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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

No, it would not be detrimental.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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