FRANK R. WOLF
10TH DISTRICT, VIRGINIA

COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEES:
CHAIRMAN—COMMERCE-JUSTICE-SCIENCE
TRANSPORTATION-HUD
STATE AND FOREIGN OPERATIONS

CO-CHAIR—TOM LANTOS
HUMAN RIGHTS COMMISSION

Congress of the United States
House of Representatives

October 13, 2011

241 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-4610
(202) 225-5136

13873 PARK CENTER ROAD
SUITE 130
HERNDON, VA 20171
(703) 709-5800
(800) 945-9653 (IN STATE)

110 NORTH CAMERON STREET
WINCHESTER, VA 22601
(540) 667-0990
(800) 850-3463 (IN STATE)

wolf.house.gov

Dr. John Holdren
Assistant to the President
Office of Science and Technology Policy
725 17th St, NW
Washington DC 20502

Dear Dr. Holdren:

I was disappointed that I did not hear back from you yesterday about your plans to bring the Office of Science and Technology Policy (OSTP) into full compliance with section 1340 of the Department of Defense and Full Year Continuing Appropriations Act, 2011, which prohibits OSTP and NASA from engaging in bilateral activities with the Chinese government or a Chinese owned company. When we spoke on the phone earlier in the day, I asked for a response by the close of business, and you informed me that I could expect to hear back from you or the White House counsel. I heard from neither.

The Government Accountability Office (GAO) found that OSTP has clearly violated both section 1340 and the Antideficiency Act. The GAO finding notes, "As a consequence of using its appropriations in violation of section 1340, OSTP violated the Antideficiency Act. Under the Antideficiency Act, an officer or employee of the U.S. Government may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation... By using its fiscal year 2011 appropriation in a manner specifically prohibited, OSTP violated the Antideficiency Act. Accordingly, OSTP should report the violation as required by the act."

Because I have received no indication from you that OSTP will bring itself into compliance with the law, I have referred this matter to the attorney general and have asked him to fully enforce the relevant statutes under the Antideficiency Act.

Sincerely,

Frank R. Wolf
Chairman
Commerce-Justice-Science Subcommittee
House Appropriations Committee

FRANK R. WOLF
10TH DISTRICT, VIRGINIA

COMMITTEE ON APPROPRIATIONS

SUBCOMMITTEES:

CHAIRMAN—COMMERCE-JUSTICE-SCIENCE

TRANSPORTATION-HUD

STATE AND FOREIGN OPERATIONS

CO-CHAIR—TOM LANTOS
HUMAN RIGHTS COMMISSION

Congress of the United States
House of Representatives

October 13, 2011

241 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–4610
(202) 225–5136

13873 PARK CENTER ROAD
SUITE 130
HERNDON, VA 20171
(703) 709–5800
(800) 945–9653 (IN STATE)

110 NORTH CAMERON STREET
WINCHESTER, VA 22601
(540) 667–0990
(800) 850–3463 (IN STATE)

wolf.house.gov

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave NW Rm 5111
Washington DC 20530

Dear Attorney General Holder:

I write to share the enclosed opinion from the Government Accountability Office (GAO) that found that the White House Office of Science and Technology Policy (OSTP), led by Dr. John Holdren, in violation of the law due to its continued bilateral dealings with the Chinese government.

I requested the GAO investigation earlier this year after Dr. Holdren defied the provision prohibiting OSTP and NASA from engaging in bilateral discussions with the Chinese government included in section 1340 of the Department of Defense and Full Year Continuing Appropriations Act, 2011. Just days after appearing before the House Commerce-Justice-Science Appropriations Subcommittee to discuss, among other things, the implementation of section 1340, Dr. Holdren participated in the U.S.-China Strategic and Economic Dialogue (S&ED), which took place between May 6-10. Dr. Holdren failed to notify the subcommittee of his involvement during the hearing and I only learned of his participation in a letter delivered to the Subcommittee on May 5.

The GAO finding clearly affirms the meaning of the section 1340 prohibition, stating:

"The plain meaning of section 1340 is clear. OSTP may not use its appropriations to participate, collaborate, or coordinate bilaterally in any way with China or any Chinese-owned companies. Here, OSTP's participation in the Innovation Dialogue and S&ED contravened the appropriations restriction. The Director opened the Innovation Dialogue and moderated discussions therein. OSTP staff prepared materials for and attended the discussions. OSTP then invited U.S. and Chinese officials to a dinner that it paid for using its appropriation. Finally, OSTP participated in the S&ED, during which the Director spoke on multiple occasions, including on climate science. OSTP did not identify, nor are we aware of, any specific authority to do so that was enacted after the date of the Continuing Appropriations Act, 2011.

"OSTP does not deny that it engaged in activities prohibited by section 1340."

In assessing OSTP's non-compliance with section 1340, the GAO finding also rebuts a September 19 memorandum prepared by the Justice Department's Office of Legal Counsel (OLC) on the constitutionality of the provision. According to the GAO finding, "In our view, 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."

Finally, the GAO finding indicates that Dr. Holdren has clearly violated the Anti-Deficiency Act. The finding notes, "As a consequence of using its appropriations in violation of section 1340, OSTP violated the Antideficiency Act. Under the Antideficiency Act, an officer or employee of the U.S. Government may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation... By using its fiscal year 2011 appropriation in a manner specifically prohibited, OSTP violated the Antideficiency Act. Accordingly, OSTP should report the violation as required by the act."

As attorney general, it is your responsibility to ensure that the nation's laws are upheld and enforced. I expect that you will: 1) ensure comprehensive enforcement of section 1340 by immediately rescinding the misguided OLC memorandum that sought to provide legal justification for OSTP's non-compliance with the law, and 2) hold Dr. Holdren to full account for his violation of the Anti-Deficiency Act by ensuring that he complies with all reporting requirements and other provisions of that law.

I look forward to your prompt response.

Sincerely,

Frank R. Wolf
Chairman
Commerce-Justice-Science Subcommittee
House Appropriations Committee

GAO
Accountability * Integrity * Reliability
United States Government Accountability Office
Washington, DC 20548

B-321982

October 11, 2011

The Honorable Frank R. Wolf
Chairman, Subcommittee on Commerce
Justice, Science, and Related Agencies
Committee on Appropriations
House of Representatives

Subject: *Office of Science and Technology Policy—Bilateral Activities with China*

This responds to your request for our opinion on the propriety of activities undertaken in May 2011 by the Office of Science and Technology Policy (OSTP) with representatives of the government of the People's Republic of China. Letter from Representative Wolf to the Comptroller General (May 11, 2011) (Request Letter). Specifically, you point to meetings with Chinese representatives during the U.S.-China Dialogue on Innovation Policy (Innovation Dialogue) and the U.S.-China Strategic and Economic Dialogue (S&ED) held in Washington, D.C., in May 2011. You ask whether OSTP violated section 1340 of the Department of Defense and Full-Year Continuing Appropriations Act, 2011. Section 1340 prohibits the use of OSTP appropriations for bilateral activities between OSTP and China, or Chinese-owned companies, unless specifically authorized by laws enacted after the date of the appropriations act. Pub. L. No. 112-10, div. B, title III, 125 Stat. 38, 123 (Apr. 15, 2011).

As explained below, we conclude that OSTP's use of appropriations to fund its participation in the Innovation Dialogue and the S&ED violated the prohibition in section 1340. In addition, because section 1340 prohibited the use of OSTP's appropriations for this purpose, OSTP's involvement in the Innovation Dialogue and the S&ED resulted in obligations in excess of appropriated funds available to OSTP; as such, OSTP violated the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(A).

Our practice when rendering legal opinions is to obtain the views of the relevant agency to establish a factual record and to elicit the agency's legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/resources.html. In this case, OSTP provided us with its legal views and relevant supporting materials. Letter from General Counsel, OSTP to Assistant General Counsel, GAO, *Re: B-321982, Office of Science and Technology Policy – Bilateral Activities with China* (June 23, 2011) (OSTP Response). We also

spoke by telephone with OSTP's General Counsel to ask questions about OSTP's June letter. Telephone Conversation with General Counsel, OSTP (Aug. 4, 2011) (August Conversation). *See also* Letter from General Counsel, OSTP to Senior Attorney, GAO, *Re: Follow-up to August 4, 2011, Telephone Call* (Aug. 29, 2011) (OSTP August Letter).

BACKGROUND

The Presidential Science and Technology Advisory Organization Act of 1976[1] established OSTP to "serve as a source of scientific and technological analysis and judgment for the President with respect to major policies, plans, and programs of the Federal Government." 42 U.S.C. § 6614(a). Part of the agency's mission is to "advise the President of scientific and technological considerations involved in areas of national concern including . . . foreign relations. . . ." 42 U.S.C. § 6613(b)(1).

Between May 6 and 10, 2011, OSTP "led and participated in a series of meetings with Chinese officials" as part of the Innovation Dialogue and the S&ED. OSTP Response, at 3. On May 6, 2011, the OSTP Director and Chinese Minister of Science and Technology participated in the Innovation Dialogue. According to OSTP, a goal of the Innovation Dialogue was to "serve as a forum for persuading the rollback of discriminatory, counterproductive Chinese procurement and intellectual property policies. . . ." OSTP Response, at 3. Among the topics discussed were "market access and technology transfer; innovation funding and incentives; standards and intellectual property; and government intervention." OSTP Response, at 4. OSTP informed our office that the OSTP Director opened and closed the Innovation Dialogue and served on discussion panels. OSTP August Letter, at 1. OSTP staff helped the Director prepare for and participate during the meetings. *Id. See* OSTP Response, at 5.

On May 8, 2011, OSTP hosted a dinner to honor Chinese dignitaries. Six U.S. participants attended the dinner, along with an unidentified number of "staff-level employees from other federal agencies." OSTP Response, at 4, n.13. The Director is the only listed dinner attendee from OSTP. There were six Chinese invitees. *Id.*

On May 9 and 10, 2011, OSTP participated in the S&ED. The purpose of the S&ED was to bring together various U.S. and Chinese government officials to "discuss a broad range of issues between the two nations," including on matters regarding trade and economic cooperation. U.S. Department of the Treasury, *U.S. –China Strategic and Economic Dialogue*, *available at* www.treasury.gov/initiatives/Pages/china.aspx (last visited Oct. 4, 2011). The Secretary of the Treasury and the Secretary of State co-chaired the S&ED along with the Vice Premier and State Councilor of the People's Republic of China. *Id.* Topics of discussion included "enhancement of trade and investment cooperation;

[1] Pub. L. No. 94-282, title II, 90 Stat. 459, 463-68 (May 11, 1976), 42 U.S.C. §§ 6611–6624

an overview of bilateral relations; military-to-military relationships; cooperation on clean energy, energy security, climate change, and environment; customs cooperation; and energy security." OSTP Response, at 4. The OSTP Director spoke many times during the various sessions, including on U.S.-China cooperation on climate science. August Conversation. OSTP also had at least one staff member attend the S&ED in addition to the Director. *Id.*

The Full-Year Continuing Appropriations Act, 2011, enacted into law on April 15, 2011, included appropriations for OSTP for fiscal year 2011 in title III of division B. Pub. L. No. 112-10, div. B. Section 1340 of title III provides:

> "None of the funds made available by this division may be used for the National Aeronautics and Space Administration or the Office of Science and Technology Policy 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."

Pub. L. No. 112-10, § 1340.

OSTP informed us that it incurred costs of approximately $3,500 to participate in the week's activities, including the cost of staff time for nine employees preparing for and participating in the discussions, as well as the cost of the dinner OSTP hosted on May 8. OSTP Response, at 5.

DISCUSSION

At issue in this opinion is whether OSTP violated section 1340's proscription, and, if so, whether the agency violated the Antideficiency Act.

As with any question involving the interpretation of statutes, our analysis begins with the plain language of the statute. *Jimenez v. Quarterman*, 555 U.S.113 (2009). When the language of a statute is "clear and unambiguous on its face, it is the plain meaning of that language that controls." B-307720, Sept. 27, 2007; B-306975, Feb. 27, 2006; *see also Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925).

The plain meaning of section 1340 is clear. OSTP may not use its appropriations to participate, collaborate, or coordinate bilaterally in any way with China or any Chinese-owned companies. Here, OSTP's participation in the Innovation Dialogue and S&ED contravened the appropriations restriction. The Director opened the Innovation Dialogue and moderated discussions therein. OSTP staff prepared materials for and attended the discussions. OSTP then invited U.S. and Chinese officials to a dinner that it paid for using its appropriation. Finally, OSTP participated in the S&ED, during which the Director spoke on multiple occasions, including on

climate science. OSTP did not identify, nor are we aware of, any specific authority to do so that was enacted after the date of the Continuing Appropriations Act, 2011.

OSTP does not deny that it engaged in activities prohibited by section 1340. OSTP Response; August Conversation. OSTP argues, instead, that section 1340, as applied to the events at issue here, is an unconstitutional infringement on the President's constitutional prerogatives in foreign affairs.[2] OSTP Response, at 1; August Conversation; Letter from Director, OSTP, to the Speaker of the House of Representatives, *Re: Section 1340 of the Department of Defense and Full-Year Continuing Appropriations Act of 2011* (May 16, 2011) (OSTP May 16 Letter). OSTP claims that section 1340 is "unconstitutional to the extent its restrictions on OSTP's use of funds would bar the President from employing his chosen agents for the conduct of international diplomacy." OSTP Response, at 1. OSTP asserts that the President has "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." OSTP May 16 Letter. OSTP argues that, for this reason, Congress may not "use its appropriations power to infringe upon the President's exclusive constitutional authority in this area." *Id.*

It is not our role nor within our province to opine upon or adjudicate the constitutionality of duly enacted statutes such as section 1340. *See* B-300192, Nov. 13, 2002; *see also* B-306475, Jan. 30, 2006. In our view, 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. B-302911, Sept. 7, 2004. *See Bowen v. Kendrick*, 487 U.S. 589, 617 (1988). Determining the constitutionality of legislation is a province of the courts. U.S. Const. art. III, § 2. *Cf. Fairbank v. United States*, 181 U.S. 283, 285 (1901). Therefore, absent a judicial opinion from a federal court

---

[2] The Department of Justice characterizes section 1340 as a "valid limitation on OSTP's use of appropriated funds only to the extent that its restrictions do not infringe upon the President's exclusive constitutional authority over international diplomacy." Letter from Assistant Attorney General, Office of Legislative Affairs to Representative Wolf (June 28, 2011). Justice advised OSTP that OSTP was "permitted to engage in diplomatic activities with Chinese representatives to the extent that it would be doing so as an agent of the President for diplomacy with China, notwithstanding Section 1340." *Id. See* Memorandum Opinion for the General Counsel, OSTP, *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*, OLC Opinion, Sept. 19, 2011, *available at* www.justice.gov/olc/memoranda-opinions.html (last visited Oct. 4, 2011). OSTP asserts that the U.S.-China Agreement on Cooperation in Science and Technology designates OSTP as the executive branch authority charged with "collaboration and coordination with China in support of U.S.-China science and technology policy cooperation." OSTP Response, at 3.

of jurisdiction that a particular provision is unconstitutional, we apply laws as written to the facts presented. *See* B-114578, Nov. 9, 1973. In 1955, for example, we stated that we "accord full effect to the clear meaning of an enactment by the Congress so long as it remains unchanged by legislative action and unimpaired by judicial determination." B-124985, Aug. 17, 1955. We see no reason to deviate here. Indeed, we are unaware of any court that has had occasion to review the provision, let alone adjudicate its constitutionality, nor did OSTP advise of any judicial determination or ongoing litigation.

As a consequence of using its appropriations in violation of section 1340, OSTP violated the Antideficiency Act. Under the Antideficiency Act, an officer or employee of the U.S. Government may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation. 31 U.S.C. § 1341. *See* B-300192, Nov. 13, 2002. If Congress specifically prohibits a particular use of appropriated funds, any obligation for that purpose is in excess of the amount available. 71 Comp. Gen. 402 (1992); 62 Comp. Gen. 692 (1983); 60 Comp. Gen. 440 (1981). By using its fiscal year 2011 appropriation in a manner specifically prohibited, OSTP violated the Antideficiency Act. Accordingly, OSTP should report the violation as required by the act.[3]

Sincerely,

Lynn H. Gibson
General Counsel

[3] *See* 31 U.S.C. § 1351. The Office of Management and Budget has published requirements for executive agencies for reporting violations. OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, §§ 145, 145.8, *available at* www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc (last visited Oct. 4, 2011).