

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20502

October 31, 2011

President Barack Obama
The White House
Washington, DC 20500

Dear Mr. President:

In accordance with OMB Circular A-11,¹ this letter reports the views of the Office of Science and Technology Policy (OSTP) in the Executive Office of the President regarding the conclusion of the U.S. Government Accountability Office (GAO) that OSTP violated the Antideficiency Act² by engaging in diplomatic activities purportedly prohibited by section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011.³ OSTP disagrees with the GAO's conclusion, which is contrary to the legal opinion of the Department of Justice.

On October 11, 2011, the GAO concluded that OSTP's use of appropriations to fund certain bilateral interactions with China violated the prohibition set forth in section 1340(a).⁴ Section 1340(a) prohibited OSTP from using appropriated funds "to develop, design, plan, promulgate, implement, or execute a bilateral policy, program, order, or contract of any kind to participate, collaborate, or coordinate bilaterally in any way with China or any Chinese-owned company unless such activities are specifically authorized by a law enacted after the date of enactment of this division."⁵

The GAO stated that it "is not our role nor within our province to opine upon or adjudicate the constitutionality of duly enacted statutes such as section 1340" and "absent a judicial opinion from a federal court of jurisdiction that a particular provision is unconstitutional, [the GAO applies] laws as written to the facts presented."⁶ The GAO observed that "legislation that was passed by Congress and signed by the President, thereby satisfying the Constitution's bicameralism and presentment requirements, is entitled to a heavy presumption in favor of constitutionality."⁷ The GAO thus concluded that OSTP's expenditure of funds during the U.S.-China Dialogue on Innovation Policy and the U.S.-China Strategic and Economic Dialogue in May 2011 violated section 1340(a) and resulted in obligations in excess of appropriated funds, in violation of the Antideficiency Act.

¹ OMB Circular No. A-11, § 145.8 (2011).

² 31 U.S.C. § 1341(a)(1)(A).

³ Department of Defense and Full-Year Continuing Appropriations Act, 2011, § 1340(a), Pub. L. No. 112-10, 125 Stat. 38, 123.

⁴ *Office of Science and Technology Policy-Bilateral Activities with China*, B-321982, 2011 WL 4826145 (Comp. Gen. Oct. 11, 2011).

⁵ Pub. L. No. 112-10, 125 Stat. 38, 123.

⁶ *Bilateral Activities*, B-321982.

⁷ *Id.*

OSTP disagrees with the GAO's conclusion. The OSTP discussions with Chinese officials that GAO claims violated the Antideficiency Act took place—on May 6-10, 2011—only after OSTP's receipt of an informal opinion from the Department of Justice. That informal opinion from the Department of Justice concluded that 1340(a) is unconstitutional to the extent that it interferes with the President's exclusive constitutional authority to conduct the foreign relations of the United States. The Department of Justice also concluded that OSTP's activities as the U.S. Executive Agent for the U.S.-China Science and Technology Cooperation Agreement and as the Administration's leader for the U.S.-China Dialogue on Innovation Policy fall under the President's exclusive constitutional authority.

Accordingly, OSTP testified before the House Appropriations Subcommittee on Commerce, Science and Justice on May 4, 2011, that OSTP would not comply with 1340(a) insofar as doing so would compromise the indicated Presidential authority. OSTP notified the Subcommittee in writing on May 5 of our intention to conduct meetings with Chinese officials in Washington, DC, starting on May 6, in connection with the U.S.-China Dialogue on Innovation Policy and the Strategic and Economic Dialogue (to which the innovation policy dialogue reports). OSTP also informed the Congressional leadership by letter on May 16, 2011, of OSTP's intent to continue not to comply with 1340(a) going forward.

The Department of Justice memorialized its informal legal opinion in a formal opinion issued on September 19, 2011 (some two weeks prior to the release of GAO's opinion, which nonetheless failed to directly address the Justice Department's arguments). The Justice Department's opinion concluded that section 1340(a) "is unconstitutional as applied to certain activities undertaken pursuant to the President's constitutional authority to conduct the foreign relations of the United States."⁸ GAO's assertion that OSTP is bound by section 1340(a) in the absence of a judicial ruling that the provision is unconstitutional is contrary to the longstanding view and practice of the Executive Branch to interpret and apply statutes consistent with the Constitution.

In particular, as the Justice Department has observed, the President "has the authority to sign legislation containing desirable elements while refusing to execute a constitutionally defective provision"⁹ and "to refuse to enforce a law that he believes is unconstitutional."¹⁰ This authority derives from the President's Constitutional duty to "take Care that the Laws be faithfully executed,"¹¹ and the obligation to "preserve, protect and defend the Constitution of the United States"¹² contained in the President's oath of office.¹³ Indeed, "in serving as the executive created by the Constitution, the President is required to act in accordance with the laws—

⁸ *Re: Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011*, at 1 (Sept. 19, 2011), available at www.justice.gov/olc/opinions.htm.

⁹ *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 202-03 (1994) ("*Unconstitutional Statutes*").

¹⁰ *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 46 (1990) ("*Foreign Relations Bill*").

¹¹ U.S. CONST. art. II, § 3.

¹² U.S. CONST. art. II, § 1.

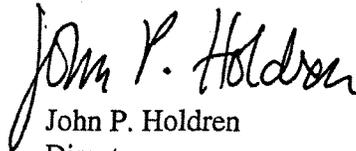
¹³ *Foreign Relations Bill*, 14 Op. O.L.C. at 46.

including the Constitution, which takes precedence over other forms of law."¹⁴ Because of the constitutional defects with section 1340(a), the Justice Department advised OSTP that it could engage in bilateral interactions with China as the President's agents insofar as appropriated funds were otherwise available.¹⁵

As an Executive Branch agency, OSTP is bound by the opinion of the Justice Department regarding the legality of its activities,¹⁶ not by the opinion of the GAO,¹⁷ which is an agency of the legislative branch. In light of the Justice Department's conclusions as to how section 1340(a) must be interpreted and applied, OSTP has consistently maintained that "certain applications of Section 1340 . . . infringe upon the President's exclusive constitutional authority over diplomatic relations."¹⁸ Consistent with past Executive Branch interpretations and under the advice of counsel, OSTP stated that it would "not apply this provision where doing so would encroach upon the President's exclusive constitutional authority over international diplomacy."¹⁹ It is the conclusion of OSTP, in consultation with the Department of Justice, that it has not violated the Antideficiency Act.

Copies of this report are being simultaneously submitted to the President of the Senate, the Speaker of the House, and the Comptroller General.

Respectfully,


John P. Holdren
Director

¹⁴ *Unconstitutional Statutes*, 18 Op. O.L.C. at 200; see also *Foreign Relations Bill*, 14 Op. O.L.C. at 46-47 ("Where a statute enacted by Congress conflicts with the Constitution, the President is placed in the position of having the duty to execute two conflicting 'laws': a constitutional provision and a contrary statutory requirement. The resolution of this conflict is clear: the President must heed the Constitution—the supreme law of our Nation.").

¹⁵ *Re: Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011*, at 1 (Sept. 19, 2011).

¹⁶ See *Use of General Agency Appropriations to Purchase Employee Business Cards*, 21 Op. O.L.C. 150, 151 (1997) ("In the event of a conflict between a legal opinion of the Attorney General and that of the Comptroller General, the opinion of the Attorney General is controlling for executive branch officers."); see, e.g., 28 U.S.C. §§ 511-512 (establishing duty of the Attorney General to provide opinions on questions of law to the President and the heads of executive departments).

¹⁷ See *Bowsher v. Synar*, 478 U.S. 714, 727-32 (1986); *Delta Data Systems Corp. v. Webster*, 744 F.2d 197, 201 (D.C. Cir. 1984) ("the GAO's advice is not binding upon the agency") (citing *INS v. Chadha*, 462 U.S. 919 (1983)); Memorandum for the Heads of Executive Departments and Agencies from Peter R. Orszag, Director, Office of Management and Budget, *Re: Recent Government Accountability Office Decisions Concerning Small Business Programs* (July 10, 2009) ("The GAO's decisions are not binding on Federal agencies . . ."); Memorandum Opinion for the Acting General Counsel, Environmental Protection Agency, from Steven A. Engel, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Authority of Environmental Protection Agency to Hold Employees Liable for Negligent Loss, Damage, or Destruction of Government Personal Property* at 6 n.5 (May 28, 2008) ("The decisions of the Comptroller General are not binding on the Executive Branch . . ."), available at www.justice.gov/olc/opinions.htm.

¹⁸ Letter from OSTP Director John Holdren to Speaker John Boehner, *Re: Section 1340 of the Department of Defense and Full-Year Continuing Appropriations Act of 2011* (May 16, 2011).

¹⁹ *Id.*

Enclosures:

Letter from OSTP Director John Holdren to Speaker John Boehner, *Re: Section 1340 of the Department of Defense and Full-Year Continuing Appropriations Act of 2011* (May 16, 2011).

Office of Science and Technology Policy-Bilateral Activities with China, B-321982, 2011 WL 4826145 (Comp. Gen. Oct. 11, 2011) (*Bilateral Activities*).

Re: Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011, at 1 (Sept. 19, 2011), available at www.justice.gov/olc/opinions.htm.

Letter from OSTP Director John Holdren to Chairman Frank Wolf, *Re: OSTP's intention to meet with Chinese officials on May 6-10* (May 5, 2011).

cc: The Honorable Joe Biden, President of the Senate
The Honorable John Boehner, Speaker of the House
Mr. Eugene Louis Dodaro, Comptroller General

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20502

May 16, 2011

The Honorable John A. Boehner
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: Section 1340 of the Department of Defense and Full-Year Continuing Appropriations Act of 2011

Dear Mr. Speaker:

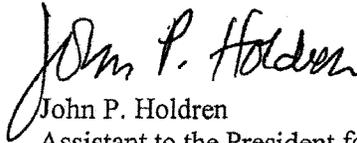
After careful consideration, including consultation with the Department of Justice, it has been determined that, with respect to OSTP, certain applications of Section 1340 of the Department of Defense and Full-Year Continuing Appropriations Act of 2011, 112 P.L. 10, infringe upon the President's exclusive constitutional authority over diplomatic relations. In particular, Section 1340 interferes with the exercise of authority delegated to OSTP by the President to carry out the President's objectives in international diplomatic negotiations and discussions. OSTP will therefore refrain from applying the restrictions of Section 1340 when those restrictions impermissibly constrain the President's exercise of his constitutional authority over diplomatic relations. Consistent with the requirements of 28 U.S.C. § 530D, I am writing to advise you of this determination and to inform you of the steps OSTP will take to implement that determination.

In OSTP's organic statute, Congress specified that the OSTP Director shall assess and advise on policies for international cooperation in science and technology and identify areas in which science and technology can be used effectively in addressing national and international problems. Science and technology cooperation provides a powerful lever with which the United States can work to achieve important U.S. goals, including opening China to U.S. exports and improving Chinese respect for international intellectual property laws. The constraints that Section 1340 places on OSTP would impair US coordination with China on science and technology matters of critical importance, including preventing pandemics, the development of clean energy, reducing reliance on foreign oil and its impact on gas prices, and nuclear reactor safety.

The President designated OSTP as his agent to conduct certain diplomatic negotiations and discussions with China, including negotiations and discussions in support of the U.S.-China Agreement on Cooperation in Science and Technology. The President may also designate OSTP to represent him in other diplomatic discussions with China in the future. To the extent that Section 1340 restricts such activities, it impermissibly interferes with the President's exclusive constitutional authority to determine the time, place, manner, and content of diplomatic

communications and to select the agents who will represent the President in diplomatic interactions with foreign nations.¹ Congress cannot use its appropriations power to infringe upon the President's exclusive constitutional authority in this area.² Accordingly, and consistent with past Executive Branch practice, OSTP will not apply this provision where doing so would encroach upon the President's exclusive constitutional authority over international diplomacy. OSTP began implementing this determination on April 15, 2011. As OSTP Director, I am the officer responsible for implementing this determination. Please do not hesitate to contact me if you have any questions.

Sincerely yours,



John P. Holdren
Assistant to the President for Science and Technology
and Director, Office of Science and Technology Policy

cc: The Honorable Harry Reid, Senate Majority Leader
The Honorable Mitch McConnell, Senate Minority Leader
The Honorable Eric Cantor, Majority Leader
The Honorable Nancy Pelosi, Minority Leader
The Honorable Lamar Smith, Chairman, Committee on the Judiciary
The Honorable John Conyers, Jr., Ranking Minority Member, Committee on the Judiciary
The Honorable Patrick Leahy, Chairman, Senate Committee on the Judiciary
The Honorable Frank Wolf, Chairman, House Appropriations Subcommittee on Commerce, Science and Justice
The Honorable Chaka Fattah, Ranking Member, House Appropriations Subcommittee on Commerce, Science and Justice
Kerry Kircher, House General Counsel
Morgan J. Frankel, Senate Legal Counsel

¹ See, e.g., Memorandum Opinion for the Acting Legal Adviser, Department of State, from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, Re: *Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act* (June 1, 2009) ("Section 7054 Opinion"), available at www.justice.gov/olc/opinions.htm; *Statement on Signing Legislation to Locate and Secure the Return of Zachary Baumel, a United States Citizen, and Other Israeli Soldiers Missing in Action*, 35 Weekly Comp. Pres. Doc. 2305 (Nov. 8, 1999); *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. O.L.C. 18, 21 (1992) ("Diplomatic Passports").

² See, e.g., Section 7054 Opinion at 10-12; *Diplomatic Passports*, 16 Op. O.L.C. at 29.