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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANSWER:

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

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

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

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

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

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

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

ANSWER: This memorandum is unclassified.

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

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

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

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

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

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

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

ANSWER:

a. This memorandum is unclassified.

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

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

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

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

ANSWER:

a. This memorandum is unclassified.

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

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

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

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

ANSWER:

a. This memorandum is unclassified.

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

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

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

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

ANSWER:

a. This memorandum is unclassified.

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

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

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

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

ANSWER:

a. This letter is unclassified.

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

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

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

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

ANSWER:

a. This memorandum is unclassified.

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

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

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

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

ANSWER:

a. This memorandum is unclassified.

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

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

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

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

ANSWER:

a. This letter is unclassified.

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

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

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

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

ANSWER:

a. This memorandum is unclassified.

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

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

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

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

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

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

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

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

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

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

ANSWER: The memorandum is not classified.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Questions submitted by U.S. Senator Sam Brownback.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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