



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 15, 2010

The Honorable Dianne Feinstein
Chairman
The Honorable Christopher S. Bond
Vice-Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

Dear Madam Chairman and Mr. Vice-Chairman:

This letter transmits statements of constitutional concerns raised by H.R. 2701 and S. 1494, the intelligence authorization bills for fiscal year 2010, as passed by the House and the Senate. We appreciate the opportunity to present our views and we hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

 Ronald Weich
Assistant Attorney General

Enclosures

IDENTICAL LETTER SENT TO THE HONORABLE SILVESTRE REYES, CHAIRMAN,
PERMANENT SELECT COMMITTEE ON INTELLIGENCE, UNITED STATES HOUSE OF
REPRESENTATIVES, WITH A COPY TO THE HONORABLE PETER HOEKSTRA,
RANKING MINORITY MEMBER

**Comments of the Department of Justice on
S. 1494, the Intelligence Authorization Act for Fiscal Year 2010,” as Passed by the Senate**

S. 1494, the FY10 Intelligence Authorization Act, as passed by the Senate, raises the following constitutional and related concerns:

Inspector General provisions.

Section 407 of the bill would create a new section 103H in the National Security Act of 1947, establishing in the Office of the Director of National Intelligence an Inspector General of the Intelligence Community. Sections 425 and 426 would make certain amendments to the existing statute governing the Inspector General for the CIA, 50 U.S.C. § 403q. We have three comments on this section.

1. As with a similar provision in the House bill, we recommend clarifying that proposed section 103H(k)(5)(A)-(D) of the National Security Act, as added by section 407 of the bill, would not purport to give intelligence community employees unilateral discretion to disclose classified information to Congress.

Section 103H(k)(5)(A)-(D) would allow any “employee of an element of the intelligence community” to report an “urgent concern” directly to the congressional intelligence committees “only if” he provides notice to the Director of National Intelligence, through the Inspector General, of the proposed disclosure, and “obtains and follows from the Director, through the Inspector General, direction on how to contact the intelligence committees in accordance with appropriate security practices.” “[I]ntelligence community” is defined under existing law to include, *inter alia*, ODNI, the CIA, the National Security Agency, Defense Intelligence Agency, National Geospatial-Intelligence Agency, National Reconnaissance Office, several enumerated elements of other agencies, and other components designated by the President. *See* 50 U.S.C. § 401a(4). The language in new section 103H(k) addressing employee communications to Congress tracks very closely—and in pertinent part is identical to—language from the Intelligence Community Whistleblower Protection Act of 1998 (ICWPA). *See* 50 U.S.C. § 403q(d)(5) (addressing communications to Congress by employees of the CIA); 5 U.S.C. app. § 8H(a) (communications by employees of the Defense Intelligence Agency, National Geospatial-Intelligence Agency, National Reconnaissance Office, National Security Agency, FBI, and any other agency or element determined by the President to have as its principal function the conduct of foreign intelligence or counterintelligence activities). In signing the ICWPA, President Clinton issued the following statement:

Finally, I am satisfied that this Act contains an acceptable whistleblower protection provision, free of the constitutional infirmities evident in the Senate-passed version of this legislation. The Act does not constrain my constitutional authority to review and, if appropriate, control disclosure of certain classified information to the Congress. I note that the Act’s legislative history makes clear that the Congress, although disagreeing with

the executive branch regarding the operative constitutional principles, does not intend to foreclose the exercise of my constitutional authority in this area.

The Constitution vests the President with authority to control disclosure of information when necessary for the discharge of his constitutional responsibilities. Nothing in this Act purports to change this principle. I anticipate that this authority will be exercised only in exceptional circumstances and that when agency heads decide that they must defer, limit, or preclude the disclosure of sensitive information, they will contact the appropriate congressional committees promptly to begin the accommodation process that has traditionally been followed with respect to disclosure of sensitive information.

Statement on Signing the Intelligence Authorization Act for Fiscal Year 1999, 2 Pub. Papers of William J. Clinton 1825 (1998).

New section 103H(k)(5)(H) would further provide that “[i]n support of this paragraph, Congress makes the findings set forth in paragraphs (1) through (6) of section 701(b) [of ICWPA].” The cross-referenced findings provide, inter alia, that “Congress, as a co-equal branch of Government, is empowered by the Constitution to serve as a check on the executive branch; in that capacity, it has a ‘need to know’ of allegations of wrongdoing within the executive branch, including allegations of wrongdoing in the Intelligence Community,” and “no basis in law exists for requiring prior authorization of disclosures to the intelligence committees of Congress by employees of the executive branch of classified information about wrongdoing within the Intelligence Community.”

Because the current bill contains language concerning employee disclosures to Congress that is essentially identical to that in the ICWPA, and because the bill would expressly incorporate the congressional findings that accompanied that Act, it raises the constitutional concerns addressed in President Clinton’s ICWPA signing statement. In particular, if this bill were read to give intelligence community employees unilateral discretion to disclose classified information to Congress, it would be unconstitutional. *See Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92 (1998). Other than adding an explicit hold-back provision to the bill, that problem could be addressed by amending the relevant portions of ICWPA itself (in particular, 5 U.S.C. app. § 8H), rather than enacting virtually identical language in this bill. This approach would involve simply extending existing law, as informed by President Clinton’s signing statement, to apply to any desired categories of employees who are not already covered, or to provide that intelligence community employees may also report their concerns to the Inspector General of the Intelligence Community instead of the Inspector General of their agency, should they so choose. Second, if amendment of the ICWPA is not practicable, we would interpret new section 103H(k)(5)(A)-(D) in a manner consistent with President Clinton’s signing statement on the ICWPA, as articulated in the DOJ letter to Senator Feinstein of December 9, 2009 providing DOJ’s comments on this bill.

2. *As with the House version of the bill, we recommend language that would avoid a constitutional concern presented by new section 103H(c)(4) and make clear the manner in which we would construe the provision. We set forth that construction below.*

New section 103H(c)(4) would provide that the Inspector General for the Intelligence Community “may be removed from office only by the President” and would require the President to “communicate in writing to the congressional intelligence committees the reasons for the removal prior to the effective date of such removal.” Section 425(b) of the bill would amend the provision governing the removal of the Inspector General for the CIA in 50 U.S.C. § 403q(b)(6) to similarly provide that the “President shall communicate in writing to the intelligence committees the reasons for any such removal not later than 30 days prior to the effective date of such removal.”

The 30-day prior notice requirement that would be imposed by these provisions closely parallels a similar requirement that appears in the Inspector General Reform Act of 2008, Pub. L. 110-409, § 3(a) (2008). However, the IG Reform Act also includes the following language not found in the current bill: “Nothing in this subsection shall prohibit a personnel action otherwise authorized by law, other than transfer or removal.” *Id.* We recommend that this language from the IG Reform Act be included here to avoid any suggestion of a congressional intent to preclude the President from taking such actions short of removal without prior notification to Congress. Even in the absence of similar clarifying language, however, there is nothing in section 103H(c)(4) or in the provisions that would be codified at 50 U.S.C. § 403q(b)(6) indicating a limitation on the President’s ability to suspend an Inspector General if necessary without advance notice to Congress, even though he would be precluded from removing the Inspector General until 30 days after providing notice to Congress. We would therefore construe the provision not to restrict such a suspension—which is not only the better interpretation of the language of the provision, but would also avoid a serious separation of powers question. *Cf.* Memorandum for Roger Pauley, Criminal Division, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Inspector General Reform Act of 1994* (Sept. 6, 1994).

3. *To avoid concerns raised by mandatory disclosure to Congress of information covered by the law enforcement component of executive privilege, new section 103H(k)(3) as added by section 407(a) of the bill should be revised to remove the reporting requirements in subparagraphs (B), (C), and (D).*

New section 103H(k)(3) purports to require the disclosure of information to Congress that may be covered by the law enforcement component of executive privilege. It would require the Inspector General for the Intelligence Community to “immediately notify, and submit a report to, the congressional intelligence committees” when “(ii) an investigation, inspection, audit, or review carried out by the Inspector General focuses on [certain] current or former intelligence community official[s],” when “(iii) a matter requires a report by the Inspector General to the Department of Justice on possible criminal conduct by [certain] current or former official[s],” or when “(iv) the Inspector General receives notice from the Department of Justice

declining or approving prosecution of possible criminal conduct of [certain] current or former official[s].” It would also require the Inspector General to provide any portion of such reports focused on current or former officials of other government departments to the congressional committees with jurisdiction over the relevant departments. Insofar as these subparagraphs purport to require the disclosure of information relating to ongoing investigations by Inspectors General or the Department of Justice, they would implicate the longstanding policy of the Executive Branch to protect open law enforcement files from any breach of confidentiality, except in extraordinary circumstances. *See, e.g., Congressional Requests for Information from Inspectors General Concerning Open Criminal Investigations*, 13 Op. O.L.C. 77, 77 (1989) (“[W]hen . . . Congress seeks to obtain from an IG confidential information about an open criminal investigation, established executive branch policy and practice, based on consideration of both Congress’ oversight authority and principles of executive privilege, require that the IG decline to provide the information, absent extraordinary circumstances.”). *See also Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 117 (1984) (“Since the early part of the 19th century, Presidents have steadfastly protected the confidentiality and integrity of investigative files from untimely, inappropriate, or uncontrollable access by the other branches, particularly the legislature.”).

Executive Privilege. Several provisions of the bill purport to require disclosure of information that could be subject to a valid claim of executive privilege, including information relating to intelligence sources and methods.

1. To avoid concerns raised by mandatory disclosure to Congress of information covered by the law enforcement component of executive privilege, section 305(a) should be revised to remove the reporting requirement in new section 506B(c)(12).

Section 305(a) of the bill would create a new section 506B of the National Security Act of 1947, subsection (c)(12) of which would require the Director of National Intelligence to provide, among other information, “[a] list of all contract personnel” who “*are or have been* the subject of an investigation or review by . . . [the] inspector general [of any element of the intelligence community] during the current fiscal year.” (Emphasis added.) Insofar as this provision purports to require the disclosure of information relating to ongoing investigations by Inspectors General within the Intelligence Community, it would implicate the longstanding policy of the Executive branch, as discussed above, to protect open law enforcement files from any breach of confidentiality, except in extraordinary circumstances.

2. To avoid concerns relating to the mandatory disclosure of material covered by the deliberative process, attorney-client, and presidential communications components of executive privilege, the requirement in section 336(c)(2) to disclose to Congress “any recommendations” of the interrogation and detention policy task forces, and the requirement in section 336(c)(6)(B) to provide to Congress the various “legal justifications of the Department of Justice” enumerated in that subsection, should be deleted or made precatory.

Section 336 would require the disclosure of Executive branch deliberative material, including confidential legal advice. Section 336 would require the Director of National Intelligence to provide the intelligence committees with a “comprehensive report on all measures taken by the Office of the Director of National Intelligence and by each element, if any, of the intelligence community with relevant responsibilities to comply with the provisions of applicable law, international obligations, and executive orders relating to the detention or interrogation activities, if any, of any element of the intelligence community, including the Detainee Treatment Act of 2005, . . . related provisions of the Military Commissions Act of 2006, . . . common article 3 [of the Geneva Conventions], the Convention Against Torture,” and Executive Orders 13491 and 13493. In particular, subsection (c)(2) would require the Director to submit to Congress “[a] description of any recommendations of a task force submitted pursuant to [Executive Orders 13491 or 13493],” and subsection (c)(6) would require the Director to submit to the committees an appendix that “contain[s] . . . the legal justifications of the Department of Justice about the meaning or application of applicable law, international obligations, or Executive orders, with respect to the detention or interrogation activities, if any, of any element of the intelligence community.”

Although this Office has recognized that Executive Branch agencies should honor reasonable requests for information by Congress and its agents, Congress cannot require that legislative agents be given access to information properly protected by executive privilege. The requirement to disclose recommendations made to the President by task forces set up by him pursuant to Executive Orders 13491 or 13493 implicates the deliberative process and presidential communications components of executive privilege. With respect to the requirement to disclose to Congress “the legal justifications of the Department of Justice,” Congress can require the executive branch to provide to the intelligence committees the legal basis for its actions. To the extent this provision purports to require disclosure of confidential DOJ legal advice, it would implicate the deliberative process, attorney-client, and, to the extent the legal advice is generated or used to assist in presidential decisionmaking, presidential communications components of executive privilege. *See, e.g.,* Assertion of Executive Privilege With Respect to Clemency Decision, 23 Op. O.L.C. 1, 1-2 (1999) (opinion of Attorney General Janet Reno) (addressing presidential communications component of executive privilege); *Assertion of Executive Privilege Regarding White House Counsel’s Office Documents*, 20 Op. O.L.C. 2, 3 (1996) (opinion of Attorney General Reno) (discussing the deliberative process and attorney-client components); *Confidentiality of the Attorney General’s Communications in Counseling the President*, 6 Op. O.L.C. 481, 494 n.24 (1982) (explaining that the attorney-client privilege is “subsumed under a claim of executive privilege when a dispute arises over documents between the Executive and Legislative Branches”). We therefore recommend that the requirements in section 336(c)(2) to disclose to Congress “any recommendations” of the interrogation and detention policy task forces, and the requirement in section 336(c)(6)(B) to provide to Congress the various “legal justifications of the Department of Justice,” be deleted or made precatory. In the alternative, we would not read these provisions to require production of confidential and deliberative Executive branch legal advice that is subject to a valid claim of executive privilege.

3. *To avoid concerns raised by mandatory disclosure to Congress of material potentially subject to the deliberative process and presidential communications components of executive privilege, the reporting requirements in section 337(1) and (3) should be deleted or made precatory.*

Section 337 of the bill would require the Director of National Intelligence to submit to the congressional intelligence committees a report containing his “assessment of the suitability for release or transfer for detainees previously released or transferred, or to be released or transferred” from Guantanamo Bay. The report is to include “a description of any objection to the release or recommendation against the release of such an individual made by any element of the intelligence community that determined the potential threat posed by a particular individual warranted the individual’s continued detention,” and, in the case of an initial recommendation against release that was subsequently retracted, “a detailed explanation of the reasoning for the retraction.” The provisions purporting to require disclosure of internal Executive branch deliberative material, such as recommendations from agency officials to the President, raise serious concerns they would infringe the deliberative process or presidential communications components of the executive privilege.

4. *With respect to the provision in section 333 requiring disclosure of “the legal authority” for intelligence activities and covert actions, we set forth below our view as to the best reading of this provision.*

Section 333 of the bill would amend sections 501 through 503 of the National Security Act to require disclosure to Congress of “the legal authority” under which an intelligence activity or covert action is or was conducted. With respect to the requirement to disclose to Congress “the legal justifications of the Department of Justice,” Congress can require the executive branch to provide to the intelligence committees the legal basis for its actions. To the extent this provision purports to require disclosure of confidential legal advice, it would implicate the deliberative process, attorney-client, and, to the extent the legal advice is generated or used to assist in presidential decisionmaking, presidential communications components of executive privilege. *See, e.g., Assertion of Executive Privilege With Respect to Clemency Decision*, 23 Op. O.L.C. 1, 1-2 (1999) (opinion of Attorney General Janet Reno) (addressing presidential communications component of executive privilege); *Assertion of Executive Privilege Regarding White House Counsel’s Office Documents*, 20 Op. O.L.C. 2, 3 (1996) (opinion of Attorney General Reno) (discussing the deliberative process and attorney-client components); *Confidentiality of the Attorney General’s Communications in Counseling the President*, 6 Op. O.L.C. 481, 494 n.24 (1982) (explaining that the attorney-client privilege is “subsumed under a claim of executive privilege when a dispute arises over documents between the Executive and Legislative Branches”). Accordingly, we do not read this language to require production of confidential and deliberative Executive branch legal advice that is subject to a valid claim of executive privilege.

Presentment.

1. *To avoid a violation of the separation of powers and the bicameralism and presentment requirements of Article I, section 7, the provision in section 353(b) authorizing a single congressional committee to delay intelligence activities should be deleted.*

Section 353(b) of the bill would purport to authorize one of the intelligence committees to delay for up to 90 days the funding of certain intelligence activities by submitting to “the element of the intelligence community that will carry out such activity a request for additional information on such activity.” Although a statutory “report and wait” requirement permitting the Executive branch to take certain actions only after a specified period following notification to Congress would be unproblematic, *see The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 173 (1996), this provision would give the committee unilateral discretion to delay expenditures that could otherwise be made. This provision violates separation of powers principles and the bicameralism and presentment requirements of Article I because it would give a single congressional committee the power to delay intelligence activities. As the Supreme Court has noted, “Once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation” that complies with bicameralism and presentment. *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986); see also *INS v. Chadha*, 462 U.S. 919, 951-52 (1983) (explaining bicameralism and presentment restrictions on legislative power).

2. *To avoid concerns under the presentment requirements of article I, section 7, the classified Schedule of Authorizations must be made available to the President at or before the time the bill is presented to him for signature.*

Sections 102, 103, and 104 of the bill refer to a “classified Schedule of Authorizations” that contains amounts authorized to be appropriated and authorized personnel ceilings for intelligence activities. Section 102(b) provides that the “classified Schedule” “shall be made available . . . to the President” and that “the President shall provide for suitable distribution of the Schedule . . . within the executive branch.” Notwithstanding subsection (b), the classified schedule has not been made available for our review, and accordingly we cannot comment on the constitutionality of these provisions. Statutory incorporation-by-reference of provisions or particulars contained in an extraneous document raise concerns with respect to the President’s ability to review legislation under the Presentment Clause, see U.S. Const. art. I, sec. 7, cl. 2, unless the extraneous document exists and is readily ascertainable by the President at the time the passed bill is presented to him. *See generally Hershey Foods Corp. v. USDA*, 158 F. Supp. 2d 37, 39-41 (D.D.C. 2001) (upholding statute’s cross-reference to ascertainable material in public documents, available to the President, that exist at time of presentment), *aff’d on other grounds*, 293 F.3d 520 (D.C. Cir. 2002). Consequently, the validity of the provisions in issue depends on the existence and availability of the incorporated materials at the time the legislation is presented to the President for signature, and preferably before such time so that the President’s advisers have adequate time and opportunity to review the materials in advance of advising the President on the enrolled bill.

Recommendations Clause. *With respect to section 354(b) of the bill, we discuss below a construction that would avoid a Recommendations Clause concern.*

Section 354(b) of the bill would amend the existing reporting requirement in 50 U.S.C. § 423(a), which requires the President to submit to an annual report on measures to protect the identities of covert agents, to include “an assessment of the need for any modification of this title.” If this provision were construed to require the President to submit legislative recommendations for congressional action even where he did not think any legislation is advisable, it would violate the Recommendations Clause, which commits to the President the discretion to recommend only such Measures as he shall judge necessary and expedient. U.S. Const. art. II, 3. We think the better reading of this provision—one that avoids a constitutional concern—is only to require recommendations of statutory measures deemed appropriate, if any.

Equal Protection. *We discuss below a construction of section 313 that would avoid Equal Protection concerns and potential strict scrutiny under Adarand Constructors.*

Section 313 of the bill would authorize the Director of National Intelligence to carry out a grant program whose purpose shall be “to enhance recruitment and retention of an ethnically and culturally diverse workforce for the intelligence community with capabilities critical to the national security interests of the United States.” The text of this provision would permit implementation in a manner that would be constitutional, but to the extent the provision contemplates making federal employment decisions or awarding federal benefits on the basis of race or ethnicity, such decisions would be subject to strict scrutiny under *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200 (1995). If strict scrutiny applied, it would require the government to demonstrate that any racial classifications in question are narrowly tailored to serve a compelling governmental purpose. *Id.* at 235.

GAO Oversight Provisions. *We discuss below a separation of powers policy concern raised by section 335 of the bill.*

Section 335 of the bill would give the Comptroller General unprecedented authority to conduct intelligence oversight, including, inter alia, authority to “conduct an audit or evaluation involving intelligence sources and methods or covert actions.” Section 335 would constitute a significant modification to the longstanding relationship between the intelligence community and Congress by which oversight of the intelligence community has been conducted exclusively by the intelligence committees, a practice that reflects a carefully crafted balance between the legitimate prerogatives of each branch. As such, this provision would raise policy concerns implicating the distribution of powers between the political branches.

**Comments of the Department of Justice on
H.R. 2701, the Intelligence Authorization Act for Fiscal Year 2010,” as Passed by the House**

H.R. 2701, the FY10 Intelligence Authorization Act, as passed by the House, raises the following constitutional and related concerns:

Inspector General provisions. Section 406 of the bill would create a new section 103I in the National Security Act of 1947, establishing in the Office of the Director of National Intelligence an Inspector General of the Intelligence Community. We have two comments on this section.

1. We recommend clarifying that proposed section 103I(i)(4)(A)-(D) of the National Security Act, as added by section 406 of the bill, would not purport to give intelligence community employees unilateral discretion to disclose classified information to Congress.

New section 103I(i)(4)(A)-(D) would allow any “employee of an element of the intelligence community” to report an “urgent concern” directly to the congressional intelligence committees “only if” he provides notice to the Director of National Intelligence, through the Inspector General, of the proposed disclosure, and “obtains and follows from the Director, through the Inspector General, direction on how to contact the intelligence committees in accordance with appropriate security practices.” “[I]ntelligence community” is defined under existing law to include, *inter alia*, ODNI, the CIA, the National Security Agency, Defense Intelligence Agency, National Geospatial-Intelligence Agency, National Reconnaissance Office, several enumerated elements of other agencies, and other components designated by the President. *See* 50 U.S.C. § 401a(4). The language in new section 103I(i) addressing employee communications to Congress tracks very closely—and in pertinent part is identical to—language from the Intelligence Community Whistleblower Protection Act of 1998 (ICWPA). *See* 50 U.S.C. § 403q(d)(5) (addressing communications to Congress by employees of the CIA); 5 U.S.C. app. § 8H(a) (communications by employees of the Defense Intelligence Agency, National Geospatial-Intelligence Agency, National Reconnaissance Office, National Security Agency, FBI, and any other agency or element determined by the President to have as its principal function the conduct of foreign intelligence or counterintelligence activities). In signing the ICWPA, President Clinton issued the following statement:

Finally, I am satisfied that this Act contains an acceptable whistleblower protection provision, free of the constitutional infirmities evident in the Senate-passed version of this legislation. The Act does not constrain my constitutional authority to review and, if appropriate, control disclosure of certain classified information to the Congress. I note that the Act’s legislative history makes clear that the Congress, although disagreeing with the executive branch regarding the operative constitutional principles, does not intend to foreclose the exercise of my constitutional authority in this area.

The Constitution vests the President with authority to control disclosure of information when necessary for the discharge of his constitutional responsibilities. Nothing in this Act purports to change this principle. I anticipate that this authority will be exercised only in exceptional circumstances and that when agency heads decide that they must defer, limit, or preclude the disclosure of sensitive information, they will contact the appropriate congressional committees promptly to begin the accommodation process that has traditionally been followed with respect to disclosure of sensitive information.

Statement on Signing the Intelligence Authorization Act for Fiscal Year 1999, 2 Pub. Papers of William J. Clinton 1825 (1998).

With respect to the signing statement's reference to legislative history, we note that the HPSCI Report circulated by OMB with the reported version of H.R. 2701 explains that the provisions in section 406 concerning the disclosure of "urgent concerns" to Congress by intelligence community employees "do[] not disturb, and the Committee intends to retain, the authoritative guidance for analogous provisions of the Intelligence Community Whistleblower Act of 1998, Pub. L. No. 105-272 (October 20, 1998), the Senate Committee report for that legislation, S. Rept. 105-185, and the conference report, H. Rept. 105-780." See H.R. Rep. No. 111-___, at 34 (draft June 24, 2009). The referenced conference report concerning the ICWPA in turn "incorporate[s] by reference the House report on H.R. 3829 (H.R. Rep. No. 105-747, part 1) and adopt[s] that report as the legislative history for title VII of the conference report [i.e., ICWPA]," subject to certain "corrections" contained in a footnote. See H.R. Rep. No. 105-780, at 33-34 & n.1 (1998). House Report 105-747, a HPSCI report on the bill later adopted in conference, discusses at length the Administration's constitutional objections to unilateral employee disclosures, and recognizes "the need for continued comity in the handling of . . . disclosures to Congress by whistleblowers from the IC." H.R. Rep. No. 105-747, at 16 (1998).

Whatever the precise significance of the (still-developing) legislative history incorporating the ICWPA reports, because the current bill contains language concerning employee disclosures to Congress that is essentially identical to that in the ICWPA, it raises the constitutional concerns addressed in President Clinton's signing statement. In particular, if this bill were read to give intelligence community employees unilateral discretion to disclose classified information to Congress, it would be unconstitutional. See *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92 (1998). Other than adding an explicit hold-back provision to the bill, the problem could be addressed by amending the relevant portions of ICWPA itself (in particular, 5 U.S.C. app. § 8H), rather than enacting virtually identical language in this bill. This approach would involve simply extending existing law, as informed by President Clinton's signing statement, to apply to any desired categories of employees who are not already covered, or to provide that intelligence community employees may also report their concerns to the Inspector General of the Intelligence Community instead of the Inspector General of their agency, should they so choose. Second, if amendment of the ICWPA is not practicable, we would interpret new section 1031(i)(4)(A)-(D) in a manner consistent with President Clinton's signing statement on the ICWPA, as articulated in the DOJ letter to Senator Feinstein of December 9, 2009 providing DOJ's comments on the Senate version of this bill.

2. *To avoid concerns raised by mandatory disclosure to Congress of information covered by the law enforcement component of executive privilege, new section 103I(i)(3) as added by section 406(a) of the bill should be revised to remove the reporting requirements in subparagraphs (B), (C), and (D).*

New section 103I(i)(3) purports to require the disclosure of information to Congress that may be covered by the law enforcement component of executive privilege. It would require the Inspector General for the Intelligence Community to “immediately notify, and submit a report to, the congressional intelligence committees” when “(B) an investigation, inspection, audit, or review carried out by the Inspector General focuses on [certain] current or former intelligence community official[s],” when “(C) a matter requires a report by the Inspector General to the Department of Justice on possible criminal conduct by [certain] current or former official[s],” or when “(D) the Inspector General receives notice from the Department of Justice declining or approving prosecution of possible criminal conduct of [certain] current or former official[s].” Insofar as these subparagraphs purport to require the disclosure of information relating to ongoing investigations by Inspectors General or the Department of Justice, they would implicate the longstanding policy of the Executive Branch to protect open law enforcement files from any breach of confidentiality, except in extraordinary circumstances. *See, e.g., Congressional Requests for Information from Inspectors General Concerning Open Criminal Investigations*, 13 Op. O.L.C. 77, 77 (1989) (“[W]hen . . . Congress seeks to obtain from an IG confidential information about an open criminal investigation, established executive branch policy and practice, based on consideration of both Congress’ oversight authority and principles of executive privilege, require that the IG decline to provide the information, absent extraordinary circumstances.”). *See also Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 117 (1984) (“Since the early part of the 19th century, Presidents have steadfastly protected the confidentiality and integrity of investigative files from untimely, inappropriate, or uncontrollable access by the other branches, particularly the legislature.”).

Executive Privilege. *With respect to a new provision entitled “Cybersecurity Oversight,” we set forth a reading of the provision that avoids a concern relating to the mandatory disclosure of information that is protected by executive privilege.*

The section of the bill entitled “Cybersecurity Oversight” would require the President to notify Congress of each cybersecurity program in operation and each new program that subsequently comes into operation. Under this section, the notification to Congress “shall include,” among other things, “the legal justification for the cybersecurity program.” Although Congress cannot require that legislative agents be given access to information properly protected by executive privilege, it may require the executive branch to provide to the intelligence committees the legal basis for its actions. We read the requirement to provide the “legal justification for [a] cyber security program” to require the disclosure to Congress of the legal basis of a cybersecurity program, but not any confidential legal opinions that are protected by executive privilege.

Presentment.

To avoid concerns under the presentment requirements of article I, section 7, the classified Schedule of Authorizations must be made available to the President at or before the time the bill is presented to him for signature.

Section 356 of the bill would incorporate into the Act any reporting requirements included in the “classified annex” to the Act. That classified annex has not been made available for our review, and accordingly we cannot comment on the constitutionality of these provisions. Statutory incorporation-by-reference of provisions or particulars contained in an extraneous document raise concerns with respect to the President’s ability to review legislation under the Presentment Clause, see U.S. Const. art. I, sec. 7, cl. 2, unless the extraneous document exists and is readily ascertainable by the President at the time the passed bill is presented to him. *See generally Hershey Foods Corp. v. USDA*, 158 F. Supp. 2d 37, 39-41 (D.D.C. 2001) (upholding statute’s cross-reference to ascertainable material in public documents, available to the President, that exist at time of presentment), *aff’d on other grounds*, 293 F.3d 520 (D.C. Cir. 2002). Consequently, the validity of the provisions in issue depends on the existence and availability of the incorporated materials at the time the legislation is presented to the President for signature, and preferably before such time so that the President’s advisers have adequate time and opportunity to review the materials in advance of advising the President on the enrolled bill.

Recommendations Clause. *We discuss below a construction of section 362(b) that would avoid a Recommendations Clause concern, and we recommend that section 505 be modified to be precatory in order to avoid a Recommendations Clause problem.*

Section 362(b) of the bill would amend 50 U.S.C. § 423(a) to provide that the President “shall submit to [Congress] an annual report on measures to protect the identities of covert agents . . . including an assessment of the need for any modification of this title.” If this provision were construed to require the President to submit his assessment of the need for legislative recommendations, even where he did not think it advisable, it would violate the Recommendations Clause, which commits to the President the discretion to recommend only such Measures as he shall judge necessary and expedient. U.S. Const. art. II, 3. We think the better reading of this provision—one that avoids a constitutional concern—is only to require recommendations of assessments or statutory measures deemed appropriate, if any.

Section 505 of the bill would establish a cybersecurity task force composed of members appointed by the Attorney General, the National Security Agency, the Director of National Intelligence, the White House Cybersecurity Coordinator, and a member appointed by the head of another agency designated by the Attorney General. It would require that this task force submit to Congress a report containing “guidelines or legislative recommendations on . . . the adequacy of existing criminal statutes to successfully deter cyber attacks, including statutes criminalizing the facilitation of criminal acts, the scope of laws for which cyber crime constitutes a predicate offense,” among other statutes. By its terms, the provision appears to permit the task force to submit “guidelines” rather than “legislative recommendations” on the “adequacy of

existing criminal statutes to deter cyber attacks,” but it is difficult to conceive of how such “guidelines” could amount to anything other than legislative recommendations. Insofar as this provision purports to require the task force, which is composed of Executive Branch officers, to submit recommendations for legislative action even when these officers do not think any legislation or amendment to existing legislation is advisable or to submit recommendations regarding legislative action even when they do not wish to take a position with respect to such action, it would violate the Recommendations Clause, which commits to the President the discretion to recommend only “such Measures as he shall judge necessary and expedient.” U.S. Const. art. II, § 3. Therefore, we recommend that the provision be made precatory (e.g., “Such report shall include guidelines or legislative recommendations, if any, on . . . the adequacy of existing criminal statutes . . .”).

Equal Protection. *We discuss below a construction of section 313 that would avoid Equal Protection concerns and potential strict scrutiny under Adarand Constructors.*

Section 312 of the bill would authorize the Director of National Intelligence to carry out a “grant program . . . to enhance the recruitment and retention of an ethnically and culturally diverse intelligence community workforce.” The text of this provision would permit implementation in a manner that would be constitutional, but to the extent the provision contemplates making federal employment decisions or awarding federal benefits on the basis of race or ethnicity, such decisions would be subject to strict scrutiny under *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200 (1995). If strict scrutiny applied, it would require the government to demonstrate that any racial classifications in question are narrowly tailored to serve a compelling governmental purpose. *Id.* at 235.

Reporting Requirements. *We discuss below our interpretation of section 304(c) and the provision entitled “Cybersecurity Oversight” as not precluding the ability of the President to review the report of the relevant Executive Branch official prior to its submission to Congress.*

Section 304(c)(2) of the bill would require the Secretary of Defense to “submit to the President and both Houses of Congress” a report on whether the Defense Civilian Intelligence Personnel System should be terminated. Similarly, in the provision of the bill entitled “Cybersecurity Oversight,” subsection (b)(1) would require the head of a department or agency to “submit to Congress and the President, in accordance with the schedule” specified in the provision, a report on the audit of a cybersecurity program. And subsection (c) of that section would require the Inspectors General of the Department of Homeland Security and the Intelligence to “jointly submit to Congress and the President” a report on the status of sharing cyber threat information. Consistent with the President’s constitutional authorities, we would not interpret these provisions as interfering with the President’s ability to review the agency head’s or Inspector General’s preparation of the report prior to its submission to Congress. *See Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 174-75 (1996).

Spending Restriction on Miranda Warnings. *We identify a concern that if section 504 were to have the effect of precluding the enforcement of federal criminal prohibitions, it would interfere with the President's ability to carry out his constitutionally assigned functions.*

Section 504 would bar the use of any funds appropriated by the Act to provide *Miranda* warnings to a non-citizen located outside the United States if that person is “suspected of terrorism, associated with terrorists, or believed to have knowledge of terrorists” or is “a detainee in the custody of the Armed Forces of the United States.” To the extent that this provision would have the practical effect of foreclosing federal criminal prosecutions for individuals described in section 504, and to the extent that the jurisdiction of military commissions would not extend to these individuals, this provision might preclude, at least in some instances, the enforcement of federal criminal prohibitions. If this were the case, the provision could raise concerns that it would interfere with the President's ability to carry out his constitutionally assigned functions. *See* U.S. Const. art. II, § 1 (“The executive Power shall be vested in a President.”); *id.* § 3 (the President shall “take Care that the Laws be faithfully executed”).

Guantanamo Spending restriction. *We note the possibility that section 367, although facially constitutional, could be the subject of as-applied constitutional challenges.*

Section 367 would prohibit the Director of National Intelligence from using any amounts that the Act authorizes to be appropriated to release or transfer into the United States any non-U.S. citizen who is in Department of Defense custody, or otherwise detained, at the Guantanamo Bay Naval Station until 120 days after the President submits a plan to Congress that includes, among other things: (1) an assessment of the risk posed by the individual; (2) a proposal for the disposition of the individual; (3) and a plan to mitigate any risks to national security posed by the individual. Although this 120-day report-and-wait requirement is facially constitutional, we note that in the event of a court order directing the transfer or release of a detainee into the United States, the length of the statutory waiting period is sufficiently substantial that it may be susceptible to as-applied constitutional challenges.

GAO Oversight Provisions. *We discuss below a separation of powers policy concern raised by section 335 of the bill.*

Section 335 of the bill would give the Comptroller General unprecedented authority to conduct intelligence oversight, including, inter alia, authority to “conduct an audit or evaluation involving intelligence sources and methods or covert actions.” Section 335 would constitute a significant modification to the longstanding relationship between the intelligence community and Congress by which oversight of the intelligence community has been conducted exclusively by the intelligence committees, a practice that reflects a carefully crafted balance between the legitimate prerogatives of each branch. As such, this provision would raise policy concerns implicating the distribution of powers between the political branches.