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Responses to questions for the record from Senator Kennedy pertaining to the Hearing of April 30, 2008 on "Secret Law and the Threat to Democratic and Accountable Government," Before the United States Senate Committee on the Judiciary, Subcommittee on the Constitution

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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