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

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

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

Response:

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

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

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

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

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

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

Response:

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

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

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

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

Response:

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

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

Response:

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

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

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

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

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

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

Response:

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

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

[6] *Id.* at 1608.