Response to Questions Submitted by U.S. Senator Russell D. Feingold to Mr. J. William Leonard

1. We all acknowledge that many OLC opinions may contain discussions of matters that are properly classified, including references to specific intelligence sources or methods.

   a. In your experience, do the tools of portion markings, redaction, and classified annexes provide a workable means of dealing with opinions that contain both legal analysis and operational information? Or in practice, does any OLC opinion that includes a discussion of operational information have to be classified in full?

Response: Based upon my experience, the tools of portion markings, redaction, and classified annexes provide extremely workable means of dealing with OLC opinions that contain both legal analysis and operational information. There is no reason in practice for any OLC opinion to be classified in full.

   b. Is there any obligation on the part of an agency, when drafting documents that contain both classified and non-classified information, to draft them in a manner that makes it easier to segregate out and release the non-classified information?

Response: Yes, there are several requirements of both Executive Order 12958, as amended, "Classified National Security Information" (the Order) as well as its implementing directive, ISOO Directive No. 1 (32 CFR Part 2001) (the Directive). Section 1.6(c) of the Order states that "[w]ith respect to each classified document, the agency originating the document shall, by marking or other means, indicate which portions are classified, with the appropriate classification level, and which portions are unclassified." In addition, section 1.6(g) of the Order states that "[t]he classification authority shall, whenever practicable, use a classified addendum whenever the classified information constitutes a small portion of an otherwise unclassified document." Section 2001.20 of the Directive makes it clear that classification "[m]arkings shall be uniformly and conspicuously applied to leave no doubt about the classified status of the information, the level of protection requires, and the duration of classification." Furthermore, section 2001.21(c) of the Directive states that "[e]ach portion of a document, ordinarily a paragraph but including subjects, titles, graphics and the like, shall be marked to indicate its classification level by placing a parenthetical symbol immediately preceding or following the portion to which it applies" while section 2001.21(f) states that[e]ach portion of a derivatively classified document shall be marked in accordance with its source, and as provided in § 2001.21(c)."

Response to Questions Submitted by U.S. Senator Edward M. Kennedy
to Mr. J. William Leonard

1. Your statement makes a compelling argument that Office of Legal Counsel opinions such as the March 14, 2003 interrogation method should never have been classified – as you stated, "whoever affixed classification markings to this document had either profound ignorance or deep contempt for the process set forth by the President" – and that such excessive classification can have deeply negative consequences for us all. To what extent do you believe this memo reflects a pervasive problem of overclassification in the Executive Branch, and to what extent has the Bush Administration deepened or exacerbated this problem?

   Response: I believe overclassification represents a pervasive problem in the Executive Branch. For example, in an audit of agency classification activity conducted in 2006 by my prior office, the Information Security Oversight Office, we discovered that even trained classifiers, with ready access to the latest classification and declassification guides, and trained in their use, got it clearly right only 64 percent of the time in making determinations as to the appropriateness of classification. This is emblematic of the daily challenges confronting agencies when ensuring that the 3 million plus cleared individuals with at least theoretical ability to derivatively classify information get it right each and every time.

   I believe the current administration has exacerbated this problem. Senior officials lead by example. As I noted in my prepared written statement for this hearing, the OLC memo that was the subject of this hearing 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. 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. It is difficult enough to convince rank and file government officials to avoid the pitfalls of overclassification without also having to overcome blatant examples of overclassification by the most senior leaders in our government.

2. To combat abuse of the classification process, you recommended in your statement that Congress make greater use of agency Inspectors General and the Public Interest Declassification Board in reviewing classification decisions, and you urged Congress to take a more active role generally. In light of the discussion at the hearing, do you have any more detailed advice for the Congress or the Judiciary Committee on how to improve the classification system and minimize "secret law"?

Response: In furtherance of their responsibilities under section 5.4(a) of Executive Order 12958, as amended, "Classified National Security Information" (the Order), Congress could require agency heads to:

- Review agency procedures to ensure that they facilitate classification challenges (§1.8(b) of the Order). In this regard, agencies could be required to appoint impartial officials whose sole purpose is to seek out inappropriate instances of classification and to encourage others to adhere to their individual responsibility to challenge classification, as appropriate (e.g. classification ombudsmen).
- Conduct routine sampling of current classified information to determine the propriety of classification and the application of proper and full markings (§5.4(d)(4) of the Order). Results of these audits should be reported to agency personnel as well as to the officials designated above who would be responsible to track trends and assess the overall effectiveness of the agency's efforts and make adjustments, as appropriate. The results of this sampling could also be reported centrally, subject to verification by the Information Security Oversight Office, the Government Accountability Office, and others.
- Require certification of original and derivative classifiers (§1.3 & 2.1 of the Order) based upon demonstration of requisite level of knowledge prior to a cleared individual being permitted to apply classification controls to information. Instances of inappropriately assigning classification to information (determined through audits or other means) would, among other sanctions, subject individuals to loss of certification and require remedial training prior to recertification.
- Require agency Inspectors General to conduct periodic audits of their agency's classification program (§5.4(d)(4) of the Order) with emphasis on the appropriateness of classification decisions and report the results to Congress.
- When confronted with instances of "secret law," the Judiciary Committee could submit a request directly to the Public Interest Declassification Board (as established in P.L. 106-567, title VII, Dec. 27, 2000, 114 Stat. 2856, as amended) to review the matter and, through exercise of its independent judgment, make a recommendation to the President to declassify the record, in whole or in part.