



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Department of State, A/GIS/IPS/RRP

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Honorable Richard G. Darman
Director
Office of Management and Budget
Washington, D.C. 20503

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Dear Mr. Darman:

This letter sets forth the views of the Department of Justice on S. 3225, which amends the State Department Basic Authorities Act of 1956, as recently passed by the Senate. See 136 Cong. Rec. 516,299-301 (daily ed. Oct. 19, 1990). We believe that certain provisions of this bill present constitutional difficulties.

Section 47(a) calls for the preparation and publication of "a thorough, accurate, and reliable documentary record of major United States foreign policy decisions and significant United States diplomatic activity." § 47(a)(1). The publication is to "include all documents needed to provide a comprehensive record of the major foreign policy decisions and actions of the United States Government." *Id.* To assist in the publication project, agencies would be required to carry out a procedure for declassification of documents. If an agency determined that a document could not be declassified because of "a continuing need to protect sources and methods or other national security information," the agency would be required to attempt to make such deletions as would make the document declassifiable. § 47(b)(3)(A). An Advisory Committee, which would be created under the bill, could direct the agency to prepare a declassified summary of material so excised if the Committee believed that the record would otherwise be misleading or incomplete. If the Advisory Committee disagreed with the agency's decisions about deletions or the summary, or if the agency refused to prepare a redacted version of the document or the summary, the Advisory Committee would report to Congress, and the agency would be required to respond to the report. The Advisory Committee could also approve the withholding of documents if, by vote of a majority of its members, it determined that continued secrecy was necessary to avoid "imped[ing] current diplomatic negotiations or

other ongoing official activities of the United States Government" or to "condense the record and avoid repetition of needless details." § 47(c)(7). Documents of the Department of State would automatically be declassified 30 years after the events documented unless their release "would compromise weapons technology important to the national defense of the United States or provide access by other nations to sensitive weapons design information relating to the United States or foreign military equipment or relating to United States cryptologic systems or codes," would create a threat of harm to living persons who gave confidential information to the United States, or would "demonstrably impede current diplomatic negotiations or other ongoing official activities of the United States Government." § 47(e).

The Advisory Committee would consist of nine "distinguished historians," of whom not more than two would be employees of the United States. Members would be appointed by the Secretary of State, with the advice of the Assistant Secretary for Public Affairs. The bill would apparently require the Secretary to select at least one member of the committee from each of the lists prepared by six named historical organizations. Members would serve for a term of three years. The Committee would select its own Chairman, who would serve a term of one year. § 47(c).

We have three objections to S. 3225. First, the bill trenches on the President's constitutional authority to protect state secrets. Second, it intrudes upon the deliberative privilege for communications within the Executive Branch. Third, the bill does not provide for sufficient presidential direction and control over the operations of the Advisory Committee to be created under the bill.

1. S. 3225 trenches on the President's constitutional authority both to protect military, diplomatic, and national security secrets and to safeguard the deliberative process within the Executive Branch. The Constitution vests in the President an expansive authority to protect state secrets from disclosure:

The President, after all, is the "Commander in Chief of the Army and Navy of the United States." U.S. Const., Art. II, § 2. His authority to . . . control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant. . . . The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.

Department of the Navy v. Egan, 484 U.S. 518, 527 (1988) (citations omitted). See United States v. Nixon, 418 U.S. 683, 710 (1974) ("As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities."). Indeed, the President can assert an absolute privilege against forced disclosure of state secrets: "The [state secrets] privilege, it is clear, is absolute. 'No competing public or private interest can be advanced to compel disclosure.'" In re United States, 872 F.2d 472, 476 (D.C. Cir.) (quoting Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984)), cert. dismissed, 110 S. Ct. 398 (1989).

Moreover, as a practical matter, while S. 3225 may be intended to provide for the release only of information other than state secrets, the procedure to be followed under the bill would create a substantial danger that state secrets would be revealed. First, in the discharge of the duties committed to him by the Constitution, the President cannot be bound by Congress' determination of what constitutes a secret worthy of protection. There may be unforeseen circumstances in which the grounds for continued secrecy laid out in the bill would be insufficient to reach information that the President considered a state secret. Second, the bill would require the Executive Branch to make publication determinations about a vast body of material on unreasonably short notice. By its terms, the bill requires the publication of "all documents needed to provide a comprehensive record of the major foreign policy decisions and actions of the United States Government" and the "published record shall omit no facts which were of importance in reaching a decision." Publication decisions would have to be made within 60 days after submission of the documents for review. § 47(b)(3)(A). These requirements place an unreasonable burden on the Executive Branch and create a substantial likelihood that state secrets will inadvertently be made public.

2. S. 3225 would also intrude upon the deliberative privilege for communications within the Executive Branch. That privilege rests on "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." United States v. Nixon, *supra*, 418 U.S. at 706. As the Supreme Court has recognized, "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Id.* The revelation of such communications, even long after the events, would have a chilling effect on the candor of executive branch officers and employees. If S. 3225 were enacted into law, the President's advisers would be put on notice that their advice will one day become public, and they may be less "candid, objective, and even blunt or harsh" as a result.

3. The operations of the "Advisory Committee" under the bill would also be unconstitutional because the Committee would not be subject to sufficient presidential direction and control. The President "may properly supervise and guide [officers'] construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." Myers v. United States, 272 U.S. 52, 135 (1926). In our view, the power to withhold documents from publication would be "the performance of a significant governmental duty exercised pursuant to a public law." Buckley v. Valeo, 424 U.S. 1, 141 (1976). Such duties may be performed only by "Officers of the United States," appointed in conformity with the Appointments Clause and subject to presidential direction and control. Id. S. 3235, however, satisfies neither of these requirements. Notwithstanding that the Advisory Committee has a role in decisions affecting the national security, S. 3225 appears to contemplate that the Advisory Committee would operate in a manner bound to frustrate the "unitary and uniform execution of the laws," because the Committee would report on disputes within the Executive Branch over declassification decisions, and the agencies would then be required to answer the Advisory Committee's reports. Furthermore, absent review by principal officers, the members of the Advisory Committee would themselves be principal officers for purposes of the Appointments Clause, and would have to be appointed by the President with the advice and consent of the Senate. See Morrison v. Olson, 108 S. Ct. 2597, 2608-2609 (1988). The President has plenary authority to nominate principal officers, subject only to the advice and consent of the Senate, and the Congress can not dictate the qualifications of the persons to be appointed or require them to be chosen from lists provided by specified non-governmental entities. See Public Citizen v. U.S. Department of Justice, 109 S. Ct. 2558, 2580-2584 (1989) (Kennedy, J., concurring in the judgment).

Sincerely,

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W. Lee Rawls
Assistant Attorney General