



United States Department of State

Washington, D.C. 20520

SENSITIVE BUT UNCLASSIFIED

July 27, 2020

MEMORANDUM

TO: Sandra Lewis, Assistant Inspector General for Inspections

FROM: L – Joshua L. Dorosin, Deputy Legal Adviser

SUBJECT: Department Redactions Related to OIG’s Review of the Department of State’s Role in Arms Transfers to the Kingdom of Saudi Arabia and the United Arab Emirates

The Department of State provided your office on July 10, 2020, with its management response to the OIG’s draft report and classified annex entitled *Review of the Department of State’s Role in Arms Transfers to the Kingdom of Saudi Arabia and the United Arab Emirates*. The Department’s response raised issues with some of the factual findings of the draft report and classified annex. It also identified language that should be marked SBU and redacted before public release, language that should be redacted before public release pursuant to certain FOIA exemptions, and language that should be redacted, based on potential executive privilege concerns, from any version of the report and annex provided to Congress.

You responded on July 21, 2020, asking the Department to provide a list of requested redactions to OIG’s report and classified annex, including any redactions that should be made to the Department’s formal responses to OIG. Following our further consultations with the OIG General Counsel’s Office, we understand that the Department should wait to provide the necessary specific word-for-word redactions until we receive the final version of the report and annex sometime this week.

Your July 21 response also took issue with the Department’s assertion that potential executive privilege concerns provided a basis for redactions, asserting that “Executive Privilege must be specifically claimed by the Department or the owner of the privilege.” As reflected in our productive discussions with your General Counsel’s Office, we disagree. The Secretary does have the authority to direct the OIG not to disclose privileged information, and the Department may do so without any final assertion of executive privilege. The Inspector General Act makes clear that the Inspector General is subject to the supervision of the Secretary: “Each Inspector General shall report to and be under the general supervision of the head of the establishment involved.” 5 U.S.C. § 3(a). That supervisory authority includes the power to exercise executive branch authority to control the disclosure to Congress of privileged information that has been made available to an Office of Inspector General over the course of its review of a matter. This principle was stated clearly in *United States v. Nixon*, 418 U.S. 683, 705 (1974) (recognizing executive privilege and observing that “the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties”).

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A situation like this was addressed at a hearing of the House Committee on Natural Resources on September 11, 2014 at which that committee sought to obtain privileged Department of Interior documents from the Department's Office of Inspector General. Testimony by the Deputy Inspector General neatly set out both the Constitutional and policy grounds for why the executive agency is the proper actor, as between the agency and the agency's inspector general, to make determinations regarding the disclosure of privileged information to Congress:

we have repeatedly asked that the Committee attempt to resolve the issue with DOI. We also explained that we have a long-standing understanding with DOI that it would not decline to provide privileged documents to the OIG so long as we gave DOI an opportunity to identify cognizable privileges, as it has here. We have also repeatedly expressed our concern that release of privileged information [to Congress] in this instance by the OIG will seriously impair our access to the same in the future.

Testimony of Mary L. Kendall, Deputy Inspector General for the Department of Interior.

Thus, it is our view that your office should defer to the Department in the identification of information the release of which would be inconsistent with executive branch confidentiality interests. As indicated in the Department's management response and technical comments, the Department believes that certain redactions are required in any version of the report that will be provided to Congress. These redactions are necessary to protect executive branch confidentiality interests in relation to the report's detailed description and analysis of the deliberative process associated with a 2017 Presidential national security and foreign policy decision and with continuing internal executive branch efforts to implement that decision. Such sensitive national security and foreign policy decisions lie at the heart of the President's constitutional powers, and deliberations related to such decisions have been recognized as falling squarely within the scope of executive privilege. While we recognize that there may be situations involving wrongdoing where it would not be appropriate to withhold privileged information from Congress, we do not, based on our review of the OIG report, believe that this is a consideration in this case.

The Department's cooperation with the OIG in making this information available to enable it to discharge its responsibility to conduct the review in question did not constitute a waiver by the Department of its ability to protect these executive branch confidentiality interests in connection with disclosures to Congress. Should a congressional committee wish to request the redacted information after its review of the report, the Department stands ready to engage in discussions with the committee in order to seek to accommodate their request in accordance with recognized Constitutional principles.