



U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

August 24, 2015

Steven Aftergood
Federation of American Scientists
1725 DeSales Street NW, Suite 600
Washington, DC 20036
saftergood@fas.org

Re: FOIA Tracking No. FY15-073

Dear Mr. Aftergood:

This letter responds to your May 12, 2015 Freedom of Information Act ("FOIA") request to the Office of Legal Counsel ("OLC"), seeking "a copy of a 2003 OLC opinion that pertains to the authority to disclose classified information outside of the executive branch." Your request was assigned tracking number **FY15-073**. Pursuant to 28 C.F.R. § 16.5(b), your request was processed in the "complex" processing track.

We have located one document responsive to your request. The document is protected by the deliberative process and attorney-client privileges and exempt from mandatory disclosure pursuant to FOIA Exemption Five, 5 U.S.C. § 552(b)(5), but we are releasing it to you as a matter of discretion. A copy of the document is enclosed.

Sincerely,

A handwritten signature in blue ink, appearing to read "Paul P. Colborn".

Paul P. Colborn
Special Counsel

Enclosure



U.S. Department of Justice

Office of Legal Counsel

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

January 27, 2003

Memorandum for Alberto R. Gonzales
Counsel to the President

Re: Presidential Authority to Protect National Security Information

You have asked us whether the President has the constitutional authority to withhold sensitive national security information from Congress involving the proliferation of weapons of mass destruction by other nations. You have informed us that the United States has obtained this information through extremely sensitive intelligence sources and methods. We conclude that 22 U.S.C. § 3282, which creates reporting requirements for proliferation information, would not demand notification of such information, if the President determines that disclosure of the information could harm the national security. We also believe that similar reporting requirements, such as those in the National Security Act, would not apply.

I.

Several statutes potentially might require the President or the agencies to report to Congress national security information of the type you have described. Because of the subject matter of the information, federal law relating to non-proliferation is the most directly relevant. In Title 22, chapter 47, Congress required the Departments of State, Defense, Commerce and Energy and the Nuclear Regulatory Commission to keep the Senate Foreign Relations and Governmental Affairs Committees, and the House International Relations Committee, "fully and currently informed" of "their activities to carry out the purposes and policies of" federal law regarding non-proliferation and "to otherwise prevent proliferation, including the proliferation of nuclear, chemical, or biological weapons, or their means of delivery." 22 U.S.C. § 3282(c)(1)(A). The statute also directs these agencies, and the Director of Central Intelligence (DCI), to keep the same committees fully and currently informed as to "the current activities of foreign nations which are of significance from the proliferation standpoint." *Id.* at § 3282(c)(1)(B). Congress further defined "fully and currently informed" to require transmission of the information within 60 days of learning of the activity concerned. *Id.* at § 3282(c)(2).

Other statutes create reporting requirements for information related to intelligence or foreign affairs. For example, the National Security Act of 1947 imposes on the President the obligation to ensure that the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence are kept "fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity," with the exception of covert action (which is handled in a separate provision). 50 U.S.C. § 413. The 1947 Act also places on the DCI and all other intelligence agencies the obligation to keep the intelligence committees "fully and currently informed of all intelligence activities," other than

covert action, "which are the responsibility of, are engaged in by, or are carried out for or on behalf of" any agency of the United States government, "including any significant anticipated intelligence activity and any significant intelligence failure." *Id.* at § 413a(1). It also requires the DCI and other agencies to furnish information involving intelligence activities, other than covert actions, within their custody or control, when "requested by either of the intelligence committees in order to carry out its authorized responsibilities." *Id.* at § 413a(2). The 1947 Act recognizes that this information should be provided "[t]o the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters." *Id.* at § 413a.¹

The State Department's authorizing statute contains a similar general reporting requirement. Section 2680 of Title 22 of the U.S. Code states that the State Department "shall keep" the Senate Foreign Relations and House International Relations Committees "fully and currently informed with respect to all activities and responsibilities within the jurisdiction of these committees." 22 U.S.C. § 2680(b). It also requires the disclosure of information requested by those committees "relating to any such activity or responsibility." *Id.*

As we understand it, the information in question implicates 22 U.S.C. § 3282 and possibly the intelligence and foreign relations statutes as well. It has been obtained through sensitive intelligence sources and methods and concerns proliferation activities that, depending upon information not yet available, may be attributable to one or more foreign nations. Due to your judgment of the extreme sensitivity of the information and the means by which it was obtained, you have not informed us about the nature of the information, what nation is involved, or what activities are implicated. We understand, however, that the information is of the utmost sensitivity and that it directly affects the national security and foreign policy interests of the United States. You have also told us that the unauthorized disclosure of the information could directly injure the national security, compromise intelligence sources and methods, and potentially frustrate sensitive U.S. diplomatic, military, and intelligence activities.

II.

We have previously noted our constitutional objections to statutory provisions that seek to force the President to disclose national security information. Indeed, this Office has specifically noted that the most directly applicable provision, 22 U.S.C. § 3282, raised constitutional problems that could be solved only by construing it not to apply when the President determines to withhold information on national security grounds. During the administration of President William J. Clinton, in examining section 1131 of the fiscal year 2000 Consolidated Appropriations Bill, which eventually became 22 U.S.C. § 3282, we recommended that the President approve the provision but observe that "I do not understand section 1131 (Congressional Notification of Non-Proliferation Activities) . . . to override my constitutional authority to determine how, when, and under what circumstances information vital to the national security shall be disclosed." Memorandum To: Rosalyn J. Rettman, Associate General

¹ The National Security Act also declares that "[n]othing in this Act shall be construed as authority to withhold information from the intelligence committees on the grounds that providing the information to the intelligence committees on the grounds that providing the information to the intelligence committees would constitute the unauthorized disclosure of classified information relating to intelligence sources and methods." 50 U.S.C. § 413.

Counsel, Office of Management and Budget, From: Joseph R. Guerra, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: FY 2000 Consolidated Appropriations Bill 2* (Nov. 24, 1999). We had earlier opined in identical language that previous versions of this notification obligation could not interfere with the President's authority over national security information. See Memorandum for Jon P. Jennings, Acting Assistant Attorney General, Office of Legislative Affairs, From: Cornelia T.L. Pillard, Deputy Assistant Attorney General, *Re: H.R. 2415, American Embassy Security Act/Foreign Relations Authorization Act, As Passed by the House and Senate 2* (Aug. 26, 1999); Memorandum for Dennis K. Burke, Acting Assistant Attorney General, Office of Legislative Affairs, From: Cornelia T.L. Pillard, Deputy Assistant Attorney General, *Re: State Department Authorization Act, FYs 2000 & 2001 at 2* (April 20, 1999).

In signing the legislation, President Clinton stated that section 1131 and similar provisions raised serious constitutional questions. He observed that the administration had made its objections to these provisions clear in previous communications to Congress or administration statements, but he also noted that such provisions could "direct or burden my negotiations with foreign governments and international organizations, as well as intrude on my ability to maintain the confidentiality of sensitive diplomatic negotiations" as well as "constrain my Commander in Chief authority and the exercise of my exclusive authority to receive ambassadors and to conduct diplomacy." President Clinton declared that he would construe these provisions "to be consistent with my constitutional prerogatives and responsibilities and where such a construction is not possible, I will treat them as not interfering with those prerogatives and responsibilities." Statement by President Clinton Upon Signing H.R. 3194, 1999 U.S.C.C.A.N. 290, 297 (Nov. 29, 1999).

Because our earlier bill comments were by their nature abbreviated, we should explain why 22 U.S.C. § 3282 must be construed to respect the President's constitutional authority over national security information. Further, we believe that the President's authority to withhold disclosure of the information at issue in this case would also apply to the similar reporting requirements of 50 U.S.C. § 413, 50 U.S.C. § 413a, and 22 U.S.C. § 2680(b) discussed in Part I. Our leading opinion on this issue, *The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the National Security Act*, 10 Op. O.L.C. 159 (1986), makes the basic points. First, as this office has long maintained and Supreme Court cases have made clear, the President possesses inherent and plenary constitutional authority to conduct the foreign relations of the United States. See, e.g., *id.* at 160-64; *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (describing "the very delicate, plenary and exclusive of the President as the sole organ of the federal government in the field of international relations"). Second, we have found that whatever the outer boundaries of the President's foreign affairs and national security power, the conduct of secret diplomatic and intelligence activities lay at its core. 10 Op. O.L.C. at 165.

Third, this inherent authority is further amplified when the President is taking steps to prevent attacks on the United States, its Armed Forces, or its citizens either at home or abroad. *Id.* at 167. The Supreme Court has recognized that a citizen of the United States may demand "the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government," *Slaughter-House Cases*, 83 U.S. 36, 79 (1872), and that the President's constitutional duty to "take Care that the Laws be

faithfully executed," U.S. Const. art. II, § 3, includes the responsibility to attend to "the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution," *In re Neagle*, 135 U.S. 1, 64 (1890).

Fourth, despite Congress's extensive powers under the Constitution, its authorities to legislative and appropriate cannot constitutionally be exercised in a manner that would usurp the President's authority over foreign affairs and national security. In our 1986 opinion, we reasoned that this principle had three important corollaries: a) Congress cannot directly review the President's foreign policy decisions; b) Congress cannot condition an appropriation to require the President to relinquish his discretion in foreign affairs; and c) any statute that touches on the President's foreign affairs power must be interpreted, so as to avoid constitutional questions, to leave the President as much discretion as possible. 10 Op. O.L.C. at 169-70.

III.

These issues are as directly implicated by congressional efforts to force the Executive Branch to disclose national security and foreign affairs information as they are by efforts to prevent the Executive from undertaking certain actions. Indeed, in 1986 we found that a statute requiring timely notification of covert action had to be interpreted to permit the President to decide to disclose information to Congress when it would not endanger the success of the operation. *Id.* at 173. When President Bush signed the 1991 amendments to the National Security Act that created further reporting requirements for covert actions, he cautioned that "provisions of the Act requiring disclosure of certain information to the Congress raise constitutional concerns" and "cannot be construed to detract from the President's constitutional authority to withhold information the disclosure of which could significantly impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties." Signing Statement, Pub. Papers of George Bush 1043, 1044 (1991).

As the Supreme Court has observed, the authority to control access to information bearing on the national security "flows primarily from [the] constitutional investment of power in the President and exists quite apart from any explicit congressional grant." *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988). Accordingly, "[t]he authority to protect such information falls on the President as head of the Executive and as Commander in Chief." *Id.* In this area of "military or diplomatic secrets," moreover, "the courts have traditionally shown the utmost deference to Presidential responsibilities." *United States v. Nixon*, 418 U.S. 683, 710 (1974). Indeed, the Court has suggested that the President's privilege to control the disclosure of such information may be absolute. *Id.* at 710-11; see also *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978) ("The state secrets privilege is absolute."). Justice Potter Stewart observed that "it is the constitutional duty of the Executive — as a matter of sovereign prerogative and not as a matter of law as the courts know law — through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the field of international relations and national defense." *New York Times Co. v. United States*, 403 U.S. 713, 729-30 (1971) (Stewart, J., concurring). As we have previously observed, "national security and foreign relations considerations have been considered the strongest possible basis

upon which to invoke the [constitutional] privilege of the executive" to withhold information. Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, and John R. Stevenson, Legal Adviser, Department of State, *Re: The President's Executive Privilege to Withhold Foreign Policy and National Security Information* at 7 (Dec. 8, 1969).

The disclosure of information on the proliferation activity of foreign nations thus directly implicates the President's core powers over foreign affairs and national security. It is obvious that the proliferation of weapons of mass destruction and their potential use has a direct effect on the national security of the United States. It is difficult to imagine activities that could be more threatening to the national security than the WMD ambitions of a nation that has been or is potentially hostile to the United States. As we have said elsewhere, the acquisition of WMD by a hostile state could provide the grounds for the use of force by the United States in anticipatory self-defense. See Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Authority of the President Under Domestic and International Law to Use Military Force Against Iraq* (Oct. 23, 2002). How to respond to such developments clearly rests within the President's authority as Commander-in-Chief and Chief Executive to protect the United States, its Armed Forces, and its citizens. Memorandum for Timothy E. Flanigan, Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001).

If United States policy on the proliferation activities of another nation falls within the President's constitutional authorities, as it does, then it must also be the case that sensitive information about these activities similarly must lie within the Executive's power. Such information may have been generated through clandestine activities, the revelation of which could harm the United States' ability to continue its acquisition of such knowledge. Disclosure could immediately threaten the success of military and/or intelligence operations taken in response, as well as the lives of any Americans taking part in such operations. Unauthorized disclosure thus implicates national security and touches upon the core of the President's duties and powers under Article II of the Constitution. Surely, the President's authority as Commander in Chief to conduct military and intelligence operations must include the authority to take those measures necessary to ensure the success, and to prevent the failure, of particular operations. See *Totten v. United States*, 92 U.S. 105 (1875); Memorandum for Alberto R. Gonzales, Counsel to the President, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Congressional Notification for Certain Special Operations* 4 (Nov. 1, 2002).

Thus, if the President finds that the information is sufficiently sensitive, and that disclosure could harm the national security, the President's constitutional responsibilities require a construction of the relevant reporting statutes under which disclosure is not required. This accords with the well-established canon of construction that statutes are to be construed so as to avoid constitutional problems whenever possible. See, e.g., *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504 (1979)). In order to respect the President's constitutional independence in international affairs, constitutional problems must be minimized by reading the disclosure requirements of 22 U.S.C. § 3282, 22 U.S.C. 2680(b), 50

U.S.C. § 413, and 50 U.S.C. § 413a as not applying to cases in which the President concludes that the disclosure to Congress of sensitive intelligence regarding the proliferation activities of other nations could harm the national security. The only other practical alternative would be to determine that these statutes are unconstitutional as applied in this case. The same reasoning that supports a limiting construction of these statutes would also argue against their constitutionality, if they were applied here.

We note that, even though legally not required to do so, the President can disclose such information as a matter of inter-branch comity to members of Congress of his choosing when he judges it consistent with the national security.

Please let us know if we may be of further assistance.



John C. Yoo
Deputy Assistant Attorney General