS.—

16 “(i) IN GENERAL.—In a circumstance
17 described in clause (ii), a report described
18 in that clause shall be considered to be
19 submitted to Congress for the purposes of
20 paragraph (1) if—

21 “(I) the unclassified portion of
22 the report is submitted to each officer
23 specified in paragraph (2); and

24 “(II) the classified annex is sub-
25 mitted to—

1 “(aa) the chairman and
2 ranking minority member of the
3 Select Committee on Intelligence
4 of the Senate;

5 “(bb) the chairman and
6 ranking minority member of the
7 Committee on the Judiciary of
8 the Senate;

9 “(cc) the chairman and
10 ranking minority member of the
11 Permanent Select Committee on
12 Intelligence of the House of Rep-
13 resentatives;

14 “(dd) the chairman and
15 ranking minority member of the
16 Committee on the Judiciary of
17 the House of Representatives;

18 “(ee) the Speaker and the
19 minority leader of the House of
20 Representatives; and

21 “(ff) the majority leader and
22 minority leader of the Senate.

23 “(ii) CIRCUMSTANCES.—A cir-
24 cumstance described in this clause is a cir-
25 cumstance in which—

1 “(I) the Attorney General sub-
2 mits a report relating to an instance
3 described in paragraph (1) that in-
4 cludes a classified annex containing
5 information relating to a Presidential
6 finding described in section 503(a) of
7 the National Security Act of 1947 (50
8 U.S.C. 413b(a)); and

9 “(II) the President determines
10 that it is essential to limit access to
11 the information described in subclause
12 (I) to meet extraordinary cir-
13 cumstances affecting vital interests of
14 the United States.”.

15 (c) DEADLINES FOR SUBMISSION OF REPORT CON-
16 CERNING CERTAIN AUTHORITATIVE LEGAL INTERPRETA-
17 TIONS.—Section 530D(b) of such title is amended—

18 (1) in paragraph (2) by striking “and” at the
19 end;

20 (2) in paragraph (3) by striking the period at
21 the end and inserting “; and”; and

22 (3) by adding at the end the following:

23 “(4) under subsection (a)(1)(D)—

24 “(A) not later than 30 days after the date
25 on which the Attorney General, the Office of

1 Legal Counsel, or any other officer of the De-
2 partment of Justice issues the authoritative
3 legal interpretation of the Federal statutory
4 provision; or

5 “(B) if the President or other responsible
6 officer of a department or agency established in
7 the executive branch of the Federal Government
8 or a responsible member of the Armed Forces
9 issues a directive described in subsection (a)(3)
10 and the directive is subsequently rescinded, not
11 later than 30 days after the date on which the
12 President, officer, or member rescinds that di-
13 rective.”.

14 (d) CONTENTS.—Section 530D(c) of such title is
15 amended—

16 (1) In paragraph (2)(A) by striking “and” at
17 the end;

18 (2) In paragraph (2)(B)(i) by striking “and” at
19 the end;

20 (3) in paragraph (2)(B) by inserting at the end
21 the following:

22 “(iii) in the case of an authoritative
23 legal interpretation described in subsection
24 (a)(1)(D), if a copy of a legal opinion
25 issued by the Office of Legal Counsel or

1 another legal opinion setting forth the au-
2 thoritative legal interpretation is provided;
3 and”;

4 (4) by adding at the end of such paragraph the
5 following:

6 “(C) any classified information shall be
7 provided in a classified annex, which shall be
8 handled in accordance with the security proce-
9 dures established under section 501(d) of the
10 National Security Act of 1947 (50 U.S.C.
11 413(d));”;

12 (5) in paragraph (3) by striking the period at
13 the end and inserting “; and”; and

14 (6) by adding at the end the following:

15 “(4) with respect to a report required under
16 subparagraph (A), (B), or (D) of subsection (a)(1),
17 specify the specific provision of the Federal statute,
18 rule, regulation, program, policy, or other law at
19 issue, and the subparagraph of subsection (a)(1) and
20 the clause of such subparagraph that describes the
21 action of the Attorney General or other officer of the
22 Department of Justice.”.

23 (e) CONFORMING AMENDMENTS.—Section 530D of
24 such title is further amended—

1 (1) in subsection (a)(2) by striking “For the
2 purposes” and all that follows through “if the re-
3 port” and inserting “Except as provided in para-
4 graph (4), a report shall be considered to be sub-
5 mitted to Congress for the purposes of paragraph
6 (1) if the report”;

7 (2) 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 each approval de-
11 scribed in subsection (a)(1)(C), or of the
12 issuance of the authoritative legal interpretation
13 described in subsection (a)(1)(D)”;

14 (B) in paragraph (2)—

15 (i) by striking “reasons for the policy
16 or determination” and inserting “reasons
17 for the policy, determination, or authori-
18 tative legal interpretation”;

19 (ii) by striking “or approving such
20 settlement or compromise” and inserting
21 “approving such settlement or compromise,
22 or issuing such authoritative legal interpre-
23 tation”; and

24 (iii) by striking “except that” and in-
25 serting “provided that”; and

1 (C) in paragraph (2)(A)—

2 (i) by inserting “except for informa-
3 tion described in paragraphs (1) or (4),”
4 before “such details may be omitted”;

5 (ii) by striking “national-security- or
6 classified information, of any”; and

7 (iii) by striking “or other law” and in-
8 serting “or other statute”; and

9 (3) in subsection (e)—

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

14 (B) by inserting “, issues an interpretation
15 described in subsection (a)(1)(D),” after “policy
16 described in subsection (a)(1)(A)”;

17 (C) by striking “,” after “litigation” and
18 inserting “;”.

19 **SEC. 4. WRITTEN AND SIGNED OPINIONS REQUIRED.**

20 (a) WRITTEN OPINIONS REQUIRED.—

21 (1) IN GENERAL.—Except as provided in para-
22 graph (2), any qualified legal opinion (as defined in
23 section 5) issued to the President, any person or en-
24 tity in the executive branch, or any member of the
25 Armed Forces shall be issued in writing.

1 (2) EXCEPTION WHEN IMMEDIATE ACTION IS
2 REQUIRED.—A qualified legal opinion is not required
3 to be issued in writing, if—

4 (A) at the time that the opinion is
5 issued—

6 (i) the Attorney General determines
7 that the immediate action of the United
8 States is required and that a qualified
9 legal opinion cannot be prepared in writing
10 as a result of such requirement; and

11 (ii) the Attorney General records, in
12 writing, the fact that a qualified legal opin-
13 ion was issued to the President, person or
14 entity in the executive branch, or member
15 of the Armed Forces, as applicable; and

16 (B) at the earliest possible date (but in no
17 case later than the end of the seven-day period
18 beginning on the date that the opinion is
19 issued), the Attorney General reissues the quali-
20 fied legal opinion in writing.

21 (b) SIGNATURES REQUIRED.—

22 (1) IN GENERAL.—If a qualified legal opinion
23 contains a statement of policy that authorizes or in-
24 structs any officer or employee of the executive
25 branch or a member of the Armed Forces to dis-

1 regard or not enforce a statute or an executive
2 order, an employee or officer of the executive branch
3 or a member of the Armed Forces may not require
4 any other employee or officer of the executive branch
5 or a member of the Armed Forces to follow the pol-
6 icy contained in such legal opinion, unless such opin-
7 ion is signed—

8 (A) by the President or the Attorney Gen-
9 eral; and

10 (B) by an officer or employee of the Office
11 of Legal Counsel in the Department of Justice.

12 (2) DELEGATION PROHIBITED.—In no case is a
13 signature by an individual other than the President
14 or the Attorney General sufficient to meet the re-
15 quirements of paragraph (1)(A), even if—

16 (A) such signature is made on behalf of
17 the President or Attorney General; or

18 (B) such signature results from a delega-
19 tion of responsibility by the President or the
20 Attorney General to another individual.

21 **SEC. 5. GOVERNMENT ACCOUNTABILITY OFFICE REPORT.**

22 (a) IN GENERAL.—Not later than 180 days after the
23 date of enactment of this Act, the Comptroller General
24 of the United States shall submit to Congress a report
25 containing an evaluation of performance of the Office of

1 Legal Counsel in the Department of Justice during the
2 25-year period ending on the date of enactment of this
3 Act.

4 (b) CONTENTS.—The report under subsection (a)
5 shall contain, at a minimum, the following:

6 (1) The total number of legal opinions (as de-
7 fined in section 5) issued by the Office of Legal
8 Counsel.

9 (2) The total number of legal opinions issued by
10 the Office that are disclosed, in written form, to the
11 public, and the amount of time between the date a
12 opinion is first issued by the office and the date the
13 opinion is disclosed to the public.

14 (3) The number of opinions issued by the Office
15 that are classified, in part or in full, and the basis
16 for classifying each opinion.

17 (4) The number of opinions issued by the Office
18 that are not disclosed to the public because of delib-
19 erative-process privilege, executive privilege, attor-
20 ney-work-product privilege, attorney-client-privilege,
21 or another type of privilege, and the nature of each
22 such privilege.

23 (5) An analysis of the role of the Office within
24 the Federal Government, including an assessment of

1 how, if at all, the role of the Office has changed over
2 the course of the period described in subsection (a).

3 (6) An analysis of the interaction between the
4 Office of Legal Counsel, the Office of White House
5 Counsel, and the Office of the Counsel to the Vice
6 President.

7 (7) A description of any information which the
8 Comptroller General could not obtain which was nec-
9 essary to complete this report.

10 (c) FORM OF REPORT.—The Comptroller General of
11 the United States shall submit the report under subsection
12 (a) in an unclassified form and may include a classified
13 annex.

14 **SEC. 6. DEFINITIONS.**

15 For the purposes of this Act, the following definitions
16 apply:

17 (1) LEGAL OPINION.—The term “legal opinion”
18 means an opinion issued by the Office of Legal
19 Counsel in the Department of Justice—

20 (A) under sections 511 through 513 of
21 title 28, United States Code;

22 (B) through a delegation of authority
23 under section 510 of such title;

1 (C) under section 0.25 of title 28, Code of
2 Federal Regulations (or any successor regula-
3 tions); or

4 (D) under or through any combination of
5 provisions listed in subparagraphs (A) through
6 (C).

7 (2) QUALIFIED LEGAL OPINION.—The term
8 “qualified legal opinion” means a legal opinion that
9 contains a policy described in subparagraph (A) of
10 section 530D(a)(1) of title 28, United States Code,
11 or an authoritative legal interpretation described in
12 subparagraph (D) of such section, or both.

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