S. HRG. 110–604

SECRET LAW AND THE THREAT TO DEMOCRATIC AND ACCOUNTABLE GOVERNMENT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

APRIL 30, 2008

Serial No. J–110–89

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

44–955 PDF WASHINGTON : 2008

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00001 Fmt 5011 Sfmt 5011 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

COMMITTEE ON THE JUDICIARY

PATRICK J. LEAHY, Vermont, *Chairman*

EDWARD M. KENNEDY, Massachusetts	ARLEN SPECTER, Pennsylvania
JOSEPH R. BIDEN, JR., Delaware	ORRIN G. HATCH, Utah
HERB KOHL, Wisconsin	CHARLES E. GRASSLEY, Iowa
DIANNE FEINSTEIN, California	JON KYL, Arizona
RUSSELL D. FEINGOLD, Wisconsin	JEFF SESSIONS, Alabama
CHARLES E. SCHUMER, New York	LINDSEY O. GRAHAM, South Carolina
RICHARD J. DURBIN, Illinois	JOHN CORNYN, Texas
BENJAMIN L. CARDIN, Maryland	SAM BROWNBACK, Kansas
SHELDON WHITEHOUSE, Rhode Island	TOM COBURN, Oklahoma

BRUCE A. COHEN, *Chief Counsel and Staff Director*
STEPHANIE A. MIDDLETON, *Republican Staff Director*
NICHOLAS A. ROSSI, *Republican Chief Counsel*

SUBCOMMITTEE ON THE CONSTITUTION

RUSSELL D. FEINGOLD, Wisconsin, *Chairman*

EDWARD M. KENNEDY, Massachusetts	SAM BROWNBACK, Kansas
DIANNE FEINSTEIN, California	ARLEN SPECTER, Pennsylvania
RICHARD J. DURBIN, Illinois	LINDSEY O. GRAHAM, South Carolina
BENJAMIN L. CARDIN, Maryland	JOHN CORNYN, Texas

ROBERT F. SCHIFF, *Chief Counsel*
LAUREN B. PETRON, *Republican Chief Counsel*

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00002 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Brownback, Hon. Sam, a U.S. Senator from the State of Kansas	3
Feingold, Hon. Russell D., a U.S. Senator from the State of Wisconsin	1
prepared statement	115
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont, prepared statement	150

WITNESSES

Aftergood, Steven, Director, Project on Government Secrecy, Federation of American Scientists, Washington, D.C.	17
Berenson, Bradford A., Partner, Sidley Austin, LLP, Washington, D.C.	9
Elwood, John P., Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, Washington, D.C.	6
Johnsen, Dawn E., Professor, Indiana University School of Law–Bloomington, former Acting Assistant Attorney General, Office of Legal Counsel, Bloomington, Indiana	7
Kitrosser, Heidi, Associate Professor of Law, University of Minnesota Law School, Minneapolis, Minnesota	15
Leonard, J. William, former Director, Information Security Oversight Office, Leonardtown, Maryland	11
Rivkin, David B., Jr., Partner, Baker Hostetler, Washington, D.C.	13

QUESTIONS AND ANSWERS

Responses of Steven Aftergood to questions submitted by Senators Feingold and Kennedy	42
Responses of John P. Elwood to questions submitted by Senators Feingold and Brownback	48
Responses of Dawn Johnsen to questions submitted by Senators Feingold and Kennedy	65
Responses of Heidi Kitrosser to questions submitted by Senator Kennedy	70
Responses of J. William Leonard to questions submitted by Senators Feingold and Kennedy	74

SUBMISSIONS FOR THE RECORD

Aftergood, Steven, Director, Project on Government Secrecy, Federation of American Scientists, Washington, D.C., statement	77
Berenson, Bradford A., Partner, Sidley Austin, LLP, Washington, D.C., statement	88
Elwood, John P., Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, Washington, D.C., statement	109
Harrison, James P., Director, The Identity Project, statement	117
Johnsen, Dawn E., Professor, Indiana University School of Law–Bloomington, former Acting Assistant Attorney General, Office of Legal Counsel, Bloomington, Indiana, statement and attachment	124
Kitrosser, Heidi, Associate Professor of Law, University of Minnesota Law School, Minneapolis, Minnesota, statement	137
Leonard, J. William, former Director, Information Security Oversight Office, Leonardtown, Maryland, statement	152
Rivkin, David B., Jr., Partner, Baker Hostetler, Washington, D.C., statement	162
Weismann, Anne L., Chief Counsel, CREW, Washington, D.C., letter	171

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00003 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

SECRET LAW AND THE THREAT TO DEMOCRATIC AND ACCOUNTABLE GOVERNMENT

WEDNESDAY, APRIL 30, 2008

UNITED STATES SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, Pursuant to notice, at 9:02 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Russell D. Feingold, chairman of the subcommittee, presiding.

Also present: Senators Whitehouse and Brownback.

OPENING STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Chairman FEINGOLD. I call the Committee to order.

Good morning, everybody. Welcome to this hearing of the Constitution Subcommittee entitled "Secret Law and the Threat to Democratic and Accountable Government".

We are honored to have with us today a distinguished panel of witnesses to help us examine this very important and timely issue.

I'll start by making just a few remarks, and then I'll recognize the Ranking Member, Senator Brownback, for an opening statement. Then we'll turn to our witnesses.

More than any other administration in recent history, this administration has a penchant for secrecy. To an unprecedented degree, it has invoked executive privilege to thwart congressional oversight and the state secrets privilege to shut down lawsuits.

It has relied increasingly on secret evidence and closed tribunals, not only in Guantanamo, but here in the United States. It has initiated secret programs involving surveillance, detention, and interrogation, some of the details of which remain unavailable today, even to Congress.

These examples are the topic of much discussion and concern, and appropriately so. But there is a particularly sinister trend that has gone relatively unnoticed: the increasing prevalence in our country of secret law.

The notion of secret law has been described in court opinions and law treatises as "repugnant" and "an abomination". It is a basic tenet of democracy that the people have a right to know the law. In keeping with this principle, the laws passed by Congress and the case law of our courts have historically been matters of public record. When it became apparent in the middle of the 20th century that Federal agencies were increasingly creating a body of non-public administrative law, Congress passed several statutes requiring

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00005 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

this law to be made public for the express purpose of preventing a regime of secret law.

That purpose today is being thwarted. Congressional enactments and agency regulations are, for the most part, still public. But the law that applies in this country is determined not only by statutes and regulations, but also by the controlling interpretations of courts and, in some cases, the executive branch. More and more, this body of executive and judicial law is being kept secret from Congress as well.

The recent release of the March 2003 John Yoo torture memorandum has shone a sobering light on this practice. A legal interpretation by the Justice Department's Office of Legal Counsel, or OLC, binds the entire executive branch, just like a regulation or the ruling of a court. In the words of former OLC head Jack Goldsmith, "These executive branch precedents are 'law' for the executive branch." The Yoo memorandum was, for a nine-month period in 2003 until it was withdrawn by Mr. Goldsmith, the law that this administration followed when it came to matters of torture. And course, that law was essentially a declaration that few, if any, laws applied.

This entire memorandum was classified and withheld from Congress and the public for years on the claim that it contained information that would harm national security. Now, it may be appropriate, prior to public disclosure of an OLC memorandum, to redact information about, for example, specific intelligence sources or methods. But as we now know, this 81-page document contains no information about sources, methods, or any other operational information that could compromise national security. What it contains is a shocking glimpse of the "law" that governed the administration's conduct during the period this memo was in effect. The many, many footnoted references to other OLC memos we have never seen suggest that there is an entire regime of secret law that may be just as shocking.

Another body of secret law is the controlling interpretations of the Foreign Intelligence Surveillance Act that are issued by the FISA Court. FISA, of course, is the law that governs the government's ability in intelligence investigations to conduct wiretaps and search the homes of people in the United States. Under that statute, the FISA Court is directed to evaluate wiretap and search warrant applications and decide whether the standard for issuing a warrant has been met a largely factual evaluation that is properly done behind closed doors. But with the evolution of technology and with this administration's efforts to get the Court's blessing for its illegal wiretapping activities, we now know that the Court's role is broader and that it is very much engaged in substantive interpretations of the governing statute.

These interpretations are as much a part of this country's surveillance law as the statute itself. Without access to them, it is impossible for Congress or the public to have an informed debate on matters that deeply affect the privacy and civil liberties of all Americans. While some aspects of the FISA Court's work involve operational details and should not be publicly disclosed, I do not believe that same presumption must apply to the Court's purely legal interpretations of what the statute means. Yet, the adminis-

tration has fought tooth and nail against public disclosure of how the court interprets the law and has strictly limited even congressional access to some of those decisions.

The administration's shroud of secrecy extends to agency rules and executive pronouncements, such as Executive orders, that carry the force of law. Through the diligent efforts of my colleague Senator Whitehouse, we have learned that OLC has taken the position that a President can "waive" or "modify" a published Executive order without any notice to the public or Congress—simply by not following it.

Now, none of us disputes that a President can withdraw or revise an Executive order at any time. That's the President's prerogative. But abrogating an Executive order without any public notice works a secret change in the law. Worse, because the published order stays on the books, it actively misleads Congress and the public as to what the law is. That has the effect—presumably the intended effect—of derailing any accountability or oversight that could otherwise occur.

That gets us to the heart of the problem. In a democracy, the government must be accountable to the people, and that means the people must know what the government is doing. Through the classification system and the common law, we have carved out limited exceptions for highly sensitive factual information about military operations, intelligence sources and methods, nuclear programs, and the like. That is entirely appropriate and important to protecting our national security. But even in these areas, Congress and the courts must maintain some access to the information to ensure that the President is acting in accordance with the law and the Constitution. And when it comes to the law that governs the executive branch's actions, Congress, the courts, and the public have the right and the need to know what law is in effect. An Executive that operates pursuant to secret law makes a mockery of the democratic principles and freedoms on which this country was based.

[The prepared statement of Senator Feingold appears as a submission for the record.]

We'll hear today from several experts who can help us understand the extent of this problem, and also help us begin to think about solutions. But before I turn to them, let me first turn to my colleague and the Ranking Member, Senator Brownback, for any comments he'd like to make.

STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR FROM THE STATE OF KANSAS

Senator BROWNBACK. Thank you, Mr. Chairman. I appreciate that. Panel members, thank you for being here today. I look forward to a good discussion, interesting information, and a good vetting on this topic. I look forward to discussion from you on the so-called issue of secret laws.

At the outset, however, I must say that I'm not convinced that the topics we'll address here today comport with the notion of secret law as defined by our Federal courts. Hopefully you can illuminate me on that. Courts have defined secret laws as "administrative guidance or standards that an agency applies to the public."

I'm confident that we can all agree, as our courts have long recognized, that an administrative agency should "not be permitted to develop a body of secret law used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as formal, binding, or final."

The application of such quasi-regulations would, of course, violate our fundamental commitment to the principle of legality, as it is beyond dispute that members of the public cannot be expected to conform their behavior to legal requirements that have been concealed from them.

In 1971, the Court of Appeals, District of Columbia, addressed the problem of such secret laws stating this: "To prevent the development of secret law within an administrative agency, we must require the agency to disclose orders and interpretations which it actually applies in cases before it."

Despite this widely understood description of secret law, every branch of the Federal Government has at times been accused of making secret law that falls outside this definition.

Prior to the adoption of the Federal rule of appellate procedure, 32.1, for example, certain courts in our Federal jurisdiction were sharply criticized in the past for policies under which many of their opinions are deemed "non-precedential", or excluded from electronic databases and collections of published cases. Critics called these decisions "secret law", even though they were not truly secret and, due to their non-binding nature with regard to other parties before the courts, could not in one sense be called law.

In Congress, they are not immune from this criticism. In a case cited by our witnesses, the Seventh Circuit proclaimed that "the idea of secret laws is repugnant." That case, however, did not deal with secret law at all. Instead, the plaintiff in that case was arguing that a properly enacted statute passed by both Houses of Congress and signed into law by the President was too inaccessible to him to be fairly considered binding.

The court concluded that the statute at issue was not secret, and that Congress has no duty to take measures to delay a statute's applicability long enough for its content to be widely disseminated.

Finally, as our witnesses today will discuss at length, there are many individuals who criticize the executive branch for promulgating supposedly secret law, particularly certain memorandum prepared by the Department of Justice's Office of Legal Counsel. I'm not convinced that these memoranda, however, can truly be considered secret law as our courts have understood that term. The D.C. Circuit's 1971 opinion on secret law distinguished "the ideas and theories which go into making the law" from "the law itself", suggesting that the latter, but not the former, must always be made available to the public.

OLC's legal opinions are the ideas and theories which go into the making of the law and they do not affect the public directly in the ways that other agency guidance or interpretations may. Rather, the White House and executive agencies use OLC's opinions to determine whether their proposed policies comply with the law. his is a vital function within the executive branch, one that sometimes requires that those opinions be kept confidential.

Regardless, I believe—and I think our witnesses will agree—that there are circumstances in which our natural inclination towards openness in all branches of government must be tempered by other considerations. We must take care to value, of course, our national security. We must also be sensitive to the reality that information we make available to the public also becomes available to those who would do us harm.

We must promote, to the extent practicable, executive agencies' unfettered access to legal opinions on their proposed policies without fear that ill-advised, and therefore rejected, policies will become public. We must respect not only the essential checks and balances that our constitutional system provides, but also the privileges that it affords to each branch of our Federal Government, including, however unpopular at the moment, the executive privilege.

I'd like to thank our witnesses for taking the time to appear before our subcommittee. I recognize that service as a witness requires a significant commitment of time and effort and a sharing of your expertise. It requires commitment both in research and in preparing written testimony, traveling here, and appearing in person before the Senate. So, I appreciate very much your input and your thoughts. I look forward to it.

I appreciate the hearing, Mr. Chairman.

Chairman FEINGOLD. Thank you, Senator Brownback.

We'll now turn to our witnesses. Will the witnesses please stand? Would you all please raise your right hand to be sworn?

[Whereupon, the witnesses were duly sworn.]

Chairman FEINGOLD. I thank the witnesses. You may be seated. I want to welcome you and thank you for being here with us this morning. I ask that you each limit your remarks to 5 minutes, as we have a full panel today and we need to finish up in time for the joint session at 11. Your full written statements will, of course, be included in the record.

We'll begin today with John Elwood. Mr. Elwood serves as Deputy Assistant Attorney General in the Justice Department's Office of Legal Counsel. He previously served in the Department as Assistant to the Solicitor General and as an attorney in the Criminal Division.

Before you start, Mr. Elwood, I want to mention that the Department of Justice and the Office of the Director of National Intelligence informed my office yesterday evening that the administration plans to give the Senate Intelligence Committee limited access to Office of Legal Counsel memoranda related to the CIA's interrogation program. We were also informed that parts of some memos may be made available to the Judiciary Committee.

Certainly some access is better than no access, but that's about the best thing I can say about this arrangement. First, it took years to get this far. During that time, the Attorney General refused to even talk to the Intelligence Committee about the legal basis for the interrogation program, which I strongly oppose on legal, moral, and national security grounds. And now, the access that is being granted comes with strings that will make it difficult for the committees to make use of this information. I understand that the Intelligence Committee members will not actually be given

the memos to allow for a thorough review, and the conditions of access for the Judiciary Committee remain unclear.

So while I appreciate that there has been some movement here, I don't think there's any way that we can say that Congress is being provided what it needs with respect to these memos. And none of this, of course, provides the public with any information about how the executive branch interprets the law governing torture.

So having said that, Mr. Elwood, I will have some questions for you about this, but I would like you to now proceed with your testimony.

STATEMENT OF JOHN P. ELWOOD, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. ELWOOD. Thank you, Mr. Chairman, Ranking Member Brownback, and members of the subcommittee for giving me the opportunity to discuss how the Office of Legal Counsel works to balance the values of transparency, accountability, and the confidentiality that is essential to the provision of candid legal advice.

The Department of Justice shares the Subcommittee's interest in ensuring that our government works in as transparent and accountable a manner as possible. Indeed, our Office regularly publishes opinions that address issues of interest to the executive branch, to Congress, and to the public, and our approach to publication is consistent with that of prior Administrations.

At the same time, administrations of both parties have recognized that policymakers within the executive branch, like any decisionmaker, sometimes need to consult with attorneys within the confidential bounds of the attorney/client relationship. For 54 years, OLC has assisted the Attorney General in his role as legal adviser to the President and executive agencies. Confidentiality is critical in performing that role as legal adviser to ensure that officials will be willing to seek our advice at precisely those critical times when it is most needed, and to ensure that our legal advice is candid.

There are, thus, times when the national interest requires that OLC advice remain confidential. There also are times when OLC must provide advice on matters that other agencies and offices have classified, for OLC lacks original classification authority.

Under such circumstances, our confidential legal opinions themselves cannot be made public, at least for a time. But this does not mean that our confidential legal advice in any sense constitutes "secret law" governing the lives of Americans. First, OLC does not make law in the same sense that Congress or the courts do. It is true that OLC opinions ordinarily are controlling within the executive branch on questions of law.

While OLC's legal advice may inform its clients' policy decisions, its legal advice rarely, if ever, compels the adoption of any particular policy. Rather, it remains up to the policymakers to decide whether, and how, to act. OLC, thus, lacks the ability to affect private parties directly, and its legal views are not binding on the legislative branch, the courts, or the general public.

Second, even when the documents communicating our legal advice to the client remain confidential, that does not mean that a policy's basis in law is secret. If officials adopt a policy that OLC has declared legally permissible, the policy will be public unless it is classified, and appropriate officials may be called upon to explain the policy, including its basis in law. Classified activities are, of course, subject to review by the Intelligence Committees.

In this manner the Department has provided Members of Congress and committees with an explanation of its position on legal issues of interest to Congress, while preserving the confidentiality of legal advice on that issue from OLC to an executive branch client. The Department has done so in meetings, in conversations, in briefings, testimony, letters, questions for the record, and in more substantial documents such as the 42-page white paper providing the Department's legal position on the NSA activities described by the President in December 2005.

In recent months, the executive branch has even made copies of confidential OLC opinions available to Members of Congress, including highly classified opinions, as the Chairman mentioned this morning. While such steps are extraordinary, the Department is committed to working with Congress to find appropriate ways to keep Congress well informed about the basis in law for executive branch policies.

OLC recognizes the value of openness in government, which promotes public confidence that the Government is making its decisions through a process of careful and thoughtful reasoning. By publishing OLC opinions when possible and by making concerted efforts to accommodate congressional requests for information, we strive to balance the values of transparency and accountability, while maintaining the confidentiality that is necessary to performing our historic function—providing reasoned and objective legal advice.

I thank the Subcommittee for the opportunity to testify, and would be happy to take any questions you may have.

Chairman FEINGOLD. Thank you, Mr. Elwood.

[The prepared statement of Mr. Elwood appears as a submission for the record.]

Chairman FEINGOLD. Our next witness is Professor Dawn Johnsen. Professor Johnsen is Professor of Law at the Indiana University School of Law–Bloomington, where she teaches and writes about issues of constitutional law, and especially about presidential power.

During the Clinton administration she served in the Office of Legal Counsel, first as Deputy Assistant Attorney General and then as Acting Assistant Attorney General from 1996 to 1998.

Professor, thank you very much for taking time out of what I know is a very busy schedule to be here. You may begin.

STATEMENT OF DAWN E. JOHNSEN, PROFESSOR, INDIANA UNIVERSITY SCHOOL OF LAW–BLOOMINGTON, FORMER ACTING ASSISTANT ATTORNEY GENERAL FOR THE OFFICE OF LEGAL COUNSEL, BLOOMINGTON, INDIANA

Ms. JOHNSEN. Thank you, Mr. Chairman and Senator Brownback. My written testimony submitted for the record gen-

erally discusses the harm of secret law, and especially the role of OLC, where I served for 5 years.

I do want to mention, I think secret law is an appropriate term for at least some OLC opinions because they do profoundly affect the lives of private persons.

I would like, now, though, to address one aspect of the Bush administration's secret law that I believe most profoundly threatens the rule of law and democratic accountability, and that is OLC's practice of issuing secret legal opinions that essentially tell the President that he has the constitutional authority to violate statutes.

Mr. Elwood, not surprisingly, did not focus on this precise question. He talked more generally about the need for secrecy in some instances. Clearly, the executive branch must protect some national security information, and also some OLC opinions must remain confidential and secret. That is beyond serious dispute, and I'd be happy to answer questions about the details of that.

But that is not what fundamentally brings us here today. The more pointed question is, may OLC issue binding legal opinions that in essence tell the President and the executive branch that they need not comply with existing laws, and then not share those opinions with Congress and the American people? I would submit that, clearly in our constitutional democracy, the answer to that question must be no.

There are at least two major problems with much of OLC's legal advice regarding counterterrorism measures, and I'd like to say a few words about each of these two.

First, on many occasions OLC wrongly advised the executive branch that it did not need to comply with existing legal restrictions. The basis for that flawed advice was an extreme and plainly erroneous view of the President's constitutional powers. For example, the March 14, 2003 OLC opinion released last month sweepingly declared, "Congress has no authority to regulate the President's ability to detain and interrogate enemy combatants, or to try them before military commissions."

Many commentators, including Jack Goldsmith, who served at the Bush administration's OLC, have detailed why this view of presidential power beyond Congress's control is clearly and dangerously wrong.

Problem two. OLC kept their profoundly flawed legal interpretations secret, which made it impossible for there to be any public debate, or scrutiny, or remedy of these extreme legal views, or the government's actions in many cases that were taken based on these views, actions that of course included electronic surveillance here in the United States without complying with FISA's court order requirements, the use of extreme interrogation methods including waterboarding in violation of legal prohibitions, indefinite detention of people at Guantanamo Bay and secret prisons abroad.

As this Subcommittee well knows, in some cases Congress and the public did not even learn about these violations of laws for years, and only then after leaks, in many cases. The Bush administration continues to withhold many legal opinions and forces Congress essentially to legislate in the dark.

So this combination of the claimed authority not to comply with the law and to do so secretly, it's a terrible abuse of power without limits and without checks, and it clearly is antithetical to our constitutional democracy.

I've appended to my written testimony a document entitled "Principles to Guide the Office of Legal Counsel", which I co-authored in 2004 with 18 other former OLC lawyers in response to the first leaked OLC torture opinion. Among the 10 principles, which were built on longstanding best practices at OLC, is a call for OLC to publicly disclose its written legal opinions in a timely manner, absent strong reason for delay and non-disclosure. The principles explained that this will help deter excessive claims of executive authority.

I'm going to read just one other of the principles: "Absent the most compelling need for secrecy, any time the executive branch disregards a Federal statutory requirement it should publicly release a clear statement explaining the deviation."

Congress actually already has enacted legislation requiring the executive branch to notify it if it declines to enforce or defend a statute on constitutional grounds. The Bush administration has evaded this by claiming it is simply interpreting statutes to avoid constitutional problems. I would recommend one statutory change which I have described in greater detail in my written testimony. Congress should add a requirement that the executive branch report any time it interprets a statute to avoid a constitutional problem, as well as when it admits that it is actually refusing to enforce the statute.

I'm going to close by thanking the Subcommittee for its work upholding the Constitution and holding the Government accountable. [Applause].

Chairman FEINGOLD. Thank you for your testimony.

[The prepared statement of Professor Johnsen appears as a submission for the record.]

Our next witness is Bradford Berenson. Mr. Berenson served as Associate Counsel to President George W. Bush from 2001 to 2003. He's now a partner in the Washington office of Sidley Austin, and a frequent witness before the Judiciary Committee.

Mr. Berenson, we're glad to have you back. You may proceed.

STATEMENT OF BRADFORD A. BERENSON, PARTNER, SIDLEY AUSTIN, LLP, WASHINGTON, D.C.

Mr. BERENSON. Thank you very much, Mr. Chairman, Ranking Member Brownback, and other members of the Subcommittee for the opportunity to appear.

I would like to start where Ranking Member Brownback started, which is with the question whether what we're really discussing here this morning is secret law at all in the way that most Americans watching this hearing would understand that term.

I don't think that it is. It doesn't mean that the issue isn't serious, it doesn't mean that there can't be problems or haven't been abuses that are worth discussing. But the kinds of things we're talking about, FISA Court opinions that interpret the FISA statute, Executive orders, OLC opinions, those are not sources of law that regulate the primary conduct of private citizens. They are all fun-

damentally sources of law that regulate the conduct of the executive branch itself. Again, that doesn't mean they aren't important, but it means that the issues of democratic accountability that are on the table today have to be seen in a somewhat different light.

In particular, it means that we have to distinguish between what we make public and what we give Congress access to. I think in general terms it is far more important in some of these areas where we may be dealing with classified activities and classified information to ensure accountability through having access in the Congress to the internal executive branch law. Where Congress does have legislative authority and responsibilities, then those sources of law which govern internal executive branch activities should be made available to the Congress. Obviously there's a value in all instances of making information available to the general public. You can stimulate debate and criticism and discussion, all of which does tend to produce more thoughtful and more accurate decision-making.

But as regards the general public, there are important countervailing considerations that I think everybody here would acknowledge. In general, executive branch law that is not made public, generally public, is not made generally public for one of two reasons. Either that's because it threatens harm to the national security of the country—that's essentially the classification issue—or because it involves confidential advice, legal or otherwise, provided to the President about how to discharge his constitutional responsibilities. Some scope for receiving confidential advice is clearly essential to the proper functioning of that office no matter who occupies it, and I don't think that's terribly controversial, either.

Let's take the example of FISA Court rulings for a moment. The FISA Court engages in a classic judicial activity and it interprets a statute of Congress, the Foreign Intelligence Surveillance Act. I think it's important for Congress to understand how that Act is being interpreted, but because that Act only guides government agents in how they conduct themselves and sets the limits on what they can do in highly classified areas of foreign intelligence, I think the broader public interest in seeing those rulings, certainly to the extent that they might disclose or hint at what is actually being done in the foreign intelligence surveillance realm, is outweighed by the needs of national security.

So long as Congress can understand what the court is saying so that it can make legislative adjustments that it deems appropriate, I think the public interest is largely protected there, and that should occur through the mechanism established by the National Security Act of 1947, through the oversight of the Intelligence Committees.

I will say that I agree with Professor Johnsen on her central criticism. I think there is an important interest in safeguarding against abuse by making sure that when the executive branch reaches a conclusion that a statute of Congress is unconstitutional as applied to a particular course of conduct, or even when it thinks the constitutional question is so serious that it will strain hard to interpret a statute to avoid it, there is a legitimate and strong interest on the part of the Congress in knowing about that.

Again, I'm not sure the public has quite the same interest because sometimes—particularly if this is occurring in the defense or intelligence realm—the very existence of the legal interpretation, and certainly the nature of it, can disclose what we are doing. But I'm generally supportive of the notion that the executive branch should be transparent with the Congress, at least the appropriate committees of the Congress, when circumstances like that arise.

Thank you very much for the opportunity to share my views, and I look forward to answering any questions you may have.

Chairman FEINGOLD. Thank you very much, Mr. Berenson.

[The prepared statement of Mr. Berenson appears as a submission for the record.]

Chairman FEINGOLD. Our next witness is J. William Leonard. Mr. Leonard recently retired after 34 years of Federal service. Between 2002 and 2007, he served as Director of the Information Security Oversight Office, where he was responsible for oversight of classification policy throughout the executive branch. In 2002, the President conferred upon Mr. Leonard the rank of Meritorious Executive.

Mr. Leonard, we're delighted to have you here and we thank you for your long and fruitful government service. You may proceed.

STATEMENT OF J. WILLIAM LEONARD, FORMER DIRECTOR, INFORMATION SECURITY OVERSIGHT OFFICE, LEONARDTOWN, MARYLAND

Mr. LEONARD. Thank you, Mr. Chairman, Senator Brownback.

I'd just like to open by addressing one point that my colleague, Mr. Berenson, made with respect to FISA Court opinions and the fact that they only regulate the conduct of the executive. I think such opinions are a classic example. When you think about the significant surveillance capability that this government has, I think it's of profound interest to any American to know to what extent, and under what circumstances, he or she may in fact be subject to Government surveillance. I think such opinions are a classic example of how even internal regulations are of profound interest to Americans.

I'd like to focus most of my attention this morning on the OLC memorandum that was released earlier this month, because when it was released I was profoundly disappointed because I believe it represents one of the worst abuses of the classification system that I have seen. This memorandum is pure legal analysis. It is not operational in nature. Its contents give no advantage to the enemy. To learn that such a document was classified had the same effect on me as waking up one morning and learning that, after all these years, there was a secret article to the Constitution that the American people somehow didn't know about.

Whoever, affixed classification markings to this document had either profound ignorance of, or deep contempt for, the process set forth by the President in which he delegates to certain Government officials his authority to restrict dissemination of information in the interest of national security. The classification of this memo is wrong on so many levels, and I provide specific details in my prepared written testimony.

What is equally disturbing is that this memo was not some obscure document written by a low-level bureaucrat who did not know any better and had inadequate supervision. Rather, the memo was written by the Deputy of the OLC, the very entity which has the responsibility to render interpretations of all Executive orders, to include the governing order that distinguishes between the proper and improper classification of information.

The effects of inappropriately classifying the OLC memo are visible to all. Use of classification in this instance is a prime example of how classification is used not for purposes of national security, but rather as a bureaucratic weapon to blunt potential opposition. Reportedly, top lawyers for the military services did not receive a final copy of the OLC memo, in part because they opposed the harsh interrogation techniques endorsed in the memo, as well as the lack of transparency about how we handle enemy combatants, all out of concern for our own men and women sent into combat; again, another example of how the American people are directly impacted by these types of decisions.

The OLC memorandum is but one example of an issue with respect to the balance of constitutional powers. It's long been recognized that the President must have the ability to interpret and define his constitutional authorities, and at times to act unilaterally. The limits of the President's authority to act unilaterally are defined by the willingness and the ability of the Congress and the courts to constrain it. Of course, before the Congress or the courts can constrain presidential claims they must first be aware of those claims. Yet, a long-recognized power of the President is to classify, and thus restrict, the dissemination of information in the interest of national security.

The combination of those two powers of the President—that is, when the President lays claim to power to act unilaterally, but does so in secret—can equate to the very open-ended executive authority that the Constitution's framers sought to avoid in constructing a system of checks and balances.

Added to this is the reality that the President is not irrevocably bound by his own Executive orders, and this administration claims the President can depart from the terms of an Executive order without public notice. Thus, at least in theory, the President could authorize the classification of the OLC memo, even though to do so would violate the standards of his own governing Executive order.

Equally possible, the President could change his order governing secrecy and do so in secret, all unbeknownst to the Congress and the courts. It's as if Lewis Carroll, George Orwell, and Franz Kafka jointly conspired to come up with the ultimate recipe for unchecked Executive power.

There are, I believe, a number of tools at the disposal of Congress to address this issue. In my prepared written testimony I make suggestions with respect to how Congress can leverage agency Inspectors General, as well as the Public Interest Declassification Board, in ferreting out similar abuses of the classification system. I also make other recommendations with respect to enhancing transparency in this area.

I appreciate the opportunity to provide my perspective on this issue and look forward to any questions or comments the members of the Subcommittee may have.

Thank you.

Chairman FEINGOLD. Thank you so much, Mr. Leonard.

[The prepared statement of Mr. Leonard appears as a submission for the record.]

Chairman FEINGOLD. Our next witness is David Rivkin. Mr. Rivkin served in a variety of legal and policy positions in the administrations of Ronald Reagan and George H.W. Bush, including positions at the White House Counsel's Office, the Office of the Vice President, the Department of Justice, and the Department of Energy.

He's currently a partner in the Washington office of Baker Hostetler, LLP. He has also appeared before the Judiciary Committee before, and we thank him for taking time to be with us this morning.

Mr. Rivkin, you may proceed.

STATEMENT OF DAVID B. RIVKIN, PARTNER, BAKER HOSTETLER, WASHINGTON, D.C.

Mr. RIVKIN. Chairman Feingold, Ranking Member Brownback, Senator Whitehouse. I am glad to meet with you this morning. I want to spend just a few minutes putting the issue we are discussing today, the so-called secret law, in its proper legal and policy context.

I think we all agree that the United States finds itself today committed to a difficult and protracted military, ideological, economic conflict with a very difficult enemy, typified by such groups as al Qaeda and the Taliban. We obviously did not seek this conflict, but this is a conflict we must prosecute well and win.

To do so, it is essential that the U.S. Government act within the proper legal paradigm. Indeed, contrary to what many people believe, war is not a domain of pure violence but is one of the most rule-driven human activities.

In this context and September 11, the Bush administration has embarked on a concerted effort to resolve many difficult issues of both international and domestic law raised by this conflict. These issues include the applicability of the 1949 Geneva Conventions to the complex al Qaeda and Taliban, rules governing collection of electronic intelligence and other types of intelligence, and a whole host of other issues.

Much of this analysis was originally classified. In my view, this is neither inappropriate nor unprecedented. The issues of attorney/client privilege and executive privilege aside, keeping this material secret from the enemy is, and remains, a vital necessity.

Much of the legal analysis prepared by the administration was either based upon sensitive factual information, but did not contain the facts by establishing what are the parameters for future administration behavior. It certainly would reveal how the U.S. Government would operate in certain circumstances, and therefore was very important to keep it secret.

Now, I realize that a number of the administration's legal positions, as they become publicly known as a result of leaks to the

media or declassification decisions, have attracted considerable criticism, some of which we heard this morning and many other times in the past, and I'm sure in the future.

I want to submit to you the questions that the administration's lawyers have sought to address, particularly dealing with issues governing the interrogation of captured enemy combatants, uncomfortable and difficult issues that do not mesh well with our 21st century sensibilities.

Many legal conclusions have struck many people as excessively harsh. Some of them, of course, have been watered down or amended as a result of internal administration debate or as a result of public and political pressure brought to bear upon the administration.

While I don't concur with every single aspect of the administration's post-September 11 wartime policies, I would vigorously defend the exercise of asking difficult legal questions and trying to work through them. To me, the fact that this exercise was undertaken at all attests actually to the vigor and strength of our democracy and the administration's commitment to rule of law, even in the most serious circumstances. In this regard, I want to point out that few of our democratic allies have ever engaged in so probing and searching illegal exegesis more times. Let me just briefly mention that I happen to do a fair amount of these type of debates with European friends. For example, whenever I ask our British friends, who of course face, in my opinion, a far less existentialist threat in dealing with IRA, the extent to which their interrogation, detention, and other policies had been predicated upon a concerted effort to obtain legal advice. The answer I get is, we did not do nearly as much of that.

I would also strongly defend the overarching legal framework chosen by the administration. In fact, I think the critics' rejection of this overarching legal framework, which is properly found in the laws of war paradigm, is the basis for so much of the criticism we hear today.

Let me stop the rest of my prepared remarks and just point out one thing, with all due respect to Professor Johnsen. The proposition that the President has both a right—indeed, an obligation—to disregard constitutional statutes is certainly not an old one. In fact, if you look at OLC jurisprudence, probably the best work done in this area is done by none other than Walter Dillinger during the Clinton administration tenure, and I would certainly commend everybody to that opinion.

Let me also point out that it is absolutely true that whenever an administration believes that a particular congressional enactment is unconstitutional either in whole or in part, it should say so. I somewhat chuckle when I hear this observation, because of course typically the administration has done that in the content of a signing statement. As some of you undoubtedly know, that practice has also been somewhat controversial, so it's somewhat difficult for me to figure out exactly how the President can convey, without arousing criticism from you, that a particular statutory enactment is unconstitutional.

Thank you very much for your time, and I'll look forward to answering your questions.

Chairman FEINGOLD. Thank you, sir.

[The prepared statement of Mr. Rivkin appears as a submission for the record.]

Chairman FEINGOLD. Our next witness is Professor Heidi Kitrosser. Professor Kitrosser is an Associate Professor at the University of Minnesota Law School. She's a scholar of constitutional law who has written extensively on the separation of powers, government secrecy, and free speech.

Professor, I appreciate your coming to D.C. today to give us your testimony, and you may proceed.

STATEMENT OF HEIDI KITROSSER, ASSOCIATE PROFESSOR OF LAW UNIVERSITY OF MINNESOTA LAW SCHOOL, MINNEAPOLIS, MINNESOTA

Ms. KITROSSER. Thank you, Chairman Feingold, Ranking Member Brownback, Senator Whitehouse. Thank you very much for inviting me to testify on secret law and the threat that it poses to democratic and accountable government. My testimony will consider the light that constitutional law sheds on the topic.

I do want to start, first, though, by echoing the point made by both Professor Johnsen and Mr. Leonard, that indeed, secret law, I think, is a very appropriate characterization of the types of decisions and materials that we're addressing here in this hearing as opposed to routine legal or administrative advice or discussion.

Rather, the types of decisions that we're addressing here, whether in the form of secret OLC memoranda or in the form of secret Executive orders, are decisions that establish Government policy of the executive branch that impact countless individuals, such as, for example, decisions to circumvent existing limitations on surveillance of American citizens, and in particular where this is done in circumvention of existing publicly known law that the public has every reason to believe is being followed. It is particularly important that this replacement of existing law be out in the open. So when openness is not adhered to in this context, I think it is quite appropriate to characterize what is occurring as secret law.

All right. With that in mind, I wish to make two main points today, again, about the light the constitutional law sheds on this topic. First, the text, structure, and history of the Constitution reflect a brilliant design that reconciles the dangers of Government secrecy with the occasional need for secrecy.

Under the Constitution, policy decisions—again, the types of decisions we're talking about today as opposed to routine legal advice—presumptively are transparent in nature, but the executive branch retains some limited leeway to implement those transparent policies in secret.

Furthermore, the Constitution gives us structural mechanisms, such as Congress's oversight capacity, to check even secret implementation of transparent policies to ensure that it does not cloak circumvention of the law—again, to oversee the distinction between implementation and policymaking is being observed.

Second, over the past several years we have seen a disturbing trend whereby the executive branch has taken its structural capacities to secretly implement law and abuse them to secretly make new law and to circumvent established law. The damage of this

trend is exacerbated by the fact that the executive branch has circumvented not only substantive law, but also procedural law such as statutory mandates to share information with Congress.

On the first point of constitutional design, we see a careful balance between secrecy's virtues and its risks in the Constitution's text and structure. Specifically, we see a negative correlation in the Constitution between the relative openness of each political branch and the relative control that each branch has over the other. Congress is relatively transparent and dialogue-driven. The executive branch, in contrast, is structurally capable of much secrecy, but also is largely beholden to legislative directives. Thus, the executive branch again can be given leeway to operate in secret, but remains subject to being overseen or otherwise restrained in its secrecy by the legislature.

Looking at history, we see an understanding by the Founders that such a balance would, indeed, be struck. Among the President's claimed virtues was a structural capacity for secrecy, yet it was equally crucial to the Founders that the President would be constrained through legislation, oversight, and other means.

As Alexander Hamilton put it, one person "will be more narrowly watched and most readily suspected." In short then, the Constitution reconciles competing needs for openness and secrecy by giving us an executive branch that has the structural capacity to keep secrets but that must operate within policy parameters that are themselves transparent and subject to revision.

On the second point as to recent events, we increasingly see a dangerous breakdown in the structure. For example, as was alluded to earlier, we know now that for years the administration relied on a series of secret Executive orders and secret legal opinions, many of which to this day remain classified, in order to run secret surveillance and interrogation programs. Furthermore, the existence of these programs was made possible in part by the additional circumvention of statutory disclosure mandates by the executive to Congress.

Finally, let me end by noting that these events turn the constitutional structure upside down, seizing for the executive branch the power not only to legislate, but to create secret alternate legislative regimes. The only thing that could make matters worse would be for such events to become normalized in the eyes of Americans. I fear that we have already started down this road and I urge Congress to use its substantial constitutional powers of legislation and oversight to make clear to the executive branch and to all Americans that secret law has no place in our constitutional system.

Thank you very much.

Chairman FEINGOLD. Thank you very much, Professor.

[The prepared statement of Professor Kitrosser appears as a submission for the record.]

Chairman FEINGOLD. Our last witness today is Steven Aftergood. Mr. Aftergood is a senior research analyst at the Federation of American Scientists, where he specializes in national security information and intelligence policies. He directs the FAS Project on Government Secrecy, and he writes and edits Secrecy News, an e-mail newsletter and blog which is read by more than 13,000 sub-

scribers in media, Government, and among the general public. He has won numerous awards for his work in this field.

Mr. Aftergood, thank you for coming this morning. You may proceed.

STATEMENT OF STEVEN AFTERGOOD, DIRECTOR, PROJECT ON GOVERNMENT SECRECY FEDERATION OF AMERICAN SCIENTISTS, WASHINGTON, D.C.

Mr. AFTERGOOD. Thank you, Chairman Feingold, Ranking Member Brownback, and Senator Whitehouse.

In October 2004, former Congressman Helen Chenoweth was attempting to board a United Airlines flight from Boise to Reno when she was pulled aside for additional security screening. She was told she needed to undergo a physical pat-down. Before doing so, she asked to see the TSA regulation that authorized such a procedure. She was told she could not see it because it is designated "sensitive security information" and could not be disclosed. She declined to submit to a pat-down under those circumstances and she was not permitted to board the aircraft.

This is a scenario that has played out innumerable times since the Transportation Security Administration decided to withhold its security directives from public disclosure. It means that secret law is not just a metaphor, it is a reality of our time in the most literal sense. There are binding requirements that purport to regulate Americans' conduct, but that cannot be examined or reviewed by them. I have attempted to catalog many of these categories of secret law in my written statement.

One of those that has already been mentioned a couple of times is the secret opinions of the Foreign Intelligence Surveillance Court. As we all know, the court is charged with reviewing Government applications for electronic surveillance and physical search to ensure that they are consistent with the law. What is not as well known is that the court has repeatedly reinterpreted that law, yet its interpretations are secret. Of course, I would emphasize I'm talking about legal interpretations, not operational information. Everyone understands that there are sensitive operational considerations that have to be protected.

What is harder to understand is how legal analysis and interpretation can be kept secret. But since it is secret, the current debate over whether, and how, to amend the Foreign Intelligence Surveillance Act is occurring in a significant vacuum and Americans' own understanding of the law is obscured. If I travel abroad, are my communications protected from warrantless surveillance or not? It's hard for me to get a definitive answer. Under what circumstances could my communications, my telephone calls abroad or my e-mails, be subject to interception? Again, it's very hard to get a clear and complete answer. In this way, the rule of law is diminished.

Now, if secret law produced wise, effective policy, then that would have to be weighed in its favor. But to our dismay, we have repeatedly seen that secret law actually distorts the decision-making process and it often produces bad policy that cannot stand the light of day. The clandestine endorsement of torture or coercive interrogation as official policy is proof of that.

The idea of secret law, courts have said, is repugnant. Thank you for holding this hearing to help shed some light on this repugnant phenomenon and for helping to keep it at bay.

Last, I would say that I was glad to hear the news from Chairman Feingold that the administration has decided to yield a bit on disclosure of OLC memoranda on interrogation, but I was only a little bit pleased because it sounds like I'm not going to see them and it's not clear that this Committee will either.

I would observe that the flip side of secret law is tactical disclosure, that is where information is disclosed at a time and in a way that advances a particular policy agenda. That is not the way to conduct the affairs of the world's greatest democracy, or any democracy. I hope that this Committee can help find a way to bring order to this practice in a way that serves the public interest.

Thank you very much.

Chairman FEINGOLD. Thank you very much, Mr. Aftergood, and all the witnesses.

[The prepared statement of Mr. Aftergood appears as a submission for the record.]

Chairman FEINGOLD. Before we start the questions, I want to briefly address the notion that an OLC memo is not what courts would consider secret law. The Supreme Court has held that "opinions and interpretations which embody the agency's effective law and policy" must be disclosed precisely because it would be "secret law" not to do so. That definition clearly would cover some OLC opinions.

Let me also comment on the notion that giving Congress information is sufficient to address some of these issues and the public can be kept in the dark. Members of Congress are representatives of the people. We need to, and should, give great consideration to the input of the public. Unless there are specific national security reasons to keep information private, we should always strive to give the public as much information as possible so that we can better do our job of representing them.

We will now turn to questions for the witnesses. We'll start with 7-minute rounds.

Mr. Elwood, in your written testimony, you argue that OLC doesn't make "secret law" because its legal views are not binding on the legislative branch, the courts, or members of the general public.

But OLC's legal views are binding on the executive branch, and your statement, therefore, goes to the very heart of the problem: the complete absence of checks and balances when the executive branch makes law in secret.

By saying that OLC's legal views are not binding on the legislative branch, you acknowledge that Congress can override, through legislation, the otherwise binding legal interpretation of OLC. But Mr. Elwood, Congress can't exercise that prerogative if it doesn't know what OLC's interpretation is, can it?

Mr. ELWOOD. Two things. First of all, I'd like to—well, I will address the second question first, because that's the most recent. Just because we don't turn over our communications to our client embodying our views doesn't mean that you can't know what our position on the law is. Whenever a policy is adopted—and this is the

reason why OLC opinions aren't law because they don't become law until some agency decides to choose among the various legal possibilities and say this is the policy we're going to adopt. At that point when it starts operating on the public, I think you can reasonably call that law.

But once it becomes public like that, you can ask us all day long for what our legal position is on the matter. The only thing that we think there's a confidentiality interest is in the deliberative communication to the client of what that law is. So to choose any example you want for a public policy, you could say, why are you adopting this policy? An appropriate witness can come up or we can write you a letter and say, this is the basis in law for that position. That's how Congress can legislate.

Chairman FEINGOLD. I understand what you're saying, but I've been a legislator for 26 years. Simply being given a general policy position, as opposed to knowing exactly what the rationale is, makes it very difficult to legislate. It makes it extremely difficult to anticipate exactly what we need to say in the law in order to make sure the Executive doesn't try again to resist it.

Mr. Elwood, you've testified that "we remain committed to working with Congress to find appropriate ways to keep Congress well-informed about the basis in law for executive branch policies." In fact, until now, the administration has refused to share with Congress OLC opinions on the CIA's interrogation program. When I asked Attorney General Mukasey if he would brief the Intelligence Committee behind closed doors on the legal justification for the program, he refused on the ground that the OLC memos spoke for themselves, even though we were not allowed to see them. That was where things stood for years, which doesn't strike me as demonstrating a commitment to keeping Congress well-informed.

As of yesterday, as we talked about, the administration has now decided to provide the Intelligence Committee with limited access to these opinions. As I've indicated, this is certainly too late, and from what I understand too little, as well. But I would like to ask some follow-up questions with regard to this.

Will the interrogation memos that you'll be providing the Intelligence Committee include all the memos on interrogation, including those that are currently in effect and those that are no longer in effect?

Mr. ELWOOD. It's my understanding that the memoranda that are going to be provided to the Intelligence Committee are going to be unredacted copies of all the memos, both in effect and those no longer in effect. That's correct.

If I might, I was not involved in briefing the Intelligence Committees earlier, but it was my understanding that they were—although they were not provided with copies of the opinions, that they were briefed on the legal basis for the policies, both of the Intelligence Committees, and Mr. Bradbury testified in front of House Judiciary on the legal basis for the current interrogation policies. Certainly it is my understanding that we wish to provide you an understanding of our basis in law for all of these positions. So I would just say, at the risk of irritating my colleagues who actually provide these briefings, just keep asking.

Chairman FEINGOLD. Okay. And can you confirm that if there are any new OLC memos that supersede the memos you're making available, that they, too, will be provided to Congress as soon as they go into effect?

Mr. ELWOOD. It's my understanding that the Intelligence Committees are going to get all of the opinions on interrogation.

Chairman FEINGOLD. And going forward?

Mr. ELWOOD. That is something I simply don't know one way or the other. The only thing I know of is what was said yesterday.

Chairman FEINGOLD. All right.

Now, will all these memos we're discussing be made available to the Judiciary Committee?

Mr. ELWOOD. I understand that those discussions are still ongoing, but we are seriously committed to making an accommodation that will get the Judiciary Committee the information it needs.

Chairman FEINGOLD. In the same form or in a redacted form?

Mr. ELWOOD. I believe that—well, I think this is still the subject of negotiation, so I'm not prepared to say anything further other than the fact that they are very interested in working something out.

Chairman FEINGOLD. All right. We'll have to take a close look at any proposed redactions to make sure that this Committee has what it needs to evaluate the legal issues.

Will you agree to make these memos public, with appropriate redactions to protect sensitive information about specific operational details?

Mr. ELWOOD. Senator, I'm not in a position to say one way or the other. It's really not up to me. But our main goal right at the moment is to make sure that Congress has the information that it needs to be apprised of our policies, as you say, so it can legislate.

Chairman FEINGOLD. I will certainly be engaged, as will I think some of my colleagues, in getting as much appropriate public access as possible.

Going back to your testimony that OLC's legal views are not binding on the courts, it is reassuring that you admit that a court's interpretation of the law would trump the interpretation of the executive branch. I think I'd be a little more reassured, though, if the Administration weren't simultaneously arguing that the courts aren't allowed to decide many of these issues because it would require the disclosure of "state secrets."

A court can't override the executive branch's legal interpretation of, for example, its wiretapping authority if the court is prevented from deciding the case, can it?

Mr. ELWOOD. Senator, I think that the way the Government's wiretapping authority would be decided would be in courts that issue wiretap warrants. Civil suits, it's a different matter. Where the state secrets privilege is asserted is in civil litigation, which doesn't directly involve wiretapping. It only does through imposition of damages, I would imagine. I'm not involved in state secrets practice. That's principally handled by the Civil Division. I know that Carl Nichols has testified on that. But I would simply want to note that all we can do, all the executive branch can do, is make our position known to the courts that certain material is state se-

crets, and it's up to the judiciary to decide whether or not they agree.

Chairman FEINGOLD. Mr. Elwood, thank you for your answers to my first round of questions.

Now we'll turn for a round to Senator Brownback.

Senator BROWNBACK. Thank you, Mr. Chairman. Thank you to the panel. I appreciate the discussion.

In starting on a premise of this, as a recovering lawyer like the Chairman, some of this I look at and I think, I want the administration asking a whole bunch of legal questions all the time. I want them asking these questions a lot. I want them asking lawyers and various agencies and branches a lot of various ways and avenues.

My guess is that if we get into a very tight practice of, all legal opinions have to be disclosed—and I know none of you are saying all legal opinions have to be disclosed, but you're pushing that a lot more of them be disclosed—that there'd be a tendency to ask a lot less legal questions. People would say, well, let's not ask because if we do then this sort of information has to be disclosed, or we're going to get in some gray category and then we're going to get some committee asking us questions about this, so let's just not ask the question. Maybe that doesn't happen. My sense of it is that people generally practice in ways that they think are going to be least subject to criticism so that they just won't ask questions. Maybe I'm off on that. That's one premise that I think we need to be careful about in looking at this.

Having said that, Mr. Berenson, you suggested at the end of your testimony there was a particular area here that you thought needed to be probed further in your agreement. I'd like for you to develop that particular area some more because I thought that was interesting, but I'm not sure I comprehended fully what you were discussing on that.

Mr. BERENSON. Was this the moment when I was responding to Professor Johnsen's suggestion about avenues for disclosure to the Congress?

Senator BROWNBACK. Yes.

Mr. BERENSON. I think it is obviously true that there are instances when statutes passed by Congress are unconstitutional. We see it every year in the Supreme Court. They can be unconstitutional for a variety of reasons, and rarely, but sometimes, a statute will transgress the President's Article 2 powers that belong to him alone. So there are going to be circumstances in which it is perfectly legitimate for the executive branch to reach a constitutional conclusion that a statute, in some particular circumstance as applied, has gone too far and has restricted the President's freedom of action in a way that is inconsistent with the constitutional design.

When that happens, I agree that there is a serious danger of abuse and essentially self-aggrandizement by the Executive if the executive can reach that conclusion without apprising the coordinate branch of Government that passed the statute in the first place.

There is already law on the books which suggests that when the Executive concludes that a statute is unconstitutional and/or decides not to defend it in court, the Executive needs to apprise the

Congress. I think that's the right rule. Depending on circumstances, you may need to do that just with the Intelligence Committees, or in closed-door briefings if they would compromise operational information about intelligence or military activities.

But the best practice, I think, is for the Executive to be transparent with the legislative branch when it reaches that conclusion. The difficulty arises when the Executive doesn't forthrightly conclude "this is unconstitutional as applied to us", but rather says this might be unconstitutional. It's so close to being unconstitutional that we're going to interpret the statute in another way.

That doesn't fall within the ambit of the existing law, but it is evidence that the Executive has concluded that the statute might be, or could be, or probably would be unconstitutional. That's where the gray area is. I think I agree with Professor Johnsen that even in those circumstances there should be some mechanism for inter-branch discussion so that there isn't abuse.

Senator BROWNBACK. So we should pas some sort of law addressing that particular area and requirement of disclosure for the legal opinion on which the basis of a constitutional question or probability of unconstitutionality exists?

Mr. BERENSON. I think Professor Johnsen has probably thought a lot more deeply than I have about the precise mechanism, but I suspect that a few words added to the existing provision would be sufficient to accomplish that objective.

Senator BROWNBACK. Professor Johnsen, I'm on limited time, but could you describe that narrow category for me? I'm sure you want to talk about a whole bunch of things, but I've got limited time. If you could, just hit that category.

Ms. JOHNSEN. Yes, certainly. I'm very glad to hear Mr. Berenson agrees that would be helpful. The category arises because very often the Bush administration, in particular, rather than acknowledge that they are declining to comply with the statute outright, instead they say we will interpret the statute in a way that is not consistent with the statute's plain meaning, because to construe it the way that it's written would violate what the Bush administration views as the President's constitutional authorities.

So they say, it seems the statute says X, but we'll interpret it to say Y, because if we say it says X as it seems to it would violate their view of the President's sweeping constitutional authorities to act unilaterally. So that's not captured by the existing reporting requirement, and I do think it could be changed with the addition of a sentence or so.

Senator BROWNBACK. And your testimony has that particular provision thought through? It seems like, Mr. Berenson, it would be great if you could review that that they have in there and give the Committee some recommendations on this.

Mr. Rivkin, just briefly, you have concerns, in the asymmetrical warfare that we're in right now, on the impact of some of what is being suggested by some of the panel members, I take it.

Mr. RIVKIN. I do, Senator Brownback. Very briefly, to me one of the biggest problems of the critics is that I have not heard any of them acknowledge that the balancing, the baseline for balancing, the openness and public safety is any different now than it was prior to 9/11. But also, let's be honest about it. It's a question of

what to disclose. Disclosing the bottom-line policy position, disclosing the bottom-line legal position is one thing. Disclosing the ebb and flow of legal advice does entail significant consequences. Let's be candid: it chills the candor which people offer legal advice, because unfortunately, this debate is not being carried out in a particularly dispassionate and collegial manner.

People whose advice is revealed, shall we say, don't prosper, they don't get confirmed, they get ostracized, people write nasty articles in various magazines suggesting they be tried for war crimes. The long-term implication of disclosing the ebb and flow of legal advice is very simple. Any administration would have fewer and fewer lawyers.

You mentioned correctly, the Executive would not ask for advice. But even if he does—or she does—he wouldn't get candid opinions, which would be bad all the way around from the standpoint of a vigorous democratic accountability. So there's a huge price to be paid, and for the life of me I don't understand every nuanced aspect, ebb and flow of legal advice, is necessary for you to legislate as long as you know what the Executive's bottom-line legal conclusion and policy conclusion is. I suspect a lot of our disclosures is really not driven by the legislative needs, it's driven by the sort of interagency, interbranch—

Senator BROWNBACK. Tension.

Mr. RIVKIN. Political warfare and tension with consequences. Does anybody really doubt that there are consequences to people whose legal advice is revealed, as they go forward with the rest of their lives and careers? I wish it would not be the case. Frankly, if that were not the case I would be a lot less concerned about the disclosure of this information.

Senator BROWNBACK. Thank you.

Thank you, Mr. Chairman.

Chairman FEINGOLD. Thank you, Senator Brownback.

I can tell you as a legislator, based on my experience in trying to deal with the illegal wiretapping program, the shifting justifications that just kept flying at us, after we shot down the notion that somehow the Authorization for Use of Military Force was a justification, show exactly why we need to know the scope and the depth of the legal justification, or you can't legislate because every time you legislate they come up with some new, usually absurd, argument to justify what was illegal. So that is why it's important for me, as a legislator, to know that.

Senator Brownback?

Senator BROWNBACK. If I could make just a brief comment. I appreciate your delving into this because it is a significant issue and it's a significant one we need to know about. But I have been witness, and I think you have too—a couple of the people on the panel have served in administrations—of the internal administration fighting that goes on, because you've got a bunch of bright people that hold their position strongly. I think if you're saying, okay, we want to know about the ebb and flow of this, it's really more of a political debate than once it gets out in front of, this group says this and that one says that.

Now, probably that's not specifically what you're asking for, but if we don't provide some protection for that discussion you are ei-

ther not going to have that or you're not going to have it in writing and it's all going to be oral, or people just aren't going to ask the question and you're going to have poorer administration decision-making taking place. I think there's a danger in us doing that to the administration that we shouldn't.

Chairman FEINGOLD. I won't continue this long, but I think this is healthy for us to discuss. You mentioned people having served in the administration. We've got a couple of them here who have served in different administrations, Professor Johnsen and Mr. Leonard, who agree with my proposition that this is something we have to deal with, and apparently aren't terribly concerned about this alleged chilling effect. So we have testimony right here from people to serve in both Republican and Democratic administrations who say the opposite.

Senator BROWNBACK. Well, you've got Mr. Rivkin who has testified differently who has served in another administration, so you've got, even on your panel, a dispute relative to this. I think what we could focus on, though, is you do have an agreement of a narrower category here that I think would be a more interesting, more likely to produce results probe of what Mr. Berenson was suggesting in an agreement with Professor Johnsen. I mean, I think if you tightened in on your focus more there is some possibility here.

Chairman FEINGOLD. You know, I may well be able to work with you on that. I think that has a lot of merit. I'm hoping we can come together in the way they came together on this matter.

Now I am pleased to turn to Senator Whitehouse, who of course is a distinguished member of the Committee. I want to repeat my compliment to him on the excellent work he did in helping reveal this problem of Executive orders being rescinded in secret. I thank you, and I turn it over to Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Mr. Chairman. I appreciate those kind words very, very much.

Mr. Berenson, you and I probably disagree on a great number of things, but I have to tell you that I was impressed by your testimony. I found it very lucid, very disciplined, very thoughtful, the sort of thing that I would hope to find in OLC opinions and recently have not.

But if I accept your proposition, as I think most people do, that there is a necessity for secrecy in various aspects of Government operations, and that necessity for secrecy in turn provides benefits back to the public through public safety if it's being done correctly, I would suggest to you that when an administration chooses to exercise the privilege of secrecy that it is given, when it chooses to pull that mantle of secrecy over its actions, it undertakes at the same time a very high and solemn obligation to use that zone of secrecy in a proper way, for two reasons. First, it's just indecent not to and it runs contrary to Government principles in our American system of democracy.

But from a practical point of view, if you foul the nest, if you will, then you create the skepticism and concern that Congress has now and you create the risk that we will tighten down on these security issues, and fundamentally you put future administrations and the public safety that it is the very purpose of secrecy to safeguard, in the future at risk as a result of having done it. It's kind

of a complex version of crying wolf. I'd like to hear your reactions to that analysis.

Mr. BERENSON. Thank you, Senator. I think I can say that I'm in complete agreement with that analysis. Both of the reasons you identify for exercising the privilege to keep something secret, I think, are exactly correct. There are manifest benefits to open debate, discussion, and criticism that you lose when something is secret, and, as with almost any authority, when you abuse it you undermine the rationale for having it in the first place and you threaten it in the future.

It is very difficult day-to-day operationally inside the Government, as all of this is happening in real time through the Department of Defense, the intelligence community, and the White House, to find a good way to police it and to guard against abuse. There are inevitable self-interested tendencies that cause people to use this power when they have it, and some of those have been alluded to by other members of the panel. It can sometimes be a way to win a bureaucratic war by controlling information to insulate yourself from criticism, to essentially get your way.

You can convince yourself, delude yourself into thinking that you're making something secret in order to protect the larger national security interests. Ultimately, it comes down to the judgment and good faith of the individuals who serve in the Executive branch. I'm not sure there's much other alternative, and it's why another of this body's powers is so vital, namely the power of confirmation.

Senator WHITEHOUSE. Let me ask you a quick, admittedly hard, question. To the extent that the classified opinions of OLC have been made public and you are familiar with them, do they meet that high standard?

Mr. BERENSON. I think that this is another area where being at 5 years distance from my own Government service gives me a little more freedom and a little more perspective. I do think that there is a strong argument that some of these memos that we've been discussing this morning should not have been classified and that they did not comport with the standards that we've been talking about. Part of the reason for that, I think, is that they were constructed structurally in a way that I don't think they should ever have been, or that any OLC opinion should ever be, namely divorcing the discussion of law from the facts to which it is applied.

OLC should be asked concrete questions about particular policies and practices and render an opinion no broader than necessary to answer that specific question. That fundamental flaw, that original sin in the way these memos were constructed, I think, led to the creation of an opinion that probably shouldn't have been classified, but in the minds of the classifiers was properly classified because it was part and parcel of other documents that were being considered simultaneously.

Senator WHITEHOUSE. Let me ask Mr. Leonard a quick question, because he's the person with the greatest expertise in the classification process I've ever had the occasion to come across. I was interested, on page 6 of his testimony, where he quoted Jack Goldsmith's observation that before Mr. Goldsmith arrived at OLC, "not

even NSA lawyers were allowed to see the Justice Department's legal analysis of what NSA was doing."

Now, that implies, to me, that the legal analysis supporting a classified program is more highly classified than the classified program itself, because clearly the NSA knew what the heck was going on. They were doing it. So why on earth would NSA, in any respect, be prohibited from seeing legal analyses? In what world does it make more sense for the legal analysis supporting a classified program to be more highly classified than the program itself?

Mr. LEONARD. That's an excellent observation, Senator. I mean, I have a very simple question I ask whenever I encounter this type of situation: from who are we trying to keep the information? When you answer that question who, that often will tell you the why, why is this being applied. As Mr. Berenson pointed out, and as I have, it's often done because of internal bureaucratic struggles.

Senator WHITEHOUSE. Will we have a second round, Mr. Chairman?

Chairman FEINGOLD. Yes.

Senator WHITEHOUSE. Okay. Good. Thank you. I won't go into it in any great detail at this point, but I think as the panel knows, my concern is that the administration took advantage of the secrecy of OLC to violate I think what Ms. Johnsen has well described as the longstanding practices of the Attorney General and Office of Legal Counsel across time and administrations in order to essentially cook the books in ways that would not survive peer review and, therefore, they wouldn't expose it to peer review. As a result, these sweeping and, at a minimum, highly questionable legal theories were propounded in these opinions.

But my time has expired.

Chairman FEINGOLD. Thank you, Senator. We will return. I'll start the second round now, and we'll get back to you shortly.

Mr. Leonard, I assume you read the entire March 14, 2003 memorandum by John Yoo?

Mr. LEONARD. Yes, I have, Mr. Chairman.

Chairman FEINGOLD. As the former head of the office responsible for implementing the President's standards for classification, did you see anything in this memo that should have been classified?

Mr. LEONARD. Absolutely nothing.

Chairman FEINGOLD. You have testified that, in your view, pure legal analysis should never be classified. It's been suggested, however, that the law of war is different from the law of taxes or the law of health care, and that the law of war is properly classified and kept secret. What's your response to that argument?

Mr. LEONARD. I think the perfect response to that is, again, some of the reasons why this memo was classified reportedly in the first place, and that was to keep it out of the hands of the military services' legal people, because they very much recognize, from a reciprocity point of view, any steps—any positions we take with respect to the handling of enemy combatants—lack of transparency and interrogation methods that they're subjected to—that our young men and women that we send into combat, they, too, are potentially subject to be held to that same reciprocal standard.

So that is why, from that perspective, the military service attorneys are great advocates of transparency. Not to say that our ad-

versary, particular in this case, is anything but brutal. But our goal is not to reduce ourselves to the level of our adversary, but rather to use our own beliefs and values as a positive vision for the rest of the world so as to isolate the extremists.

Chairman FEINGOLD. Professor Johnsen, as you know, the Attorney General is required by statute to inform Congress if the Justice Department determines that it will not enforce or defend a statute on the ground that it is unconstitutional.

You've made the case that the Attorney General also should be required to inform Congress when it applies the doctrine of "Constitutional avoidance" to construe a statute's limitations narrowly.

Why, in your view, is it important for the executive branch to notify Congress when it has decided that it does not need to fully comply with a statute?

Ms. JOHNSEN. Let me make one preliminary point, if I may. I'm delighted we're all moving towards some agreement that it would be good to extend it that way.

I do need to point out that President Bush has created a real problem by saying in previous statements that it is unconstitutional in some applications for Congress even to require what it has required, so certainly the Bush administration would say this extension also would unconstitutionally infringe the President's powers, which I think is clearly wrong, but that's something that we need to be aware of.

So I think it's simply self-evident for the reasons, Mr. Chairman, you described, that in a democracy the Government must be accountable to the people and Congress must know how the executive branch, in particular, is interpreting and enforcing statutes that are already on the books. The whole system falls apart if the executive branch is allowed to keep those interpretations secret.

I want to clarify, no one is talking about revealing the ebb and flow of discussions. I am a big supporter, and saw firsthand, the importance of having confidentiality in deliberations about policy and legal interpretation as well. What we're talking about is a limited class of OLC opinions and a presumption in favor of release, not an absolute requirement. I would be opposed to Congress going beyond what we've discussed and requiring the release of all OLC opinions.

Chairman FEINGOLD. And I agree with that as well.

Is it a sufficient substitute for such notification, in your view, for the administration to brief a few Members of Congress under the condition that they keep the information secret?

Ms. JOHNSEN. Absolutely not. I realize there may be some very rare circumstances where that is the only possible opportunity. But remember, as it's been said, and as you said, we're talking about legal reasoning and legal conclusions here. We're not talking about sources, methods, and operational details. The better approach is to redact that information to the extent it does appear in an OLC opinion. As Mr. Berenson pointed out, what we're talking about—in these OLC opinions we know about, at least—are not discussions of those kinds of details.

Mr. Berenson, I think, is right. They should contain more and be more pointed. But I do think in some cases OLC does need to give more general advice. But part of the problem was, it was trying to

give sweeping immunization to Government actors to violate criminal statutes. That's what really was going on with some of these opinions.

Chairman FEINGOLD. Professor, a couple of witnesses have suggested that these OLC memos address matters that are not proper subjects of congressional interest. Do you agree with that?

Ms. JOHNSEN. Absolutely not. Congress clearly has broad authority to regulate with regard to war and national security. You talked about FISA, interrogation methods, military commissions. It was the position, in the March 2003 opinion, that Congress did not have that authority. But the Supreme Court has rejected that and it was plainly wrong, and it's been widely ridiculed. The administration itself, once these opinions are leaked and made public, regularly backs down from the more extreme assertions.

Chairman FEINGOLD. Thank you, Professor.

Mr. Aftergood, Mr. Berenson draws a distinction between laws that govern the conduct of private citizens and laws that govern the conduct of government officials. In fact, he says that the laws governing the conduct of the executive branch are not what is meant by the term "law," which I find puzzling. In any event, he claims that when the law that governs the conduct of government officials is withheld from the public, that is not truly secret law and not something the public should be concerned with.

What is your response to that?

Mr. AFTERGOOD. I find that hard to understand. In fact, there is a spectrum of legal activity delineated in my statement, some of which directly affects the conduct of American citizens and requires them to behave in a certain way, such as the example I gave of Transportation Security directives that cannot be inspected by ordinary citizens.

But even more important than those are the decisions of executive branch officials that have tremendous ramifications and implications for the rights of American citizens. The whole question of domestic surveillance. Under what conditions might I be subject to interception of communications? These are elemental questions of American citizenship, and when they are moved behind a cloak of secrecy, we are all diminished as citizens.

Chairman FEINGOLD. Thank you very much, Mr. Aftergood.

Senator Brownback?

Senator BROWNBACK. Thank you.

Mr. Elwood, can the OLC decide for itself whether to classify information?

Mr. ELWOOD. No, Senator. OLC lacks the authority to classify information itself, so-called original classification authority. However, when we discuss matters that have been classified by other agencies, the discussions of them must be classified. That's so-called derivative classification. I will note that Executive order 12958 requires that original classification be respected by the people who deal with that information later.

Senator BROWNBACK. So you cannot classify information on your own, but you have to abide by the agency that you're working with?

Mr. ELWOOD. That's right. We can neither classify nor declassify information, essentially.

Senator BROWNBACK. Okay. So it's all bound by the other agencies' classification process. Is that correct?

Mr. ELWOOD. That's correct.

Senator BROWNBACK. Okay.

Now, is that uniform across the administration or is that per agency-by-agency?

Mr. ELWOOD. It's agency-by-agency, and even component-by-component. I suspect that there are parts of DOJ that can classify information. Like, I wouldn't be surprised if the National Security Division could. But I just don't know that off the top of my head.

Senator BROWNBACK. Whereas, there'd be other agencies that wouldn't have near the classification needs or requirements, I would guess. Is that correct?

Mr. ELWOOD. That's correct. I believe, for example, the Department of State does have classification authority; Department of Defense does. My understanding is that it's agency heads who are designated in the Federal Register have classification authority.

Senator BROWNBACK. That seems to me to be prudent, that different agencies would have different requirements. You can't classify anything, but that agency has its own procedure. That seems prudent to me. Has that been workable within OLC, by and large?

Mr. ELWOOD. Certainly. Yes. We haven't had the need to do any of that ourselves.

Senator BROWNBACK. Okay.

There is a document attached to Ms. Johnsen's testimony entitled, "Principles to Guide the Office of Legal Counsel". In your experience, are these principles generally followed in the current Office of Legal Counsel?

Mr. ELWOOD. Yes, absolutely. I remember the first time I saw the principles, and I read them from front to back. I remember thinking that it described the ordinary practice of the office.

Senator BROWNBACK. And that's been your experience within the OLC, is that these are followed?

Mr. ELWOOD. Yes, that's right. I've been in OLC since October of 2005, and it is definitely consistent with our practice during that time.

Senator BROWNBACK. Good. Thank you.

Thank you, Mr. Chairman.

Chairman FEINGOLD. Senator Whitehouse?

Senator WHITEHOUSE. Thank you, Mr. Chairman.

Mr. Elwood, I'll confess, I was a little disappointed by your testimony. I'd like to challenge some of the things you said in it which I think are misleading, perhaps.

One, is the suggestion on page 3 of your testimony that OLC lacks the ability to affect private parties directly. If, as Professor Johnsen has just said, the purpose of the OLC opinion is to provide legal cover for Executive activities that would otherwise be tortuous, or illegal, or even criminal, but particularly if they would be tortuous, by virtue of having received an opinion from OLC upon which the government actor can rely, they are now protected. It would strike me that that is a considerable ability to affect private parties directly. In fact, you're taking away a right of action from the individual who is the victim of the action.

The second thing that concerns me is that immediately after that you say, "if the executive branch adopts a policy that OLC has declared legally permissible, the policy will be public unless it is classified, and appropriate officials may be called upon to explain the policy, including its basis in law." Then you dropped this little parenthetical: "Classified activities are, of course, subject to review by the Intelligence Committees."

Well, I sit on the Intelligence Committees, and we've had the most god-awful fight getting these opinions. There are ones we still don't have. So I don't know how on earth you can say that "classified activities are, of course, subject to the review by the Intelligence Committees" when we don't have them. We've asked for years to get these things. There's an absolute stone wall thrown up around this stuff.

It seems to me that it is just extremely misleading to kind of glibly pass off as if there were no problem here that of course the Intelligence Committees have access to this stuff, when you know perfectly well that we don't and that there's been a very, very determined effort to prevent us having access to them for, how long has it been? Since before I've been a Senator, but certainly the entire time I've been here.

If you could respond to those two things, because I just—

Mr. ELWOOD. Certainly. Well, whenever says that someone says that my testimony has been misleading, I have a very strong interest in responding very fully. The three points that I heard were, first, that it affects private parties directly because these provide legal cover for stuff that would be otherwise tortious. That is not the purpose for OLC opinions. I can only speak for what has occurred in the Office since I've been there, which is October 2005.

But the purpose of OLC opinions is not to provide cover, even legal protection, for actors. Its purpose is to help the President effect his duty to take care that the laws be faithfully executed. So before he undertakes action, he routinely asks us for legal advice on matters that might be subject to dispute. That's the purpose of OLC opinions.

Senator WHITEHOUSE. That's the theory. But there is very little that prevents the practice from straying into the area of providing legal cover.

Mr. ELWOOD. That, I will tell you that since I've joined OLC since October 2005, that has been the purpose of the opinions I have seen. I think that people do have—should have the ability—who rely on them, should have the ability to rely on them. However, that does not eliminate—

Senator WHITEHOUSE. Even if the purpose—let me just interrupt you a second. Even if the purpose is well-intentioned, it would nevertheless have the effect of providing that legal cover and of taking away a claim because of the reliance that the actor now can make on the OLC opinion so that he would not have the requisite scienter to qualify for the tort or for the level of knowledge required for culpability under the criminal statute.

Mr. ELWOOD. I think that—I don't think it would affect—it depends on what the tort is, but I don't think it would extinguish the cause of action. It might provide a factual defense—

Senator WHITEHOUSE. A defense.

Mr. ELWOOD.—if there is a scienter requirement. But again, that requires a scienter requirement, and then there's still the discussion of—

Senator WHITEHOUSE. So you'll concede that where somebody has been the victim of an act and this defense takes away their claim, they have been affected as a result of OLC's action?

Mr. ELWOOD. But I wouldn't accept the premise that it would take away their claim.

Senator WHITEHOUSE. It could be a complete defense to their claim.

Mr. ELWOOD. No, I don't think it would be. It may be a factual defense depending on what the tort is, but again, it would depend on what the tort is. There are a lot of torts on the books and there are a lot of creative lawyers, and so I wouldn't say that it would provide a protection against torts.

Senator WHITEHOUSE. Well, let's go on to your reaction to my concern to your statement that "classified activities are, of course, subject to review by the Intelligence Committees."

Mr. ELWOOD. One of the fundamental points that I want to make here—I mean, you may not agree with it, but one of my points—if I have not made this point, I have not done my job—is that you don't need to have OLC opinions to know what our legal basis is for a policy. OLC opinions are a—when they are written they are a confidential, legal, deliberative document that gives our advice to one party, the client.

When a policy has been adopted, then whatever committee has jurisdiction over it, whether it be an Intelligence Committee, this Committee, the Agriculture Committee, whatever, has the perfect right to say, what is your legal basis for doing this? They can keep asking the questions to their satisfaction until they feel like they know what our legal basis is.

My understanding is that you were given legal briefings on the basis in law for our interrogation programs and for the surveillance programs. I wasn't involved in that, so I can't tell you what it is.

Senator WHITEHOUSE. Well, ultimately what we were given was a big stack of documents about that high on the Terrorist Surveillance Program, and one, or maybe two of a great number, apparently, of legal opinions and letters related to the interrogation program.

Mr. ELWOOD. But again, those are the actual opinions. You can have witnesses and talk to them until you're satisfied with the understanding of the basis in law. That's not the only thing. We also write letters and—

Senator WHITEHOUSE. Isn't it a little bit different when the opinion itself isn't just one little blip of legal advice to a particular agency, but actually becomes part of the ongoing precedent of OLC and becomes something that future administrations will rely on. It's like having a court that publishes its decisions and creates precedent, but won't tell lawyers practicing before them what the precedent is.

Mr. ELWOOD. Well, when the documents serve in that sort of precedential fashion, that's a reason why OLC publishes opinions it has—it does. We've published 82 since January 2005. We've published 13 just in 2008, including one that went live this morning.

So, no, we are very attuned to those sort of precedential concerns. When it's a classified document it puts an additional wrinkle on things, but we are committed—and I mean this very sincerely—to getting Congress the information it needs to know what we're doing.

Senator WHITEHOUSE. My time has expired. Thank you, Chairman.

Chairman FEINGOLD. Thank you, Senator.

We'll begin the third, and what I suspect will be the final round.

Professor Johnsen, how do you respond to Mr. Elwood's statement that OLC, under this administration, has complied with the "Principles to Guide the Office of Legal Counsel"?

Ms. JOHNSEN. To fully reply would take quite a long time. I'm a little—kind of amazed that Mr. Elwood said he agreed with the principles. It does not seem consistent with his point that OLC should not need to reveal the actual legal opinions that it has issued. I also believe that OLC has not been forthcoming in other ways. But one of the principles is that there should be presumption in favor of releasing OLC opinions to the public, not just to Congress. So that is flatly inconsistent with Mr. Elwood's description of OLC opinions as confidential legal advice that routinely should be withheld from the public.

I think also important, is Mr. Elwood only talked about, since he's been there in October, 2005. We just don't have, and Congress does not have, a good sense of what has happened at OLC over time. We do know isolated opinions that have been publicly released, and some of them are, concededly, before October, 2005.

Those opinions do, as Senator Whitehouse said, have precedential force within the OLC, within this administration, and in future administrations. So I'd be curious to hear what Mr. Elwood thinks about the pre-October, 2005 opinions that flatly contradict the guidelines, the "Principles to Guide OLC," because they clearly were not written to give accurate principled legal advice. They were not written with the input of all interested, knowledgeable agencies. They violated many of the specifics of the principles.

Chairman FEINGOLD. Thank you, Professor.

Professor Kitrosser, for the past 6 months, Congress has been working on legislation to amend FISA. But FISA Court decisions that are directly relevant to the drafting of that legislation have been withheld from most lawmakers, leaving them to even consider proposed amendments and statutory terms in the dark, without the benefit of the Court's prior interpretations.

How does this disrupt the constitutional balance among the branches of Government? Can Congress really do its job under these circumstances?

Ms. KITROSSER. Senator Feingold, I believe it disrupts it very substantially. As I talked about in my oral testimony and in more detail in my written testimony, the Constitution, I think, strikes a rather brilliant balance by ensuring that the policy framework under which the executive branch implements that policy is transparent, even if some implementation can occur in secret. However, as we have seen and as we've discussed at length today, there is a danger that that opportunity and capacity for secret implementa-

tion will be abused, will be taken advantage of, and will be used not merely to implement law, but to circumvent law.

Now, how can we strike that balance? How can we ensure that doesn't happen? Congressional oversight is absolutely crucial. One problem that we've seen in the past with FISA over the last few years is a failure of the administration that still has not really explained adequately the reasons for this failure, failure of the administration to comply with its informing requirements under the NSA, and certainly going forward I would agree that Congress has a need to understand how FISA has been implemented, as well, certainly, as any policy decisions that the FISA Court has made in order to understand how the statute might need to be amended in the future.

Chairman FEINGOLD. Thank you.

Mr. Elwood, I'd like to ask you about a certain memo that is referenced in the March 2003 memo. There's a memo to the Defense Department dated October 23, 2001 entitled "Authority for Use of Military Force to Combat Terrorist Activities in the United States", authored by John Yoo.

It's my understanding that some of my colleagues in Congress have been asking to see this memo for years. Has this memo been provided to Congress? If not, on what ground?

Mr. ELWOOD. I don't know whether it has been provided to Congress. I suspect from your question that it has not. If it has not been provided, I can't say specifically why that particular memo wasn't provided. But I can say something generally about the terrorism-related opinions that were released—or not released, were signed—in 2001 to 2003. That is, there was always a lag in time between when an OLC opinion is signed and when it is published. I think the shortest it ever got was with the December 2004 torture law opinion that OLC put out that was put on the website the same day, but generally it is a period of months, or even years.

I've seen where they aren't even sent out for circulation for a while because at the time they are made they are confidential legal advice. The policy decisions have not been made. After a period of years, the confidentiality interests come down because the decisions have been made and so revealing the opinions won't disrupt the decisional process.

I think that the terrorism opinions are in some ways *sui generis*, if I can use a legalism, which I'm usually loathe to do, because in the aftermath of 9/11, a catastrophic terrorist attack when thousands of people died, they were scrambling to try to figure out what to do because they thought another terrorist attack would be coming and they didn't know where it would be coming from or what it would look like, so there was a lot of think-tanking on various contingencies.

One thing that I think heightens the confidentiality interest of many of the terrorism opinions is that the policies discussed weren't implemented. If you look through all of the opinions—which some day I think they will be released. There are some in the publication pipeline now—you will see things in there that were considered, but not adopted.

I think there is heightened confidentiality interest there because people aren't going to come to you and ask for legal advice if they

know that, even if they don't wind up doing it, everyone's going to find out that they were thinking about it. So as a general matter, that's why I think the war on terror opinions are especially sensitive, but many of them are on a pipeline for publication.

Chairman FEINGOLD. Will you agree to promptly release the portion of the October 23, 2001 memo that addresses the legal conclusion about the Fourth Amendment that has now been made public?

Mr. ELWOOD. I will certainly go back and—it's not my decision, but I'll certainly go back and convey it. Inasmuch as I understand that the Attorney General himself has criticized that conclusion, I don't think that that is any longer an operative conclusion of the Office. But, yes, I'll take that back.

Chairman FEINGOLD. Is this memo still in effect and binding on the executive branch?

Mr. ELWOOD. The entire memo? I don't know the answer to that question. That particular conclusion, I think, has been repudiated.

Chairman FEINGOLD. Thank you, Mr. Elwood.

Senator Brownback?

Senator BROWNBACK. Mr. Elwood, Professor Johnsen seems to disagree with your statement about whether or not you have followed, generally, the recommendations made by the group that she cited in her testimony. I'd like to give you a chance to respond to her accusations. It seems like you'd probably be in a better position to respond to those.

Mr. ELWOOD. I really appreciate that.

To begin with, I don't think it's an accurate statement to say that we don't feel that we have to reveal legal opinions or that we don't want to. We are committed to publishing them, and it's been a real priority of mine and Steve Bradbury to publish as many opinions as we can. We are constantly trying to move them through, because as you can imagine, when you're sending around a request for consent to various agencies, the last thing they want to do is do your business. They want to do their own business, first. But that's something we do, is we're constantly pinging agencies to try to move the process along.

Senator BROWNBACK. Because the agency is the one that determines this, not OLC?

Mr. ELWOOD. No. No. But you want to get at least their views on it. They don't have the last word. We have the last word on it. But it's one of the best practices, I think, of the Office to ask the people who might be affected by publication for what their views on publication are. But it is our decision.

But we are committed to publishing them. I think one thing, I think we still have a presumption in favor of releasing the opinions, but the fact of the matter is that it has been my understanding that the historic practice of OLC is to publish them when they have been turned into policy, because otherwise if it's just, here's our opinion and they say, thanks very much but we're going to do something else, or even though you say we're not legally required to do this we're going to do it anyway as a matter of policy, it might be publishable but it's a completely different, I think, confidentiality interest when they've decided, for policy reasons, to do something else than what they discussed with you.

But for opinions that have been implemented as policy, we have a very strong commitment to making them public as fast as possible. In fact, one thing that we have been, I think, especially aggressive on is attempting to move the process along quickly. If you look at our web site, there are four opinions on there from just the last 5 months, including three that were signed in 2008. As I said, we published 13 just in 2008 and it's only April.

Senator BROWNBACK. Thank you.

Mr. Rivkin, there's been a suggestion here at the hearing that the TSA regulations all be made available to the traveling public. I don't want to over-generalize on that, but do you have any concerns about all of the TSA regulations being disclosed, or that there'd be any impact on security issues if those are disclosed?

Mr. RIVKIN. Thank you very much, Senator Brownback. I think the answer is very obvious: of course they'll have an impact. If we're talking about regulations that describe the particular screening scenarios in terms of when they're triggered, as well as how they're implemented, they're obviously going to give notice to folks we do not want to give notice.

Look, again, to be fair, there is inherent constructive balance, as in most issues dealt with in a democracy. My problem with most of the critics, including my good colleague Mr. Aftergood, is there is sort of reluctance to acknowledge that there is a cost to more disclosure. The disclosure may be, indeed, necessary, but let's be honest about what the implications of a disclosure are.

In this case, again, the answer is very obvious. If people knew, for example, what triggers secondary screening or even know some routines of secondary screening, what do you think is going to happen? They're going to try to avoid it, either triggering it at all or, you know, secret things about their body that would not be detected by that particular search routine. I mean, to me it's just pretty obvious.

Senator BROWNBACK. Mr. Berenson, do you have a thought on that, by chance?

Mr. BERENSON. I do. I agree with Mr. Rivkin, that secrecy is appropriate where you're talking about sensitive security information from the Homeland Security Department, whether it relates to the security measures we take to protect air travel through the TSA or it relates to procedures that we employ at chemical plants or nuclear plants to safeguard them against attack.

Nobody is worried about what Mr. Aftergood himself would do with that information. What we're worried about is what people who would be determined to breach those defenses, to take down an airliner, to attack a chemical plant or a nuclear plant, would do. I think it's obvious that the more you know about how our defenses are constructed and our practices and procedures, the better chance you have, if you mean us harm, to succeed. So I don't find it terribly troubling that some of the procedures of the TSA, for example, are not generally available. I do think they should be available to the Congress. Congress has a legitimate legislative interest in knowing that. So pursuant to appropriate security procedures, I would hope they would be shared with the legislative branch. But this is one area where I would make a distinction between the people themselves and their elected Representatives in Congress.

Senator BROWNBACK. It seems to me that you've got a healthy tension between a desire to disclose as much as possible to the public, which we should, and we need to and we need to get as much out there, but also the need to protect the public. The desire here, and the key mechanism then, is disclosure to Congress in appropriate settings of that information so that you've got not just one entity of the government, the executive branch, but also the legislative branch reviewing this.

I'd like to see a lot more information put out there. But at the same time, when I'm getting on a plane I want to be safe in this, and make sure that the procedures are followed that we can be as safe as possible, given the asymmetrical war that we're in and the desire of a number of people in the world in different places to do us harm. So, it's a tough balance. I'm glad that we're discussing it because I think there are places that we can see improvement in the disclosure. But at the same time, I think we need to discuss it with the public from the standpoint of, here's why some of this is not disclosed, to be able to express that openly to the public.

Mr. BERENSON. And having served in the administration on 9/11 and the period immediately thereafter, I would echo one of the observations that Mr. Elwood made, which is, it is hard, and especially hard now so many years removed from those events, to understand just what an extraordinary, difficult, and unprecedented time that was.

There was an atmosphere of genuine crisis and genuine threat, and almost everything I observed during my time in government suggested that our public servants in both of the political branches of government were doing their level best to deal with a very serious, very dangerous threat. I think most of the decisions that were made, even on disclosure matters, were made with the best of intentions and sincerely for the purpose of trying to protect the public.

The fact that we may focus here on a couple of celebrated instances where, with the benefit of hindsight, we now know that there may have been an error made shouldn't obscure from view the fact that I think the vast run of these decisions were well-intentioned and properly made.

Mr. AFTERGOOD. Senator Brownback, may I quickly respond?

Senator BROWNBACK. I'm out of time. But Mr. Chairman, if you want to—

Chairman FEINGOLD. You're welcome to.

Senator BROWNBACK. If you don't object, I'll let Mr. Aftergood quickly respond.

Mr. AFTERGOOD. The suggestion was made earlier that there's really no such thing as secret law in the sense of regulations that are binding on the conduct of members of the public. My point was, in fact, there are such regulations. I think that the initial suggestion has been refuted. Secrecy comes with a price. Among the prices are that we lose the ability to critique our security policies. I think there's a lot of room to doubt the wisdom and efficacy of TSA procedures. Part of the reason for that is that so much of it is conducted in secret.

Chairman FEINGOLD. Thank you, Mr. Aftergood. Thank you, Senator Brownback, for your courtesy on that.

Senator Whitehouse?

Senator WHITEHOUSE. Thank you, Mr. Chairman.

One of the reasons that I'm concerned about the transparency issue has to do with the very institutional integrity of one of the great institution of our government. The concern, I think, has become reasonably widespread that in this sort of hothouse environment of a classified program with nobody looking in at what's going on, the OLC became kind of, you know, the little shop of legal horrors that would deliver what was requested. When you have the actual opinion out, you can actually look at, you know, kind of the merits of the legal analysis, whether it stands up.

I mean, I disagree with Mr. Berenson on a million topics, I said, but his testimony here was incredibly lucid and clear. When you see something like that you think, oh, that's pretty good scholarship. Then you see something like this. I won't go through it. It's been in the testimony already. That's a pretty alarming proposition that an Executive order is just ignorable, willy-nilly, with no reporting. When it became apparent that I was going to release this, that I'd had it declassified, I was told that it stands on precedent.

When they told me what the precedent was, the precedent was a Griffin-Bell opinion that said that the President can legally revoke or supersede an Executive order at will. Well, of course the President can legally supersede or revoke an Executive order at will. There's a process for doing that. That's a completely different proposition than saying that the Executive can use the Executive orders of this country as a screen behind which they can operate programs directly contrary to the text of the Executive order.

So, there is one example. The other one that I declassified was the proposition that the President, exercising his constitutional authority under Article 2, can determine whether an action is a lawful exercise of the President's authority under Article 2.

I mean, aside from the "pulling yourself up from your own bootstraps" nature of that argument, it stands on an earlier opinion that says the executive branch has an independent constitutional obligation to interpret and apply the Constitution. Well, of course they do in the exercise of their duties. But among the things that that opinion goes on to say is that it requires deference to legislative judgments.

Once you hang it off Article 2, which the Executive, under this unitary executive theory, claims it is immune from either judicial or legislative intrusion, you are now saying a very different thing. When you actually see the opinion and see how the extra step has been taken, you know, you know it's a little bit—something else is going on other than just plain legal interpretation.

The last one—this is my "justice bound". The Department of Justice is bound by the President's legal determinations. I mean, I thought we'd cleared that when President Nixon told an interviewer that if the President does it it's not illegal. That stands on the proposition that the President has authority to supervise and control the activity of subordinate officials within the executive branch.

But the idea that the Attorney General of the United States and the Department of Justice don't tell the President what the law is and count on it, but rather it goes the other way, opens up worlds

for enormous mischief. I think it's a sweeping proposition. The three of them, as precedent, open enormous avenues for further mischief if you're going to climb out, and out, and out further on your own precedent.

So let me ask you, Mr. Rivkin. These three theories that we have put up, you say that there's a cost to revealing these things. What is the cost in security in revealing any one of those three propositions, or all three of them together?

Mr. RIVKIN. Well, Senator Whitehouse, those three propositions, I don't see any particular cost in revealing them. It doesn't, of course, mean that there may not be other propositions it would be costly to reveal. But let me just say a couple of things.

Senator WHITEHOUSE. So at least as far as these three are concerned, you'll concede that there's no cost?

Mr. RIVKIN. I do. And let me also say, I think the language is rather stark. As most of us lawyers, you hate to look at one sentence. I certainly wouldn't have, particularly the last—

Senator WHITEHOUSE. I'd be delighted to show you the whole rest of the opinion, but I'm not allowed to. It's classified. I had to fight to get these declassified.

Mr. RIVKIN. No, no.

Senator WHITEHOUSE. They made me take—they kept my notes. They then delivered them to the Intelligence Committee, where I could only read them in the secure confines of the Intelligence Committee. Then I had to—again in a classified fashion—send this language back to be declassified. I'm doing it again with a piece of language that relates to the question of exclusivity. There is a sentence that describes whether or not the FISA statute exclusivity provision is really exclusive enough for the OLC. We're still going through this process.

Mr. RIVKIN. I understand. But if I could just say—

Senator WHITEHOUSE. I'd like to be able to tell you more about this.

Mr. RIVKIN. But this is a very—language. If I can just take 15 seconds with regards to the first proposition about the President's not being bound constitutionally by Executive order. I would say, mindful of your earlier remarks, in most circumstances it would be a matter of good government for the Executive who bothered to issue an Executive order giving some kind of notice to the public and the world at large as to how he or she would discharge their duties to go for the same exercise, but surely we can all agree that there may be some very unique circumstances not promiscuously or frequently triggered where you have an Executive order that, if it were done publicly, would give some notice to people we don't want to give notice.

Very rarely—and I certainly wouldn't defend any particular frequency which has been applied. But as a constitutional matter, of course the President is not bound by Executive order, and of course the President can violate the Executive order, and of course the President can retract the Executive order sotto voce. I mean, that's constitutionally unexceptional. As a matter of competence in government and good policy, we can all agree it should not be done, except in the rarest of circumstances.

Mr. ELWOOD. May I respond, since this is directed at a Department of Justice product?

Senator WHITEHOUSE. Sure.

Mr. ELWOOD. The opinion—you should have also have been provided with an opinion that has been public for 20 years and was put out by my Office and provided to Congress in 1987, which reads as follows: "E.O. 12333, like all Executive orders, is a set of instructions from the President to his subordinates in the executive branch. Activities authorized by the President cannot violate an Executive order in any legal and meaningful sense because this authorization creates a valid modification of, or exception to, the Executive order." So this is not secret law, this is as public as it can get. It's turned over to Congress and put in—

Senator WHITEHOUSE. Well, there's an important piece missing from that, which is not telling anybody and running a program that is completely different from the Executive order without ever needing to go back and clean it up.

Mr. ELWOOD. This opinion actually involved a secret modification that involved Iran-Contra, so it was also classified.

Senator WHITEHOUSE. So your opinion is that in saying that an Executive order cannot limit a President, there is no constitutional requirement for a President to issue a new Executive order whenever he wishes to depart from the terms of a previous Executive order. Rather than violate an Executive order, the President has, instead, modified or waived it. There is no requirement for the President ever to go back and clean up.

Mr. ELWOOD. I think that Mr. Rivkin got it exactly right, which is that in the ordinary course, yes, that's the whole reason we have Executive orders. The President doesn't have to make Executive orders, or make them public. But he does both of those things because—

Senator WHITEHOUSE. Well, I've gone over my time, so let me just close by making the point that I'm trying to make with all this, which is that if you can't see the opinion itself you can't make these determinations. It looks very much to me—although we can debate the proposition—as if these are extremely broad, extremely stark, and extremely constitutionally challenging opinions. It is different for us to read this than to see a carefully, finely crafted point such as Mr. Rivkin suggested. That is why I think it's important to see these opinions, and that's the reason I went through this.

I apologize for going over my time, Mr. Chairman.

Chairman FEINGOLD. Thank you, Senator Whitehouse.

The Ranking Member has asked to make brief closing remarks, and I will follow him.

Senator Brownback?

Senator BROWNBACK. Thank you, Mr. Chairman.

I want to thank the panelists for being here and for their discussion and thought that you've put into the process. I think it's helpful. I think it's helpful to us to be able to look at it. I am hopeful that there's at least one point that we can get some agreement on that I was probing in the first round, and I'd like to work with each of you on it.

I would just urge the majority caution on this. I appreciate the sentiment in which the disclosure is being pursued, what you're

putting forward, and I appreciate the tenacity with it. I just would note, let us be careful on this so we don't hurt the security of the people of the country. I don't think anybody's intent is to do that. And let's also not hurt the process by which we hope an administration comes up with good policy, which is a battle of ideas back and forth between, you hope, highly competent, qualified, good-hearted people. You don't disclose things that—a process date, time, or place in which you thwart that, or you make everything go and be oral instead of in writing.

I mean, I was one—I would hope that whether the administration is Republican, or Democrat, or Independent, or whatever the case might be, that they would have a good, aggressive battle of ideas internally and that those be shared, and that those be put in writing, and that those be sent back and forth and that they allow it to come up with as much as they possibly can, and that security not be harmed in this time of a big, asymmetric war that we're going to be in for a long time.

So I know your hearts are good on this. I just would urge us to take some real caution and make sure that we do this in an appropriate way that can be done in getting good decisions and not harming the public and public security for this country.

Thank you for the hearing, Mr. Chairman.

Chairman FEINGOLD. Thank you, Senator Brownback.

I want to thank all the witnesses for their testimony and for this very enlightening discussion. I want to particularly thank both of my colleagues for their very diligent attention throughout this two-hour plus hearing. I think this is a unique matter. In fact, I think this is a groundbreaking hearing with regard to this area of law.

As much as we've accomplished here today, I feel that we've only scratched the surface with this hearing. I take the Ranking Member's concern about caution seriously. There is not a single member of the Senate who would not act cautiously in this area. But I must say that the fact that we're having this hearing is an indication of almost a complete lack of caution on the part of the administration in terms of the other side of this, a complete failure to be concerned about disclosure and what the failure to disclose means for the American public. That's why we're here today. Presumably this never would have been as serious an issue under many other administrations. It is this administration's approach that has caused us to have to take these actions and investigate this issue.

We focused today on the OLC memos and on FISA Court opinions—appropriately so, in my opinion, because they are critical and timely examples of the problem. But it is more and more clear to me that this problem is a systemic one and that there's much more secret law out there than most of us suspected.

It is also clear to me that this systemic problem needs a systemic solution. While it is true that this administration has raised secret Government concerns to a new level, I think it would be naive to expect that this problem will disappear when the Bush administration leaves office. Government secrecy has been compared to kudzu, and I think there's something to that: once it takes hold, it's difficult to pry loose. We've heard some ideas here about ways to tackle the problem, and I intend to continue to give this issue close study.

The hearing record will remain open for one week for additional materials and written questions for the witnesses to be submitted. As usual, we will ask the witnesses to respond promptly to any written questions so that the record of the hearing can be completed.

Thank you. The hearing is adjourned.

[Whereupon, at 11:07 a.m. the hearing was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Responses of Steven Aftergood to
Questions Submitted by U.S. Senator Russell D. Feingold

1. At the hearing, Professor Johnsen testified that the Department of Justice is evading the statutory requirement, set forth at 28 U.S.C. § 530D, to notify Congress when the Justice Department takes the position that a statute is unconstitutional. Mr. Rivkin responded by asserting that the President conveys this information through signing statements, and that "it's somewhat difficult for me to figure out how the president can convey, without arousing criticism, a view that a particular statutory enactment is unconstitutional."

a. Do the President's signing statements represent a determination by the Department of Justice, as required by 28 U.S.C. § 530D?

No. Presidential signing statements and Justice Department notifications to Congress pursuant to 28 U.S.C. § 530D are distinct and different in almost every respect. Presidential signing statements are not issued by the Attorney General, they are not submitted as reports to Congress and, most important, they do not serve the same purpose as 530D notifications.

Signing statements often express Presidential disapproval, but only occasionally do they represent a determination not to implement or enforce a statute. "A signing statement is not a policy of nonenforcement," Mr. Elwood of the Office of Legal Counsel told the House Judiciary Committee last year.[1]

Thus, executive branch agencies did implement provisions that were the subject of signing statements in a majority of cases examined by the Government Accountability Office, or else the conditions of implementation did not arise. In a minority of cases, agencies did not implement the statutes as written.[2]

Ironically (as noted by Prof. Johnsen), the President issued a signing statement objecting to the reporting requirements of 28 U.S.C. § 530D itself.[3] And yet, according to Mr. Elwood's testimony last year, the Department of Justice has complied fully with the terms of 530D despite the President's statement of disapproval.

---

[1] "Presidential Signing Statements Under the Bush Administration: A Threat to Checks and Balances and the Rule of Law?" hearing before the House Judiciary Committee, January 31, 2007, at page 71.

[2] "Presidential Signing Statements: Agency Implementation of Selected Provisions of Law," Statement of Gary L. Kepplinger, Government Accountability Office, GAO-08-553T, March 11, 2008.

[3] Statement on Signing the 21st Century Department of Justice Appropriations Authorization Act, November 11, 2002.

44955.001

b. Do the President's signing statements contain a "complete and detailed statement of the relevant issues and background ... including a complete and detailed statement of the reasons for the policy or determination," as required by 28 U.S.C. § 530D(c)(2)?

No, they do not. To the contrary, the formulaic quality of the signing statements has been a source of consternation and confusion as to the President's intentions.

The requirements of 530D lay a foundation for constructive debate and disagreement over matters of legal or constitutional interpretation. By contrast, the vague and generalized objections contained in most Presidential signing statements do not offer similar clarity or opportunity for engagement.

c. Does President Bush issue signing statements for statutes, such as the Foreign Intelligence Surveillance Act or the War Crimes Act, that he did not actually sign because he was not the President when they were passed?

Clearly he does not. As a result, signing statements can provide no indication of Presidential views on the constitutionality or the implementation of such critical statutes.

d. In your experience, are the criticisms leveled at Presidential signing statements based on a perception that they provide too much detailed information to Congress?

No. As suggested above, much of the frustration generated by recent Presidential signing statements derives from their imprecise, boilerplate character. The Congressional Research Service put it this way:

> [T]he large bulk of the signing statements the Bush II Administration has issued to date do not apply particularized constitutional rationales to specific scenarios, nor do they contain explicit, measurable refusals to enforce a law.
>
> Instead, the statements make broad and largely hortatory assertions of executive authority that make it effectively impossible to ascertain what factors, if any, might lead to substantive constitutional or interpretive conflict in the implementation of an act.[4]

In other words, Presidential signing statements do not provide Congress with an adequate indication of executive branch views or intentions.

---

[4] "Presidential Signing Statements: Constitutional and Institutional Implications," Congressional Research Service, Order Code RL 33667, updated September 17, 2007, at page CRS-11.

44955.002

2. As you know, the Transportation Security Administration (TSA) has issued regulations requiring that "any Security Directive," without limitation, be withheld from the public on the ground that its release would be "detrimental to the security of transportation."

a. Do you believe that it would be "detrimental to the security of transportation" for the public to know that the requirement to show identification – a requirement that is conveyed to every passenger in every airport – is set forth in a TSA directive (assuming that is the case)?

No, public disclosure of the text of such a directive could not possibly be detrimental to transportation security, particularly since the public is necessarily made aware of the essential contents of the directive in the course of their travel.

Rather, non-disclosure in such cases is an indication that TSA has exercised dubious security judgment by withholding records which need not be withheld.

b. Do you believe it would be "detrimental to the security of transportation" for the public to know that the pat-down searches which occur frequently in airports, in plain view of other passengers, are in fact authorized by law (assuming that is the case)?

No, it would not be detrimental.

I understand the instinct that leads people to equate secrecy with security, but it is an instinct that needs to be scrutinized and tested by experience.

Although it may be counterintuitive, it is sometimes true that disclosure rather than secrecy leads to improved security. Publication of security policies can serve as a deterrent to potential violators. It can boost public confidence in the integrity of the security system. And most important, disclosure provides an opportunity for rapid identification and correction of security flaws. This is evident, for example, in the case of open source encryption software, which is regarded as superior to some alternatives precisely because the encryption algorithm is publicly disclosed, widely tested and thereby improved.

Determining the optimal degree of secrecy and disclosure in any particular case can be a challenging endeavor that requires careful analysis. Reflexive, indiscriminate secrecy is a poor substitute.

44955.003

Responses of Steven Aftergood to
Questions for the Record from Senator Edward M. Kennedy

1. In September 2004, the minority staff of the House Committee on Government Reform published a report, "Secrecy in the Bush Administration," which provides a comprehensive analysis of the Administration's efforts to expand government secrecy. The report details the ways in which the Administration has undermined laws that require public disclosure, expanded laws that restrict public access, and stonewalled relevant committees of Congress. "Taken together," the report concludes, "the Administration's actions represent an unparalleled assault on the principle of open and accountable government." You've been one of the most diligent analysts of U.S. government secrecy for many years. Do you agree with the report's conclusion, and if so, do you believe the problem has become better or worse in the three-and-a-half years since its publication?

I agree with the report's conclusion that the Administration's policies have had profound negative consequences for open, accountable government.

It is difficult to say with certainty whether the problem has worsened or not in recent years. In some respects, there has been a measurable increase in secrecy since the report was published. Thus, the combined total number of agency classification actions reported to the Information Security Oversight Office reached a new record high in 2006.

In other respects, there has been movement in the direction of greater openness. Thus, the reported production of new secrets ("original classifications") declined each year in 2005 and 2006. Also, for example, the declassification of the national intelligence budget occurred for the first time in a decade in 2007, pursuant to a legislative requirement.

But perhaps the most important observation to make is that there is much we still do not know about the role of secrecy throughout the last seven years. It will take some focused effort to document the missing portions of the Bush Administration's record.

44955.004

2. In your prepared statement, you describe a "precipitous decline" in publication of Office of Legal Counsel opinions under the Bush Administration, based on information on the Office's website. As you point out, these statistics raise troubling implications about the nature of the withheld opinions and the Office's commitment to transparency and accountability. In his prepared statement and spoken testimony, however, Deputy Assistant Attorney General Elwood argued that the Office of Legal Counsel's "approach to publication is consistent with the approach of prior Administrations," and he tried to support this assertion with his own statistics. How do you respond to Mr. Elwood's statistical arguments and his characterization of the Office's approach to publication?

On the Office of Legal Counsel website, there is only one opinion posted for the entire year of 2006. I cannot recall a prior year in the past decade or so when the pace of publication dropped so low. It could hardly go much lower. I believe this qualifies as a "precipitous decline." At any rate, that is what I had in mind.

On the other hand, I did not fully recognize the extent of the OLC publication activities that were described by Mr. Elwood, and I appreciate his endorsement of the value of continued publication. (As I was preparing these answers, I received copies of an additional 17 historical memoranda from OLC that I had requested under the Freedom of Information Act, for which I am also grateful.)

Fundamentally, however, mere statistics are beside the point. The important point is not how many opinions have been disclosed, but the public policy consequences of those that have been withheld, whether they are few or many.

While OLC insists that it does not make policy, it seems clear that OLC opinions have played an enabling role in momentous national policy decisions regarding surveillance, detention, interrogation and other matters. By obscuring the record on such uniquely important decisions, I believe the Administration has done a disservice to the nation.

44955.005

3. Your statement emphasizes that there's been a "discernable increase in secret law and regulation in recent years," and suggests that "legislative intervention may be required to reverse the growth of secret law." What forms of legislative intervention do you recommend?

Very briefly, I think there are three general categories of legislative intervention that may warrant consideration.

First, it may be possible to directly legislate a disclosure requirement in some specific cases, such as those TSA directives that are withheld without a well articulated security rationale.

In other cases, an indirect approach may be needed to counter agency claims of privilege. Congress could make particular program authorizations or appropriations conditional upon the disclosure of requested records. Then the agency would be compelled to choose which it values more, the privilege that it claims or the program that it wishes Congress to fund.

Perhaps even more important, effective, and achievable, Congress could exercise special care in the confirmation process next year and thereafter to ensure that individuals who are nominated for key positions are genuinely committed to open and accountable government, and that they agree to undertake specific obligations in this regard.

4. At the end of your statement, you said that the State Secrets Protection Act (S. 2533), which I introduced in January with Senator Specter and Senator Leahy and which the Judiciary Committee recently approved, "represents one promising model of how conflicting interests in secrecy and disclosure may be reconciled." As you are no doubt aware, Attorney General Mukasey sent the Committee a letter on March 31 opposing this legislation. What are your views on the Attorney General's letter?

The views of the Attorney General are of course entitled to serious and careful consideration. But I found his letter to be unsatisfactory because he did not admit the reality of the problem that the State Secrets Protection Act is intended to solve.

Instead, the Attorney General contended that the manner in which the state secrets privilege has been exercised "already strikes the appropriate balance" between national security and the rights of litigants.

Unfortunately, that is not true. A growing number of litigants with valid and urgent grievances have been unnecessarily denied a fair adjudication of their claims because of an uncompromising use of the state secrets privilege.

The sponsors of the State Secrets Protection Act made an obvious effort to meet the legitimate concerns of the executive. It is regrettable that the Attorney General did not reciprocate.

44955.006

Senate Judiciary Committee
Subcommittee on the Constitution
Hearing on "Secret Law and the Threat to Democratic and Accountable Government"
Wednesday, April 30, 2008

Questions submitted by U.S. Senator Russell D. Feingold.

1. **In your written testimony, you stated that OLC's legal views "are not binding on . . . the courts." Of course, this assumes that OLC's opinions do not themselves interfere with courts' ability to rule on the legal questions at issue. In February of this year, however, Attorney General Mukasey made the following statement in testifying before Congress: "[W]e could not investigate or prosecute somebody for acting in reliance on a Justice Department opinion."**

   May courts issue a ruling on whether a criminal law has been violated if no case alleging such a violation is brought before the courts?

ANSWER: There are various mechanisms for courts to pass on the lawfulness of Executive Branch conduct even if the Justice Department declines to bring a prosecution because the official in question has relied on a Justice Department opinion that such conduct is lawful. For example, a court asked to issue an order or a warrant to authorize certain conduct would be in a position to discuss the lawfulness of the proposed conduct. In addition, certain civil causes of action can be based on alleged violations of criminal statutes.

2. **When I asked you whether the Administration's assertion of the "state secrets" privilege could prevent courts from overriding the Executive Branch's interpretation of its wiretapping authority, you responded, "I think that where the government's wiretapping authority would be decided would be in the courts that issue wiretap warrants." If the Administration did not apply to those courts for warrants—if, for example, the Administration believed it was not bound by the statutory warrant requirements—how would the courts be able to rule on the subject?**

ANSWER: There is no reason to address alternative mechanisms for undertaking foreign intelligence surveillance efforts, because, as you know, such surveillance today is conducted pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended. In any event, as noted during Deputy Assistant Attorney General Elwood's testimony, the Government's assertion of "state secrets" does not prevent courts from reviewing the Government's interpretation of its wiretapping authority; courts, not the Executive Branch, have the final word on whether the state secrets privilege prevents a lawsuit from proceeding.

3. **In response to a question from Senator Brownback, you indicated that no officials within the Office of Legal Counsel have original classification authority**

44955.007

and that any classified products your office produces are derivatively classified. Presumably, this would include the March 14, 2003 memorandum from John Yoo to the Department of Defense General Counsel on the subject of interrogation.

Pursuant to Executive Order 12958, as amended, "Classified National Security Information," and its implementing directive, "ISOO Directive No. 1" (32 CFR Part 2001), derivatively classified documents must contain, among other things: (1) a "derived from" line that identifies the source document or classification guide, including the agency and office of origin; (2) portion markings that identify the classification level of each paragraph or heading; and (3) the date on which the document is to be declassified (carried forward from the original classified document). 32 CFR § 2001.22. The March 2003 memo does not comply with any of these regulatory requirements.

a. What document or classification guide was the source of the derivative classification of the March 2003 memo?

b. Who was the derivative classifier who classified the March 2003 memo?

c. There are paragraphs in the March 2003 memo that simply describe the contents of various provisions of the United States Code (for example, section "c" on page 39 of the memo). Did every paragraph in the March 2003 memorandum contain information that was identified as classified in an original source document or classification guide?

d. Abuse of the classification system weakens national security, as J. William Leonard testified. In this case, the classification of the March 2003 memo apparently disregarded almost every procedural rule set forth in the law for the classification of documents. The substantive rules for classification were just as flagrantly violated, as the memo treated even the contents of the United States code as classified.

The President's governing order (§5.5b(2) of Executive Order 12958, as amended) calls for "appropriate sanctions" for officials or employees who "knowingly, willfully, or negligently . . . classify or continue classification of information in violation of this order or any implementing directive," or who "contravene any other provision of this order or its implementing directives." Has any original or derivative classifier been subject to sanctions for the improper classification of the March 2003 memo, and if not, why not?

e. How many OLC memoranda issued under this Administration are currently classified?

f. Please certify that each currently classified OLC memorandum that was issued under this Administration complies with the requirements of

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00053 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.008

Executive Order 12958, as amended, and 32 C.F.R. Part 2001. Specifically, please confirm that each such memorandum identifies the original classification source, includes a date for declassification, and includes portion markings for each paragraph. If that is not the case for any memorandum, please detail the steps OLC plans to take to address the failure to comply with the applicable regulations, including whether OLC plans to release any information that was improperly classified.

ANSWER: Because none of the attorneys who participated in preparing the March 2003 memorandum remains at the Department of Justice, no current DOJ employees have first-hand knowledge of the circumstances surrounding the classification of that memorandum. We have consulted the Acting General Counsel of the Department of Defense and understand from him that the memorandum was classified under the authority of DoD using that agency's classification authority because the memorandum related to the guidance of a DoD working group charged with developing recommendations for the Secretary of Defense concerning a range of possible interrogation techniques for use with alien unlawful combatants detained at Guantanamo Bay. The subject matter addressed by that working group project was classified at that time because it related to the conduct of current intelligence collection activities and other military operations the public disclosure of which, including to al Qaeda and other adversaries of the United States, reasonably could be expected to cause serious damage to national security and the foreign relations interests of the United States. OLC is not aware of any OLC-originated documents that were classified as derivative of the March 2003 memorandum. The Department of Defense, as the classifying authority for the opinion, is better situated to address whether any sanctions have been imposed in connection with classification of the March 2003 opinion. (Note that Executive Order 12958 and the governing regulations do not appear to require a statement identifying a derivative classification authority. *See* Exec. Order 12958, § 2.1(b); 32 C.F.R. § 2001.22.)

OLC has issued numerous opinions since 2001 that remain classified. OLC has taken and will continue to take appropriate steps to ensure that its classification practices comply with Executive Order 12958.

4. **At the hearing, I asked you whether Congress would be provided with any future OLC memos on the subject of interrogation as soon as they went into effect. You responded that this was your understanding, but "[t]hat is something I simply don't know one way or the other." Please consult with the appropriate personnel and confirm whether, under the arrangement that has been reached, Congress (or specific congressional committees) will be provided any future OLC memos on the subject of interrogation as soon as they go into effect.**

ANSWER: The Administration has accommodated the Intelligence Committee by making available the existing OLC opinions on the CIA interrogation program, and accommodated the Judiciary Committee by making available those opinions with redactions for exceptionally sensitive information concerning sources and methods. We

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00054 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.009

have made clear that any changes to the CIA program in the future would be briefed to the Intelligence Committees. It is premature to speculate about hypothetical future OLC opinions.

5. **You acknowledged in your testimony that when an agency actually adopts a policy discussed in an OLC opinion, then the OLC opinion "at that point . . . can reasonably [be] call[ed] law." However, you maintained that even in these situations, while Congress could "ask us all day long for what our legal position is on that matter," there was still a "confidentiality interest" in the advice given by OLC.**

   In *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), the Supreme Court held that the deliberative process privilege did not extend to an intra-agency memorandum containing advice that an agency actually adopted and that became "the agency's effective law and policy." In so holding, the Court stated:

   > **"The probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice[,] if adopted, will become public is slight. First, when adopted, the reasoning becomes that of the agency and becomes its responsibility to defend. Second, agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency. Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports [disclosure]."**

   Do you agree with the Supreme Court that the considerations underlying the deliberative process privilege have little application where an employee's advice is adopted and serves as the reasoning for an actual agency policy?

ANSWER: Deputy Assistant Attorney General Elwood did not testify that, once a policy was implemented, an OLC opinion addressing the policy could "reasonably [be] call[ed] law." Rather, he testified that once a policy was implemented so that it "starts operating" in a way that affects the public, such as the adoption of regulations, *the implementation of the policy* might reasonably be described as "law."

The quoted paragraph from *Sears, Roebuck* did not involve circumstances where a decisionmaker decides to implement a policy discussed in a confidential memorandum. Rather, it concerned the very different situation in which the decisionmaker *expressly* incorporates such a memorandum in a non-privileged decision document, thereby *embracing* the memorandum as the justification for, and explanation of, the policy. Indeed, the very next sentence in the Court's opinion in *Sears, Roebuck*—which the block quote above omits—makes clear the limitation of the holding, stating that the deliberative process privilege would not justify withholding a document if "an agency

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00055 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.010

chooses *expressly* to adopt or incorporate by reference an intra-agency memorandum." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975) (emphasis in original).

This distinction is made clear in *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (1975), decided the same day as *Sears, Roebuck* and also authored by Justice White. The Court concluded that the deliberative process privilege is lost only where "the reasoning in the reports is adopted by the [decisionmaker] as *its* reasoning"; while "memoranda setting forth the reasons for an agency decision" are subject to disclosure, "predecisional memoranda prepared in order to assist an agency decisionmaker in arriving at his decision" are "exempt from disclosure," "even when [the decisionmaker] agrees with the conclusion of [the predecisional memoranda]." *Id.* at 184. The courts of appeals have noted this distinction time and again, holding that the deliberative process privilege still applies after a policy is adopted, unless the agency has expressly adopted the predecisional document as the justification for, and explanation of, the policy. For example, although the Second Circuit concluded that the deliberative process privilege was not a basis for withholding an OLC opinion where "the Attorney General and his high level staff made a practice" of invoking the reasoning of the memorandum publicly "to justify and explain the Department's policy and to assure the public" and government officials "that the policy was legally sound," *Nat'l Council of La Raza v. Dept. of Justice*, 411 F.3d 350, 358 (2d Cir. 2005), the court cautioned that "[t]o be sure, had the Department simply adopted only the conclusions of the OLC Memorandum, the district court *could not have required* that the Memorandum be disclosed." *Id.* (emphasis added). Indeed, the court held that portions of the memorandum that had not explicitly been adopted should be redacted before the document was publicly released. *Id.* at 360 n.7. *Accord Wood v. FBI*, 432 F.3d 78, 84-85 (2d Cir. 2005) ("[A]n agency does not adopt or incorporate by reference a pre-decisional memorandum where it only adopts the memorandum's conclusions."); *Casad v. Dept. of Health & Human Servs.*, 301 F.3d 1247, 1252 (10th Cir. 2002) (discussing *Sears, Roebuck* and *Grumman*); *Montrose Chem. Corp v. Train*, 491 F.2d 63, 70 (D.C. Cir. 1974) (explaining that disclosure is warranted "where a decision-maker has referred to an intra-agency memorandum as a *basis* for his decision" where doing so constitutes adoption of the memorandum "as a rationale for a decision"). Indeed, even reference to a memorandum's conclusion is insufficient to waive the deliberative process privilege, unless the decisionmaker expressly adopts the reasoning of the memorandum as the justification for, and explanation of, the policy. *See Casad*, 301 F.3d at 1252 ("The Court has also refused to equate reference to a report's conclusions with adoption of its reasoning. It is only the latter that destroys the [deliberative process] privilege.").

6. **Senator Whitehouse asked you about OLC opinions that "actually become[] part of the ongoing precedent of OLC, and become[] something that future administrations will rely on." You responded that, "when the documents serve in that sort of precedential fashion, that's the reason why OLC publishes the opinions it has." You also testified that, "for opinions that have been implemented as policy, we have a very strong commitment to making them public as fast as possible." You suggested, however, that there is often a delay in**

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00056 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.011

publication because OLC consults with agencies before publishing opinions, and that agencies do not always give a prompt response.

a. Does OLC have a policy of publishing all non-classified opinions that are precedential in nature and/or that have been implemented? If not, will OLC commit to adopting this policy?

b. Is congressional action required, or would congressional action be helpful, to ensure that the agencies OLC consults about releasing precedential opinions respond promptly to the inquiry?

ANSWER:

a. Many OLC opinions address issues of relevance to a broader circle of Executive Branch lawyers or agencies than just those officials directly involved in the opinion request. In some cases, the President or an affected agency may have a programmatic interest in putting other agencies, Congress, or the public on notice of the legal conclusions reached by OLC and the supporting reasoning. In addition, some OLC opinions will be of significant practical interest and benefit to lawyers outside the Executive Branch, or of broader interest to the general public, including historians. In such cases, and when consistent with the legitimate confidentiality interests of the President and the Executive Branch, it is the policy of OLC to publish its opinions. This approach to publication is consistent with the approach of prior Administrations of both parties. In effect, OLC has a presumption in favor of publishing opinions that are believed to be of interest to a broader circle of government lawyers, to Congress, and to the public at large.

   To our knowledge, however, no administration has had a policy of publishing "all non-classified opinions that are precedential in nature and/or that have been implemented," and such a policy would not be warranted. Even for opinions of that sort, it has long been recognized, by Administrations of both parties, that maintaining the confidentiality of OLC opinions for an appropriate period is often necessary to preserve the deliberative process of decisionmaking within the Executive Branch and attorney-client relationships between OLC and other executive offices. Moreover, it is vital that OLC be able to maintain confidentiality at times, precisely so that senior Executive Branch officials will be encouraged to seek OLC's advice at precisely those critical times when it is most needed. *See generally Principles to Guide the Office of Legal Counsel* at 4 (Dec. 21, 2004)

b. Congressional action is not necessary to facilitate the solicitation of views on the publication process, which ordinarily proceeds as promptly as limited resources reasonably permit.

7. Please answer questions (a) through (d) below, separately for each of the following memoranda referenced in the March 2003 memo:

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00057 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.012

ANSWER: At the outset, please note that some of the memoranda listed in your question are currently being considered for publication. As an accommodation to the Subcommittee, if a decision is made to publish any of the opinions, a copy of the opinion will be provided to the Subcommittee in advance of publication.

1. **Memorandum for Alberto R. Gonzales, Counsel to the President, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Legality of the Use of Military Commissions to Try Terrorists (Nov. 6, 2001).**

   a. **Is this memo classified? If so, please confirm that the classification requirements set forth in Executive Order 12958, as amended, and 32 C.F.R. Part 2001 were followed, and state the identity of the derivative classifier within OLC.**

ANSWER: This memorandum is unclassified.

   b. **Has this memorandum been made available to Congress or to any of its committees? If so, when was the memorandum made available, to whom, and under what conditions?**

ANSWER: We are not aware that this memorandum has been made available to a committee of Congress.

   c. **Is this memo still in effect, or has it been withdrawn or modified?**

ANSWER: The conclusions of the memorandum have been affected by subsequent case law, most particularly, the Supreme Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

   d. **Has any department, agency, or Executive official or employee (including the President) adopted any policy or taken any action based in whole or in part on the advice or legal analysis in this memorandum?**

ANSWER: The memorandum advised on policy options to be implemented by another agency (the Department of Defense), and so we have no firsthand knowledge of the extent to which decisionmakers relied on the opinion. We believe, however, that the memorandum was part of the deliberative process of the Executive Branch in connection with the establishment of military commissions.

2. **Memorandum for William J. Haynes II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Legal Constraints to Boarding and Searching Foreign Vessels on the High Seas (June 13, 2002).**

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00058 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.013

ANSWER:

a. This memorandum is unclassified.

b. We are not aware that this memorandum has been made available to a committee of Congress.

c. The Department has not had occasion formally to reconsider the conclusions of this memorandum.

d. We are not aware that the options discussed in the opinion have been implemented.

3. Memorandum for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Applicability of 18 U.S.C. § 4001(a) to Military Detention of United States Citizens (June 27, 2002).

ANSWER:

a. This memorandum is unclassified.

b. We are not aware that this memorandum has been made available to a committee of Congress.

c. The Department has not had occasion formally to reconsider the conclusions of this memorandum. We note that the issue addressed in the memorandum was addressed by the Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

d. We are not aware of any U.S. citizen who has been taken into military custody for detention as an unlawful combatant after the date the memorandum was signed.

4. Memorandum for William J. Haynes II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations (Mar. 13, 2002).

ANSWER:

a. This memorandum is unclassified.

b. We are not aware that this memorandum has been made available to a committee of Congress.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00059 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.014

c. The Department has not had occasion formally to reconsider the conclusions of this memorandum.

d. We believe that the memorandum was part of the deliberative process of the Executive Branch in connection with the decision to transfer captured terrorists from U.S. custody.

5. Memorandum for Daniel J. Bryant, Assistant Attorney General, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Swift Justice Authorization Act (Apr. 8, 2002).

ANSWER:

a. This memorandum is unclassified.

b. We are not aware that this memorandum has been made available to a committee of Congress.

c. The conclusions of the memorandum have been affected by subsequent case law, most particularly, the Supreme Court's decision in *Hamdan, supra.*

d. We are not aware that any agency has adopted a policy or taken final action based on the conclusions of this memorandum.

6. Letter for William H. Taft, Legal Adviser, Department of State, from John C. Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel (Jan. 14, 2002).

ANSWER:

a. This letter is unclassified.

b. We are not aware that this letter has been made available to a committee of Congress.

c. The Department has not had occasion formally to reconsider the conclusions of this memorandum. Portions of the analysis have been affected by subsequent statutes and case law.

d. We believe that this letter was part of the deliberative process of the Executive Branch in connection with matters of international law.

7. Memorandum for John Bellinger, III, Senior Associate Counsel to the President and Legal Adviser to the National Security Council, from Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty (Nov. 15, 2001).

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00060 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.015

ANSWER:

a. This memorandum is unclassified.

b. We are not aware that this memorandum has been made available to a committee of Congress.

c. The Department has not had occasion formally to reconsider the conclusions of this memorandum.

d. We believe that this memorandum was part of the deliberative process of the Executive Branch in connection with the decision of the United States to withdraw from the ABM treaty. We are not aware, however, that any decision was made to suspend provisions of the treaty.

8. Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Re: Authority of the President to Denounce the ABM Treaty (Dec. 14, 2001).

ANSWER:

a. This memorandum is unclassified.

b. We are not aware that this memorandum has been made available to a committee of Congress.

c. The Department has not had occasion formally to reconsider the conclusions of this memorandum.

d. We believe that advice embodied in this memorandum was part of the deliberative process that preceded the decision of the United States to withdraw from the ABM treaty, which the President announced December 13, 2001.

9. Letter for Alberto R. Gonzales, Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel (July 22, 2002).

ANSWER:

a. This letter is unclassified.

b. We are not aware that this letter has been made available to a committee of Congress.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00061 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.016

c. The Department has not had occasion formally to reconsider the conclusions of this letter.

d. We are not aware that of any agency has adopted a policy or taken final action based on the conclusions of this letter.

10. Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Re: Authority of the President under Domestic and International Law to Use Force Against Iraq (Oct. 23, 2002).

ANSWER:

a. This memorandum is unclassified.

b. We are not aware that this memorandum has been made available to a committee of Congress.

c. The Department has not had occasion formally to reconsider the conclusions of this memorandum.

d. We believe this memorandum was part of the deliberative process of the Executive Branch in connection with the decision of the United States to use military force against Iraq.

8. The March 2003 memo references a Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States (Oct. 23, 2001). According to the March 2003 memo, the October 2001 memo "concluded that the Fourth Amendment had no application to *domestic* military operations."

You testified that it was your understanding that "the Attorney General himself has criticized that conclusion" and "[t]hat particular conclusion, I think, has been repudiated." In fact, Attorney General Mukasey said only that "[t]he Fourth Amendment applies across the board, regardless of whether we're in wartime or in peacetime." This distinction is important, as OLC has taken the position that there is a significant difference between saying that a constitutional amendment does not apply *during wartime* and saying that the amendment does not apply *to military operations*. (See p.8, n.11 of the March 2003 memo.)

a. Is the October 2001 memo's conclusion that "the Fourth Amendment ha[s] no application to *domestic* military operations" still in effect?

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00062 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.017

ANSWER: As the Attorney General explained, that conclusion does not represent the current position of the Department of Justice. The Fourth Amendment would apply even to domestic military operations inasmuch as they involved searches or seizures, although the Fourth Amendment's bedrock "reasonableness" test would take the circumstances of such military operations into account.

b. If not, has the memo been withdrawn or revised accordingly, and has Counsel to the President and the Department of Defense General Counsel (the original recipients of the memo) been notified of the change?

ANSWER: Appropriate steps have been taken to communicate the Department's current position on this question.

c. Is this memo classified? If so, please confirm that the classification requirements set forth in Executive Order 12958, as amended, and 32 C.F.R. Part 2001 were followed, and state the identity of the derivative classifier within OLC.

ANSWER: The memorandum is not classified.

d. Has this memorandum been made available to Congress or to any of its committees? If so, when was the memorandum made available, to whom, and under what conditions?

ANSWER: In response to a subpoena from the House Judiciary Committee, on September 9, 2008, the Department offered to make this memorandum available for review at the Department, and it has been reviewed.

e. Are any portions of this memo still in effect?

ANSWER: The Department has not made a formal determination whether other portions of the memorandum continue to be authoritative.

f. Has any department, agency, or Executive official or employee (including the President) adopted any policy or taken any action based in whole or in part on the advice or legal analysis in this memorandum?

ANSWER: The memorandum advised on policy options to be implemented outside the Department, and so we have no firsthand knowledge of the extent to which decisionmakers relied on the opinion. We believe that several of the options mentioned in the opinion have not been implemented.

g. As the memo's conclusion that "the Fourth Amendment ha[s] no application to *domestic* military operations" has now been released (and therefore is neither classified or privileged), will you promptly make public the portion of the October 2001 memo that sets forth that conclusion?

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00063 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.018

ANSWER: It is settled law that simply stating the conclusion of a deliberative memorandum does not waive the deliberative process privilege for the memorandum. *Casad v. Dept. of Health & Human Servs.*, 301 F.3d 1247, 1252 (10th Cir. 2002) ("The [Supreme] Court has also refused to equate reference to a report's conclusions with adoption of its reasoning. It is only the latter that destroys the [deliberative process] privilege.") (discussing *Sears, Roebuck* and *Renegotiation Board*). Nevertheless, your request is being given serious consideration.

9. At Senator Whitehouse's urging, the Administration declassified the following three propositions from OLC memos relating to surveillance.

1. An executive order cannot limit a President. There is no constitutional requirement for a President to issue a new executive order whenever he wishes to depart from the terms of a previous executive order. Rather than violate an executive order, the President has instead modified or waived it.

2. The President, exercising his constitutional authority under Article II, can determine whether an action is a lawful exercise of the President's authority under Article II.

3. The Department of Justice is bound by the President's legal determinations.

a. Senator Whitehouse indicated that the OLC memos containing these propositions had been classified. Please confirm that the classification requirements set forth in Executive Order 12958, as amended, and 32 C.F.R. Part 2001 were followed for each of these memos, and state the identity of the derivative classifier within OLC.

ANSWER: We understand that the memoranda indicate which portions are classified. The memoranda do not state the identity of the derivative classifier (such a statement does not appear to be required, *see* Exec. Order 12958, § 2.1(b); 32 C.F.R. § 2001.22), and because the authors of those memoranda are no longer with the Department, we have no firsthand knowledge of the identity of the derivative classifiers.

b. Have the memos that set forth these propositions been made available to Congress or to any of its committees? If so, when were the memos made available, to whom, and under what conditions?

ANSWER: We understand that the memoranda were made available in fall 2007 to the Members of the Senate Select Committee on Intelligence and the Judiciary Committee and their staff with appropriate security clearances, and early this year were made available to the House Permanent Select Committee on Intelligence and the House

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00064 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.019

Judiciary Committee and their staff with appropriate security clearances. In both instances, the memoranda were made available for review only.

c. Are the memos that set forth these propositions still in effect, or have they been withdrawn or modified?

ANSWER: The memorandum that set forth the first proposition listed above has been superseded.

d. Has any department, agency, or Executive official or employee (including the President) adopted any policy or taken any action based in whole or in part on the advice or legal analysis in the memos that set forth these propositions?

ANSWER: We believe that the memoranda were part of the deliberative process of the Executive Branch in connection with the authorization of the surveillance activities.

e. Having now been disclosed, the three propositions above are neither classified nor privileged. Will OLC promptly release those portions of the OLC memoranda that set forth these propositions?

ANSWER: Just as referencing the conclusion of a memorandum does not waive the deliberative process privilege for it, *see Nat'l Council of La Raza v. Dept. of Justice*, 411 F.3d 350, 359 (2d Cir. 2005); *Casad v. Dept. of Health & Human Servs.*, 301 F.3d 1247, 1252 (10th Cir. 2002), simply stating a single proposition from a memorandum does not waive the deliberative process privilege with the respect to the entirety of the surrounding discussion. Protection of the confidential legal advice from public disclosure continues to promote important interests in candid discussion and the candid provision of legal advice.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00065 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.020

Senate Judiciary Committee
Subcommittee on the Constitution
Hearing on "Secret Law and the Threat to Democratic and Accountable Government"
Wednesday, April 30, 2008

Questions submitted by U.S. Senator Sam Brownback.

During the hearing, Senator Whitehouse discussed three legal conclusions from OLC memoranda that he had successfully had de-classified. The conclusions are:

- **An executive order cannot limit a President. There is no constitutional requirement for a President to issue a new executive order whenever he wishes to depart from the terms of a previous executive order. Rather than violate an executive order, the President has instead modified or waived it;**

- **The President, exercising his constitutional authority under Article II, can determine whether an action is a lawful exercise of the President's authority under Article II; and**

- **The Department of Justice is bound by the President's legal determinations.**

Can you please respond to Senator Whitehouse's criticism of these three conclusions? Do you believe his criticisms are valid? How would you defend these three legal conclusions?

All three propositions have been firmly established in unclassified opinions of OLC under Administrations of both political parties.

1. Is the President bound by his own executive orders, so that he may not give instructions contrary to those orders without amending them publicly?

As Attorney General Griffin Bell recognized during the Carter Administration, executive orders are instructions from the President to his subordinates in the Executive Branch, and "he legally could revoke or supersede the Executive order at will." *Proposals Regarding an Independent Attorney General*, 1 Op. O.L.C. 75, 77 (1977). Thus, the President may validly issue subsequent directives that are not consistent with a prior executive order.

Such a presidential directive would not violate the prior executive order, but rather would operate as an exception to or modification of the order. As OLC Assistant Attorney General Charles Cooper wrote: "executive orders [are] a set of instructions from the President to his subordinates in the executive branch. Activities authorized by the President cannot 'violate' an executive order in any legally meaningful sense, . . . because his authorization creates a valid modification of, or exception to, the executive order." Memorandum for the Attorney General, from Charles J. Cooper, Assistant Attorney

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00066 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.021

General, Office of Legal Counsel, *Re: Legal Authority for Recent Covert Arms Transfers to Iran* 14 (Dec. 17, 1986), *reprinted in Authorization for the Department of Justice for Fiscal Year 1988: Hearing Before the H. Comm. on the Judiciary*, 100th Cong. App. 97 (1988).

Generally, when the President gives an order inconsistent with an existing executive order, the President would take the public step of formally modifying or revoking an existing executive order. With respect to classified programs, however, there may be circumstances where such a step would not be in the interest of the country's national security. In such cases, however, there are well established procedures for providing appropriate notification to the Intelligence Committees.

2. Does the President have authority to determine the limits of his own authority under Article II of the Constitution?

The President takes an oath to "preserve, protect and defend the Constitution of the United States." U.S. Const., Art. II, sec. 1, cl. 8. Thus, the President must ensure that he exercises his authority in a manner that is consistent with the powers and limitations that the Constitution prescribes. This requires the President to interpret the Constitution, including his own authority under it. Similarly, a member of Congress who votes on a bill must determine whether the bill is within Congress's constitutional powers.

While the courts will have the final word with respect to issues that are subject to litigation, the Executive Branch must take action with respect to a host of issues the courts have not already resolved. In such cases, the President must act based on his own view of his authority. As explained in 1996 by OLC Assistant Attorney General Walter Dellinger:

> *[T]he executive branch has an independent constitutional obligation to interpret and apply the Constitution.* That obligation is of particular importance in the area of separation of powers, where the issues often do not give rise to cases or controversies that can be resolved by the courts. . . . The Attorneys General and this Office have a long tradition of carrying out this constitutional responsibility . . . .

The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 128-29 (1996).

3. Is the President's determination that an activity is lawful binding on the Department of Justice?

The Constitution instructs the President to "take Care that the Laws [are] faithfully executed." U.S. Const. Art. II, § 3. To help him carry out this duty, the President generally relies on legal advice from the Attorney General and other subordinates in the Department of Justice. But ultimate authority over the Executive Branch—and the obligation to ensure that it is exercised constitutionally—is vested in the

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00067 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.022

President. As explained by Assistant Attorney General Dellinger, "[t]he President has the constitutional authority to supervise and control the activity of subordinate officials within the executive branch. In the exercise of that authority he may direct such officials [on] how to interpret and apply the statutes they administer." *The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 132 (1993) (citation omitted).

Presidents usually follow the legal advice of the Attorney General, but it is well established that the President has ultimate responsibility for determining the position of the Executive Branch, including on legal matters. In 1940, during the Administration of President Franklin Roosevelt, Attorney General Robert Jackson issued an order prohibiting the Federal Bureau of Investigation from engaging in wiretapping, based on his conclusion that the practice was forbidden by the Communications Act of 1934 and by Supreme Court precedent. President Roosevelt disagreed and ordered Attorney General Jackson to resume the practice, and the Attorney General complied. *See* Joseph E. Perisco, *Roosevelt's Secret War* 35-36 (2002); *see also* Address by Honorable Herbert Brownell, Jr., Attorney General of the United States (Mar. 2, 1954).

Indeed, it has been accepted since the earliest days of the Republic that the President is ultimately responsible for the legal positions to be taken by the Executive Branch, and is not bound by the conclusion of the Attorney General. Attorney General Edmund Randolph formally opined in 1791 that Congress lacked authority to establish a national bank. President Washington, however, was not persuaded by his opinions on the subject. As Assistant Attorney General Walter Dellinger wrote, "[p]ersuaded by Secretary of the Treasury Hamilton's opinion defending the validity of the legislation, President Washington declined to accept the Attorney General's arguments that the bank bill was unconstitutional and signed it into law. The Supreme Court upheld the President's conclusion that Congress could charter a national bank in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)." *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. at 128 n.11.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00068 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.023

Responses Submitted by Dawn Johnsen, May 30, 2008, to Questions from Senator Russell D. Feingold and Senator Edward M. Kennedy

Questions Submitted by U.S. Senator Russell D. Feingold to Professor Dawn Johnsen

1. Mr. Rivkin's written testimony includes the statement that "few of our democratic allies have ever engaged in so probing and searching a legal exegesis in wartime." He cites this as an example of the Administration's commitment to the rule of law. Do you see the OLC memos on interrogation as an example of the Administration's commitment to the rule of law, or do you think there may be some other motivation?

Response:

Under our system of government, the President, of course, is not above the law and must adhere to legal constraints, even during wartime and in the face of threats to national security. To ensure the legal compliance the Constitution demands, the President and the numerous governmental actors he supervises require a source of reliable, accurate and principled legal advice. For decades, the Attorney General has charged the Department of Justice's Office of Legal Counsel (OLC) with that responsibility, under the Attorney General's supervision.

The post-9/11 OLC memos regarding interrogation, however, are far from a model for how the system should work to promote the rule of law. I have no special knowledge of the motivations or processes followed in these instances, but many reports suggest that rather than adhere to its traditional role, OLC was driven to support desired ends. I do know that some of the OLC memoranda that have been made public—in particular, memos on interrogation dated August 1, 2002 and March 14, 2003 that found virtually unfettered executive authority to use the most extreme interrogation methods—do not meet OLC's traditional standards. I agree with former OLC Assistant Attorney General Jack Goldsmith's assessment that these opinions "were deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President."[1] Goldsmith characterized OLC's opinions as "approving every aspect of the administration's aggressive antiterrorism efforts" and noted they "gave counterterrorism officials the comfort of knowing that they could not easily be prosecuted later for the approved actions."[2]

Far from evaluating the legal issues in an accurate and balanced manner as the rule of law demands, the OLC interrogation legal memos methodically developed all conceivable legal arguments to allow governmental actors who use extreme interrogation methods, even counter to legal restrictions, to escape legal liability. They adopt extremely broad and clearly erroneous conceptions of presidential power even to disregard the requirements of federal statutes. They cannot plausibly be cited as examples of executive branch commitment to the rule of law.

---

[1] Jack Goldsmith, THE TERROR PRESIDENCY 10 (2007).
[2] *Id.* at 23.

44955.024

Senator Edward M. Kennedy Questions for the Record
Senate Judiciary Subcommittee Hearing on "Secret Law and the Threat to Democratic and Accountable Government"
Questions for Dawn E. Johnsen

1. In his testimony at the hearing, Deputy Assistant Attorney General Elwood said that, at least since he joined the Office of Legal Counsel in 2005, the Office has been in full compliance with the "Principles to Guide the Office of Legal Counsel" that you coauthored. Do you agree? If not, can you specify the ways in which the Office has deviated from the Principles?

Response:

I was pleased to hear Deputy Assistant Attorney General Elwood say that he agrees with the ten "Principles to Guide the Office of Legal Counsel." I was surprised, though, by his assertion that since he joined the office in 2005, OLC actually has complied with them, because that is not my impression. OLC's continued high level of secrecy prevents a full assessment, but it is clear that in at least this respect—excessive secrecy—OLC has not fully complied with the "Principles." Among the ten principles is a call for OLC to "publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure."[3] The Guidelines note that the need for public disclosure is particularly strong whenever the executive branch does not fully comply with a federal statutory requirement: "Absent the most compelling need for secrecy, any time the executive branch disregards a federal statutory requirement on constitutional grounds, it should publicly release a clear statement explaining its deviation."[4]

It is true that OLC issued many of the memoranda that constitute the most egregious violations of the "Principles" prior to 2005, but OLC continues to refuse to release many such memoranda even in the face of compelling public interest. In addition to the failure of excessive secrecy, what is known about the content of the advice strongly suggests that OLC has failed since 2005 to adhere to other aspects of the Principles in the formulation of advice, including that OLC provide "an accurate and honest appraisal of applicable law."[5] The most prominent example, based on press reports of leaks and on public statements of Bush administration officials, including Attorney General Michael Mukasey and Principal Deputy Assistant Attorney General (former Acting Assistant Attorney General) Steven Bradbury, is OLC's advice even since 2005 on the use of extreme methods of interrogation such as waterboarding.

---

[3] Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1607 (2007) (reprinting as an appendix the "Principles to Guide the Office of Legal Counsel").
[4] *Id.*
[5] *Id.* at 1604.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00070 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.025

2. I was encouraged that Senator Feingold, Senator Brownback, and Bradford Berenson all seemed to embrace your proposal that Congress require Presidents to provide a detailed public explanation not only when they determine a statute is unconstitutional and need not be enforced (as is already required), but also whenever they rely on the constitutional avoidance canon to interpret a statute. As you noted, the Bush Administration has repeatedly relied on the avoidance canon in secret, in efforts to ignore the plain meaning of statutes without triggering the existing congressional notice requirements. Is there a concern that even if Congress passed such a statute, the President would "interpret" it in such a way that he does not feel bound to comply in all cases? That is, could the President secretly invoke the avoidance canon in refusing to comply with the very law that requires him to report on each use of the canon?

Response:

Yes, there definitely is reason for concern that the President will refuse to comply with any additional reporting requirement, and do so in secret reliance on the avoidance canon. In fact, when President Bush signed into law a version of the existing reporting requirement, which as you note covers situations where the administration determines a law is unconstitutional, he issued a signing statement suggesting that he might use the avoidance canon to decline to comply fully with that requirement. Specifically, he said in the signing statement that he would construe the statute "in a manner consistent with the constitutional authorities of the President to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties." The fact that a President might unjustifiably refuse to comply with a statute, however, should not deter Congress from passing the legislation; rather, it is cause for more diligent oversight and effective safeguards.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00071 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.026

3. In recent articles published in the *Yale Law Journal* and the *New Republic*, Neal Katyal has argued that "Congress should consider a drastic overhaul of OLC—one that strips it of its role as a 'mini-court' and permits it only to function as an adviser to the government. The adjudication function should be transferred to a separate official—say, a director of adjudication—who would resolve inter-agency disputes and straddle presidential terms." According to Professor Katyal, recent experience "shows that the current OLC cannot withstand the conflict in its dual roles, and so one of its roles needs to be split off. Otherwise many presidents will be too tempted to appoint John Yoos of their own . . . ." Do you agree with Professor Katyal's diagnosis and prescription, or do you believe that the Office of Legal Counsel can be adequately rehabilitated through less drastic means, such as formal adoption of your Principles?

Response:

I am very sympathetic to efforts to think creatively about how to reform OLC to diminish the possibility that any future administration repeats the Bush administration's abuses. Indeed, such concerns were precisely what motivated me to work with other former OLC lawyers to develop ten "Principles to Guide the Office of Legal Counsel" and to author several articles on the subject. However, I do not support a "drastic overhaul" of OLC along the lines suggested by Professor Neal Katyal.

The current OLC structure has worked relatively well for decades, in both Republican and Democratic administrations. I believe the recent problems are best addressed within that basic structure (at a minimum, that approach should be attempted first). The President and other executive branch officials cannot perform their responsibilities without access to high quality legal advice from a trusted source within the executive branch. Professor Katyal's analysis exaggerates the distinction between what he describes as OLC's two functions: inter-agency dispute resolution and government advisor. In fact, the same question could come to OLC in either form, as a request for assistance from a single agency or from two agencies who disagree. Whichever the form, OLC's responsibility is to promote the faithful execution of the laws, on behalf of the President, which requires OLC's advice to reflect "an accurate and honest appraisal of applicable law" and not an advocate's view of the desired legal outcome. Splitting the functions seems premised on an artificial distinction between the functions, and I fear would only encourage inappropriate, slanted advice-giving on the part of OLC in the limited responsibilities Prof. Katyal would leave in that office.

The legitimacy of any system ultimately depends on a President setting the correct tone of respect for the rule of law, his legal advisors living up to their professional obligations and the best traditions of executive branch lawyering, and Congress utilizing its authorities to monitor the executive branch for legal abuses and to force legal compliance. The overriding lesson of the abuses of the last years is the need for greater transparency and accountability when OLC provides authoritative legal interpretations that provide the basis for executive branch action.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00072 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.027

4. In September, I sent a letter to Attorney General Mukasey in which I outlined five basic reforms to the Office of Legal Counsel that I believe should be made. The Attorney General, in my view, should:

    a. establish a group of senior lawyers to review OLC decisions, particularly those related to interrogation techniques and other aspects of the "war on terror";
    b. revise or withdraw all opinions that are not legally sound;
    c. promptly report to Congress on the results of this review and any actions taken;
    d. establish new procedures for the pre-issuance review of future OLC opinions; and
    e. commit to sharing significant OLC opinions with Congress (in a classified setting, if necessary).

I'm disappointed that none of these actions seems to have been taken by the Attorney General. Do you agree that the next Attorney General should pursue these steps?

Response:

I believe that the five reforms you suggested to Attorney General Mukasey last September were precisely what the Department of Justice needed to do at that point, to restore integrity and the public's confidence. Your proposal remains an excellent approach to remedying OLC's past abuses and continued tainted reputation, especially in light of the long absence of a confirmed Assistant Attorney General to head OLC.

With regard to the next administration, I believe reforms (b), (c) and (e) should remain priorities. OLC will need promptly to review OLC opinions and replace those that merit withdrawal, and it absolutely should keep Congress apprised of its progress. I agree strongly with the sentiment behind (d) but would slightly rephrase it. Rather than "new" procedures for pre-issuance review of future OLC opinions, I think what is needed is a restoration of the proven review processes of prior administrations. The "Principles" address this need, generally stating that "OLC should maintain internal systems and practices to help ensure that OLC's legal advice is of the highest possible quality and represents the best possible view of the law," and then specifying some of those desirable practices.[6] The one recommended reform that I do not believe should necessarily be implemented in the next administration is (a), the establishment of a group of senior lawyers to review OLC opinions. Most needed is for the next President personally and forcefully to set a tone of respect for the rule of law and then to nominate and the Senate to confirm an Attorney General and an Assistant Attorney General for the Office of Legal Counsel with that same commitment. If this is accomplished, the review of prior OLC opinions I believe would best be located in OLC itself, under the review of the Attorney General, as has been the longstanding bipartisan practice.

[6] *Id.* at 1608.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00073 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.028

Questions from Senator Kennedy **(in boldprint)** and responses from Professor Heidi Kitrosser (in regular font):

1. In your prepared statement, you explain how the Bush Administration has engineered a "dangerous breakdown in [our] constitutional structure" with respect to secrecy, and you "urge Congress to use its substantial constitutional powers of legislation and oversight to make clear to the executive branch and to all Americans that secret law has no place in our constitutional system." What specific legislative and oversight activities do you recommend to Congress?

Thank you for raising this important question. Given increasing public and political awareness of the dramatic abuses of secrecy of the last several years, I believe that we are at a moment in which successful legislative action, as well as continued public and intra-governmental education, are real possibilities.

There are multiple avenues for legislative action. Of course, the perfect must not be the enemy of the good, and achieving reform in even one or two areas is preferable to no reform. It also might make political sense to take incremental steps, one or two measures at a time, as opposed to championing a single, sweeping package. That said, legislative reform ideally should seek to ensure diverse checking mechanisms that correspond to the diverse routes through which abusive secrecy can occur. For example, legislation authorizing electronic surveillance can build in a check on its face by outlining the aspects of the program that must be conducted in secret (such as the obtaining of warrants and the surveillance itself) and those that must be transparent (including, perhaps, general statistical information to be disclosed after a period of years, or broad policy determinations to be disclosed immediately). Additionally, such legislation (or accompanying legislation) should provide for varying degrees of information-sharing with Congress (such as the National Security Act currently requires), to help ensure that the executive's limited secrecy allowance under the surveillance legislation is not abused. As we have seen, however, even these two types of checks (limitations on the face of a statute and congressional information sharing requirements) are not sufficient to prevent executive branch abuse. In the case of the Bush Administration's warrantless wiretapping program, for instance, the program only came to light after leaks from within the National Security Agency and publication by the New York Times. This example reminds us of the crucial checking function played by government whistleblowers and the press. Existing protections for both should be bolstered through legislation.

In keeping with the foregoing analysis, the following is a bullet-point summary of possible areas for legislative action. This is, of course, merely a sketch and a starting point. It is by no means meant to be comprehensive in its breadth or its depth. I would be more than happy to work further on any or all of these bullet-point ideas should you or the Judiciary Committee wish to pursue them further.

- As Professor Dawn Johnsen, a witness at the April 30th hearing, reported after the hearing, Republican-invited witness Bradford Berenson agreed with Johnsen's "suggestion (building on a proposal by Professor Trevor Morrison) that perhaps Congress should enact legislation to require additional reporting, so that the executive branch has to tell Congress not only when it refuses to comply with a statute, but also when it (mis)interprets a statute by relying on the constitutional-

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00074 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.029

avoidance doctrine."[1] Given this bi-partisan breakthrough at the hearing and given the special dangers in executive circumvention of statutory law, such legislation could prove an important starting point for reform.

- In his record questions to me, Senator Feingold asked:

  > Certain Executive Orders are required by statute to be published in the Federal Register, and others may be published in the Federal Register even if not statutorily required. Would you see any constitutional problem in a statute that required the President to place a notice in the Federal Register any time he or she effectively modified, revoked, suspended, or waived a published Executive Order?

  In my answer to that question, I indicated that I saw no constitutional problem with the proposal and that the proposal in fact "would serve the general constitutional design in which governing law presumptively is open." Senator Feingold's suggested legislation seems one excellent means of reform.

- Congressional oversight of matters not known to the public – such as much intelligence activity -- is crucial to help ensure that the executive branch does not abuse limited legislative allowances to conduct secret activities. While existing statutory and internal congressional rules provide for such oversight, there is much room for improvement. In an article entitled *Congressional Oversight of National Security Activities: Improving Information Funnels*, I make detailed suggestions as to how these provisions might be improved. In particular, I suggest statutory amendments geared toward bolstering congresspersons' political incentives to conduct effective oversight. I attach an electronic copy of the article to the e-mail transmission through which this statement is being sent. I also will send hardcopies of the article to your office.

- Another crucial check on abusive executive branch secrecy is the judiciary. The judicial process not only can vindicate the civil rights and liberties of those victimized by abusive secrecy, it can bring improperly hidden information to light through discovery. Yet as we have seen recently – with respect to lawsuits involving warrantless wiretapping and abusive interrogation – the executive branch often wields the common law "state secrets" privilege to convince courts to dismiss lawsuits that might otherwise bring important information to light. Congress should continue to pursue legislation to limit the use of this privilege.

- As noted above, whistleblowers are a crucial checking mechanism against government abuse. As in the cases of warrantless surveillance and of Justice Department misconduct in the case of John Walker Lindh, whistleblowers often are the key means by which government abuses are uncovered. Congress should

[1] http://www.slate.com/blogs/blogs/convictions/archive/2008/05/01/surprise-agreement-at-senate-hearing-on-secret-law.aspx

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00075 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.030

explore deficiencies in existing whistleblower protections and consider legislation to improve such protections. Such statutory protection is particularly important in light of the Supreme Court's recent decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), which limits government employees' First Amendment protections.

- Like whistleblowers, the press often is our country's last, best defense against abusive executive branch secrecy and dissembling. Congress should pass a federal shield law for reporters, and should consider other mechanisms to improve press protections as well. For example, Congress also should consider and address the risks posed to the press by the increasing trend toward prosecuting leaks and disclosures of classified information. For more information on such prosecutions, please see Heidi Kitrosser, *Classified Information Leaks and Free Speech,* 2008 Ill. L. Rev. 881 (2008). I attach an electronic copy of the article to the e-mail transmission through which this statement is being sent. I also will send hardcopies of the article to your office.

- As many have pointed out -- perhaps most notably and most prolifically J. William Leonard, a witness at the April 30th hearing and the former Director of the Information Security Oversight Office – our information classification system long has been subject to terrible abuse through over-classification. Congress should step up its efforts to consider and address this problem. In addition, Congress should consider and address backlogs in de-classification programs.

- Congress also should consider and address the dramatic backlogs in responses to Freedom of Information Act ("FOIA") requests.

2. Your statement describes "*Youngstown* zone three action," in which the Executive Branch acts in direct contravention of congressional restrictions, as a "troubling new norm." To what extent do you believe this development has been driven by the Bush Administration's extreme view of executive power or its desire to aggrandize its own power, as opposed to other, external, factors? Do you anticipate frequent *Youngstown* zone three action by future administrations, and if so, how should Congress address this issue now?

While the Bush Administration has been unusually extreme in its vision of executive power and unusually aggressive in seeking to effectuate this vision, it would be a terrible mistake to view executive aggrandizement in general, or *Youngstown* zone three actions in particular, as unique to the Bush Administration. I view the past eight years as constituting a "perfect storm" of many factors: a long history of an increasingly "imperial" presidency, an administration unusually extreme and determined in its views of presidential power, the tragedy of 9/11 and its shameful exploitation, a disturbingly compliant media in the wake of 9/11, weak political incentives for Congress to conduct effective oversight of the executive branch, and other factors as well. The heightened abuses of the last eight years are best viewed as exemplifying the potential for how very bad things can get under our system, given the right (or wrong) mix of circumstances.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00076 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.031

Recent abuses thus should spur us toward reform, rather than toward the view that all will be better once the current administration leaves office.

This brings me back to the point with which I began my answer to question #1: Given increasing public and political awareness of the dramatic abuses of secrecy of the last several years, I believe that we are at a moment in which successful legislative action, as well as continued public and intra-governmental education, are real possibilities. I thus reiterate my praise of your office and of the Judiciary Committee for taking on these very important issues, and I urge you to consider the proposals that I offer above. I also reiterate that I would be very pleased to be of help should you choose to proceed further on these or any related proposals or inquiries.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00077 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.032

Response to Questions Submitted by U.S. Senator Russell D. Feingold to Mr. J. William Leonard

1. We all acknowledge that many OLC opinions may contain discussions of matters that are properly classified, including references to specific intelligence sources or methods.

   a. In your experience, do the tools of portion markings, redaction, and classified annexes provide a workable means of dealing with opinions that contain both legal analysis and operational information? Or in practice, does any OLC opinion that includes a discussion of operational information have to be classified in full?

Response: Based upon my experience, the tools of portion markings, redaction, and classified annexes provide extremely workable means of dealing with OLC opinions that contain both legal analysis and operational information. There is no reason in practice for any OLC opinion to be classified in full.

   b. Is there any obligation on the part of an agency, when drafting documents that contain both classified and non-classified information, to draft them in a manner that makes it easier to segregate out and release the non-classified information?

Response: Yes, there are several requirements of both Executive Order 12958, as amended, "Classified National Security Information" (the Order) as well as its implementing directive, ISOO Directive No. 1 (32 CFR Part 2001) (the Directive). Section 1.6(c) of the Order states that "[w]ith respect to each classified document, the agency originating the document shall, by marking or other means, indicate which portions are classified, with the appropriate classification level, and which portions are unclassified." In addition, section 1.6(g) of the Order states that "[t]he classification authority shall, whenever practicable, use a classified addendum whenever the classified information constitutes a small portion of an otherwise unclassified document." Section 2001.20 of the Directive makes it clear that classification "[m]arkings shall be uniformly and conspicuously applied to leave no doubt about the classified status of the information, the level of protection requires, and the duration of classification." Furthermore, section 2001.21(c) of the Directive states that "[e]ach portion of a document, ordinarily a paragraph but including subjects, titles, graphics and the like, shall be marked to indicate its classification level by placing a parenthetical symbol immediately preceding or following the portion to which it applies" while section 2001.21(f) states that[e]ach portion of a derivatively classified document shall be marked in accordance with its source, and as provided in § 2001.21(c)."

44955.033

Response to Questions Submitted by U.S. Senator Edward M. Kennedy to Mr. J. William Leonard

1. Your statement makes a compelling argument that Office of Legal Counsel opinions such as the March 14, 2003 interrogation method should never have been classified – as you stated, "whoever affixed classification markings to this document had either profound ignorance or deep contempt for the process set forth by the President" – and that such excessive classification can have deeply negative consequences for us all. To what extent do you believe this memo reflects a pervasive problem of overclassification in the Executive Branch, and to what extent has the Bush Administration deepened or exacerbated this problem?

   Response: I believe overclassification represents a pervasive problem in the Executive Branch. For example, in an audit of agency classification activity conducted in 2006 by my prior office, the Information Security Oversight Office, we discovered that even trained classifiers, with ready access to the latest classification and declassification guides, and trained in their use, got it clearly right only 64 percent of the time in making determinations as to the appropriateness of classification. This is emblematic of the daily challenges confronting agencies when ensuring that the 3 million plus cleared individuals with at least theoretical ability to derivatively classify information get it right each and every time.

   I believe the current administration has exacerbated this problem. Senior officials lead by example. As I noted in my prepared written statement for this hearing, the OLC memo that was the subject of this hearing was not some obscure, meaningless document written by a low-level bureaucrat who did not know any better and had inadequate supervision. Rather, the memo was written by the Deputy of the OLC, the very entity which has the responsibility to render interpretations of all Executive Orders, a responsibility that includes interpreting the governing order that distinguishes between the proper and improper classification of information. In addition, the memo was addressed to the most senior legal official within the DoD and was reportedly shared with some of the most senior officials in the Executive branch, including the then White House Counsel as well as the then Counsel to the Vice President. Like all people with a security clearance, per the President's direction in the governing Executive Order, each of these government officials had the affirmative responsibility to challenge the inappropriate classification of information. There is no evidence to suggest that any of them did so in this case – even though the memorandum failed on almost every level in fulfilling the President's direction concerning conditions under which information will be classified. It is difficult enough to convince rank and file government officials to avoid the pitfalls of overclassification without also having to overcome blatant examples of overclassification by the most senior leaders in our government.

44955.034

2. To combat abuse of the classification process, you recommended in your statement that Congress make greater use of agency Inspectors General and the Public Interest Declassification Board in reviewing classification decisions, and you urged Congress to take a more active role generally. In light of the discussion at the hearing, do you have any more detailed advice for the Congress or the Judiciary Committee on how to improve the classification system and minimize "secret law"?

Response: In furtherance of their responsibilities under section 5.4(a) of Executive Order 12958, as amended, "Classified National Security Information" (the Order), Congress could require agency heads to:

- Review agency procedures to ensure that they facilitate classification challenges (§1.8(b) of the Order). In this regard, agencies could be required to appoint impartial officials whose sole purpose is to seek out inappropriate instances of classification and to encourage others to adhere to their individual responsibility to challenge classification, as appropriate (e.g. classification ombudsmen).
- Conduct routine sampling of current classified information to determine the propriety of classification and the application of proper and full markings (§5.4(d)(4) of the Order). Results of these audits should be reported to agency personnel as well as to the officials designated above who would be responsible to track trends and assess the overall effectiveness of the agency's efforts and make adjustments, as appropriate. The results of this sampling could also be reported centrally, subject to verification by the Information Security Oversight Office, the Government Accountability Office, and others.
- Require certification of original and derivative classifiers (§1.3 & 2.1 of the Order) based upon demonstration of requisite level of knowledge prior to a cleared individual being permitted to apply classification controls to information. Instances of inappropriately assigning classification to information (determined through audits or other means) would, among other sanctions, subject individuals to loss of certification and require remedial training prior to recertification.
- Require agency Inspectors General to conduct periodic audits of their agency's classification program (§5.4(d)(4) of the Order) with emphasis on the appropriateness of classification decisions and report the results to Congress.
- When confronted with instances of "secret law," the Judiciary Committee could submit a request directly to the Public Interest Declassification Board (as established in P.L. 106-567, title VII, Dec. 27, 2000, 114 Stat. 2856, as amended) to review the matter and, through exercise of its independent judgment, make a recommendation to the President to declassify the record, in whole or in part.

44955.035

SUBMISSIONS FOR THE RECORD

Statement of Steven Aftergood
Federation of American Scientists

Before the Subcommittee on the Constitution
Of the
Committee on the Judiciary
United States Senate

Hearing on

Secret Law and the Threat to Democratic
and Accountable Government

April 30, 2008

Thank you for the opportunity to address the Subcommittee.

My name is Steven Aftergood. I direct the Project on Government Secrecy at the Federation of American Scientists, a non-governmental policy research and advocacy organization. The Project seeks to promote public oversight and government accountability in intelligence and national security policy.

Summary

Secret law that is inaccessible to the public is inherently antithetical to democracy and foreign to the tradition of open publication that has characterized most of American legal history. Yet there has been a discernable increase in secret law and regulation in recent years. This testimony describes several of the major categories of secret law, including secret interpretations of the Foreign Intelligence Surveillance Act, secret opinions of the Office of Legal Counsel, secret Presidential directives, secret transportation security directives, and more. Legislative intervention may be required to reverse the growth of secret law.

44955.036

Introduction: "The Idea of Secret Laws is Repugnant"

To state the obvious, secret law is not consistent with democratic governance. If the rule of law is to prevail, the requirements of the law must be clear and discoverable. Secret law excludes the public from the deliberative process, promotes arbitrary and deviant government behavior, and shields official malefactors from accountability.

In short, as one federal appeals court put it, "The idea of secret laws is repugnant."[1]

From the beginning of the Republic, open publication of laws and directives was a defining characteristic. The first Congress of the United States mandated that every "law, order, resolution, and vote [shall] be published in at least three of the public newspapers printed within the United States."[2]

Secret law in the United States also has a history, but for most of the past two centuries it was attributable to inadvertence and poor record keeping, not deliberate choice or official policy. In 1935, for example, "Federal attorneys, to their great embarrassment, found they were pursuing a case before the Supreme Court under a revoked executive order."[3]

Confronted with the rise of the administrative state and its increasingly chaotic records management practices, Congress responded with a series of statutory requirements designed to regularize the publication of laws and regulations, and to prevent the growth of secret law. These included the Federal Register Act of 1935, the Administrative Procedures Act of 1946, and later the Freedom of Information Act. "The

---

[1] *Torres v. I.N.S.*, 144 F.3d 472, 474 (7th Cir. 1998).

[2] 1 Stat. 68. Cited by Harold C. Relyea, "The Coming of Secret Law," *Government Information Quarterly*, Vol. 5, No. 2, 1988, pp. 97-116.

[3] Relyea, "The Coming of Secret Law," p. 104, citing *Panama Refining Company v. Ryan*, 293 U.S. 388 (1935).

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00082 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.037

FOIA was designed… as a means of deterring the development and application of a body of secret law."[4]

But with the start of the Cold War and the creation of the various institutions and instruments of national security decisionmaking, secret law, directives and regulations became a continuing part of American government.

Today, such secrecy not only persists, it is growing. Worse, it is implicated in fundamental political controversies over domestic surveillance, torture, and many other issues directly affecting the lives and interests of Americans.

FISA Court Opinions

Many of the concerns that arise from secret law are exemplified in the dispute over public access to judicial interpretations of the Foreign Intelligence Surveillance Act (FISA), the law that regulates domestic intelligence surveillance.

The ongoing political turmoil associated with amending the FISA was prompted by decisions made in 2007 by the Foreign Intelligence Surveillance Court, reinterpreting that law. Yet the specific nature of the Court's reinterpretations is not reliably known. And so the current debate over amending the FISA proceeds on an uncertain footing.

In August 2007, the American Civil Liberties Union petitioned the Foreign Intelligence Surveillance Court (FISC) on First Amendment grounds to publicly disclose those legal rulings, after redacting them to protect properly classified information.[5]

The ACLU noted that the contents of the requested rulings had been repeatedly referenced by Administration officials, including the Attorney General and the Director of National Intelligence, without identifiable harm to national security.

---

[4] *Providence Journal Co. v. Department of the Army*, 981 F.2d 552, 556 (1st Cir. 1992).

[5] Motion of the American Civil Liberties Union for Release of Court Records, August 8, 2007. Copy available at: http://www.fas.org/irp/agency/doj/fisa/aclu080807.pdf. The same records were independently sought by the Electronic Frontier Foundation under the Freedom of Information Act, without success.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00083 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.038

> While the government contends to this Court that the sealed materials are properly classified and must remain secret in their entirety, administration officials continue publicly to reference, characterize, and discuss the materials in the service of a legislative and political agenda.
>
> Given the many public statements made by government officials, it is plain that at least some of the sealed materials can be disclosed.... The administration's own public statements make clear that the materials can be discussed without reference to any particular investigation or surveillance target.[6]

And the requesters proposed a crucial distinction between the Court's legal interpretations, which they argued should be presumptively releasable, and operational intelligence material, which they admitted to be presumptively classified.

> The material that the ACLU seeks consists not of factual information but legal analysis.... The ACLU seeks court records containing legal reasoning and legal rulings, and only to the extent they contain legal reasoning and legal rulings.[7]
>
> Needless to say, the ACLU does not ask the Court to disclose information about specific investigations or information about intelligence sources or methods. However, this Court's legal interpretation of an important federal statute designed to protect civil liberties while permitting the government to gather foreign intelligence should be made public to the maximum extent possible.[8]

The Justice Department denied that such a distinction could be maintained:

> Any legal discussion that may be contained in these materials would be inextricably intertwined with the operational details of the authorized surveillance.[9]

---

[6] Reply of the American Civil Liberties Union in Support of Motion for Release of Court Records, September 14, 2007, at pp. 1, 2, 10. Copy available at: http://www.fas.org/irp/agency/doj/fisa/aclu-reply091407.pdf.

[7] Ibid., pp. 8, 12-13.

[8] Motion of the American Civil Liberties Union for Release of Court Records, August 8, 2007, at p. 12.

[9] Opposition to the American Civil Liberties Union's Motion for Release of Court Records, August 31, 2007, at p. 14. Copy available at: http://www.fas.org/irp/agency/doj/fisa/aclu-doj-resp083107.pdf .

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00084 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.039

The Justice Department went on to assert, improbably in my opinion, that not even the "volume" of the materials at issue, let alone their contents, could be safely disclosed.[10]

The Court denied the ACLU motion and asserted, in any case, that it lacked the expertise to declassify the requested records without undue risk to national security. Nevertheless, in issuing its denial, the FIS Court endorsed some of the ACLU's major premises:

> The ACLU is correct in asserting that certain benefits could be expected from public access to the requested materials. There might be greater understanding of the FISC's decisionmaking. Enhanced public scrutiny could provide an additional safeguard against mistakes, overreaching or abuse. And the public could participate in a better-informed manner in debates over legislative proposals relating to FISA.[11]

Perhaps most important, the Court decision confirmed that the FISA Court is not simply engaged in reviewing government applications for surveillance authorization to ensure that they conform with legal requirements. Rather, the Court has repeatedly generated binding new interpretations of the FISA statute. Thus, aside from the 2007 opinions sought by the ACLU,

> the FISC has in fact issued other legally significant decisions that remain classified and have not been released to the public (although in fairness to the ACLU it has no way of knowing this).[12]

In summary, it has become evident that there is a body of common law derived from the decisions of the Foreign Intelligence Surveillance Court that potentially implicates the privacy interests of all Americans. Yet knowledge of that law is deliberately withheld from the public. In this way, "secret law" has been normalized to a previously unknown extent and to the detriment, I believe, of American democracy.

---

[10] Ibid., p. 14, footnote 9.

[11] Memorandum Opinion by Judge John D. Bates, Foreign Intelligence Surveillance Court, Docket No. MISC. 07-01, December 11, 2007, at p. 16. Copy available at: http://www.fas.org/irp/agency/doj/fisa/fisc121107.pdf .

[12] Ibid., at page 15.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00085 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.040

Office of Legal Counsel Opinions

The Office of Legal Counsel at the Justice Department produces opinions on legal questions that are generally binding on the executive branch. Many of these opinions may be properly confidential. But others interpret the law authoritatively and in ways that are reflected in government policy. Yet most of these opinions are secret, so that the legal standards under which the government is actually operating at any given moment may be unknown to the public.

Other witnesses today will address this category of "secret law" in detail. I would only note that there appears to be a precipitous decline in publication of OLC opinions in recent years, judging from the OLC website.[13] Thus, in 1995 there were 30 published opinions, but in 2005 there were 13. In 1996, there were 48 published opinions, but in 2006 only 1. And in 1997 there were 29 published opinions, but only 9 in 2007.

Other things being equal, OLC "publication policy and practice should not vary substantially from administration to administration," according to a statement issued by several former OLC employees. "The values of transparency and accountability remain constant, as do any existing legitimate rationales for secret executive branch law."[14]

But despite these constants, current OLC publication policy has varied substantially from the past Administration, in the direction of greater secrecy.

---

[13] http://www.usdoj.gov/olc/opinionspage.htm . Some opinions were not published until years after they were issued. Accordingly, publication of additional recent opinions might still be expected in years to come. Nevertheless, even allowing for such delays, there appears to be a real decline in the current pace of publication.

[14] Principles to Guide the Office of Legal Counsel, a White Paper published by the American Constitution Society, December 2004, available at: http://www.acslaw.org/node/5561.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00086 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.041

Reversible Executive Orders

One secret OLC opinion of particular significance, identified last year by Senator Whitehouse, holds that executive orders, which are binding on executive branch agencies and are published in the Federal Register, can be unilaterally abrogated by the President without public notice. Because many executive orders are partly rooted in statute or reflect statutory imperatives, this approach has the potential to subvert Congressional intent and to do so secretly.

Based on his review of the document, Sen. Whitehouse paraphrased the classified OLC opinion as follows:

> An Executive order cannot limit a President. There is no constitutional requirement for a President to issue a new Executive order whenever he wishes to depart from the terms of a previous Executive order. Rather than violate an Executive order, the President has instead modified or waived it.[15]

Sen. Whitehouse expressed particular concern about the status of Executive Order 12333, an order published in 1981 which governs the conduct of surveillance and other intelligence activities. The President's authority to issue the order was explicitly derived, in part, from the National Security Act of 1947.[16] Congress plainly has an interest in the exercise of the authority that it delegated by statute.

But if the terms of such an order can be modified or waived by the President "whenever he wishes" and without notice, Congress is left with no opportunity to respond to the change and to exercise its own authorities as it sees fit. Worse, the OLC policy disclosed by Sen. Whitehouse implies a right to actively mislead Congress and the public, who will mistakenly believe that a published order is still in effect even when it isn't.

---

[15] Statement of Sen. Whitehouse, December 7, 2007, Congressional Record, pp. S15011-S15012, available at: http://www.fas.org/irp/congress/2007_cr/fisa120707.html .

[16] "United States Intelligence Activities," Executive Order 12333, 4 December 1981, preamble: "... by virtue of the authority vested in me by the Constitution and statutes of the United States of America, including the National Security Act of 1947, as amended..." Copy available at: http://www.fas.org/irp/offdocs/eo12333.htm .

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00087 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.042

Executive orders are used to define some of the most basic policy positions of the United States, on everything from assassination of foreign leaders to domestic intelligence activities to protection of human subjects in scientific research. But now it appears that none of these policies are securely established. In fact, any of them may already have been violated (or, rather, "waived") without notice. We just don't know.

Two additional points may be worth noting. First, following Senator Whitehouse's disclosure, I requested a copy of the referenced opinion from OLC under the Freedom of Information Act. The request was denied, on grounds that the opinion is classified, that it would reveal intelligence sources and methods, and that it is protected by deliberative process and attorney-client privileges. Not even the language cited by Sen. Whitehouse could be released.[17] Thus the legal opinion that places the status of thousands of executive orders in doubt itself remains classified.

Secondly, the idea that a President can simply waive an executive order "whenever he wishes" without notice (as opposed to formally rescinding or replacing it, which he is entitled to do) appears to be a novel interpretation. OLC opinions, as far as I can tell, do not simply restate well-established legal positions; rather, they address new issues and new circumstances. So once again, this classified OLC opinion appears to represent a new departure and a secret new expansion of unchecked executive authority.

Secret Presidential Directives

By late January 2008, the Bush Administration had issued 56 National Security Presidential Directives (NSPDs) on many diverse national security topics. Most of these directives are undisclosed. Texts of the directives or descriptive fact sheets have been obtained for about a third of them (19). Titles alone have been ascertained for 8 more.

[17] Letter to me from Paul P. Colborn, Special Counsel, Office of Legal Counsel, February 5, 2008, denying a FOIA request dated December 18, 2007.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00088 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.043

Suspected or reported topic areas have been proposed for another 19. No data at all are available for at least ten others.[18]

Unlike the case of some other categories of "secret law," this does not represent a significant departure from recent past practice. The Clinton Administration, for example, issued a total of 75 Presidential Decision Directives, with a roughly comparable proportion of classified, unclassified, and unidentified directives.

Nevertheless, such national security directives are a vexing instrument of executive authority since they often combine significant national policy initiatives with unwavering secrecy. They "commit the Nation and its resources as if they were the law of the land" and yet in most cases "they are not shared with Congress" or the public.[19]

Presidential directives, many of which carry the force of law, can take a bewildering number of different forms, including memoranda, orders, proclamations, and more.[20] Because the President is not subject to the Freedom of Information Act, the public is dependent on the good graces of the Administration for access to many of these records.

Transportation Security Directives

The Transportation Security Administration has imposed a control category known as "Sensitive Security Information" on many of its security policies with the result that some unclassified security regulations affecting ordinary airline passengers have been withheld from disclosure.

---

[18] A collection of unclassified NSPDs, fact sheets and related material is available here: http://www.fas.org/irp/offdocs/nspd/index.html .

[19] Relyea, "The Coming of Secret Law," op.cit., p. 108. See also U.S. General Accounting Office, "National Security: The Use of Presidential Directives to Make and Implement U.S. Policy," January 1992, report no. GAO/NSIAD-92-72.

[20] See Harold C. Relyea, "Presidential Directives: Background and Overview," Congressional Research Service, updated August 9, 2007. Copy available at: http://www.fas.org/sgp/crs/misc/98-611.pdf .

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00089 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.044

In the post-September 11, 2001 statute that created the TSA, Congress directed the agency to devise regulations to prohibit disclosure of "information obtained or developed in carrying out security [if disclosure would] be detrimental to the security of transportation."[21]

But in its implementing rule, TSA interpreted this mandate broadly to permit or require the withholding of an entire class of "security directives."[22]

Consequently, in an apparent departure from congressional intent, a whole series of binding regulations governing passenger inspection, personal identification and other practices were rendered inaccessible, to the frustration of some and the disgust of others. Some Americans understandably wondered why and how they could be required to comply with regulations that they could not see.[23]

Secret Law in Congress

It may be noted that the problem of secret law is not exclusively attributable to the executive branch. Congress has participated in the propagation of secret law through the adoption of classified annexes to intelligence authorization bills, for example. Such annexes may establish national policy, or require or prohibit the expenditure of public funds, all without public notice or a semblance of accountability. In a broader sense, Congress has acquiesced in the secret law practices identified above by failing to effectively challenge them.

On the other hand, Congress enacted legislation for the first time last year to require public disclosure of the amount of the National Intelligence Program budget, a step away from the inherited Cold War practice of secret law.

---

[21] The Aviation and Transportation Security Act, 49 U.S. Code 114(s)(1).

[22] Protection of Sensitive Security Information, Interim Final Rule, Federal Register, May 18, 2004, pp. 28066-28086, section 15.5 (b)(2), copy available at: http://www.fas.org/sgp/news/2004/05/fr051804.html .

[23] See my article "The Secrets of Flight," Slate, November 18, 2004, available at: http://www.slate.com/id/2109922/ .

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00090 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.045

Conclusion

It should be possible to identify a consensual middle ground that preserves the security of genuinely sensitive national security information while reversing the growth of secret laws, regulations and directives.

The distinction advanced by the ACLU in its pursuit of FIS Court rulings between legal analysis which should be released and operational intelligence information which should be protected was appropriate and correct, in my opinion.

The fact that the FIS Court was unwilling (and believed itself unable) to adopt and apply this distinction in practice suggests that legislative action may be needed to reestablish the norm that secret laws are anathema. The pending "State Secrets Protection Act" (S. 2533) that was reported out of the Judiciary Committee on April 24 represents one promising model of how conflicting interests in secrecy and disclosure may be reconciled.

The rule of law, after all, is one of the fundamental principles that unites us all, and one of the things we are committed to protect. Secret law is inconsistent with that commitment.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00091 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.046

**BEFORE THE UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY**

**SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND PROPERTY RIGHTS**

"SECRET LAW AND THE THREAT TO DEMOCRATIC AND ACCOUNTABLE GOVERNMENT"

TESTIMONY OF BRADFORD A. BERENSON

**Former Associate Counsel to the President
Partner, Sidley Austin LLP**

April 30, 2008

Chairman Feingold, Senator Brownback, and Members of the Committee, I appreciate the opportunity to testify before you today. I served as Associate Counsel to President Bush from January, 2001 through January, 2003. As a member of the President's staff during the immediate post-9/11 period, I had the opportunity to observe at close hand the way in which the executive branch functions in a time of national security crisis, including the internal and external pressures that sometimes cause the executive to feel that it needs to shield from public view certain aspects of its legal decisionmaking. I offer the following general observations regarding government secrecy in contexts as diverse as executive orders, Office of Legal Counsel opinions, FISA court orders, and executive privilege in the hope that they may be of some assistance to you in formulating your own views on where the boundaries between appropriate confidentiality and excessive secrecy should lie.

Background

Ours is and traditionally has been among the most open, transparent, self-critical and self-correcting societies in the world. Without question, this is one of our great strengths, if not our greatest. This ability to fix our mistakes depends upon the ability to recognize them and debate them, together with possible solutions. This in turn depends on broad and unrestricted access to information, especially about governmental policies and activities. Recent advances in information technology have made more information available to more people than ever before in human history, and this has greatly magnified the advantages accruing to a society such as ours that values openness, criticism, and debate.

Because openness is such a venerable American strength, we all have an understandable tendency to regard secrecy of any sort, and especially governmental secrecy, with suspicion and distrust. This conventional wisdom was well expressed recently by the United

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00093 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.048

States Court of Appeals for the Sixth Circuit when it said, "Democracies die behind closed doors." *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

But a reflexive and unthinking condemnation of governmental secrecy is scarcely more defensible than a reflexive and unthinking appetite for it. The Sixth Circuit's flair for the quotable judicial aphorism unfortunately was not matched by a similar passion for historical accuracy, for the empirical truth is very nearly the opposite: the world's oldest democracy – our own – was *born* behind closed doors. When the Constitutional Convention met in Philadelphia for four months in the summer of 1787, it did so under a rule of strict and absolute secrecy. No reporters or visitors were permitted at any session, and not one word of its momentous deliberations was permitted to be disclosed to anyone who was not a delegate. General George Washington, who presided over the Convention, personally enforced the rule of secrecy, at one point sternly admonishing the delegates when he found a single page of notes that a delegate had mislaid inside the Convention hall. This secrecy was scrupulously respected during the Convention and indeed lasted well beyond the debates over ratification: the details of the Founders' deliberations were not laid before the public until the publication of James Madison's notes more than fifty years later, in 1840.

The difficult question is thus not whether governmental secrecy is a good or a bad thing but rather how much of it is really necessary. At the highest level of generality, every person on this panel and every member of this Committee would probably agree with the basic proposition that we should have no more government secrecy than is truly necessary. That is to say, our government should be as open as possible and keep as few secrets as possible, consistent with the public good. However, it has always been understood that the public goods inherent in

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00094 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.049

the free flow of information are sometimes trumped by even greater public goods that result from protecting certain kinds of information from disclosure.

The difficult questions are thus: How do we identify what information it is better to safeguard than disclose? And who is to decide? I believe the same general principles inform the analysis when the subject is, as it is today, "secret law" as when we are discussing any other category of information. In my view, there is nothing unique or special about legal materials or legal analysis that entitle them to less protection than other categories of protectable information. Indeed, as the law of the common law attorney-client and work product privileges makes clear, our legal system has traditionally regarded the legitimate confidentiality interests in such materials as occupying a higher rung on the ladder than most others. The same basic considerations should apply to deciding when to protect legal materials and analysis generated inside the executive branch from disclosure as should apply to deciding when to protect other categories of information.

In making this assertion, it is essential at the outset, however, to clarify that there is no such thing as true "secret law" in the way most lay observers would understand that term. When we talk about "law," we generally are referring to rules of prospective application that govern or regulate private conduct, setting forth rights and duties whose violation might subject a person to some form of sanction. That is not what we are talking about in this hearing. Secret law of this sort would obviously be intolerable, and is quite inconsistent with the traditions of a free and democratic society. It also does not exist. Neither Congress nor executive branch agencies are permitted to regulate private citizens' behavior through rules the citizens do not or cannot know about. *See, e.g., Brinton v. Department of State*, 636 F.2d 600, 605 (D.C. Cir. 1980) (noting that Freedom of Information Act does not permit keeping secret "final statements

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00095 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.050

of policy or final actions of agencies, which have the force of law or which explain actions the agency has already taken" or "communications that promulgate or implement an established policy of an agency").

Instead, the "secret law" to which the title of this hearing refers includes such things as non-public opinions of the Justice Department's Office of Legal Counsel, orders of the FISA Court, classified Executive Orders promulgated by the President, and information protected by the presidential communication and related executive privileges. It is essential to appreciate that, although legal in nature, these materials govern or pertain to the internal functioning, operation, or deliberations of the executive branch; they do not regulate private conduct or impose primary obligations on our citizens. And the public officials whose conduct they regulate have access to them and know what they require. As such, their secrecy does not pose the same kind of due process problems as would true "secret law."

It is also very important to appreciate that, although much of this material may be secret from the public, most of it is available for review to the public's representatives in Congress in the course of properly authorized oversight activities. Thus, although there is not the full democratic accountability that attends full disclosure to the press and the public, there are still mechanisms in place for checking and balancing the policy choices of the executive.

With the issue thus in proper perspective, let us consider the circumstances and process by which such executive branch information should properly be kept confidential. My central point this morning is that the fundamental categories of "secret law" and the reasons that support their secrecy are traditional and well-established, and they are not only endorsed and validated in specific congressional enactments and judicial opinions but also they are reflected in parallel practices of the Congress itself. It is always possible to argue that there are particular

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00096 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.051

instances in which something has been kept secret which should not have been, but disagreement over the application of settled and well-supported understandings is inevitable, and it does not generally signal a systemic problem. Moreover, although one can certainly identify inherent flaws and perverse incentives in the existing system of executive control over national security classification and executive privilege, I do not believe that there is any cure that would not be far worse than the disease.

The Legitimate Interests Supporting Secrecy

There are two broad categories of information that account for virtually all of the instances of "secret law" with which the Committee is concerned: national security information, and information pertaining to internal communications and deliberations of the executive branch. Each of these categories is well-recognized, and each has a long historical pedigree. Each has also been expressly recognized and validated by Congress through statutes such as the Administrative Procedures Act (APA) and the Freedom of Information Act (FOIA), and by the courts. And ultimately each is driven by the need to protect the long-term public interest.

Moreover, each is reflected in similar practices by the Congress itself. If there is "secret law" in the executive branch, it also exists in the legislative branch. The fact that both branches, from the time of the founding until now, and regardless of political party alignment, have felt the need to safeguard the confidentiality of national security information and certain categories of internal deliberations is proof positive that the reasons for withholding this sort of information from the public are not only legitimate but compelling.

The protection of diplomatic, military, and intelligence information. The vast majority of information withheld from public view, including most of the categories of "secret law" with which the Committee is concerned, are withheld on the ground that they pertain to the

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00097 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.052

foreign relations, military, or intelligence activities of the United States. According to reports of the Office of Information Security Oversight at the National Archives, in a typical year, well more than 90% of national security classifications are made by either the CIA or the Department of Defense.

In contrast to the domestic sphere, where the values of openness are paramount, it has long been recognized that the ability to keep secrets is essential to the nation's ability to protect itself against foreign threats and conduct relations and negotiations with foreign countries. As Cardinal Richelieu observed centuries ago in this context, "Secrecy is the first essential in affairs of the State." Cardinal Richelieu served a king, but his observation, which focuses on the foreign relations sphere, is true as well for a democracy. Alexander Hamilton in the Federalist Papers famously cited the capacity to maintain "secrecy" as one of the principal comparative institutional advantages of a unitary executive in conducting the nation's external relations. *See* The Federalist No. 70 at 423-24 (Alexander Hamilton) (Clinton Rossiter ed. 1961). And President Wilson, liberal humanist that he was, observed after the experience of World War I that as "commander in chief of the armies and navy of the United States," the President had to be "ready to order it to any part of the world where the threat of war is a menace to his own people. And you can't do that under free debate. You can't do that under public counsel. Plans must be kept secret." Speech of September 5, 1919, *Papers of Woodrow Wilson* 63:46-47.

Effective military and intelligence activities by their nature require concealment of information from the nation's adversaries, which necessarily also means concealment from the public. No sensible person disputes the notion that military plans, the sources and methods of gathering intelligence, or negotiating instructions given to our diplomats cannot be made public

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00098 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.053

for fear of compromising paramount interests of the state. It would no doubt improve decisionmaking and reduce mistakes if all of our activities in these areas could be disclosed and subjected to a full public debate, but the cost to our vital interests of simultaneously revealing this information to our adversaries has always been thought to outweigh those advantages. Whatever benefits could be gained from fuller public debate and discussion, they do not outweigh the risks to the safety of our citizens that would attend revealing such things as the identity of our intelligence agents or confidential sources abroad; the means by which we gather intelligence on suspected terrorists through cooperating intelligence services, moles, or technological means; our military plans and the disposition of our forces in foreign battlefields; or our assessments of the motivations, interests, strengths and weaknesses of foreign nations with whom we may be dealing.

In today's legal environment, the conduct of military, intelligence, and diplomatic affairs are shot through with difficult legal questions, and someone has to decide them. They cannot be decided by the courts, which have no institutional role in these affairs as such. And usually they cannot be decided by the Congress, because Congress can only act through legislation, which is a slow, cumbersome, and blunt instrument for addressing the infinitely variable and nuanced circumstances that daily confront the nation in its intercourse with the rest of the world. Thus, the responsibility falls to lawyers in the executive branch to interpret whatever law may apply and to attempt to ensure that our military, diplomatic, and intelligence operations conform to constitutional and statutory law. In some of these areas, Congress may lay down certain rules, but it is the executive that has to apply them.

In doing so, it is impossible in many instances to publicly disclose the way in which they are being applied, for the simple reason that doing so will disclose precisely what the

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00099 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.054

nation is in fact doing – information that would do our security interests great harm if disclosed. For example, if the President issues an intelligence finding authorizing a particular covert operation to be carried out by our clandestine services, the legality of that finding must necessarily be passed upon by lawyers in the intelligence community, the Department of Justice's Office of Legal Council, and/or the National Security Council. But their opinions and analysis obviously cannot be disclosed because they must discuss the activity itself in the course of rendering legal judgments. I suppose this is "secret law" in some sense, but it is part and parcel of the underlying intelligence activity. The opinions will typically be classified at the same level as the underlying activities.

For the same reason, FISA orders are classified. A FISA order authorizes specific foreign intelligence surveillance activities. Revealing these orders would reveal both intelligence methods and capabilities, and intelligence targets – including to the targets themselves. Whatever public benefit would accrue from a robust debate over the propriety of the workings of the FISA Court is, in my opinion, far outweighed by the harm the country would suffer from losing its ability to eavesdrop on foreign terrorists and agents of foreign powers.

These are not, at bottom, controversial observations. Indeed, Congress itself has already endorsed them in various statutory pronouncements. Whether in FISA's requirement that FISA Court proceedings generally occur pursuant to stringent security requirements, *see* 50 U.S.C. §§ 1803(c), 1805(a), FOIA's categorical exemption from disclosure for information properly classified by the executive, 5 U.S.C. § 552(b)(1), or the APA's exemption for matters involving "a military or foreign affairs function of the United States," 5 U.S.C. § 553(a)(1), statutes passed by Congress already broadly support the notion that materials of this sort must be kept secret, and that the national executive is responsible for seeing to it that this occurs. *See*

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00100 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.055

also, e.g., 50 U.S.C. § 403-1(i)(1) (obligating the Director of National Intelligence to protect sources and methods of intelligence-gathering from unauthorized disclosure).

The courts also have made clear that they, too, recognize that secrecy is essential to the effective conduct of foreign, military, and intelligence affairs. Echoing Hamilton, for example, the Supreme Court has noted that the President "has his agents in the form of diplomatic, consular, and other officials," and that "[s]ecrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

The need for maintaining the secrecy of national security information is abundantly reflected in the way the Congress conducts its own business. The funding of the intelligence community occurs through a "black budget," which is not publicly disclosed except as to it aggregate amount. What is this if not "secret law" of the most literal sort? The public does not get to weigh in on the decisions their elected officials are making with regard to costly and vital national initiatives; there is no press coverage, and no public debate, and we undoubtedly lose something as a result. Yet few question that Congress is perfectly right to consider and pass the intelligence budget in this manner. Likewise, under the National Security Act of 1947, the intelligence committees of both houses were established to oversee intelligence matters. *See* 50 U.S.C. §§ 1413a(a), 1413b(b). These committees do much of their work in secret. Closed-door hearings are often held, and sometimes even the fact of a hearing is not publicly known, in order to protect the nation's intelligence assets.

Moreover, entire sessions of Congress are held in secret. Article I, Section 5 of the Constitution specifically provides that "Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00101 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.056

secrecy." Congress has not hesitated to use this authority where the larger public interest has required it. Until 1929, all executive sessions of the Senate were held in secret. Even after that date, the Senate has held more than 50 secret sessions. With the exception of President Clinton's impeachment trial (which itself occasioned six secret sessions) the overwhelming majority of those sessions have been convened to consider foreign affairs and national security-related matters such as defense procurements, presidential reports on Soviet compliance with arms control agreements, nuclear treaties, sales of military hardware to nations in the Middle East, Chinese trade status, and chemical weapons conventions. *See* Congressional Research Service, *Secret Sessions of Congress: A Brief Historical Overview* (Oct. 21, 2004).

With respect to government secrecy relating to national security information, Congress generally has the ability to obtain access to that information for oversight purposes. Thus, there is some interbranch accountability and a check built into the system, even if it is a more limited and imperfect one than exists in other spheres. However, the second major category of information generally protected from disclosure by the executive, to which I will now turn, is protected, almost by definition, from disclosure to the Congress as well, because it is direct function of the separation of powers.

Preserving the separation of powers. Information that remains secret as an outgrowth of the separation of powers relates primarily to the deliberative process inside the executive branch and is generally thought of under the rubric of "executive privilege." As a technical matter, executive privilege has a number of different and distinct aspects (e.g., deliberative process, presidential communications, attorney-client, military and diplomatic secrets, law enforcement, etc.), but in general, significant controversies in this area have tended

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00102 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.057

to focus on the privilege attaching to communications between and among the President and his advisers.

Because this aspect of executive branch secrecy shields information even from the Congress, it has not received the same explicit congressional endorsement as the secrecy associated with national security activities. However, it is no less well-rooted in the history and traditions of our country. Indeed, the rule of secrecy adopted by the Constitutional Convention was justified on precisely the same grounds that continue to support executive privilege more than two hundred years later. As James Madison noted at the time, the secrecy rule was adopted "to effectually secure the requisite freedom of discussion." Letter from James Madison to James Monroe (Sept. 10, 1787).

After adoption of the Constitution, President George Washington, in consultation with his cabinet, was the first to invoke a presidential prerogative to maintain the confidentiality of certain intra-executive communications, even from the Congress. He did so when the House of Representatives sought to compel the production of information pertaining to the negotiating instructions in relation to Jay's Treaty, which was then quite controversial. President Washington refused to produce the requested information on the ground that doing so would be contrary to the public interest, in that it would harm the President's ability to function and to direct the nation's foreign affairs.

The courts have clearly recognized the legal legitimacy of President Washington's reasoning. Although executive privilege is sometimes qualified, depending upon circumstances and the nature of the information in question, the courts have accepted the basic rationale for its existence. In *United States v. Nixon*, 418 U.S. 683, 705 (1974), the Supreme Court explained that "[h]uman experience teaches that those who expect public dissemination of their remarks

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00103 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.058

may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." In order to "protect[] . . . the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking," *id.* at 705, the Court therefore concluded that executive privilege was "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id.* at 708.

Even though the Congress is more skeptical of claims of executive privilege, its own practice clearly evinces an implicit recognition that the theoretical justification for it is sound. As noted above, Congress has from time to time held secret sessions. Some of these – notably the recent secret sessions associated with the Clinton impeachment – were designed to further the exact same interest in candor and frank internal deliberation that underlie the executive's invocation of its privilege. The same justification also shields many proceedings and reports of the House and Senate Ethics Committees from public view. Clearly, Ethics Committee proceedings are matters of considerable public interest and importance, concerning as they do the conduct of public officials, yet the rules allow for secrecy in order to serve the larger public interest in fair process for those accused of impropriety and full and frank debate within the committees.

The same parallelism between the executive and legislative branches is evident even in the narrow realm of legal opinions. Just as the Department of Justice has traditionally guarded its ability to give candid legal advice to the President by shielding certain OLC opinions from disclosure, so has the Congress shielded much of the legal advice it has received. Although it is less common now than it once was for the Senate Legal Counsel or House Legal Counsel to render formal opinions, most such opinions are not made public at the time they are issued.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00104 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.059

And those are just the more formal aspects of congressional practice that are marked by the same secrecy that characterizes similar executive branch activities. When we consider the less formal aspects of lawmaking, it is clear that Capitol Hill is the scene of a considerable amount of private or "secret" lawmaking that occurs outside the view of the press and the public. Members' communications with their staffs, whether in person or through written memoranda, are extremely important to the legislative process, yet I know of no member who believes the hometown paper, the public, or the White House has a right to examine such material to understand how individual congressmen or Senators arrive at their positions. Meetings at which Members receive input, advice, or assistance from constituents, lobbyists, or other outside groups are likewise cloaked in secrecy. Some of the most critical meetings of all for deciding what ultimately happens in a legislative process – meetings among Members themselves, whether in small groups or in party caucuses – also occur behind closed doors. The process by which earmarks are added to appropriations bills or conference reports are generated are also marked by a notable lack of transparency. Indeed, an observer of the workings of the Congress could be forgiven for believing that the public portions of the process are but surface ripples caused by the currents running beneath.

To complete the parallelism, the Constitution itself, through the Speech or Debate Clause, U.S. Const. Art. I, sec. 6, cl. 1 – provides Members of Congress a constitutional shield against being forced to describe any of these meetings and processes – a legislative privilege to match the executive one.

I intend none of this to be critical of the way the Congress does business. Quite the contrary: the point is not that these activities are illegitimate or dangerous but rather that they demonstrate a remarkable, fundamental consensus regarding the need for secrecy and

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00105 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.060

confidentiality in certain types of governmental activities. If Congress has essentially the same forms of secret law as the executive, and for same reasons, then there is no disagreement between the branches at the level of principle. The only real disputes arise from particular applications of those principles, a subject to which I will now briefly turn.

The Responsibility For Deciding What Must Remain Secret

If the general principles informing most "secret law" are accepted and applied by all three branches of government, it is still possible to argue about how they are applied. Individual instances may be identified in which one branch makes a mistake in the eyes of the other and conceals something that should be revealed. These are discussions worth having, because they will tend to help prevent further errors in the future, but they are not indicative of a systemic problem that needs to be addressed through new ground rules or processes. They are simply examples of the truism that no process of government will ever work perfectly and that reasonable minds can and often do disagree about how best to apply even agreed principles in particular cases.

Apart from individual mistakes, it is also possible to level a more general criticism that the executive branch keeps too many secrets and does not reveal enough of what it knows. Often this criticism is articulated as a criticism of "overclassification," the tendency of the bureaucracy to err on the side of classifying information when in doubt.

There is almost certainly some truth to the overclassification criticism. Natural caution, combined with observed organizational behavior in bureaucracies, create a set of incentives for individuals with classification authority that will often lead them to classify something as a secret if there is any conceivable reason for doing so, without subjecting the issue to too much careful analysis.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00106 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.061

However, the argument that the executive keeps too much information secret is very hard to prove, and, even if proven, still leaves an important question to which there is no satisfactory answer: what is the alternative? To illustrate the first problem, consider Governor Tom Kean's oft-cited observation that in his work with the 9/11 Commission, the vast majority of the classified information he saw would not have hurt our country's security if disclosed and should not have been classified in the first place. This is a common exhibit put forward by adherents of the overclassification critique. I respect Governor Kean's integrity and judgment, but why should we necessarily assume that his judgment on this matter is superior to that of our intelligence professionals? After all, Governor Kean is not responsible for overseeing intelligence operations or protecting the public from foreign threats on a day-to-day basis. He does not have a detailed understanding of our ongoing intelligence relationships with cooperating intelligence services, or the complex web of our global intelligence assets. He is not in a position to assess what our adversaries know or don't know, and what tile added to the mosaic of known information about our capabilities would prompt those adversaries to change the way they do business in a manner that would impair our intelligence-gathering capabilities. In his role on the 9/11 Commission, his background, his expertise, and his objectives and mission were all quite different from those of the individuals in the intelligence community who bear primary responsibility for protecting the country's secrets and maximizing the effectiveness of our intelligence operations. He is not the person whom anyone would blame if his opinion on this subject turned out to be wrong and innocent Americans died as a result.

This highlights a fundamental problem. Anyone who claims that the executive keeps too much information secret has to answer the question, too much compared to what? In whose judgment? This criticism assumes that there is some objective standard by which to

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00107 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.082

measure the aggregate amount of information withheld, or that there is some readily accessible ideal that we would all agree on. There isn't. And even accepting that there is probably some degree of natural overclassification, assessing the magnitude of that problem and how deleterious an impact it has on policymaking and public debate requires an omniscience regarding the full universe of secret information that simply isn't possible. Without that omniscience, how can one truly assess how much is overclassified, and whether the harm flowing from that overclassification exceeds the harm that would flow from erring in the other direction?

Classification decisions will never be made perfectly to everyone's satisfaction. There inevitably will be errors. The question is really which sort of errors we should prefer: errors that conceal too much or reveal too much. One of the principal reasons for overclassification is the working assumption that the consequences of underclassification would be far worse than the consequences of overclassification. My own instinct is that this is probably right, but even for those whose instincts are different, it's just a matter of instinct: marshaling any sort of reliable evidence by which to evaluate the competing assumptions is a daunting if not impossible task. There simply are too many unknowns and unknowables, both about what information is classified and what the impacts of release would be.

The question thus devolves to one of process: who will decide what to withhold, and how? That, and not any objective debate about the substantive correctness of the withholding and disclosure decisions, will really determine what secrets are kept. Here, the current answer is clear: executive branch officials decide what to withhold based upon standards set forth in executive orders promulgated by the President. I suspect that to the extent Members of Congress are uncomfortable with executive branch "secret law," that discomfort stems from this basic fact, which inevitably means that the Executive enjoys a very broad degree of

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00108 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.083

unilateral discretion in managing these matters. But any challenge to this system bears the burden of identifying a better one – and not just one that *might* be better but that clearly *will* be better given the stakes and the costs of error. It is here that, in my judgment, the critiques break down most clearly. To paraphrase Churchill, we currently have the worst of all possible systems for regulating the creation and maintenance of official secrets – except all the others.

At bottom, the case for the current system comes down to relative institutional competence. The system has evolved as it has because the information in question is acquired or created as part of the operation of the executive. It is generated by intelligence agents and analysts, the military chain of command, the communications of senior policymakers and presidential advisors, and the daily functioning of executive branch officers and agencies. It is inherently operational in nature. And it is essential to the executive's ability to carry out core executive functions, such as gathering intelligence, developing military weapons, and conducting relations with foreign countries. It is, in short, quintessential executive branch information, and its maintenance and management has traditionally been regarded as an inherent aspect of the President's Article II power.

The legislative and judicial branches of government do not have nearly the same need for or control over this information. These kinds of communications and data do not form the basis for resolving lawsuits, nor do they generally bear on legislative questions (and when they do, the Congress has means to obtain them under appropriate security procedures). Nor are the courts or Congress as well positioned as the executive to make sound, fully informed, contextual judgments in real time about whether the release of such information would jeopardize the national interest. This simply has to be a matter of judgment for individual officials in the moment. The relevant executive branch officials are daily immersed in the flow

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00109 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.064

of information and the operational realities of the matters and issues to which this information pertains. They have far superior access to the full mix of information and other considerations that must inform a judgment regarding protection or disclosure of such information. Their training, professional experience, and expertise are all directly germane to the task at hand. Neither of the other two branches has anything like the same practical ability to make these judgments in a comprehensive and intelligent manner, however flawed they may be in gross.

Both Congress and the courts have recognized this. FOIA (and numerous other statutes) expressly acknowledges that the executive runs the security classification system. *See* 5 U.S.C. § 552(b)(1). And the courts have disclaimed the authority or ability to meaningfully second-guess executive branch judgments about the harm that would likely flow from releasing national security-related information. The Supreme Court has noted that "[i]t is the responsibility of [the intelligence community], not that of the judiciary to weigh the variety of complex and subtle factors in determining whether the disclosure of information may lead to an unacceptable risk of compromising the . . . intelligence-gathering process." *CIA v. Sims*, 471 U.S. 159, 180 (1985). In the Pentagon Papers case, five Justices in two separate opinions, one concurring and one dissenting, strongly endorsed the notion that the executive, not the judiciary, must superintend matters of national security. Justice Harlan's dissent, speaking on behalf of three Justices, describes the strongly held and traditional view of the courts regarding their relative institutional competence in this area:

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible for the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00110 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.065

> responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

New York Times v. United States, 403 U.S. 713, 757-58 (1971) (Harlan, J., dissenting). These three Justices' views were echoed by Justice Potter Stewart, writing for himself and a fifth Justice, constituting an overall majority of the Court:

> [I]t is clear to me that it is the constitutional duty of the Executive – as a matter of sovereign prerogative and not as a matter of law as the courts know law – through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

Id. at 729-30 (Stewart, J., concurring).

Note that Justice Stewart makes the same distinction regarding "secret law" that I made at the outset, distinguishing between "executive regulations" that govern the bureaucracy and "law as the courts know law." We have much less to fear from "secret law" in the former category than in the latter. Indeed, its existence is inevitable and vital to the protection of the public interest. Some things in government are properly kept secret. As described above, there is general consensus, validated by pronouncements and practice in all three branches of government, on what kinds of things those are. And somebody has to apply those categories to the millions of documents and communications that are created within the executive branch each year. However imperfect its judgments may be, as a practical matter, that can only be the executive. Just as Congress must control the confidentiality of the information and communications it generates, so to must the executive branch control those things in its own domain.

* * * *

In closing, I wish to thank the Committee for the opportunity to address this interesting and important issue. The Committee's concern with openness and accountability in

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00111 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.086

our government is laudable. It is a concern that I share. But I would hesitate to allow concerns about classified information or executive privilege in individual disputes or contexts to provoke a reaction that could result in an even less satisfactory state of affairs. I believe we have little choice but to continue to work with the system that we have, and to try to improve it patiently and slowly through case-by-case discussions of circumstances in which we believe it has malfunctioned. I would be glad to answer any questions the Committee may have.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00112 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.067

Department of Justice

STATEMENT OF
JOHN P. ELWOOD
DEPUTY ASSISTANT ATTORNEY GENERAL
THE OFFICE OF LEGAL COUNSEL
DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND PROPERTY RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ENTITLED

"SECRET LAW AND THE THREAT TO DEMOCRATIC AND ACCOUNTABLE GOVERNMENT"

PRESENTED

APRIL 30, 2008

STATEMENT OF
JOHN P. ELWOOD
DEPUTY ASSISTANT ATTORNEY GENERAL
THE OFFICE OF LEGAL COUNSEL
DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND PROPERTY RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ENTITLED
"SECRET LAW AND THE THREAT TO DEMOCRATIC AND ACCOUNTABLE GOVERNMENT"

APRIL 30, 2008

Mr. Chairman, Ranking Member Brownback, and Members of the Subcommittee, I appreciate the opportunity to appear here today to discuss how the Office of Legal Counsel ("OLC") works to balance the values of transparency, accountability, and the confidentiality that are essential to good governance.

Let me say at the outset that the Department of Justice appreciates, and shares, this Subcommittee's interest in ensuring that our Government operates in as transparent and accountable a fashion as possible. Indeed, our Office frequently publishes opinions that address issues of interest to the Executive Branch, to Congress, and to the public, and our approach to publication is consistent with the approach of prior Administrations. At the same time, as Administrations of both parties have recognized, it cannot be denied that policy makers within the Executive Branch, like any other decision maker, sometimes have the need to consult with attorneys within the confidential bounds of the attorney-client relationship. Although there are

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00114 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.089

times where the national interest requires that OLC advice remain confidential, at least for a time, I hope to dispel the notion that such legal advice constitutes in any sense "secret law" governing the lives of Americans.

The Office of Legal Counsel assists the Attorney General in his role as legal adviser to the President and to executive departments and agencies. Under our constitutional system, the Executive Branch must be able to come to a unified interpretation of the law in order to carry out the President's constitutional duty to execute the law faithfully, and doing so necessarily requires the ability to seek and obtain confidential, authoritative legal advice within the Executive Branch. That essential function has been recognized since the Judiciary Act of 1789, which provides that the President and the heads of the executive departments may request the opinion of the Attorney General on any question of law. For 54 years, the Attorney General's traditional function of providing legal opinions for the internal use of the Executive Branch has been assigned to OLC.

In connection with this function, OLC provides advice and prepares documents addressing a wide range of legal questions involving Executive Branch operations. Agencies ask OLC for advice and analysis on difficult and unsettled legal issues, often in connection with complex and sensitive operations that implicate national security interests. Our advice reflects the attorney-client relationship that exists between OLC and other executive offices, and, as in other attorney-client relationships, our advice is confidential. Protecting the confidentiality of OLC opinions helps ensure that decisionmakers will be willing to seek legal advice before they act. Indeed, without confidentiality, officials may be reluctant to seek our advice at precisely

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00115 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.070

those critical times when it is most needed. Confidentiality also helps to ensure that the legal advice that policymakers receive will be completely candid.

I would like to address directly the concern that, by issuing confidential legal advice, OLC makes "secret law." It is true that, subject to the President's authority under the Constitution, OLC opinions are controlling within the Executive Branch on questions of law. However, OLC does not "make law" in the same sense that Congress or the courts do. While OLC's legal advice and analysis may inform the decisionmaking of its clients, the legal advice rarely, if ever, compels the adoption of any particular policy; rather, it remains up to policymakers to decide whether and how to act. OLC thus lacks the ability to affect private parties directly, and its legal views are not binding on the Legislative Branch, the courts, or members of the general public. If the Executive Branch adopts a policy that OLC has declared legally permissible, the policy will be public unless it is classified, and appropriate officials may be called upon to explain the policy, including its basis in law. (Classified activities are, of course, subject to review by the intelligence committees.) But effective policymaking is not possible if officials are inhibited by concerns that the advice they receive or their other internal, pre-decisional deliberations will be made public.

At the same time, OLC recognizes that many of its opinions address issues of interest to the government or to the public. It is our policy to publish such opinions whenever doing so is consistent with the legitimate confidentiality interests of the President and the Executive Branch, and this publication policy is sensitive to Congress's interests in understanding the legal reasoning relied upon by executive agencies. There has historically been a time lag between when an opinion is signed and when it is considered for publication, which reflects the need for

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00116 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.071

confidentiality in the course of ongoing decisionmaking. Moreover, before publishing an opinion, OLC seeks approval from the office that requested it and generally solicits the views of other agencies and entities within the Executive Branch whose work may be affected by the opinion, a process that sometimes takes several months. There has been fundamental continuity from one Administration to the next in the criteria and procedures that OLC employs to make publication decisions. The Office's current approach to publication is consistent with historical practice. The publication review process has largely been completed for opinions signed in the years 1993-2000 but is ongoing for opinions signed since 2001. As a result, fewer of these more recently signed opinions have been published at this time. But during my tenure at OLC, the rate of publication has increased, and the period of time between opinion signature and opinion publication has decreased.

Since the beginning of 2005, OLC has published 81 of its opinions on its Web site. *See* http://www.usdoj.gov/olc/whatsnew.htm. Three more opinions were released in response to requests under the Freedom of Information Act, one was released in redacted form, and one was declassified and publicly released in response to a congressional inquiry. In all, 86 opinions have been made public since the beginning of 2005, more than 90 percent of which were signed during this Administration. The number of opinions made public since the beginning of 2005 thus exceeds the 71 unclassified opinions that the Office has signed during that time.

The Office of Legal Counsel remains committed to sharing our work product with the public, consistent with the need to protect policy makers' ability to obtain confidential legal advice. We are also committed to working with Congress, when it expresses interest in the work of the office. From time to time, Congress requests access to opinions that cannot be disclosed

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00117 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.072

because they constitute confidential legal advice. Some other OLC opinions have been classified for reasons of national security, typically because they incorporate classified information provided by another agency or office. OLC acknowledges the importance of congressional oversight, however, and we remain committed to working with Congress to find appropriate ways to keep Congress well informed about the basis in law for Executive Branch policies, while at the same time respecting the attorney-client confidentiality and national security sensitivity of our work. For instance, the Department may provide a congressional committee with a statement of its position on a legal issue of interest to the Committee, while preserving the confidentiality of legal advice on that issue from OLC to an Executive Branch client. To take one concrete example, in response to congressional and public interest in the surveillance activities of the National Security Agency described by the President in December 2005, the Department of Justice prepared a 42-page white paper providing our views concerning the legal authorities supporting that program. In addition, during my tenure at OLC, representatives of the Office have appeared before numerous Committees to publicly discuss our legal views, and we have had many more private conversations with Members and staff on topics of mutual interest.

In sum, OLC recognizes the value of openness in government, which promotes public confidence that the government is making its decisions through a process of careful and thoughtful reasoning. By publishing OLC opinions when appropriate, we ensure that Executive Branch views are part of the public conversation on topics for which the Executive possesses relevant expertise. As we work to balance the values of transparency, accountability, and the confidentiality essential to good governance, our publication decisions will continue to reflect our commitment to a basic policy of openness, as well as to the important constitutional function of congressional oversight.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00118 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.073

Opening Statement of U.S. Senator Russ Feingold
Hearing on "Secret Law and the Threat to Democratic and Accountable Government"
Senate Judiciary Committee, Subcommittee on the Constitution

"More than any other Administration in recent history, this Administration has a penchant for secrecy. To an unprecedented degree, it has invoked executive privilege to thwart congressional oversight and the state secrets privilege to shut down lawsuits. It has relied increasingly on secret evidence and closed tribunals, not only in Guantanamo but here in the United States. And it has initiated secret programs involving surveillance, detention, and interrogation, some of the details of which remain unavailable today, even to Congress.

"These examples are the topic of much discussion and concern, and appropriately so. But there is a particularly sinister trend that has gone relatively unnoticed – the increasing prevalence in our country of secret law.

"The notion of 'secret law' has been described in court opinions and law treatises as 'repugnant' and 'an abomination.' It is a basic tenet of democracy that the people have a right to know the law. In keeping with this principle, the laws passed by Congress and the case law of our courts have historically been matters of public record. And when it became apparent in the middle of the 20th century that federal agencies were increasingly creating a body of non-public administrative law, Congress passed several statutes requiring this law to be made public, for the express purpose of preventing a regime of 'secret law.'

"That purpose today is being thwarted. Congressional enactments and agency regulations are for the most part still public. But the law that applies in this country is determined not only by statutes and regulations, but also by the controlling interpretations of courts and, in some cases, the executive branch. More and more, this body of executive and judicial law is being kept secret from the public, and too often from Congress as well.

"The recent release of the March 2003 John Yoo torture memorandum has shone a sobering light on this practice. A legal interpretation by the Justice Department's Office of Legal Counsel, or OLC, binds the entire executive branch, just like a regulation or the ruling of a court. In the words of former OLC head Jack Goldsmith, 'These executive branch precedents are "law" for the executive branch.' The Yoo memorandum was, for a nine-month period in 2003 until it was withdrawn by Mr. Goldsmith, the law that this Administration followed when it came to matters of torture. And of course, that law was essentially a declaration that few if any laws applied.

"This entire memorandum was classified and withheld from Congress and the public for years on the claim that it contained information that could not be disclosed without harming national security. Now it may be appropriate, prior to public disclosure of an OLC memorandum, to redact information about, for example, specific intelligence sources or methods. But as we now know, this 81-page document contains no information about sources, methods, or any other operational information that could compromise national security. What it contains is a shocking glimpse of the 'law' that governed the Administration's conduct during the period this memo was in effect. And the many, many footnoted references to other OLC memos we've never seen suggests that there is an entire regime of secret law that may be just as shocking.

"Another body of secret law is the controlling interpretations of the Foreign Intelligence Surveillance Act that are

44955.074

issued by the Foreign Intelligence Surveillance Court. FISA, of course, is the law that governs the government's ability in intelligence investigations to conduct wiretaps and search the homes of people in the United States. Under that statute, the FISA Court is directed to evaluate wiretap and search warrant applications and decide whether the standard for issuing a warrant has been met – a largely factual evaluation that is properly done behind closed doors. But with the evolution of technology and with this Administration's efforts to get the Court's blessing for its illegal wiretapping activities, we now know that the Court's role is broader, and that it is very much engaged in substantive interpretations of the governing statute.

"These interpretations are as much a part of this country's surveillance law as the statute itself. Without access to them, it is impossible for Congress or the public to have an informed debate on matters that deeply affect the privacy and civil liberties of all Americans. While some aspects of the FISA Court's work involve operational details and should not be publicly disclosed, I do not believe that same presumption must apply to the Court's purely legal interpretations of what the statute means. Yet the Administration has fought tooth and nail against public disclosure of how the Court interprets the law, and has strictly limited even congressional access to some of those decisions.

"The Administration's shroud of secrecy extends to agency rules and executive pronouncements, such as Executive Orders, that carry the force of law. Through the diligent efforts of my colleague Senator Whitehouse, we have learned that OLC has taken the position that a President can 'waive' or 'modify' a published Executive Order without any notice to the public or Congress – simply by not following it.

"Now, none of us disputes that a President can withdraw or revise an Executive Order at any time; that's every President's prerogative. But abrogating an Executive Order without any public notice works a secret change in the law. Worse, because the published Order stays on the books, it actively misleads Congress and the public as to what the law is. That has the effect – presumably, the intended effect – of derailing any accountability or oversight that could otherwise occur.

"And that gets us to the heart of the problem. In a democracy, the government must be accountable to the people, and that means the people must know what their government is doing. Through the classification system and the common law, we've carved out limited exceptions for highly sensitive factual information about military operations, intelligence sources and methods, nuclear programs, and the like. That is entirely appropriate and important to protecting our national security. But even in these areas, Congress and the courts must maintain some access to the information to ensure that the President is acting in accordance with the law and the Constitution. And when it comes to the law that governs the executive branch's actions, Congress, the courts, and the public have the right and the need to know what law is in effect. An executive branch that operates pursuant to secret law makes a mockery of the democratic principles and freedoms on which this country was based.

"We'll hear today from several experts who can help us understand the extent of this problem and help us begin to think about solutions."

44955.075

THE IDENTITY PROJECT
www.papersplease.org

May 7, 2008

The Honorable Russell D. Feingold
Chairman
Senate Committee on the Judiciary
Subcommittee on The Constitution
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Sam Brownback
Ranking Member
Senate Committee on the Judiciary
Subcommittee on The Constitution
224 Dirksen Senate Office Building
Washington, DC 20510

RE: Hearing on "Secret Law and the Threat to Democratic and Accountable Government" April 30, 2008

Dear Senators Feingold and Brownback:

I am writing to express my general concern about secret law, and to bring to your attention the Transportation Safety Administration's unpublished Security Directives, imposed directly upon the citizens of this nation by federal employees, that have the force and effect of law. My name is James P. Harrison. I am a private attorney and also director of the Identity Project (IDP), <http://www.PapersPlease.org>, which provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization providing legal and educational resources dedicated to protecting and promoting First Amendment rights. As a private attorney, I represented John Gilmore in Gilmore v. Gonzales, a recent federal case that extensively examined the issue of secret administrative law involving identification requirements for domestic air transportation.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00121 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.076

Among the categories of secret law raised before the Subcommittee are secret transportation Security Directives issued by the Transportation Security Administration (TSA). The specific Security Directive addressed here is that which involves a passenger's presentation of identification (ID) to travel domestically by commercial air carrier. While the rule that "Passengers Must Show Identification" is printed on TSA posters prominently displayed about security screening checkpoints in airports, TSA refuses to release the actual written rule that requires passengers to produce identification because it designates the rule itself as part of a control category of information known as "Sensitive Security Information."

The secrecy surrounding this specific Security Directive, which has the force and effect of a law, broadly illustrates the dangers inherent in secret law. It is important to make absolutely clear at the outset that the specific Security Directive at issue here does not involve the training procedures of TSA employees, or the manner in which any aviation security procedure is conducted by the TSA. What is at issue here is the federal requirement imposed directly by federal employees upon domestic air transportation passengers indicating that the passenger must show their ID to fly, which it turns out is actually not the case.

As a result of the secrecy surrounding this law, the public remains misinformed about TSA's identification requirements. This public confusion has now broadened to include the Department of Homeland Security's (DHS') misinformation that the federal penalties imposed upon the citizens of states that decide not to comply with REAL ID incudes their inability to travel by air. Further, not being able to actually read the law that requires ID to fly renders it largely unchallengeable in any court of law by those upon who it is arbitrarily enforced, and also makes it legislatively unreviewable by their representatives. It appears that this is a result of deliberate choice and official policy on the part of DHS.

Accepting, or even turning a blind eye to, this secret law invites the public to become accustomed to something antithetical to our systems of justice and liberty. I invite this Subcommittee to recognize and publicly decree this example of secret law for what it is, an abomination.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00122 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.077

The Specific Law at Issue

Various statutory provisions govern airport security screening. The Under Secretary of Transportation is directed to provide for the screening of all passengers and property. 49 U.S.C. 44901(a). In addition, the Under Secretary must direct airlines to refuse to transport a passenger who does not consent to a search establishing whether the passenger is carrying unlawfully a dangerous weapon, explosive or other destructive substance. *Id.* §44902(a). Neither of these statutes mentions passenger identification.

Congress has generally forbidden the use of secret law. However, there are narrowly tailored exceptions to the requirement of disclosure. 49 U.S.C. 114(s) provides that notwithstanding FOIA, TSA is authorized, upon making particular findings, to prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act or under chapter 449 of this title. These findings include a required administrative determination that disclosure is inappropriate for specified reasons, principally because it would be detrimental to the security of transportation.

TSA's implementing regulations address "Sensitive Security Information" (SSI) that the agency will refuse to disclose pursuant to the just-cited statutory provisions. The regulations define SSI to include, for example, all threat information, security measures, and security screening information. 49 C.F.R. 1520.5(b)(7)-(9). But the regulations go further to define as SSI "[a]ny Security Directive or order" issued under relevant regulatory provisions, together with "[a]ny comments, instructions, and implementing guidance pertaining thereto." *Id.* §1520.5(b)(2). A Security Directive is the document setting forth mandatory measures that airports and TSA personnel must follow in conducting airport screening. *Id.* §1542.303(a). Every Security Directive or Information Circular, and information contained in either document, is forbidden to be disclosed to persons other than those who have an operational need to know. *Id.* §1542.303(f)(2).

At issue here is the TSA requirement that all passengers show identification before they are permitted to board a domestic commercial airline flight in the United States. The government categorically refuses to make public the document that imposes this legal obligation on commercial airline passengers as it has determined it to be SSI.

The secrecy surrounding this directive is quite unusual in two respects. First,

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00123 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.078

although the *document* itself is withheld from public disclosure, *its requirements* are disclosed every day to millions of people, who are advised that they must show identification. Thus, the government's secrecy does not involve keeping sensitive information non-public. What is at stake is instead the government's refusal to prove that what it claims is the law is, in fact, required. Second, and relatedly, it appears that the directive or implementing guidance purposefully or inadvertently causes transportation security officials to mislead the public.

DHS' Admission of Misinformation

Passengers are consistently advised that federal law requires them to show identification. That representation is false, however. There is another option. Passengers in reality can generally travel even without showing "proper" identification so long as they undergo a more extensive security screening. The government s secrecy here in refusing to disclose the actual directive thus has the effect of misinforming the public of what the law actually requires.

During the pleadings phase of Gilmore v. Gonzales before the Ninth Circuit Court of Appeals, the government defendants asserted that Mr. Gilmore's various rights were not violated by the identification requirement in part because he had the option for a "heightened" level of physical search instead. After being pressed on this issue during oral argument, defendants were ordered by the Court to file the Security Directive under seal for its *ex parte* and *in camera* examination. In its ruling, the Court referred to its examination of the Security Directive: "As noted, we have reviewed *in camera* the materials submitted by the Government under seal, and we have determined that the TSA Security Directive is final within the meaning of §46110(a). The Security Directive "imposes an obligation" by requiring airline passengers to present identification or be a "selectee," and by requiring airport security personnel to carry out the policy." 435 F.3d 1125, 1148 (9th Cir. 2006).[1] In part based upon the availability of the "selectee" option, the Court found that Mr. Gilmore's rights were not unconstitutionally violated by the identification requirement. A writ of certiorari was filed with the Supreme Court focused singularly on the issue of secret law. Despite the filing of multiple amicus briefs, and the

[1] Gilmore v. Gonzales 435 F.3d 1125 (9th Cir. 2006) is available at http://www.papersplease.org/gilmore/_dl/GilmoreDecision.pdf

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00124 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.079

importance of the issue, the Supreme Court denied the writ of certiorari.[2] In spite of this admission of misinformation by TSA, the signs at the airports continue to state that identification is required to fly.

One of the major problems with Secret Law is that it is impossible to tell when the law has changed. Since the Appellate Court's examination of the security directive in the Gilmore case, we have not until recently been able to confirm the law regarding identification to fly had not been altered. In a letter dated March 22, 2008, a DHS official confirmed in writing to a private citizen that the law had not changed.[3] This letter caught the attention of the media and resulted in a number of newspaper articles including that printed on April 8, 2008, in the Kansas City Star (*Although airport security tells passengers they must show ID to board planes, they really don't*), on April 14, 2008, in the Seattle Times (*If truth be told, you don't always need ID for domestic flights*) and on April 20, 2008, in the Arizona Star (*You can fly without ID, but a hassle will accompany you*).[4] Even with these recent admissions by DHS that ID is not actually required to fly domestically, there is no way of knowing whether this secret law has been changed since then, thereby making the federal government's signs posted at our airports truthful.

This Misinformation Spreads into the National REAL ID Debate

Despite the above statements that ID is not required to fly domestically in the United States, the TSA, in its recent issuance of Final Rules pertaining to the Real ID Act, leads the public, and the state governments that may refuse to comply with the Act, to the opposite conclusion. Beginning on page six of the final rules, it reads:

> **I. BACKGROUND**
>
> **A. Statutory Authority and Regulatory History**
>
> This final rule establishes minimum standards for State-issued drivers' licenses and identification cards that Federal agencies can accept for official purposes on or after May 11, 2008, as required under

---

[2] The separate Supreme Court amicus briefs filed by the Electronic Frontier Foundation (EFF); the Electronic Privacy Information Center (EPIC); and Reporters Committee for Freedom of the Press and the American Society of Newspapers Editors are available at http://papersplease.org/gilmore/legal.html

[3] See http://papersplease.org/wp/wp-content/uploads/2008/03/tsa-080226-070-mocek.pdf

[4] See http://www.kansascity.com/105/story/567590.html
http://seattletimes.nwsource.com/html/travel/2004347810_webflyingnoid14.html
http://www.azstarnet.com/news/235184

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00125 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.080

the REAL ID Act of 2005. *See,* Public Law 109- 13, 119 Stat. 231, 302 (May 11,2005) (codified at 49 U.S.C. 30301 note) (the Act).

During the terrorist attacks on the United States on September 1 1, 2001, all but one of the terrorist hijackers acquired some form of identification document, some by fraud, and used these forms of identification to assist them in boarding commercial flights, renting cars, and other necessary activities leading up to the attacks. See THE 911 COMMISSION REPORT, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS ON THE UNITED STATES (July 2004) (911 Commission Report), p. 390. The 911 Commission recommended implementing more secure sources of identification for use in, among other activities, boarding aircraft and accessing vulnerable facilities. In its report, the Commission stated

> Secure Identification should begin in the United States. The federal government should set standards for the issuance of birth certificates and sources of identification, such as drivers' licenses. Fraud in identification documents is no longer just a problem of theft. At many entry points to vulnerable facilities, including gates for boarding aircraft, sources of identification are the last opportunity to ensure that people are who they say they are and to check whether they are terrorists.
>
> Id. at 390.

Congress enacted the Act in May 2005, in response to the 911 Commission's recommendations.

Under the Act, Federal agencies are prohibited, effective May 11, 2008, from accepting a driver's license or a State-issued personal identification card for an official purpose unless the issuing State is meeting the requirements of the Act. "Official purpose" is defined under §201 of the Act to include access to Federal facilities, boarding Federally-regulated commercial aircraft, entry into nuclear power plants, and such other purposes as established by the Secretary of Homeland Security. Undoubtedly, the most significant impact on the public of this statutory mandate is that, effective May 11, 2008, citizens of States that have not been determined by DHS to be in compliance with the mandatory minimum requirements set forth in the REAL ID Act may not use their State-issued drivers' licenses or identification cards to pass through security at airports. Citizens in this category will likely encounter significant travel delays.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00126 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.081

This inconsistency did not go unnoticed. In South Carolina's Governor Mark Sanford's scathing letter of March 31, 2008, to Secretary Chertoff, in which he asked that the citizens of South Carolina not be punished by DHS for their state's deciding not to comply with Real ID, he specifically raised the point that ID is not actually required to fly.[5] On the final page of his letter he alludes to the Ninth Circuit's Gilmore decision and the current ability to fly without ID. In this instance, the serious aspect that a secret law prevents an informed legislative examination of the law presents itself. Without Gilmore bringing suit and forcing disclosure of the law, albeit through an *in camera* review and the resulting secondary description of it by a Federal Appellate Court, Governor Sanford may not have been aware of the content of this secret law.

While Real ID implementation has been passed on to the next administration to resolve, this important example of secret law remains; and will continue to cause confusion and stymie an informed national debate on the virtues of a national identification card program.

Permitting the government to enforce a secret law invites abuse and confusion in its application. It permits the government to misrepresent the contents of the law to suit its purposes (whatever they may be at the time) and to inappropriately hide provisions that it may not want known. It also deprives the public of the ability to monitor agency compliance regarding enforcement of the law (for example, to ensure that the law is not enforced in a discriminatory manner). The very problems with the secrecy challenged by here are highlighted by the government's own inconsistent statements about the directive. Airport personnel themselves do not seem to know the standards that they are expected to enforce.

The rule of law protects us from unbridled governmental authority and defends liberty. It continues to be said that our best form of homeland security is liberty. DHS' willingness to stray from the rule of law, in an attempt to attain some perceived greater security, is something deserving of this Subcommittee's continued attention.

Sincerely,
/s/
James P. Harrison
Director, The Identity Project

---

[5] See http://www.scgovernor.com/NR/rdonlyres/8EA29AE1-B84F-443E-B54A-3626FE5DEF57/0/Letterf033108RealIDletterDHS.PDF

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00127 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.082

Testimony of Dawn E. Johnsen
Before the U.S. Senate Committee on the Judiciary Subcommittee on the Constitution
"Secret Law and the Threat to Democratic and Accountable Government"
April 30, 2008

I was privileged to have the opportunity to serve for five years at the Office of Legal Counsel, first as a Deputy Assistant Attorney General (1993-1997) and then as the Acting Assistant Attorney General heading that office (1997-1998). Since then, I have continued to study the work of OLC (as it is known) as a professor of law at Indiana University—Bloomington, where for the past ten years I have focused my work on issues of constitutional law and especially presidential power.

Excessive executive branch secrecy undoubtedly threatens the proper functioning of our constitutional democracy. The reasons are simply stated. Openness in government is critical to our system of checks and balances: Congress and the courts cannot possibly safeguard against executive branch overreaching or abuses if they (and potential litigants) do not know what the executive branch is doing. Openness is critical to democratic accountability and self-governance: without it, we the people cannot intelligently vote and petition the government for change. Openness is critical to our nation's standing in the world community as a model worthy of emulation.

There has been consistent criticism of the Bush Administration's penchant for secrecy as a general matter, but this hearing more narrowly focuses on one particularly harmful aspect of the government's current excessive secrecy: its practice of making and relying on "secret law." I will focus my testimony on OLC's central role in that process.[1] OLC, most notably, was a key player in the development of the Bush Administration's most important counterterrorism issues. OLC has been widely and deservedly criticized for the substance of its legal interpretations, which at least at times have not reflected principled, accurate assessments of applicable legal constraints, but instead were tainted by the Administration's desired policy ends and overriding objective of expanding presidential power.

In addition, OLC has been terribly wrong to withhold the content of much of its advice from Congress and the public—particularly when advising the executive branch that in essence it could act contrary to federal statutory constraints. For example, recall that it is only because of government leaks that the public first learned—years late—of the Bush Administration's legal opinions and policies on extreme methods of interrogation (which concluded that the President need not comply with prohibitions on torture),[2] the government's domestic surveillance program (which operated outside the requirements of the Foreign Intelligence Surveillance Act),[3] and the use of secret prisons overseas to detain and interrogate (even waterboard) suspected terrorists.[4] The Bush

1. This testimony draws upon an analysis of the role of OLC and the Bush administration's use of extreme interrogation methods, in Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007).
2. *See* Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST, June 8, 2004, at A1.
3. *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.
4. *See* Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

44955.083

Administration continues to keep secret, without adequate justification, some important advice on these and other issues, even as Congress continues to struggle to legislate in a vacuum. Last month's release of a five-year-old OLC opinion on permissible interrogation methods by the military reconfirmed the unjustified dangers of such extreme secrecy. That opinion, like many others, relied upon an extreme and clearly incorrect view of expansive presidential authority, and a correspondingly unduly narrow view of congressional power, that could not withstand the light of public scrutiny.

There are circumstances, of course, in which the executive branch should keep OLC advice secret. In extreme cases, the release of an OLC opinion could gravely imperil national security. Congress should respect the President's genuine needs for secrecy. But so, too, should the President respect Congress's need to know how—even whether—the executive branch is enforcing existing law. It is fundamental that if OLC advises the executive branch that it may disregard an applicable legal restriction—whether in the Constitution, a treaty or a statute—because a presidential prerogative trumps the law, OLC virtually always should make that legal interpretation public. There may be a need to redact factual details from the opinion about the program under review, if for example revealing them would create a genuine threat to national security. In rare circumstances, there may be a need for some delay in release of the opinion. But OLC should as soon as possible provide Congress and the public with the legal conclusions and reasoning behind any advice that the executive branch may disregard or in effect interpret away an existing legal requirement.

Before evaluating more closely these principles and the Bush Administration's deviation from them, it is useful to consider more generally OLC's role in the executive branch and the practical import of OLC's legal interpretations. OLC's essential function is to provide the President and other executive branch officials with the legal advice they need to ensure that their actions comply with the law. The Constitution obligates presidents to "preserve, protect and defend the Constitution"[5] and "take Care that the Laws be faithfully executed"[6] by those who work for them enforcing the law. In order to fulfill these obligations, the President clearly requires a source of legal advice. In recent decades, OLC ultimately has filled that role, working under delegated authority of the Attorney General. OLC functions as a kind of general counsel to other top lawyers in the executive branch, including the Counsel to the President, who tend to send OLC particularly difficult and consequential questions about what the relevant law requires with regard to contemplated governmental action.

By virtue of regulation and tradition, OLC's legal interpretations typically are considered binding within the executive branch unless overruled by the Attorney General or the President (which in practice rarely happens). Unless overruled, OLC's advice ordinarily must be followed by the entire executive branch, from the Counsel to the President and cabinet officers to the military and career administrators, regardless of any disagreement or displeasure with that advice. The flipside of having to comply with OLC interpretations is that executive officers and other governmental actors receive

5. U.S. CONST. art. II, § 1, cl. 8.
6. *Id.* art. II, § 3.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00129 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.084

substantial protection from OLC opinions. It is exceedingly difficult to prosecute for illegal action someone who has relied on an OLC opinion, even if the President, the Attorney General, or OLC itself were subsequently to withdraw the opinion as conveying an incorrect view of the law. Any prosecution would have to satisfy the constitutional guarantee of due process, which would include the right of reasonable reliance on the government's authoritative legal interpretation. Moreover, as a practical matter, due to the substantial obstacles to judicial review especially on matters of national security, OLC interpretations at times prove final or may go unreviewed for years. OLC therefore plays a critical role in upholding the rule of law and our system of government.

OLC's legal interpretations regarding the interrogation of detainees provide a useful lens for evaluating the harms of secret OLC law. As is now widely known, beginning shortly after September 11, 2001, OLC issued a series of legal opinions and other secret legal advice that found lawful extreme methods of interrogation, including waterboarding, that are widely viewed as unlawful—and the Bush Administration actually relied on this advice to subject detainees to such methods. Some of these OLC opinions, and particularly one dated August 1, 2002 and leaked in the summer of 2004,[7] have been almost universally ridiculed and condemned as ends-driven, faulty legal analyses. For example, former Assistant Attorney General Jack Goldsmith has described his shock upon learning, when he assumed leadership of OLC in 2003, that this and some other key Bush-era OLC opinions "were deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President. I was astonished, and immensely worried, to discover that some of our most important counterterrorism policies rested on severely damaged legal foundations."[8] The Bush Administration itself withdrew this particular Torture Opinion under the pressure of public scrutiny, and ultimately issued a new opinion, but the details of its disagreement and its current views remain unclear to this day.

I was part of a group of nineteen former OLC lawyers who were outraged by that initial OLC Torture opinion that was leaked in the summer of 2004, and who responded by coauthoring a short statement of the core principles that we believe should guide OLC's formulation of legal advice. Our statement of ten principles, issued in December 2004 and entitled *Principles to Guide the Office of Legal Counsel* ("the Guidelines") describes how OLC should function, with an eye toward avoiding a recurrence of what to us was a dramatic and dangerous deviation from the office's longstanding, best traditions. The Guidelines draw upon "the longstanding practices of the Attorney General and the Office of Legal Counsel, across time and administrations."[9] I have appended that document, with its list of authors, to the end of this testimony for the record.

Among the ten principles is a call for OLC to "publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure." The Guidelines describe several values served by a presumption of public disclosure, beyond the general public accountability that accompanies openness in government. The

7. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002).
8. Jack Goldsmith, THE TERROR PRESIDENCY 10 (2007).
9. All quotations from the Guidelines are taken from the document appended to the end of this testimony.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00130 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.085

likelihood of public disclosure will encourage both the reality and the appearance of governmental adherence to the rule of law, including by deterring "excessive claims of executive authority." In significant part because of inappropriate secrecy, the current Administration has dangerously compromised the work of OLC. Particularly on important counterterrorism matters, OLC has failed to satisfy the Guidelines' first and most fundamental principle:

> OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action.

In short, OLC must be prepared to say no to the President. For OLC instead to distort its legal analysis to support preferred policy outcomes undermines the rule of law and our democratic system of government.

Perhaps most essential to avoiding a culture in which OLC becomes merely an advocate of the Administration's policy preferences is transparency in the specific legal interpretations that inform executive action, as well as in the general governing processes and standards followed in formulating that legal advice. The Guidelines note additional values, including that transparency "promotes confidence in the lawfulness of governmental action" and "adds an important voice to the development of constitutional meaning" which is particularly of value "on legal issues regarding which the executive branch possesses relevant expertise."

OLC at times undoubtedly possesses strong, even compelling, reasons for keeping some advice confidential, as the Guidelines acknowledge. The classic example is to protect national security interests, such as where the release of an OLC opinion might reveal the identity of a covert agent. Less obvious perhaps, OLC also often has a strong interest in not releasing opinions in which it advises the administration that a contemplated action would be unlawful and the administration accepts the advice and does not take the action. "For OLC routinely to release the details of all contemplated action of dubious legality might deter executive branch actors from seeking OLC advice at sufficiently early stages in policy formulation." Policymakers should not have to fear public disclosure of their hastily conceived ideas for potentially unlawful action—that is, and this is critical, so long as they abide by OLC's advice. The public interest is served when government officials run proposals by OLC, and publication policy must not unduly deter the seeking of legal advice. Thus, the Guidelines state, "[o]rdinarily, OLC should honor a requestor's desire to keep confidential any OLC advice that the proposed executive action would be unlawful, where the requestor then does not take the action."

A hypothetical helps illustrate: Imagine that in the immediate wake of the Oklahoma City bombing, the counsel to the President had asked OLC to consider several necessarily rough and hurriedly prepared proposals, among them whether the government could torture and unilaterally wiretap the leaders of right-wing militias suspected of

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00131 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.086

planning future attacks, notwithstanding federal statutes apparently to the contrary. If OLC advised that the proposed actions would be unlawful and the White House then decided not to pursue the policies, there would be relatively little need to disclose the request or the response and good reason to keep them confidential. If, however, OLC interpreted the relevant law to allow the torture and warrantless wiretapping, the public ordinarily would have a strong interest in seeing those opinions in an appropriate, timely manner.

The need for public disclosure is particularly strong whenever the executive branch does not fully comply with a federal statutory requirement. The Guidelines do not take a position on the circumstances under which it may be legitimate for a President not to enforce a statutory provision he concludes is unconstitutional—a complex and difficult question. The Guidelines do note its "rare" occurrence and call at a "bare minimum" for full public disclosure and explanation: "Absent the most compelling need for secrecy, any time the executive branch disregards a federal statutory requirement on constitutional grounds, it should publicly release a clear statement explaining its deviation." The supporting legal analysis "should fully address applicable Supreme Court precedent." Indeed, Congress has required the Attorney General to notify Congress if the Department of Justice determines either that it will not enforce a statutory provision on the grounds the provision is unconstitutional or that it will not defend a statute against constitutional challenge.

The Bush Administration has not complied with this public notice standard and has operated in extraordinary secrecy, generally and with regard to its interrogation policy. Again, the Administration kept secret OLC's determination that the President had the constitutional authority to violate a federal statutory ban on torture, in an opinion that did not evaluate Congress's competing constitutional authorities or the most relevant Supreme Court precedent. The public learned of this determination only through a leak almost two years after OLC issued its written opinion and after the Administration began engaging in unlawful interrogations.

Rather than acknowledge it is asserting the authority to act contrary to a federal statute, the Bush Administration often claims it is simply "interpreting" the statutory provision—sometimes inconsistent with the best reading of the text and legislative intent—to avoid a conflict with the Administration's expansive view of the President's powers. The Administration cites for support to the judicial canon of constitutional avoidance.[10] Given the Bush Administration's propensity to claim that it is simply engaging in statutory interpretation when it in effect is claiming the authority to disregard a statute, Congress should amend the current notification requirement to extend beyond cases in which the executive branch acknowledges it is refusing to comply with a statute. Presidents should explain publicly not only when they determine a statute is

10. In its classic statement of the avoidance canon, the Supreme Court wrote, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to the intent of Congress." Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00132 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.087

unconstitutional and need not be enforced, but also whenever they purport to rely upon the constitutional avoidance canon to interpret a statute.

Professors Trevor Morrison and H. Jefferson Powell in separate articles recently have explored the extent to which it even is appropriate for the executive branch to rely upon the avoidance canon in determining how to enforce a statute.[11] When invoked by the courts, the avoidance canon is a doctrine of judicial restraint, one that minimizes judicial invalidation of statutes. When invoked by the President to interpret at statute to avoid a conflict with his view of his own powers, it brings substantial risks of abuse to expand presidential power. As Professor Morrison has recently explained, the most persuasive justification for allowing the executive branch even to use the avoidance canon, notwithstanding the substantial risks of abuse, is to promote constitutional enforcement by requiring Congress to be clear about its intent when it comes close to a constitutional line. Executive use of the avoidance canon, like judicial use, protects constitutional norms by encouraging Congress to deliberate before coming close to violating them. This justification, which has the effect of forcing Congress to reconsider legislation, depends entirely on the executive branch disclosing its concerns to Congress.

The Bush Administration, however, repeatedly has relied upon the avoidance doctrine in secret, depriving Congress of any opportunity to respond with clarifying legislation. Congress cannot effectively legislate unless it knows how the executive branch is implementing existing laws. Moreover, if the President refuses even to notify Congress when he refuses to comply with a statutory requirement, Congress—and the public—has little ability to monitor the executive branch's legal compliance and significant reason for suspicion. The public notification regarding either nonenforcement or the use of the avoidance canon should contain sufficient detail and analysis genuinely to inform the public of the legal reasoning behind the administration's legal conclusions, as well as of its potential future action.

Our system does not work when the executive branch secretly determines not to follow enacted statutes—or interprets them away under extreme constitutional theories. This is not to deny the executive branch its constitutional authority. It is to assure that in our constitutional democracy, where the rule of law is paramount, all branches of government and the American people know what the law is.

---

11. *See* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006); Trevor W. Morrison, *Executive Branch Avoidance and the Need for Congressional Notification*, SIDEBAR: ONLINE PUBL. COLUM. L. REV., http://clrsidebar.org/essays/executive-branch-avoidance (last visited April 28, 2008); H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313 (2006).

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00133 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.088

Principles to Guide the Office of Legal Counsel
December 21, 2004

The Office of Legal Counsel (OLC) is the Department of Justice component to which the Attorney General has delegated the function of providing legal advice to guide the actions of the President and the agencies of the executive branch. OLC's legal determinations are considered binding on the executive branch, subject to the supervision of the Attorney General and the ultimate authority of the President. From the outset of our constitutional system, Presidents have recognized that compliance with their constitutional obligation to act lawfully requires a reliable source of legal advice. In 1793, Secretary of State Thomas Jefferson, writing on behalf of President Washington, requested the Supreme Court's advice regarding the United States' treaty obligations with regard to the war between Great Britain and France. The Supreme Court declined the request, in important measure on the grounds that the Constitution vests responsibility for such legal determinations within the executive branch itself: "[T]he three departments of government ... being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions seems to have been purposely as well as expressly united to the executive departments." Letter from John Jay to George Washington, August 8, 1793, *quoted in* 4 The Founders' Constitution 258 (Philip B. Kurland & Ralph Lerner, eds. 1987).

From the Washington Administration through the present, Attorneys General, and in recent decades the Office of Legal Counsel, have served as the source of legal determinations regarding the executive's legal obligations and authorities. The resulting body of law, much of which is published in volumes entitled Opinions of the Attorney General and Opinions of the Office of Legal Counsel, offers powerful testimony to the importance of the rule-of-law values that President Washington sought to secure and to the Department of Justice's profound tradition of respect for the rule of law. Administrations of both political parties have maintained this tradition, which reflects a dedication to the rule of law that is as significant and as important to the country as that shown by our courts. As a practical matter, the responsibility for preserving this tradition cannot rest with OLC alone. It is incumbent upon the Attorney General and the President to ensure that OLC's advice is sought on important and close legal questions and that the advice given reflects the best executive branch traditions. The principles set forth in this document are based in large part on the longstanding practices of the Attorney General and the Office of Legal Counsel, across time and administrations.

1. When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00134 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.089

OLC's core function is to help the President fulfill his constitutional duty to uphold the Constitution and "take care that the laws be faithfully executed" in all of the varied work of the executive branch. OLC provides the legal expertise necessary to ensure the lawfulness of presidential and executive branch action, including contemplated action that raises close and difficult questions of law. To fulfill this function appropriately, OLC must provide advice based on its best understanding of what the law requires. OLC should not simply provide an advocate's best defense of contemplated action that OLC actually believes is best viewed as unlawful. To do so would deprive the President and other executive branch decisionmakers of critical information and, worse, mislead them regarding the legality of contemplated action. OLC's tradition of principled legal analysis and adherence to the rule of law thus is constitutionally grounded and also best serves the interests of both the public and the presidency, even though OLC at times will determine that the law precludes an action that a President strongly desires to take.

2. *OLC's advice should be thorough and forthright, and it should reflect all legal constraints, including the constitutional authorities of the coordinate branches of the federal government–the courts and Congress–and constitutional limits on the exercise of governmental power.*

The President is constitutionally obligated to "preserve, protect and defend" the Constitution in its entirety–not only executive power, but also judicial and congressional power and constitutional limits on governmental power–and to enforce federal statutes enacted in accordance with the Constitution. OLC's advice should reflect all relevant legal constraints. In addition, regardless of OLC's ultimate legal conclusions concerning whether proposed executive branch action lawfully may proceed, OLC's analysis should disclose, and candidly and fairly address, the relevant range of legal sources and substantial arguments on all sides of the question.

3. *OLC's obligation to counsel compliance with the law, and the insufficiency of the advocacy model, pertain with special force in circumstances where OLC's advice is unlikely to be subject to review by the courts.*

In formulating its best view of what the law requires, OLC always should be mindful that the President's legal obligations are not limited to those that are judicially enforceable. In some circumstances, OLC's advice will guide executive branch action that the courts are unlikely to review (for example, action unlikely to result in a justiciable case or controversy) or that the courts likely will review only under a standard of extreme deference (for example, some questions regarding war powers and national security). OLC's advice should reflect its best view of all applicable legal constraints, and not only legal constraints likely to lead to judicial invalidation of executive branch action. An OLC approach that instead would equate "lawful" with "likely to escape judicial condemnation" would ill serve the President's constitutional duty by failing to

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00135 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.090

describe all legal constraints and by appearing to condone unlawful action as long as the President could, in a sense, get away with it. Indeed, the absence of a litigation threat signals special need for vigilance: In circumstances in which judicial oversight of executive branch action is unlikely, the President–and by extension OLC–has a special obligation to ensure compliance with the law, including respect for the rights of affected individuals and the constitutional allocation of powers.

4. OLC's legal analyses, and its processes for reaching legal determinations, should not simply mirror those of the federal courts, but also should reflect the institutional traditions and competencies of the executive branch as well as the views of the President who currently holds office.

As discussed under principle 3, jurisdictional and prudential limitations do not constrain OLC as they do courts, and thus in some instances OLC appropriately identifies legal limits on executive branch action that a court would not require. Beyond this, OLC's work should reflect the fact that OLC is located in the executive branch and serves both the institution of the presidency and a particular incumbent, democratically elected President in whom the Constitution vests the executive power. What follows from this is addressed as well under principle 5. The most substantial effects include the following: OLC typically adheres to judicial precedent, but that precedent sometimes leaves room for executive interpretive influences, because doctrine at times genuinely is open to more than one interpretation and at times contemplates an executive branch interpretive role. Similarly, OLC routinely, and appropriately, considers sources and understandings of law and fact that the courts often ignore, such as previous Attorney General and OLC opinions that themselves reflect the traditions, knowledge and expertise of the executive branch. Finally, OLC differs from a court in that its responsibilities include facilitating the work of the executive branch and the objectives of the President, consistent with the requirements of the law. OLC therefore, where possible and appropriate, should recommend lawful alternatives to legally impermissible executive branch proposals. Notwithstanding these and other significant differences between the work of OLC and the courts, OLC's legal analyses always should be principled, thorough, forthright, and not merely instrumental to the President's policy preferences.

5. OLC advice should reflect due respect for the constitutional views of the courts and Congress (as well as the President). On the very rare occasion when the executive branch—usually on the advice of OLC—declines fully to follow a federal statutory requirement, it typically should publicly disclose its justification.

OLC's tradition of general adherence to judicial (especially Supreme Court) precedent and federal statutes reflects appropriate executive branch respect for the coordinate branches of the federal government. On very rare occasion, however, Presidents, often with the advice of OLC, appropriately act on their own understanding of constitutional meaning (just as Congress at times enacts laws based on its own constitutional views). To begin with relatively uncontroversial examples, Presidents at

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00136 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.091

times veto bills they believe are unconstitutional and pardon individuals for violating what Presidents believe are unconstitutional statutes, even when the Court would uphold the statute or the conviction against constitutional challenge. Far more controversial are rare cases in which Presidents decide to refuse to enforce or otherwise comply with laws they deem unconstitutional, either on their face or in some applications. The precise contours of presidential power in such contexts are the subject of some debate and beyond the scope of this document. The need for transparency regarding interbranch disagreements, however, should be beyond dispute. At a bare minimum, OLC advice should fully address applicable Supreme Court precedent, and, absent the most compelling need for secrecy, any time the executive branch disregards a federal statutory requirement on constitutional grounds, it should publicly release a clear statement explaining its deviation. Absent transparency and clarity, client agencies might experience difficulty understanding and applying such legal advice, and the public and Congress would be unable adequately to assess the lawfulness of executive branch action. Indeed, federal law currently requires the Attorney General to notify Congress if the Department of Justice determines either that it will not enforce a provision of law on the grounds that it is unconstitutional or that it will not defend a provision of law against constitutional challenge.

6. OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.

OLC should follow a presumption in favor of timely publication of its written legal opinions. Such disclosure helps to ensure executive branch adherence to the rule of law and guard against excessive claims of executive authority. Transparency also promotes confidence in the lawfulness of governmental action. Making executive branch law available to the public also adds an important voice to the development of constitutional meaning–in the courts as well as among academics, other commentators, and the public more generally–and a particularly valuable perspective on legal issues regarding which the executive branch possesses relevant expertise. There nonetheless will exist some legal advice that properly should remain confidential, most notably, some advice regarding classified and some other national security matters. OLC should consider the views regarding disclosure of the client agency that requested the advice. Ordinarily, OLC should honor a requestor's desire to keep confidential any OLC advice that the proposed executive action would be unlawful, where the requestor then does not take the action. For OLC routinely to release the details of all contemplated action of dubious legality might deter executive branch actors from seeking OLC advice at sufficiently early stages in policy formation. In all events, OLC should in each administration consider the circumstances in which advice should be kept confidential, with a presumption in favor of publication, and publication policy and practice should not vary substantially from administration to administration. The values of transparency and accountability remain constant, as do any existing legitimate rationales for secret executive branch law. Finally, as discussed in principle 5, Presidents, and by extension OLC, bear a special responsibility to disclose publicly and explain any actions that conflict with federal statutory requirements.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00137 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.092

7. OLC should maintain internal systems and practices to help ensure that OLC's legal advice is of the highest possible quality and represents the best possible view of the law.

OLC systems and processes can help maintain high legal standards, avoid errors, and safeguard against tendencies toward potentially excessive claims of executive authority. At the outset, OLC should be careful about the form of requests for advice. Whenever possible, agency requests should be in writing, should include the requesting agency's own best legal views as well as any relevant materials and information, and should be as specific as circumstances allow. Where OLC determines that advice of a more generally applicable nature would be helpful and appropriate, it should take special care to consider the implications for its advice in all foreseeable potential applications. Also, OLC typically should provide legal advice in advance of executive branch action, and not regarding executive branch action that already has occurred; legal "advice" after the fact is subject to strong pressures to follow an advocacy model, which is an appropriate activity for some components of the Department of Justice but not usually for OLC (though this tension may be unavoidable in some cases involving continuing or potentially recurring executive branch action). OLC should recruit and retain attorneys of the highest integrity and abilities. OLC should afford due respect for the precedential value of OLC opinions from administrations of both parties; although OLC's current best view of the law sometimes will require repudiation of OLC precedent, OLC should never disregard precedent without careful consideration and detailed explanation. Ordinarily OLC legal advice should be subject to multiple layers of scrutiny and approval; one such mechanism used effectively at times is a "two deputy rule" that requires at least two supervising deputies to review and clear all OLC advice. Finally, OLC can help promote public confidence and understanding by publicly announcing its general operating policies and procedures.

8. Whenever time and circumstances permit, OLC should seek the views of all affected agencies and components of the Department of Justice before rendering final advice.

The involvement of affected entities serves as an additional check against erroneous reasoning by ensuring that all views and relevant information are considered. Administrative coordination allows OLC to avail itself of the substantive expertise of the various components of the executive branch and to avoid overlooking potentially important consequences before rendering advice. It helps to ensure that legal pronouncements will have no broader effect than necessary to resolve the question at hand. Finally, it allows OLC to respond to all serious arguments and thus avoid the need for reconsideration.

9. *OLC should strive to maintain good working relationships with its client agencies, and especially the White House Counsel's Office, to help ensure that OLC is consulted,*

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00138 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.093

before the fact, regarding any and all substantial executive branch action of questionable legality.

Although OLC's legal determinations should not seek simply to legitimate the policy preferences of the administration of which it is a part, OLC must take account of the administration's goals and assist their accomplishment within the law. To operate effectively, OLC must be attentive to the need for prompt, responsive legal advice that is not unnecessarily obstructionist. Thus, when OLC concludes that an administration proposal is impermissible, it is appropriate for OLC to go on to suggest modifications that would cure the defect, and OLC should stand ready to work with the administration to craft lawful alternatives. Executive branch officials nonetheless may be tempted to avoid bringing to OLC's attention strongly desired policies of questionable legality. Structures, routines and expectations should ensure that OLC is consulted on all major executive branch initiatives and activities that raise significant legal questions. Public attention to when and how OLC generally functions within a particular administration also can help ensure appropriate OLC involvement.

10. OLC should be clear whenever it intends its advice to fall outside of OLC's typical role as the source of legal determinations that are binding within the executive branch.

OLC sometimes provides legal advice that is not intended to inform the formulation of executive branch policy or action, and in some such circumstances an advocacy model may be appropriate. One common example: OLC sometimes assists the Solicitor General and the litigating components of the Department of Justice in developing arguments for presentation to a court, including in the defense of congressional statutes. The Department of Justice typically follows a practice of defending an act of Congress against constitutional challenge as long as a reasonable argument can be made in its defense (even if that argument is not the best view of the law). In this context, OLC appropriately may employ advocacy-based modes of analysis. OLC should ensure, however, that all involved understand whenever OLC is acting outside of its typical stance, and that its views in such cases should not be taken as authoritative, binding advice as to the executive branch's legal obligations. Client agencies expect OLC to provide its best view of applicable legal constraints and if OLC acts otherwise without adequate warning, it risks prompting unlawful executive branch action.

The following former Office of Legal Counsel attorneys prepared and endorse this document:

Walter E. Dellinger, Assistant Attorney General 1993-96
Dawn Johnsen, Acting Assistant Attorney General 1997-98; Deputy AAG 1993-97
Randolph Moss, Assistant Attorney General 2000-01, Acting 1998-2000; Deputy AAG 1996-98
Christopher Schroeder, Acting Assistant Attorney General 1997; Deputy AAG 1994-96
Joseph R. Guerra, Deputy Assistant Attorney General 1999-2001

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00139 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.094

Beth Nolan, Deputy Assistant Attorney General 1996-99; Attorney Advisor 1981-85
Todd Peterson, Deputy Assistant Attorney General 1997-99; Attorney Advisor 1982-85
Cornelia T.L. Pillard, Deputy Assistant Attorney General 1998-2000
H. Jefferson Powell, Deputy Assistant Attorney General and Consultant 1993-2000
Teresa Wynn Roseborough, Deputy Assistant Attorney General 1994-1996
Richard Shiffrin, Deputy Assistant Attorney General, 1993-97
William Michael Treanor, Deputy Assistant Attorney General 1998-2001
David Barron, Attorney Advisor 1996-99
Stuart Benjamin, Attorney Advisor 1992-1995
Lisa Brown, Attorney Advisor 1996-97
Pamela Harris, Attorney Advisor 1993-96
Neil Kinkopf, Attorney Advisor 1993-97
Martin Lederman, Attorney Advisor 1994-2002
Michael Small, Attorney Advisor 1993-96

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00140 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.096

April 30, 2008

Heidi Kitrosser,
Associate Professor, University of Minnesota Law School

Testimony of Heidi Kitrosser, Associate Professor, University of Minnesota Law School

Before the United States Senate Committee on the Judiciary, Subcommittee on the Constitution

Hearing on "Secret Law and the Threat to Democratic and Accountable Government"

INTRODUCTION AND SUMMARY

Thank you for inviting me to testify on secret law and the threat that it poses to democratic and accountable government. My testimony will consider the light that constitutional law sheds on the topic. I teach constitutional law at the University of Minnesota Law School and I have written extensively on the constitutional separation of powers, government secrecy, and free speech.

I wish to make two main points today. First, the text, structure, and history of the Constitution reflect a brilliant design that reconciles the dangers of government secrecy with the occasional need for secrecy. Under the Constitution, policy decisions presumptively are transparent in nature, but the executive branch retains some limited leeway to implement those transparent policies in secret. Furthermore, the Constitution gives us structural mechanisms – such as Congress' oversight capacity – to check even secret implementation of transparent policies to ensure that it does not cloak circumvention of the law. Second, over the past several years, we have seen a disturbing trend whereby the executive branch has taken its structural capacities to secretly *implement* law and abused them to secretly *make* new law and to *circumvent* established law. The damage of this trend is exacerbated by the fact that the executive branch has circumvented not only substantive law but also procedural law, such as statutory mandates to share information with Congress.

On the first point, of constitutional design, we see a careful balance between secrecy's virtues and its risks in the Constitution's text and structure. Specifically, we see a negative correlation in the Constitution between the relative openness of each political branch and the relative control that each branch has over the other. Congress is relatively transparent and dialogue-driven. The executive branch, in contrast, is structurally capable of much secrecy, but it also is largely beholden to legislative directives. Thus, the

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00141 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.096

executive branch can be given much leeway to operate in secret, but remains subject to being overseen or otherwise restrained in its secrecy by the legislature. Looking to history, we see an understanding by the founders that such a balance would indeed be struck. Among the President's claimed virtues was a structural capacity for secrecy. Yet it was equally crucial to the founders that the President would be constrained through legislation, oversight, and other means. As Alexander Hamilton put it, one person "will be more narrowly watched and most readily suspected." In short, then, the Constitution reconciles competing needs for openness and secrecy by giving us an executive branch that has the structural capacity to keep secrets, but that must operate within policy parameters that are themselves transparent and subject to revision.

On the second point, as to recent events, we increasingly see a dangerous breakdown in this constitutional structure. For example, we now know that for years the administration relied on a series of secret executive orders and secret legal opinions – many of which to this day remain classified – in order to run secret surveillance and interrogation programs. These programs not only operated under a regime of secret law, but they secretly circumvented statutory mandates. Their existence was made possible in part by the additional circumvention of statutory disclosure mandates. For example, as is now well known, the administration did not comply with its statutory obligation to inform the full congressional intelligence committees of its secret surveillance program.

These events turn the constitutional structure upside down, seizing for the executive branch the power not only to legislate, but to create secret, alternate legislative regimes. The only thing that could make matters worse would be for such events to become normalized in the eyes of Americans. Given the length of time in which these events have been unfolding and given the administration's continuing lack of cooperation with congressional and public information requests, I fear that we have already started down this road. I urge Congress to use its substantial constitutional powers of legislation and oversight to make clear to the executive branch and to all Americans that secret law has no place in our constitutional system.

I. The Constitutional Design: Policy Transparency and Limited Leeway for Secret Implementation[1]

A. Overview of the Constitutional Design

The Constitution's founders recognized their crucial task to "combin[e] the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form."[2] One of the most important ways in which they met this challenge was

[1]Much of this discussion is drawn, and in some cases quoted directly (including internal citations), from three articles: Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels,* 29 CARDOZO L. REV. 1049 (2008); Heidi Kitrosser, *Macro-Transparency as Structural Directive: A Look at the NSA Surveillance Controversy,* 91 MINN. L. REV. 1163 (2007); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited,* 92 IOWA L.REV. 489 (2007).
[2] The Federalist No. 37, at 194 (James Madison) (Clinton Rossiter ed., 1961).

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00142 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.097

by granting policy-making powers to the relatively open, transparent, and dialogue-driven legislature while leaving policy implementation predominantly to an executive branch with substantial capacities for secret, energetic, and efficient operation. The founders thus designed a Constitution under which laws and law-making presumptively are transparent and subject to political checking and revision. The laws themselves, however, can provide some room for secret implementation.

Of course, the line between law-making and law-implementation often is a fine one. As the Supreme Court observed in Mistretta v. U.S.,[3] "Congress simply cannot do its job absent an ability to delegate power under broad general directives."[4] Law implementation thus can entail the crafting of sub-policies, or "quasi-legislating."[5] But important protections remain to ensure that executive branch policy-making does not give way to a regime of secret law. First, the executive branch remains subject to statutes and thus cannot craft policies which circumvent (let alone secretly circumvent) those statutes. In this sense, the executive branch is obliged to act under a transparent statutory framework, however broad that framework might be. Second, Congress – both through legislation and through its constitutional power to create its internal rules[6] -- may craft policies for conducting oversight to ensure that the executive branch does not secretly circumvent statutory law or otherwise abuse its implementation powers. Third, Congress can craft legislation requiring openness in executive branch policy-making. Congress did just this, for example, in creating the Administrative Procedure Act ("APA"). It created the APA partly to ensure that the administrative state not become a parallel, secret law-making regime.[7] Fourth, the judiciary retains the power to reign in executive branch activity that crosses the line from statutory implementation to unconstrained law-making. It famously did just this in the seminal case of Youngstown Sheet & Tube Co. v. Sawyer.[8] It also did this when it invalidated two delegations of power to the administrative state before the latter was constrained statutorily through the APA.[9]

B. Constitutional Text, Structure, and History

That the Constitution creates a structure in which policy-making presumptively must be open and subject to political checks is exemplified by several aspects of constitutional text, structure, and history.

---

[3] 488 U.S. 361 (1989).
[4] *Id.* at 372.
[5] "Quasi-legislation" is a term often used in administrative law to describe agency crafting of rules under broad statutory directives. It is perhaps in administrative law, particularly in discussions of the non-delegation doctrine, that the line between policy-making and policy-implementation has been most thoroughly considered.
[6] U.S. Const., art. I, §5, cl. 2.
[7] *See, e.g.*, Erik Luna, *Transparent Policing*, 85 IOWA L.REV. 1107, 1165 (2000); William Mock, *On the Centrality of Information Law: A Rational Choice Discussion of Information Law and Transparency*, 17 JOHN MARSHALL J. OF INFO. & COMPUTER L., 1069, 1098 (1999).
[8] 343 U.S. 579 (1952).
[9] Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935)). *See also, e.g.*, Cass Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 446-48 (1987).

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00143 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.098

First, there is a negative correlation between the relative openness of each political branch and the relative control that each branch has over the other. Congress is a relatively transparent and dialogue-driven branch,[10] and its core tasks are to pass laws that the executive branch executes and to oversee such execution.[11] The executive branch, in contrast, is capable of much secrecy,[12] but also is largely beholden to legislative directives in order to act.[13] This creates a rather brilliant structure in which the executive branch can be given leeway to operate in secret, but remains subject to being overseen or otherwise restrained in its secrecy by the legislature.

Second, historical references to secrecy as an advantage of a single President (as opposed to an executive council) – particularly two widely cited Federalist papers[14] -- also cite accountability and the ability of other branches and the people to uncover wrongdoing as a major advantage of a single President. For instance, Alexander Hamilton famously stated that a single President is desirable because "[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number."[15] Yet Hamilton, in the same Federalist Paper in which he made this statement, followed the statement with an approving explanation of the responsibility and potential transparency of a single President. Hamilton argued that "multiplication of the executive adds to the difficulty of detection," including the "opportunity of discovering [misconduct] with facility and clearness." One person "will be more narrowly watched and most readily suspected."[16] Similar observations were made at the Philadelphia convention in which the Constitution was written[17] and throughout the constitutional ratification period.[18] For example, William Davie explained in the North Carolina ratification debate:

> With respect to the unity of the Executive, the superior energy and secrecy wherewith one person can act, was one of the principles on which the Convention went. But a more predominant principle was, the more obvious responsibility of one person. It was observed that, if there were a plurality of persons, and a crime should be committed, when their conduct was to be examined, it would be impossible to fix the fact on any one of them, but that the public were never at a loss when there was but one

---

[10] *See, e.g.*, U.S. Const., art. I, §5, cl. 2 (requiring Congress to keep and to publish journals of its proceedings); U.S. Const., Art. I, § 7 (laying out relatively open and dialogic process of legislating, including requirements that legislation be approved by both branches, that any presidential objections be communicated to Congress and considered by them, and that "the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively").

[11] *Compare, e.g.*, U.S. Const., art. I, § 8 to U.S. Const., art. II, § 2.

[12] *See, e.g.*, The Federalist No. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); The Federalist No. 64, at 392-93 (John Jay) (Clinton Rossiter ed., 1961)).

[13] *See, e.g.*, Saikrishna Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1154-69 (1999).

[14] *See supra* n. 12.

[15] *See* Hamilton, *supra* n. 12, at 424.

[16] *Id.* at 427-30.

[17] 1 The Records of the Federal Convention of 1787, at 74, 254 (Max Farrand, ed., Yale Univ. Press 1966).

[18] *See, e.g.*, Daniel N. Hoffman, Governmental Secrecy and the Founding Fathers 29-32 (1981).

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00144 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.099

man.[19]

The historical evidence thus reflects a balanced constitutional design whereby executive secrecy is expected but remains tethered to political accountability.

Third, the only explicit textual reference to secrecy occurs in Article I, § 5, of the Constitution, which requires Congress to keep journals of its proceedings, but allows each chamber to exempt "such Parts as may in their Judgment require Secrecy."[20] That fact by itself does not tell us very much, as one could argue that a secret-keeping prerogative is intrinsic in the President's executive and commander-in-chief duties. What it does reflect, however, is a constitutional structure that permits secrecy only under conditions that will ensure some political awareness of and ability to check such secrecy. The very framing of the congressional secrecy provision as an exception to an openness mandate, combined with a logical and historical expectation that a large and deliberative legislative body generally will operate in sunlight suggest a framework wherein final decisions as to political secrecy are trusted only to bodies likely to face internal and external pressures against such secrecy.

Finally, an executive branch that can keep secrets but that can be reigned in by Congress reflects the most logical reconciliation of competing constitutional values. On the one hand, the Constitution clearly values transparency as an operative norm. This is evidenced by myriad factors, including the necessities of self-government, the First Amendment, and Article I's detailed requirements for a relatively open and dialogic legislative process. On the other hand, the Constitution reflects an understanding that secrecy sometimes is a necessary evil, evidenced both by the congressional secrecy allowance and by the President's structural secrecy capabilities. Permitting executive branch secrecy, but requiring it to operate within policy parameters themselves open and subject to revision, largely reconcile these two values.

C. Justice Jackson's Three Zones of Presidential Power

The above analysis complements Justice Jackson's influential analysis from his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.[21] In *Youngstown*, Justice Jackson described three basic zones of presidential power.[22] Presidential power is "at its maximum" in zone one.[23] In this first zone, "the President acts pursuant to an express or implied authorization of Congress."[24] In zone two, presidential power is at an uncertain, intermediate level.[25] In this second zone, "the President acts in absence of either a congressional grant or denial of authority."[26] Here, the President:

---

[19] Id. at 30 (quoting 3 The Records of the Federal Convention, supra note 17, at 347).
[20] U.S. Const., art. I, § 5, cl. 3.
[21] 343 U.S. 579, 634 (1952) (Jackson, J., concurring).
[22] *Id.* at 635-38.
[23] *Id.* at 635.
[24] *Id.*
[25] *Id.* at 637
[26] *Id.*

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00145 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.100

> can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.[27]

In zone three the President's "power is at its lowest ebb."[28] In this third zone, he "takes measures incompatible with the express or implied will of Congress."[29] He thus "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[30]

The first zone is the simplest from the perspective of the constitutional presumption of transparent law and policy. The President's authority is at his highest in this zone because his actions are legitimized by statutory authority, which itself is legitimized partly by the relative transparency of the legislative process. Hence, even where secrecy characterizes aspects of the President's implementation, the policy framework under which he operates itself is transparent. The second zone raises the possibility of inherent presidential powers or presidential powers pursuant to very broad, ambiguous statutory authority, while the third zone raises the barely more than theoretical possibility of a situation in which the president alone, and not Congress, is empowered to act. Actions in the respective zones indeed have progressively less presumptive legitimacy. The absence of a relatively clear policy-making process means the absence of legislative transparency. And in the third zone, not only is such process absent but in its place is a known, established policy whose presence gives false assurance to the public and to other branches.

II. Swallowing the Transparency Rule: The Arrival of Secret Law[31]

Secret law poses a very real and present threat to our constitutional system. Some striking, non-exhaustive, examples include the following.

A. Secret Warrantless Electronic Surveillance Program

Shortly after September 11, 2001, the National Security Agency began secretly to employ warrantless electronic surveillance of some calls between the United States and foreign

---

[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] Some discussion in sections A & D, including some direct quotations (which incorporate their internal citations) is drawn from two articles: Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels,* 29 CARDOZO L. REV. 1049 (2008); Heidi Kitrosser, *Macro-Transparency as Structural Directive: A Look at the NSA Surveillance Controversy,* 91 MINN. L. REV. 1163 (2007).

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00146 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.101

nations.[32] According to a very recent report, then Attorney General John Ashcroft "signed off on the surveillance program [in October 2001] at the direction of the White House with little in the way of a formal legal review. . . . Mr. Ashcroft complained to associates at the time that the White House, in getting his signature for the surveillance program, 'just shoved it in front of me and told me to sign it.'"[33] According to the same report:

> [N]ervousness among Justice Department officials led the administration to secure a formal opinion from John Yoo, a deputy in the Office of Legal Counsel ["OLC"], declaring that the president's wartime powers allowed him to order the N.S.A. to intercept international communication of terror suspects without a standard court warrant.
>
> The opinion itself remains classified and has not been made public. It was apparently written in late 2001 or early 2002, but it was revised in 2004 by a new cast of senior lawyers at the Justice Department, who found the earlier opinion incomplete and somewhat shoddy, leaving out important case law on presidential powers. . . . Even after the final legal opinions were written, lawyers at the National Security Agency were not allowed to see them . . . .[34]

The program did not become public until 2005 when its existence was revealed in an article in the New York Times.[35]

As I and many others have discussed at length elsewhere, those parts of the program that now are publicly known appear to violate the requirements of the Foreign Intelligence Surveillance Act ("FISA").[36] Furthermore, the Administration appears to have violated its statutory requirement to keep the full intelligence committees of the House and Senate informed of the program.[37]

Because the arguments that the administration did not really violate FISA or its intelligence reporting requirements are extremely weak, the administration ultimately must rely on the notion that the President constitutionally was empowered secretly to

---

[32] James Risen & Eric Lichtblau, Bush Lets U.S. Spy on Callers Without Courts, N.Y. Times, Dec. 16, 2005, at A1; see also James Risen, State of War: The Secret History of the CIA and the Bush Administration 43-44 (2006); Eric Lichtblau & James Risen, Eavesdropping Effort Began Soon After Sept. 11 Attacks, N.Y. Times, Dec. 18, 2005, at A44; David E. Sanger, In Address, Bush Says He Ordered Domestic Spying, N.Y. Times, Dec. 18, 2005, at A1.

[33] Eric Lichtblau, Debate and Protest at Spy Program's Inception, N.Y. Times, March 30, 2008.

[34] *Id.* Reports also long have indicated that, in 2002, President Bush issued a secret executive order that authorized the program. *See* Risen & Lichtblau, *supra* note 32; Memorandum from Elizabeth B. Bazan & Jennifer K. Elsea, Legislative Attorneys, Am. Law Div (Jan. 5, 2006), available at http://www.fas.org/sgp/crs/intel/m010506.pdf.

[35] *See* Risen & Lichtblau, *supra* note 32.

[36] *See, e.g.*, Letter from Law Professors Curtis A. Bradley et al., to Members of Congress 3 – 7 (Jan. 9, 2006), http://www.fas.org/irp/agency/doj/fisa/doj-response.pdf [hereinafter Law Professors Letter]; John Cary Sims, *What NSA is Doing ... And Why It's Illegal*, 33 Hastings Const. L.Q. 105, 128-32 (2006).

[37] I explain this argument in detail in Kitrosser, *Congressional Oversight, supra* note 31, at 1053-64.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00147 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.102

circumvent FISA and also to circumvent his statutory reporting obligations.[38] With respect to its violation of FISA, the administration would have to demonstrate that somehow a *Youngstown* zone three action was justified. They would have to demonstrate, in other words, that somehow Congress constitutionally was disabled from acting while the President constitutionally was entitled to take exclusive action, and to do so in secret. The Administration has not come close to meeting, or even attempting to meet, this burden. Rather, they simply have asserted that it would have been dangerous to go through the constitutionally mandatory legislative process to amend FISA. In other words, the administration makes the remarkable assertion that the program's *very existence*, as opposed to its case-by-case implementation, would have been so damaging as to require that it remain hidden. The Administration's failure even to approach its heavy burden of justification is reflected in an attempt by former Attorney General Alberto Gonzales to articulate such an explanation before the Senate Judiciary Committee in 2006. Gonzales argued:

> I think, based on my experience, it is true. You would assume that the enemy is presuming that we are engaged in some kind of surveillance. But if they are not reminded about it all the time in the newspapers and in stories, they sometimes forget, and you're amazed at some of the communications that exist. And so, but when you keep sticking it . . . in their face that we are involved in some kind of surveillance, even if it is unclear in these stories, it can't help but make a difference, I think.[39]

On such speculation, then, rested the Administration's apparent belief that it was legally entitled to operate contrary to FISA, that it had the constitutional power to do so in secret for a period of many years, and that Congress had no constitutional role to play in the matter.

B. Secret Torture Program

Shortly after 9/11, the administration began secretly to alter longstanding statutory, treaty-based and regulatory limits on the methods that the CIA and the military could use to interrogate prisoners.[40] The changes apparently were justified through a series of memoranda issued by the OLC.[41] A few of these memoranda have been leaked or declassified and now are publicly known. Among the memoranda arguing that interrogation restrictions could be substantially loosened is a 2002 opinion written by John Yoo of OLC and signed by (now Judge) Jay Bybee and a 2003 opinion written and signed by John Yoo. The 2002 opinion was leaked to the press in 2004.[42] Jack

---

[38] *Id.* at 1052-58.
[39] Wartime Executive Power and National Security Agency's Surveillance Authority: Hearing Before Comm. on Judiciary, 109th Cong. 107 (2006), available at http://fas.org/irp/congress/2006-hr/nsasurv.pdf.
[40] For a list of some longstanding statutory and treaty-based limitations on torture, *see, e.g.,* Marty Lederman, *Now Why Didn't I Think of That? Washington Post Proposes That Senate Ban Torture!,* Balkinization website, November 2, 2007.
[41] *See, e.g.,* Jack Goldsmith, The Terror Presidency 141-76 (2007); Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations,* N.Y. Times, October 4, 2007.
[42] *See* Shane, Johnston & Risen, *supra* note 41; Goldsmith, *supra* note 41, at 157.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00148 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.103

Goldsmith, who as OLC head in 2004 withdrew the 2002 and 2003 opinions,[43] writes that the opinions evinced an "unusual lack of care and sobriety in their legal analysis,"[44] and that they "seemed more an exercise of sheer power than reasoned analysis."[45]

The 2003 opinion remained classified until roughly one month ago when it was released in unclassified form.[46] Yet while the 2002 and 2003 memoranda were withdrawn by OLC in 2004, "the White House never repudiated [them] and, as the New York Times reported last October, two more secret torture memos were issued in 2005 saying the CIA could continue to use torture."[47] Furthermore, court documents indicate that "*more than seven thousand pages* of documents still [are] hidden within the Executive branch dealing with the CIA's 'enhanced interrogation' practices and 'black sites' and renditions programs. (This does not even include the DOD materials.) The documents . . . include at least eight OLC final opinions and opinion letters in the period between September 2004 and February 2007 alone."[48] What is more, Attorney General Mukasey recently declined a request to reveal to the Senate Judiciary Committee, even in closed session, the current scope of and legal justifications for CIA interrogation techniques.[49]

Goldsmith is critical not only of the OLC opinions' substance, but of the intense secrecy in which they were written and followed. He deems such secrecy not only unnecessary, but counter-productive. He writes:

> On the theory that expert criticism improves the quality of opinions, OLC normally circulates its draft opinions to government agencies with relevant expertise. The State Department, for example, would normally be consulted on the questions of international law implicated by the interrogation opinions. But the August 2002 opinion, though it contained no classified information, was treated as an unusually 'close hold' within the administration. Before I arrived at OLC, Gonzales made it a practice to limit readership of controversial legal opinions to a very small group of lawyers. And so, under directions from the White House, OLC did not show the opinion to the State Department, which would have strenuously objected. This was ostensibly done to prevent leaks. But in this and other contexts, I eventually came to believe that it was done to control outcomes in the opinions and minimize resistance to them.

Martin Lederman, a professor at Georgetown Law School and a former OLC attorney is similarly critical of the torture program's secrecy. He emphasizes the absence of reasonable justification for keeping its parameters and underlying legal analysis secret. He explains:

---

[43] Goldsmith, *supra* note 41, at 142-43, 146, 153, 158.
[44] *Id.* at 148.
[45] *Id.* at 150
[46] *See, e.g.*, Marty Lederman, *[Post No. 1] The March 2003 Yoo Memo Emerges!*, Balkinization website, April 1, 2008.
[47] Editorial, *Agenda for the Next President: A New Torture Policy,* Sacramento Bee, Feb. 12, 2008.
[48] Marty Lederman, *The Torture Papers*, Balkinization website, April 24, 2008 (emphasis in original).
[49] Marty Lederman, *Disdain*, Balkinization website, January 30, 2008 (emphasis in original).

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00149 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.104

> The notion that discussing the techniques will tell the enemy what it should prepare for is a transparently flimsy excuse. . . . [N]one of the techniques in question here is unknown. They all have a very lengthy historical pedigree, and they have all been documented in excruciating detail. . . . .
>
> What is more, this is information that is *revealed to the enemy as soon as it is implemented.* Thus, it can't possibly be legitimately classified, because those upon whom we have inflicted these techniques know about them and can describe their treatment to anyone they wish. The premise behind the classification, therefore, must be **an assumption that none of these detainees will ever be permitted to speak to anyone in the outside world ever again** -- that without any process at all, they all have been *permanently* relegated to a black hole without any human contact. Otherwise, they are of course free to describe the techniques to their hearts' content. Classification simply makes no sense in this context, unless we've already decided that these detainees will never see another human face.[50]

What is more, the Administration, as in the case of electronic surveillance, bases an alternate, secret legal regime on these thin justifications. As with the case of electronic surveillance, such questionable reasoning hardly demonstrates that the Administration's secret legal regime is constitutionally legitimate, let alone that it constitutionally trumps the nation's public statutory and treaty obligations.

C. Secret Override of Public Executive Orders

After requesting and receiving its declassification from the White House, Senator Whitehouse recently revealed an OLC legal proposition to the effect that "An executive order cannot limit a President. There is no constitutional requirement for a President to issue a new executive order whenever he wishes to depart from the terms of a previous executive order. Rather than violate an executive order, the President has [, by departing from it] instead modified or waived it."[51] The potential practical implications of such a proposition are limited only by the number and nature of executive orders that exist. And by definition, the extent to which the implications are realized will remain largely unknown in light of the secrecy that the proposition embraces. Nonetheless, Senator Whitehouse notes one very immediate possible implication. He writes:

[50] Marty Lederman, *CIA Agent Reveals Highly Classified Interrogation Techniques, and, Inexplicably, the Sky Does Not Fall,* Balkinization website, December 11, 2007 (emphasis in original).

[51] Floor Speech of Senator Whitehouse, December 7, 2007. The legal proposition, along with two others that were declassified at Senator Whitehouse's request, were discovered by the Senator in his review of "highly classified secret [OLC] legal opinions" on surveillance. Senator Whitehouse gained limited access to the opinions as a member of the Senate Intelligence Committee.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00150 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.105

> Bear in mind that the so-called Protect America Act that was stampeded through this great body in August provides no – zero – statutory protections for Americans traveling abroad from government wiretapping. . . . The only restriction is an executive order called 12333, which limits executive branch surveillance to Americans who the Attorney General determines to be agents of a foreign power. That's what the executive order says. . . . . [In light of the OLC's proposition on executive orders, however,] unless Congress acts, here is what legally prevents this President from wiretapping Americans traveling abroad at will: Nothing.[52]

Professor Lederman addressed Senator Whitehouse's comments, noting:

> If the President publicly rescinded 12333, there would be a huge outcry. It would prompt Congress to act immediately.
>
> Which is presumably why he didn't do so in public. Whitehouse suggests that the President secretly transgressed 12333. If so -- if in fact the President chose to ignore 12333 without notifying the public or Congress, it's quite outrageous -- constitutional bad faith, really, to announce to the world that you are acting one way (in large part to deter the legislature from acting), while in fact doing exactly the opposite.[53]

D. Some Key Conflicts between These Events and Constitutional Design

Some of the examples discussed above reflect direct violations of the constitutional separation of powers. At minimum, they all reflect a clash with the principles and purposes underlying the same. What follows are some key aspects of these conflicts.

1. Youngstown Zone Three Action as Troubling New Norm

Among the striking aspects of the warrantless surveillance and torture programs are the weakness in each case of the administration's claim that it complies with existing statutes and thus its implicit (and to some degree explicit) reliance on the notion that the administration may secretly circumvent existing statutes. In short, the administration in both cases is in Justice Jackson's *Youngstown* zone three, whereby the President "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." As discussed earlier, *Youngstown* zone three actions carry a deep presumption of illegality for very good reason. Such actions bypass the transparent and dialogic protections of the legislative process. And because they conflict with existing statutes, they mislead the public, particularly when the circumventing actions occur in secret.

Despite its exceedingly weak statutory arguments, the administration in each case provided no basis to conclude that Congress constitutionally was disabled from acting

[52] Whitehouse Speech, *supra* note 51.
[53] Marty Lederman, *Misdirected Outrage,* Balkinization blog, December 8, 2007.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00151 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.106

and that the Administration thus had exclusive constitutional right to craft and follow its own laws and to do so in secret. Instead, the administration offered bald assertions about the danger of making public the very existence of our laws. As explained earlier, those assertions barely pass the "laugh test."[54]

2. The Intra-Executive-Branch Analogue of the Zone Three Problem

While it may not share the legal ramifications of the secret override of statutes, secret revision by the executive branch of its own publicly announced policies – such as its executive orders – violates core purposes of separated powers. As with *Youngstown* zone three actions, such secret policy changes implicitly assure the public that certain policies are in place when in fact they have been altered or withdrawn. The President thus retains the power of law-making while avoiding political accountability.

Congress can and should take legislative and/or oversight action to prevent such abuses by the executive branch. As detailed throughout this statement and at greater length elsewhere,[55] Congress has ample constitutional prerogative to set legislative parameters by which the President may act in secret and by which he must disclose information to Congress or to the public.

3. Disregard for Statutory Oversight Mandates and for Congressional Oversight Generally

Effective congressional oversight must take place if limits on secret law-making are to be more than theoretical. Such oversight is a means, for example, to determine if legislatively sanctioned secrecy has been harnessed to cloak unauthorized policy-making or policy-circumvention. Yet as the experience with the surveillance and torture programs demonstrate, the oversight system too often cracks under the weight of executive branch disregard and legislative acquiescence in the same. Such disregard and acquiescence is facilitated in part by the same arguments used to justify the circumvention of substantive statutory directives. That is, the executive branch often simply asserts that statutorily required disclosures or requested disclosures would prove too dangerous, and these assertions too often are met with acquiescence.

This breakdown in oversight, in which the executive branch effectively calls the shots, gets things exactly backwards from a constitutional perspective. As discussed throughout this statement and in the sources cited throughout, the executive branch constitutionally is constrained by Congress' policy directives regarding information-sharing. It is for Congress, through statutory terms and through its constitutional power to make rules for its proceedings, to set the policy framework under which information disclosure, including negotiations about the same, can take place. Current statutory and chamber rules indeed strike myriad balances and provide flexibility to accommodate secrecy and

[54] Indeed, the testimonial explanation of then Attorney General Gonzales as to the need to keep the warrantless surveillance program secret literally did not pass the laugh test. The transcript reflects audience laughter following his stated justification. Gonzales Testimony, *supra* note 39, at 107.
[55] *See* sources cited, *supra* note 1.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00152 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.107

other needs as they arise in hearings.[56] Openness can, of course, pose dangers. But so can secrecy, as recent events attest. The Constitution's founders struck a balance by leaving it to Congress to openly debate and establish policies, including rules on information disclosure. The executive is left to implement the rules, sometimes in secret, and sometimes through give-and-take with Congress as the rules provide.

4. The Troubling Ease With Which Secrecy "Needs" are Invoked Generally

In the *Youngstown* zone three contexts described above and more generally, the administration has repeatedly invoked claims of "national security necessity" to justify secret policy-making. Yet as already noted, these claims often are made cavalierly, rarely rising beyond mere assertion. Congress ought not to accede to such empty claims.

CONCLUSION

Congress should use its substantial legislative and oversight powers to make clear to the administration and to the American people that secret law has no place in the United States of America.

Thank you for soliciting my views on this important topic. Please do not hesitate to let me know if I can be of further assistance.

[56] *See, e.g.*, Kitrosser, *Congressional Oversight, supra* note 31, at 1073-75, 1080-83, 1084-86 (detailing such rules).

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00153 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.108

Statement Of Senator Patrick Leahy (D-Vt.),
Hearing On "Secret Law And The Threat
To Democratic And Accountable Government"
Before The Subcommittee On The Constitution
Senate Judiciary Committee
April 30, 2008

I thank Senator Feingold for holding this important hearing. To paraphrase James Madison, if men were angels we would need no laws. We are not angels, and our government needs laws to guide its actions. But laws that are created, defined, or interpreted in secret might as well not exist. Secret law is not a check on the government; when law is kept secret, the rule of law suffers.

This administration has, for years, set out to shield itself from constraint and accountability by employing unprecedented secrecy. Key members of this administration have long held the view that when it comes to national security the President should not be encumbered by laws, the Congress, or the courts. To accomplish this vision of executive power, the White House has insisted on limiting knowledge of important legal decisions and interpretations to a tiny, powerful group of like-minded lawyers. If you might disagree, you are not allowed in the discussion. Congress, at all costs, is to be denied input into or knowledge of these critical matters.

The role of the Justice Department's Office of Legal Counsel (OLC) has been a casualty of this drive for secrecy. The OLC is a small but very important office within the Justice Department. Some of the best legal minds in the country have been OLC lawyers. The job of the lawyers at OLC is to give principled, neutral assessments of the law to guide the Executive Branch. The OLC's opinions have traditionally carried great weight in the Executive Branch; in fact, they are considered binding

Because of their practical authority, it is critical that OLC opinions be as transparent as possible. The prospect of review and challenge by peers, Congress, and even the public ensures a stronger, more thoughtful opinion. If an OLC opinion interprets the law in a way that permits action that Congress believes is or should be illegal, Congress should know. Congress writes the laws. If the Executive is not "faithfully executing" the law but wrongly interpreting or implementing them, Congress needs to call the Executive to task through oversight or, in the extreme case, to amend the law to reiterate its intention and clarify the law's meaning. Obviously an opinion kept secret from Congress makes that impossible.

But in this administration the tool of secrecy has been used to pervert the role of OLC. The OLC's opinions in the critical area of counter-terrorism were written to support preordained results and to justify illegal conduct. They were not shared with anyone who might criticize their analysis. Opinions that interpreted our obligations under international treaties were not even shared with the State Department – which has obvious expertise on those legal issues and the consequences of adopting particular positions. Opinions on warrantless surveillance were kept from the NSA, which was charged with carrying them out, and for years even from the Deputy Attorney General.

44955.109

When a conservative lawyer, Jack Goldsmith, came in briefly to head OLC and reviewed some of these opinions, he found, as he has written in his book, they were "deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President." Opinions about the warrantless wiretapping program were "a legal mess" and opinions on torture "in effect gave interrogators a blank check." In addition, the opinions "lacked the tenor of detachment and caution that usually characterizes OLC work" and sounded instead "like a bad defense counsel's brief." Mr. Goldsmith rescinded and corrected some of these opinions, but he was in the job for less than a year.

The veil of secrecy continues at OLC. I have sought on literally dozens of occasions to review key OLC opinions on detainee treatment and the government's other actions in fighting terrorism. I have been stonewalled at every step. They have even refused my repeated requests even to provide an index of OLC opinions. Think about that – they do not even want the Senate Judiciary Committee to be aware of the subjects on which OLC has opined. That is how resistant this administration has been and remains to any review or accountability.

An OLC opinion has been described as akin to an "advance pardon" because of how difficult it would be to prosecute someone who relied on an OLC legal interpretation. That may explain why this administration has chosen to pervert the role of OLC. It seems part of a deliberate effort to create a form of self-serving immunization for its actions.

The perversion of OLC is only one aspect of this administration's problem with secret law. They have distorted claims of executive privilege beyond recognition in order to keep Congress in the dark and have overused claims of the state secrets privilege to avoid review by the courts. They have used presidential signing statements to obscure rather than clarify the law, as I have said to sign the law with one hand but to keep the other behind the President's back with his fingers crossed. They have manipulated the classification system, which is designed to protect national security, using it instead to shield their misdeeds and flawed legal analysis.

We see the disastrous effects of this secret law all around us today. We see it in a system of detention that, rather than being above reproach and an example to the world, has lost credibility with our allies and is a powerful rhetorical tool for our enemies. We see it in the terrible abuses at Abu Ghraib. It is now clear those abuses resulted directly from OLC's secretly procured and preordained legal interpretations. We see it in the distrust on the part of Americans about actions and pronouncements of its government.

I am grateful to the excellent witnesses at today's hearing. I am confident their testimony will help shed new light on this important issue. History will judge this era harshly for its distortion of the rule of law.

# # # # #

Formal Statement

J. William Leonard

Former Director, Information Security Oversight Office

before the Subcommittee on the Constitution

Committee on the Judiciary

U.S. Senate

"Secret Law and the Threat to Democratic and Accountable Government"

April 30, 2008

Good Morning, Mr. Chairman, Senator Brownback, and members of the subcommittee. Thank you for the opportunity to appear before you to discuss a critical but seldom reviewed topic dealing with the increasing conflation of secrecy and law in the Federal government.

Several months ago, I retired from the Federal service after a career of over 34 years. While I am neither a lawyer nor a constitutional scholar, I have been a public servant for my entire adult life, during which I have been thoroughly immersed in the world of government secrecy. The last position in which I served was as the Director of the Information Security Oversight Office, often called "ISOO." The President established this position, as well as the organization I directed, in section 5.2 of Executive Order 12958, as amended, "Classified National Security Information."

ISOO is within the National Archives and Records Administration. It receives policy guidance from the Assistant to the President for National Security Affairs. Under the Order and applicable Presidential guidance, ISOO has substantial responsibilities with respect to the classification, safeguarding, and declassification of information by agencies within the Executive branch. Included is the responsibility to develop and promulgate directives implementing the Executive Order on "Classified National Security Information." This is accomplished through ISOO Directive No. 1 (32 CFR Part 2001).

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00156 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.111

Before being appointed as the Director, ISOO, I spent almost 30 years in the Department of Defense (DoD) and served as the Deputy Assistant Secretary of Defense (Security & Information Operations) in both the Clinton and George W. Bush administrations. In that position, I was responsible for programmatic and technical issues relating to the DoD's information assurance, critical infrastructure protection, counterintelligence, security, and information operations programs.

This morning I would like to focus my attention on the recently "declassified" March 14, 2003, Department of Justice (DoJ) memorandum on interrogation of enemy combatants. At the risk of emphasizing form over substance, I plan to concentrate my observations on the classified status of this and similar legal products of the Executive branch that have the force of law yet are intended to remain unknown to the American public, and oftentimes to the Congress and the courts as well. I will leave it to others more competent than I to comment on the quality and reasonableness of the legal rationale for such products.

The March 14, 2003, memorandum on interrogation of enemy combatants was written by DoJ's Office of Legal Counsel (OLC) to the General Counsel of the DoD. By virtue of the memorandum's classification markings, the American people were initially denied access to it. Only after the document was declassified were my fellow citizens and I able to review it for the first time. Upon doing so, I was profoundly disappointed because this memorandum represents one of the worst abuses of the classification process that I had seen during my career, including the past five years when I had the authority to access more classified information than almost any other person in the Executive branch. The memorandum is purely a legal analysis – it is not operational in nature. Its author was quoted as describing it as "near boilerplate."[1] To learn that such a document was classified had the same effect on me as waking up one morning and learning that after all these years, there is a "secret" Article to the Constitution that the American people do not even know about.

[1] Dan Eggen and Josh White, "Memo: Law Didn't Apply to Interrogators," *Washington Post*, April 2, 2008, p. A1

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00157 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.112

Whoever affixed classification markings to this document had either profound ignorance of or deep contempt for the process set forth by the President in which he delegates to certain government officials his inherent constitutional authority to restrict the dissemination of specific information in the interest of national security. This process is set forth in the previously-referenced Executive Order 12958, as amended.

The classification of this memo is wrong on so many levels. For example, within the Federal government, while there are over 3 million people with a security clearance, only 4,000 of them have the authority to classify information in the first instance. These people must be authorized in writing by the President, agency heads, or other officials designated by the President. In this instance, the OLC memo did not contain the identity of the official who designated this information as classified in the first instance, even though this is a fundamental requirement of the President's classification system. In addition, the memo contained neither declassification instructions nor a concise reason for classification, likewise basic requirements. Equally disturbing, the official who designated this memo as classified did not fulfill the clear requirement to indicate which portions are classified and which portions are unclassified, leading the reader to question whether this official truly believes a discussion of patently unclassified issues such as the President's Commander-in-Chief authorities or a discussion of the applicability to enemy combatants of the Fifth or Eighth Amendment would cause identifiable harm to our national security. Furthermore, it is exceedingly irregular that this memorandum was declassified by DoD even though it was written, and presumably classified, by DoJ.

What is equally disturbing is that this memo was not some obscure, meaningless document written by a low-level bureaucrat who did not know any better and had inadequate supervision. Rather, the memo was written by the Deputy of the OLC, the very entity which has the responsibility to render interpretations of all Executive Orders, a responsibility that includes interpreting the governing order that distinguishes between the proper and improper classification of information. In addition, the memo was addressed to the most senior legal official within the DoD and was reportedly shared with some of the most senior officials in the Executive branch, including the then White House Counsel as well as the then Counsel to the Vice President. Like all people with a security clearance, per the President's direction in the

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00158 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.113

governing Executive Order, each of these government officials had the affirmative responsibility to challenge the inappropriate classification of information.[2] There is no evidence to suggest that any of them did so in this case – even though the memorandum failed on almost every level in fulfilling the President's direction concerning conditions under which information will be classified.

What is most disturbing is that at the exact same time these officials were writing, reviewing, and being briefed on the classified nature of this memorandum, they were also concurring with the President's reaffirmation of the standards for proper classification, which was formalized the week after the OLC memo was issued when the President signed his amended version of the Executive Order governing classification.[3]

Furthermore, while it is entirely appropriate that we consistently hold accountable, both criminally and administratively, people who are responsible for the unauthorized disclosure of classified national security information, the President's governing Executive Order makes it abundantly clear that people who "classify or continue the classification of information in violation of [the] order or any implementing directive ... shall be subject to sanctions ... [to] include reprimand, suspension without pay, removal, termination of classification authority, loss or denial of access to classified information, or other sanctions..."[4] There is no evidence to suggest that such sanctions have been imposed in this instance. Failure to apply sanctions makes it increasingly difficult to preserve the integrity and credibility of the classification system, a process that is an essential national security tool. Senior officials lead by example; as such, the threat to our national security that overclassification represents appears to be a bane that our nation – as well as the members of our military and intelligence services whose well-being depends upon the classification system's integrity – will be compelled to endure for the foreseeable future.

---

[2] E.O. 12958, as amended, Section 1.8(a).

[3] The OLC memo was signed on March 14, 2003. The President signed his amendment to E.O. 12958 on March 25, 2003, following coordination with OLC, DoD and the Office of the Vice President, as well as others.

[4] Section 5.5, ibid.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00159 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.114

While only the official who inappropriately assigned classification markings to the OLC memo can attest to the reasons for that decision, the effects of it are visible to all. In addition to keeping the information in the memo from the American people and the two co-equal branches of government, use of classification in this instance is a prime example of how classification is used, not for purposes of national security, but rather as a bureaucratic weapon to blunt potential opposition. Reportedly, top lawyers for the military services did not receive a final copy of the OLC memo,[5] in part because they opposed the harsh interrogation techniques endorsed in the memo, as well as the lack of transparency about how we handle enemy combatants. Our military lawyers fully recognize that our young men and women we send into battle as combatants are subject to capture and that we needlessly increase their exposure to potential abuse in this and future conflicts by ceding the moral high ground in the treatment of detainees. This is not to say that our enemy in the current conflict is anything but brutal; however, the first pillar of our national security strategy as articulated by the current administration is, not to reduce ourselves to the level of our adversary; rather it is to promote freedom, justice, and human dignity, which includes offering people throughout the world a positive vision rooted in America's beliefs, thereby isolating and marginalizing violent extremists.

Unfortunately, overclassification in the area of policy development is not new. Based upon my experience, there is a veritable hierarchy with respect to the appropriateness of classification decisions. Usually, when applied to the design, capabilities, and vulnerabilities of weapons systems, overclassification is a rarity. Likewise, classification with respect to the application of intelligence sources and methods is usually appropriate; however, the absence of a viable definition of what constitutes an intelligence source or method can lead to overclassification. In addition, the application of classification to information derived from intelligence sources or methods is often misapplied if the information is not source revealing.

Finally, the area of policy development is the one where, I believe, classification authority is most frequently abused, which by no coincidence also corresponds to the type of classified information that, I believe, is most frequently "leaked." Officials often rightfully do not want senior officials, including the President, to be denied the opportunity to make the final decision

[5] Eggen and White, "Memo."

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00160 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.115

on policy options – thus the frequent desire to keep policy-development information out of the public domain and thereby avoid being subject to numerous external pressures. Classification is often turned to as an easy means to control the flow information during the policy-development phase, even if the information is not of a nature that would endanger national security in the event of its unauthorized disclosure.

In addition, as we see in the case of this specific OLC memo, classification is often used as a bureaucratic weapon to blunt potential internal opposition. A prime example of indiscriminate secrecy was recently revealed by Jack Goldsmith, the former head of the OLC. Goldsmith wrote in his 2007 book *The Terror Presidency* that senior officials within the government "blew through [the Foreign Intelligence Surveillance Act] in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis for the operations." Goldsmith further recounted one of his first experiences with such extraordinary concealment in late 2003, when, as he recalls, David Addington of the Office of the Vice President (OVP) angrily denied a request by the National Security Agency's (NSA) Inspector General to see a copy of OLC's legal analysis supporting the oft-discussed secret NSA terrorist-surveillance program. Goldsmith wrote: "Before I arrived in OLC, not even NSA lawyers were allowed to see the Justice Department's legal analysis of what NSA was doing."[6]

Based upon my experience, pure legal analysis, especially when it lays new claims to inherent powers, should never be classified. Nonetheless, it is not unusual for a legal analysis to also discuss the specifics of a classified military operation or the application of a classified intelligence source and method, and those discussions would properly be classified. However, even in those instances, the President's own classification order states that "[t]he classification authority shall, whenever practicable, use a classified addendum whenever classified information constitutes a small portion of an otherwise unclassified document."[7] As such, legal analyses that claim novel inherent powers are ideal candidates for a classified addendum if specifics of a classified operation must be disclosed.

---

[6] Jeffry Rosen, "Conscience of a Conservative," *New York Times Magazine*, September 9, 2007.

[7] E.O. 12958, as amended, Section 1.6 (g).

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00161 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.116

I have often talked about how secrecy is a two-edged sword. For example, denying information to the enemy on the battlefield also increases the risk of a lack of awareness on the part of our own forces, contributing to the potential for fratricide or other failures. Similarly, strict compartmentalization in handling human agents increases our own vulnerability to deception as a consequence of using sources that ultimately prove to be unreliable. Simply put, secrecy comes at a price – sometimes a deadly price – oftentimes through its impact upon the decision-making process. Whether seeking advances in science and technology, formulating government policy, developing war plans, or assessing intelligence, the end product can always be enhanced as a consequence of a far-reaching give and take during which underlying premises are challenged and alternate approaches are considered. As such, secrecy and compartmentalization just about guarantee the absence of an optimized end product. The challenge is ensuring that this tradeoff – that is, accepting something less than the optimal result in exchange for denying a potential adversary insight into or knowledge of our capabilities or intentions – is taken into account when making a decision to cloak certain information in secrecy.

The OLC memo at issue is a prime example of the costs of excessive secrecy. Disclosure of the information in the document gives no advantage to the enemy. At the same time, restrictions on its dissemination led directly to the creation of a legal product that was so lacking in its analysis that DoJ had to advise DoD to no longer rely upon its legal reasoning a scant nine months after the memorandum's issuance, a reportedly unprecedented step for OLC to take within the same administration in which the withdrawn opinion was issued.

Furthermore, the inappropriate classification of this memo arguably led to the very damage to our national security that classification, when properly applied, is intended to preclude. Specifically, the endorsement of abusive conduct severely undermined our national security strategy of providing the world populace with a positive vision of the United States and thereby isolating and marginalizing violent extremists. It is unlikely that this endorsement would have occurred had the preparation of this memo not been shrouded in secrecy.

The OLC memo in question is but one example of what has the potential to be a significant issue with respect to the balance of constitutional powers. It has long been recognized that the President must have the ability to interpret and define his constitutional authorities and, at times,

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00162 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.117

to act unilaterally. The tools at his disposal to do this include Executive Orders, memoranda, National Security Directives, proclamations, executive agreements, signing statements and the like. OLC legal opinions can be another tool, especially when such opinions provide legal advice to the Executive branch on constitutional issues.

The limits of the President's authority to act unilaterally are defined by the willingness and ability of the Congress and the courts to constrain it. Of course, before the Congress or the courts can act to constrain Presidential claims to inherent unilateral powers, they must first be aware of those claims. Yet, a long recognized power of the President is to classify and thus restrict the dissemination of information in the interest of national security. The combination of these two powers of the President – that is, when the President lays claim to inherent powers to act unilaterally, but does so in secret – can equate to the very open-ended, non-circumscribed, executive authority that the Constitution's framers sought to avoid in constructing a system of checks and balances. Added to this is the reality that the President is not irrevocably bound by his own Executive Orders, and this administration claims the President can depart from the terms of an Executive Order without public notice. Thus, at least in theory, the President could authorize the classification of the OLC memo, even though to do so would violate the standards of his own governing Executive Order. Equally possible, the President could change his Executive Order governing secrecy, and do so in secret, all unbeknownst to the Congress and the courts. It is as if Lewis Carroll, George Orwell, and Franz Kafka jointly conspired to come up with the ultimate recipe for unchecked executive power.

The above is not that farfetched. In some regards, it already occurred, in part, last year when the issue arose of the applicability of the Executive Order governing secrecy to officials in the OVP. I was personally informed that the President did not intend for the Executive Order to mean what a plain-text reading of the order said it meant. I fully recognize the President's authority to say an Executive Order means what he says it means. However, to do so in secret can truly represent a threat to democratic and accountable government, as can other unilateral and secret claims to executive authority.

There are, I believe, a number of tools at the disposal of Congress to address this issue. First, I have been an ardent supporter of agency Inspectors General (IGs) becoming involved in auditing

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00163 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.118

the appropriateness of agency classification decisions as one means to address the critical issue of overclassification. IGs, of course, have a dual reporting responsibility to both the executive and legislative branches. The DoJ IG can be asked to review and report back to Congress on the appropriateness of the instant case of the March 2003 OLC memo, but also could be asked to provide an assessment as to the appropriateness of the classification of other purportedly classified recent OLC legal analyses. If the March 2003 memo is representative, the abuse of classification authority in this area may be significant. The DoJ IG could draw upon the expertise of my former office, ISOO, in conducting this review.

In addition to the above, a few years ago Congress established the Public Interest Declassification Board (the Board) and last year expanded the Board's role and authority. Specifically, the Board can now respond directly to a request from a committee of jurisdiction to declassify certain records. The Board can elect on its own to conduct a review and, after the review, make a recommendation to the President as to whether specific documents should be declassified or not. Of course, the final decision is the President's to make.

I should point out that the Board is composed of exceedingly knowledgeable and conscientious men and women who are committed to preserving the integrity of the classification process. I know some have questioned the Board's effectiveness in the past; however, I believe any concerns were due to the imprecise language of the original statute, which was remedied with last year's statutory revisions. Unfortunately, since then the Congress has yet to avail itself of this new avenue to resolve disputes with the Executive branch centered on the appropriateness of classification decisions.

While the utilization of existing avenues such as the IGs and the Board may prove beneficial in addressing some of the most egregious instances of the executive laying claim to novel, inherent and unilateral powers in secrecy, Congress should consider institutionalizing a process that ensures that such unilateral claims are known to all, not just the Congress and the courts, but the American people as well. The entire concept of "secret law" violates our most fundamental understandings of what constitutes the democratic and accountable form of government that has been bestowed on us by previous generations of Americans at great expense.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00164 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.119

In addition, while the President has traditionally established the process whereby information is classified in the interest of national security, Congress at the least should insist that whatever process the President establishes is transparent. The standards and criteria should be known to all, and the Congress and the courts should be able to ensure that the Executive branch follows its own procedures. Classification is and must remain more than a simple assertion by the executive. That the very concept of "secret" secrecy standards is antithetical to the entire concept of checks and balances should go without saying. However, recent experience indicates that Congress should make this precept explicit.

I applaud this subcommittee's initiative to examine this oft-overlooked aspect of challenges to maintaining the checks and balances crafted by the Constitution's original framers. I appreciate the opportunity to provide my perspective on this critical issue, and I look forward to any questions or comments that members of the subcommittee may have.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00165 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.120

Statement by
David B. Rivkin, Jr.

Before the

Senate Judiciary Committee
Subcommittee on the Constitution

"Secret Law and the Threat to Democratic and Accountable Government"

April 30, 2008

The United States today finds itself committed to a difficult and protracted military, ideological, economic and diplomatic conflict with a resolute foe – the Islamo-fascist and Jihadist network typified by such terrorist groups as al Qaeda and the Taliban. We did not seek this conflict, but we must fight and win it. To prosecute this war successfully, it is essential that we act within the proper legal paradigm. Indeed, contrary to what many people believe, war is not a domain of pure violence, but one of the most rule-driven of human activities.

Since September 11, the Administration has embarked on a concerted effort to resolve the difficult issues of both international and domestic law raised by this conflict. These issues include the applicability of the Geneva Conventions of 1949 to the conflict with al Qaeda and the Taliban and the rules governing the collection of electronic and other intelligence, as well, and a whole host of other matters. That much of this analysis was originally classified is neither inappropriate nor

44955.121

unprecedented. The issues of attorney-client and executive privilege aside, keeping this material secret from the enemy was a vital necessity. Much of the legal analysis prepared for the Administration was based on sensitive factual information and tended to reveal how the U.S. government would likely operate in certain circumstances.

I realize that a number of the Administration's legal positions, as they become publicly known, whether as a result of leaks to the media or the declassification of the relevant legal documents, have attracted considerable criticism. The questions that the Administration's lawyers have sought to address, particularly those dealing with the interrogation of captured enemy combatants, are uncomfortable ones that do not sit well with our 21st Century sensibilities. Many of the legal conclusions reached have struck critics as being excessively harsh. Some have since been watered down as a result of internal debates and political and public pressure brought to bear upon the Administration.

Though I would not defend each and every aspect of the Administration's post-September 11 wartime policies, I would vigorously defend the overall exercise of asking difficult legal questions and trying to work through them. To me, the fact that this exercise was undertaken so thoroughly attests to the vigor and strength of our democracy and of the Administration's commitment to the rule of law, even in the most serious of circumstances. In this regard, I point out that few

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00167 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.122

of our democratic allies have ever engaged in so probing and searching a legal exegesis in wartime. I also strongly defend the overarching legal framework chosen by the Administration. I believe that it is the critics' rejection of this overall legal framework that underlies most of their criticisms of the Administration's specific legal decisions.

The proper legal paradigm for confronting the terrorist threat is that established by the laws of war. The laws of war are essential to organized warfare, particularly when waged by a civilized, democratic society. The first key task performed by the laws of war is to create a framework within which acts of violence – ordinarily rejected by a civilized, democratic society – may legitimately be performed in the defense of that society. In my view, modern democracies are not capable of sustaining protracted military engagements without the legitimacy afforded by the laws of war.

This legitimating function aside, the specific rules contained within the laws of war paradigm help determine how to balance individual liberty and public safety, a balance that must be struck differently in wartime as compared with peacetime. This, by the way, is an entirely unexceptional position. Its truth has been recognized throughout American history, a point well explained in a superb book by the late Chief Justice William Rehnquist, entitled "All Laws But One." Indeed, for the United States to have retained the pre-September 11 balance

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00168 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.123

between liberty and order, would have meant either that the government was grossly derelict in failing to discharge its core duty of protecting the safety of the American people, or that the peacetime balance was unduly tilted against individual liberty. In my view, given the decades of jurisprudence from the Warren and Burger Courts, this last proposition is not very likely.

It is here that we find most critics of the use of the laws of war paradigm to be fundamentally wrong. In the many debates in which I have had the privilege to participate, I frequently pose the following question: "If you don't like how the Bush Administration has altered the peacetime balance between liberty and order, how would you alter the balance?" I have never received a serious answer. The proffered answers range from the useful but trivial, such as strengthening airline cockpit doors, to the clearly insufficient, such as giving more money to first responders, or giving the FBI better computers and more personnel.

Most critics prefer to evade this difficulty by not crediting al Qaeda with posing much of a threat to the United States. They certainly do not subscribe to the view that what happened on September 11 and thereafter merits the use of the term "war." This not being a war, in their view, it is both inappropriate and unnecessary to use the laws of war paradigm. Instead, they endorse the exclusive use of the law enforcement paradigm. In their view, al Qaeda fighters are to be treated as criminal defendants to be tried in regular federal courts. Similarly, all surveillance

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00169 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.124

conducted to guard against the post-September 11 terrorist threat should be done, they insist, within the context of the unmodernized 1978 Foreign Intelligence Surveillance Act (FISA). The bottom line is that the critics are wrong, as a matter of both law and policy.

Whether or not we are in a state of war with al Qaeda, the Taliban, and various Iraqi Jihadist groups, is a fairly straightforward question. The international laws of war provides a series of objective tests to determine whether a given extent of violence, or a series of violent encounters, rises to the level of an armed conflict. These tests rely on such factors as the scope and intensity of fighting, the number of casualties involved on one or both sides, the value of the targets that have been attacked, whether the warring parties espouse political or merely pecuniary goals, the nature of the weapons being used, and the conflict participants' own stated views of what is taking place – especially whether one or both parties has claimed for itself belligerent rights, as has the United States with regard to those responsible for the September 11 attacks. By all of these indicia, the United States is at war with al Qaeda and its affiliated entities.

Of course, as a non-state entity, al Qaeda itself has no legal right to make war in the first instance. In other words, all of its violent actions are punishable – unlike the actions of a sovereign state that resorts to armed force. That does not mean, however, that al Qaeda cannot be involved in an armed conflict. It can, but

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00170 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.125

only as an unlawful or unprivileged belligerent. Certainly, al Qaeda has insisted that it is at war with the United States (in the form of a "jihad") since the mid-1990s. During this time, al Qaeda has used both military-style weapons as well as improvised weapon systems to attack a broad array of American targets throughout the world, including warships, military barracks, embassy buildings, the Pentagon, and the heart of our financial infrastructure – New York City.

Thousands of American civilians and military personnel have lost their lives as the result of such attacks. Indeed, the number of Americans killed on September 11 alone rivals the number killed during the Japanese attack on Pearl Harbor. Moreover, al Qaeda's goals are political and religious – to drive the United States from the Middle East, and to spread its form of Islam throughout the region and then throughout the world. Al Qaeda simply is not comparable to a criminal gang or an organized crime syndicate, and the United States – which does have the right to make war – is fully justified in invoking the rights of a belligerent against al Qaeda and its allied groups. That conflict continues, with al Qaeda forces striving to carry out additional attacks on U.S. soil. Al Qaeda fighters are engaged in combat with U.S. and allied forces on a virtually daily basis, in places ranging from Iraq to Afghanistan, Somalia, Yemen, Jordan, and Saudi Arabia. In this global war, the battlefield is correspondingly large. We must accept the fact that it encompasses our own territory. Our enemies have come here to launch

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00171 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.126

attacks against us for the first time in more than half a century. As such, the laws of war paradigm is not only an appropriate and legitimate choice for this country in the post-September 11 world, but one that has been imposed upon us by the terrorists themselves.

I want to stress that adhering to the law enforcement paradigm in these circumstances would be a great folly. The most obvious problem is that, unless the U.S. is in a state of armed conflict, deadly force cannot be used by the U.S. military against al Qaeda targets. Instead, policing and ineffectual extradition efforts would be our sole recourse.

We know all too well that exclusive reliance on the law enforcement paradigm has failed to protect Americans from terrorist attack. The successful prosecutions of the 1993 World Trade Center bombers did nothing to prevent the 2001 attacks. Nor have the indictments of at least some of the culprits in the bombings of the U.S. embassies in Kenya and Tanzania, or the conviction of Zacharias Moussaoui abated for a moment Al Qaeda's attacks.

The 9/11 Commission Report explored in great detail the various deficiencies in the Clinton and Bush Administrations' policies which contributed to this tragic outcome. Among the worst of these were the infamous "wall" between the FBI's and DOJ's law enforcement and intelligence sides, the inability to mount robust paramilitary operations against Osama bin Laden (on account of

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00172 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.127

both bureaucratic snafus and a misplaced obsession with the Executive Order Against Assassinations) and the "kinder, gentler" rules of the game followed by the CIA's Clandestine Service, such as the ban against working with "human rights violators." I suppose one could argue that all of these problems could have been fixed, while retaining the basic parameters of the law enforcement paradigm. I very much doubt it, however.

In any case, our criminal justice system is inherently ill-suited to the task of protecting the American people from terrorist attacks. In part, my skepticism about the ability of the law enforcement system to meet and defeat al Qaeda is predicated upon the legal and political developments of the last forty years, which have made our criminal justice system increasingly defendant-friendly.

More fundamentally, however, the criminal justice system itself is reactive. It is designed to punish bad behavior and not to prevent it in the first place. Some individuals can, of course, be deterred by the fear of punishment, but deterrence is not a particularly effective weapon against individuals who are ideologically or religiously motivated. The guilty pleas or convictions of individual terrorists notwithstanding, it is difficult to imagine how prosecutions could be consistently and successfully conducted against individuals who operate on a trans-national basis and who may have the assistance and protection of foreign states.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00173 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.128

I have recently had the occasion to study the experience of those European countries most hostile to the application of the laws of war paradigm. Their governments have opted to rely more or less exclusively on law enforcement tools to protect their populations against terrorist attack. I concluded that the European judicial and investigatory systems are far more capable of mounting successful prosecutions of terrorists than the U.S. system, largely because of features of the Civil Law system – such as lengthy pre-trial detentions, looser evidentiary rules, and a higher degree of secrecy – which would be incompatible with our Constitution. I would rather rely on the laws of war in these circumstances, than attempt fundamental changes in the Common Law system that we all value. Even so, it is interesting that despite the more robust aspects of law enforcement in Civil Law systems, a number of European law enforcement officials have begun to call for enhanced counterterrorism authority, borrowing, in many cases, from the laws of war paradigm that their governments have formally rejected.

The bottom line is that relying on the law enforcement paradigm would put Americans at greater risk than would proceeding under the laws of war paradigm. The American people are neither legally nor morally required to assume that risk. In this war, as in previous wars, the laws of war provide the only legal architecture consistent with the security and success of the American people.

VerDate Aug 31 2005 14:56 Nov 20, 2008 Jkt 044955 PO 00000 Frm 00174 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44955.TXT SJUD1 PsN: CMORC

44955.129

CREW | citizens for responsibility and ethics in washington

May 7, 2008

Senator Feingold, Chairman
Senator Brownback, Ranking Member
United States Senate Committee on the Judiciary
Subcommittee on the Constitution
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Hearing of the Subcommittee on the Constitution: "Secret Law and the Threat to Democratic and Accountable Government," April 30, 2008

Dear Chairman Feingold and Ranking Member Brownback:

I write in reference to the recent hearing before the Subcommittee on the Constitution concerning the threat that secret Office of Legal Counsel ("OLC") opinions pose to democratic and accountable government. I would appreciate if the views of my organization, Citizens for Responsibility and Ethics in Washington ("CREW"), can be made a part of the record.

CREW is committed to transparency in government. We share the belief that secrecy is antithetical to democracy and that government accountability depends on public accessibility to what our government is doing and why they are doing it. The growing body of secret OLC opinions on critical issues of national importance represents a dramatic and alarming departure from the openness that is the hallmark of our democratic form of government.

CREW has had direct experience in a number of civil lawsuits with secret OLC opinions and the government's refusal to make public the rationale behind the final government decisions that OLC opinions represent. Hiding behind claims of privilege, the government on at least two occasions has refused to produce to CREW OLC opinions: one that addresses the status of White House visitor records as agency records under the Freedom of Information Act (FOIA) and another that addresses the agency status under the FOIA of the Office of Administration, a component of the Executive Office of the President. In each case the OLC opinions had a direct effect on the public, by depriving it of access to a wealth of valuable and historical records of this presidency.

The OLC is charged with providing definitive legal advice "to the President and all the executive branch agencies," and issuing written opinions in response to requests from, among others, the Counsel to the President. USDOJ: Office of Legal Counsel Homepage, available at http://www.usdoj.gov/olc/index.html. OLC opinions "typically deal with legal issues of particular complexity and importance or about which two or more agencies are in disagreement." Id.

1400 Eye Street, N.W., Suite 450, Washington, D.C. 20005 | 202.408.5565 phone | 202.588.5020 fax | www.citizensforethics.org

44955.130

Senator Feingold
Senator Brownback
May 7, 2008
Page two

OLC's authority to issue these definitive opinions stems from the authority of the Attorney General to render opinions to heads of executive departments "on questions of law arising in the administration of his department." 5 U.S.C. § 512. The Attorney General, in turn, has delegated this authority to the OLC by virtue of the delegation authority contained in 5 U.S.C. § 510. Specifically, the Attorney General has assigned to the OLC the responsibility to, *inter alia*, "[p]repar[e] the formal opinions of the Attorney General . . ." 28 C.F.R. § 0.25(a).[1]

While OLC opinions are not binding on the courts,[2] they are binding on the executive branch "until withdrawn by the Attorney General or overruled by the courts." Public Citizen v. Burke, 655 F.Supp. 318, 321-22 and n.5 (D.D.C. 1987), *citing* Smith v. Jackson, 246 U.S. 388, 390-91 (1918); U.S. Bedding Co. v. U.S., 55 Ct.Cl. 459, 460-61 (1920).[3] See also Randolph D. Moss, Executive Branch Legal Interpretation: A Perspective From The Office of Legal Counsel, 52 Admin. L. Rev. 1303, 1305 (Fall 2000) ("The legal advice of the Office [of Legal Counsel], often embodied in formal written opinions, constitutes the legal position of the executive branch, unless overruled by the President or the Attorney General.").[4]

---

[1] The official Department of Justice website describes OLC's authority as follows:

> The authority of the Office of Legal Counsel to render legal opinions is derived from the authority of the Attorney General. Under the Judiciary Act of 1789, the Attorney General was authorized to render opinions on questions of law when requested by the President and the heads of executive departments. This authority is now codified at 28 U.S.C. §§ 511-513. Pursuant to 28 U.S.C. § 510 the Attorney General has delegated to the Office of Legal Counsel responsibility for preparing the formal opinions of the Attorney General . . .

http://www.usdoj.gov/olc/opinions.htm.

[2] See, e.g., Nat'l Mining Ass'n v. Slater, 167 F.Supp.2d 265, 284 n.18 (D.D.C. 2001).

[3] While these cases address the binding effect of Attorney General opinions they are equally applicable to OLC opinions where OLC is exercising the authority of the Attorney General.

[4] At the time that he wrote this article Mr. Moss was an Assistant Attorney General in the Department of Justice and head of the OLC.

44955.131

Senator Feingold
Senator Brownback
May 7, 2008
Page three

The government has refused to produce two separate OLC opinions to CREW, claiming they are protected by the deliberative process and attorney-client privileges. In CREW v. Nat'l Archives and Records Admin., Civil No. 07-048 (D.D.C.), in response to CREW's FOIA request for documents related to the determination that White House visitor records are not agency records, NARA withheld its copy of an OLC advice memorandum pursuant to Exemption 5 of the FOIA, claiming it was protected under the attorney-client and deliberative process privileges. Similarly in CREW v. Office of Administration, Civil No. 07-964 (D.D.C.), the White House refused to produce a copy of an OLC opinion on the agency status of the Office of Administration under the FOIA, claiming the opinion was also protected by both the attorney-client and deliberative process privileges.

In both cases, however, the role that OLC was serving in the executive branch when it issued these legal opinions negates any legitimate claim of privilege. As the Supreme Court explained in Nat'l Labor Rel. Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 138 (1975), "[c]rucial" to determining whether a document is non-final and deliberative "is an understanding of the function of the document[] in issue in the context of the administrative process which generated [it]."

As noted, OLC functions as the definitive arbiter on questions of law for the executive branch and prepares formal opinions that are binding on the executive branch. To recognize these opinions as privileged and not subject to public disclosure would lead to a "body of 'secret law,' used by [an agency] in the discharge of its regulatory duties and in its dealings with the public," something the courts have properly deemed unacceptable. Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 867 (D.C. Cir. 1980). Specifically excepted from the deliberative process privilege are final opinions precisely "to prevent agencies from developing a body of 'secret law' veiled by the privilege of Exemption 5." Brinton v. Dep't of State, 636 F.2d 600, 605 (D.C. Cir. 1980) (citation omitted)).

In Coastal States, the D.C. Circuit concluded that memoranda prepared by the agency's regional counsel in response to requests for interpretations of regulations were non-deliberative final documents not subject to privilege. The Court explained that the memoranda bore "little resemblance to the types of documents intended to be protected under the deliberative process privilege," in that they were "not advice to a superior," were not "suggested dispositions of a case," were not "one step of an established adjudicatory process, which would result in a formal opinion" and were not "subjective or personal . . ." 617 F.2d at 868. Of equal importance, as the Supreme Court explained in Sears, is the public's "vital concern[] with the reasons which did supply the basis for an agency policy actually adopted. These reasons, if expressed within the agency, constitute the 'working law' of the agency" that falls outside the protection of privilege. 421 U.S. at 152-53.

44955.132

Senator Feingold
Senator Brownback
May 7, 2008
Page four

OLC opinions are not advice to a superior, a suggested disposition of a case, or a step in an adjudicatory process that will result in a formal opinion. To the contrary, OLC opinions are themselves formal and final opinions that "supply the basis" for a host of governmental policies and decisions. Nor is there a possibility that the author of an OLC opinion "would be less 'frank' or 'honest' if he or she knew that the document might be made known to the public . . ." Coastal States, 617 F.2d at 869. OLC opinions represent the opinion of the Attorney General through the Department of Justice's Office of Legal Counsel, not the opinion of a single attorney. And the mere fact that the government's position on an issue may prove to be controversial is certainly no justification for keeping that position secret, particularly where it forms the basis or justification for a governmental action.

Equally unpersuasive is the claim that OLC opinions are protected from disclosure by the attorney-client privilege. In the government context the attorney-client privilege does not throw a blanket of secrecy over any and all communications between the agency and its lawyers, but instead protects only "confidential information *concerning the Agency* . . ." Tax Analysts v. IRS, 117 F.3d 607, 619 (D.C. Cir. 1997) (emphasis in original). Nor does the privilege protect "written responses containing 'neutral, objective analyses.'" Id., *quoting* Coastal States, 617 F.2d at 863. Policy reasons also dictate this conclusion given that government lawyers, unlike their private counterparts, "have the power to formulate the law to be applied to others" and are, in effect, "making law." Tax Analysts, 117 F.3d at 619.

In sum, OLC opinions represent the "considered and conclusive declaration" of the government's legal positions[5] and statements of policy on a host of critical issues that often impact the public directly. We are committed to litigating fully individual attempts by the government to block CREW's access to specific OLC opinions. We welcome the Committee's interest in this issue and hope that Congress will use its legislative powers to stem the growing body of secret laws and put us back on a course of transparency and accountability in government.

---

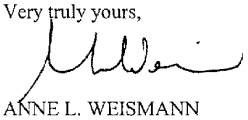
[5] Evans v. U.S. Off. of Personnel Mgmt., 276 F.Supp.2d 34, 40 (D.D.C. 2003).

44955.133

Senator Feingold
Senator Brownback
May 7, 2008
Page five

Thank you for the opportunity to weigh in on this important issue.

Very truly yours,



ANNE L. WEISMANN
Chief Counsel

44955.134