Hearing before the Senate Committee on the Judiciary Subcommittee on the Constitution

on

"Secret Law and the Threat to Democratic and Accountable Government"

Wednesday, April 30, 2008

Opening Statement - Senator Russ Feingold - Chairman

Opening Statement - Senator Patrick Leahy

Testimony:

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Statement
United States Senate Committee on the Judiciary
Secret Law and the Threat to Democratic and Accountable Government
April 30, 2008

The Honorable Russ Feingold
United States Senator , Wisconsin

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

As Prepared For Delivery

"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 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.”

Statement
United States Senate Committee on the Judiciary
Secret Law and the Threat to Democratic and Accountable Government
April 30, 2008

The Honorable Patrick Leahy
United States Senator , Vermont

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.

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.

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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.

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

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[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).

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.

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[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.

> 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]

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[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 .

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.

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[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.

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.

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.

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[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 .

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.

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.

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[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 .

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.

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[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/ .

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.

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).

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.

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[1] Dan Eggen and Josh White, "Memo: Law Didn't Apply to Interrogators," *Washington Post*, April 2, 2008, p. A1

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

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.

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[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.

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."

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.

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[6] Jeffry Rosen, "Conscience of a Conservative," *New York Times Magazine*, September 9, 2007.

[7] E.O. 12958, as amended, Section 1.6 (g).

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,

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

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.

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.

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.

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.

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.

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

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).

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).

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.

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

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

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.

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,*

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.

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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
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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

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

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

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

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.

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

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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

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

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

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

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

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

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

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*

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

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

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

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.

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

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.

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

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

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

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

> 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

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.

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

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).

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.

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[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).

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).

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:

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[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.*

> 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

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[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).

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

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[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.

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

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[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.

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:

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[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).

> 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:

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[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.

> 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.

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.

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.

[56] *See, e.g.*, Kitrosser, *Congressional Oversight, supra* note 31, at 1073-75, 1080-83, 1084-86 (detailing such rules).

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.

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 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 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 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 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 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 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 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.

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.