Testimony of

# Dawn E. Johnsen

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On the Nomination of Michael B. Mukasey
To Be Attorney General of the United States
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I am glad for the opportunity to be here today to discuss the Department of Justice and, in particular, one of its core functions: to help ensure that the rule of law guides governmental action. I had the privilege of serving at the Office of Legal Counsel (OLC) for five years, from 1993 to 1998, including as Acting Assistant Attorney General heading that office from 1997 to1998. I currently am a professor of law at Indiana University--Bloomington School of Law, where I teach and write about various issues of constitutional law, including presidential power.

My time at OLC, and continued study since, has taught me much about the great potential of the Department of Justice, and OLC in particular, to either promote or undermine the Executive Branch's adherence to the rule of law. I also appreciate the importance of the Department of Justice's role in defending our nation against terrorism, and the tremendous responsibility and pressure the Executive Branch faces in order to protect us all from future attacks.

In our system of government, the President, of course, is not above the law. The Constitution commands that the President "take Care that the Laws be faithfully executed." One of the Attorney General's chief responsibilities is to give the President and others throughout the Executive Branch the legal advice they require to act lawfully. As a general matter, the Attorney General has delegated that work to OLC. OLC's legal determinations are considered authoritative and binding on the entire Executive Branch, unless overruled by the Attorney General or the President (or by OLC itself). As a practical matter, those determinations at times prove final, or go unchecked for years, due to the substantial obstacles to judicial review on issues of national security. OLC thus plays a critical role in upholding the rule of law and preserving our constitutional democracy.

The work of OLC under the current administration has been dangerously compromised. Those of us outside the Executive Branch--and most significantly, this Committee and Congress--cannot fully assess the extent of the problem, due to the Administration's excessive secrecy. We know, however, that on at least some matters of counterterrorism and national security, OLC has not adhered to its traditional role of helping the President fulfill his constitutional obligation to faithfully execute the laws. Instead, under the guise of legal interpretation, OLC has served as a facilitator of policies that do not comply with applicable legal constraints.

Jack Goldsmith, a Harvard Law School professor who served as the Assistant Attorney General for OLC from October 2003 to June 2004, is an important source of some of the details of OLC's recent failures. He describes coming to the realization, soon after arriving at OLC, that some OLC opinions issued earlier in the Bush administration "were deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President." "I was astonished, and immensely worried," Goldsmith writes, "to discover that some of our most important counterterrorism policies rested on severely damaged legal foundations." Goldsmith aptly describes OLC opinions as akin to get-out-of-jail-free cards, because they render any subsequent prosecution for violating the law virtually impossible.

This Committee has heard directly from Professor Goldsmith. He has testified, for example, about the shocking hospital visit to then-Attorney General John Ashcroft while he was in intensive care, to urge him to authorize a program that Goldsmith and then-Acting Attorney General James Comey had determined was illegal. James Comey

also has testified about that incident. We still do not know the details of their concerns--only that they related to some aspect of the Bush administration's warrantless domestic surveillance program--because the administration continues to refuse to release that information.

I want to focus my testimony on detainee interrogation methods, another subject of Goldsmith's concern, and again a counterterrorism program about which the administration continues to withhold, without adequate justification, critically needed details. Here, Goldsmith's concerns proved so grave he felt compelled to take what he described as the unprecedented step of withdrawing the legal advice given by his OLC predecessor--the only instance he could find in which OLC overturned advice provided within the same administration.

One of the withdrawn opinions was an August 2002 legal memorandum, widely known as the "OLC Torture Memo," in which OLC advised then-Counsel to the President Alberto Gonzales on the meaning of the federal statute that makes it a crime to commit torture. Leaked to the press in June 2004, the Torture Memo first interpreted the scope of the statute in an exceedingly narrow manner, and then methodically explored all conceivable arguments whereby governmental actors who engage in aggressive interrogations, including torture, could escape conviction. It interpreted "torture" as limited only to the most extreme interrogation methods and went on to suggest defenses to prosecution, including necessity and self-defense, even for methods that do qualify as torture. Most far-reaching, the Torture Memo found that the statute could not be interpreted to allow the prosecution of someone who commits torture "pursuant to the President's constitutional authority to wage a military campaign," because to do so would interfere with the President's Commander-in-Chief power. In exaggerating the President's war powers in blatantly inaccurate ways, this opinion ignored entirely Congress's constitutional war powers--such as the power to make rules concerning captures on land and water and for the government and regulation of the land and naval forces. OLC failed to cite or consider the Supreme Court's directly relevant, landmark Steel Seizure case, in which the Court addresses how Congress may limit presidential war powers.

Largely in response to the appalling content of the OLC Torture Memo, nineteen former OLC lawyers came together in 2004 to produce a set of ten principles that we believe should guide the work of OLC and others, most notably the Attorney General, when advising the Executive Branch on the legality of contemplated action. We developed these "Principles to Guide the Office of Legal Counsel" in order to help prevent a recurrence of such terribly and dangerously inappropriate OLC legal analysis. A New York Times investigative report published just this month, however, suggests that the problem continues: OLC twice again issued secret interrogation memos, after Goldsmith's departure, finding that the most extreme CIA interrogation techniques are lawful, whether used individually or in combination. In 2005, of course, Congress enacted the Detainee Treatment Act, which outlawed not only torture, but all cruel, inhuman or degrading treatment of detainees. According to this recent news report, OLC astonishingly interpreted this law to find that even a classic form of torture--simulated drowning through waterboarding--is not cruel, inhuman or degrading.

Congress should respond to OLC's failures by demanding public accountability and a restoration of the Department of Justice's tradition of independent legal analysis and respect for the rule of law. The ten "Principles to Guide the Office of Legal Counsel" provide a good framework for that task, and I therefore append the document to this testimony and submit it for the Committee's consideration. All ten principles are drawn, as the introduction states, from "the longstanding practices of the Attorney General and the Office of Legal Counsel, across time and administrations." They are nonpartisan, consensus principles that are both realistic and aspirational, in that they describe best practices, albeit practices that have not invariably been followed. I will not detail them all here, but highlight two.

Our first and most fundamental principle reads as follows: "When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action."

In short, OLC has to be prepared to tell the President no. The President of course remains free to act on his own, good faith understanding of the law, but OLC best aids the President's fulfillment of his constitutional obligation to uphold the law by providing accurate, balanced and forthright legal appraisals. This is not, to be sure, simply a matter of predicting how a court would rule. To the contrary, on matters such as national security that courts are less likely to scrutinize, the President and OLC have "a special obligation to ensure compliance with the law."

Importantly, saying no does not mean disabling the government from meeting serious threats to national security. In the most serious controversies from the Bush administration--warrantless domestic surveillance, coercive interrogations and the establishment of military commissions--the critical question was whether the President would take largely secret, unilateral action in violation of statutes or comply with the constitutional process for amending the laws by submitting his recommendations to Congress. The OLC Principles also recognize that OLC's legal advice should not end with saying no. OLC should help craft lawful alternative means by which the President may achieve his objectives.

Second, and I want to state this clearly and emphatically: the Department of Justice must avoid secret law. The OLC Principles provide that "OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure." Of course, the Executive Branch has some legitimate needs for secrecy, such as to protect the identity of a covert agent or an unknown technological capability. But public disclosure of how the Executive Branch construes the law is especially critical where the Executive Branch does not fully comply with a federal statute. Recent news reports suggest this may be the case with the recently enacted ban on cruel, inhuman and degrading treatment. When the President disagrees with a statute, even when he believes it to be unconstitutional in some respect, the right thing to do nearly always is to go to Congress and seek legislation to change it. If the President nonetheless determines not to comply with the law, at a bare minimum he must explain his defiance to Congress and the public. And when he construes the law in a manner that would come as a surprise to those in Congress who enacted it, he should make that interpretation known. In particular, there appears to be no valid justification for keeping secret the Executive Branch's views regarding which interrogation techniques are legal and which are not. The Department of Defense has made such information public for decades, without any harm to national security. Congress cannot effectively monitor and regulate what the Executive Branch does unless it has some understanding of how the Executive Branch is implementing the laws that Congress already has enacted.

The next Attorney General should make it a priority to undertake a comprehensive review of OLC's work during this administration. He should rescind all flawed opinions, publicize all opinions that will not truly endanger the national security, and restore the integrity and traditional role of the office through the adoption of publicly announced principles and procedures to guide the work of OLC. Congress should engage in aggressive oversight of the Department of Justice to ensure all this is accomplished, and beyond this, that the Executive Branch complies with the laws.

It pains me to have to be so critical of the Department of Justice, an institution that I greatly esteem, and at which many, many fine career lawyers continue to toil. James Comey, Jack Goldsmith and doubtless many other political appointees, too, have struggled to act with integrity during their service at the Department of Justice. If our country is to return to the bipartisan tradition of Executive Branch action within the law, Congress and the next Attorney General must confront the reality that the problem ultimately derives not from the Department of Justice, but from the President. Numerous reports confirm that President Bush, Vice President Cheney and their top advisors have been deeply hostile to any checks on their counterterrorism policies. Not only external checks--from the courts and Congress and the press and public--but even legal checks from within the Executive Branch, from the President's own lawyers. Rather than respecting the Department of Justice's traditional independence, they instead made clear they wanted "forward-leaning" legal opinions that would justify their preferred policies, in order to immunize government officials from prosecution. They have been determined to act unilaterally, except when compelled to go to Congress, as they were by the Supreme Court's decision in Hamdan v. Rumsfeld.

Absent a dramatic change in attitude from the President and in the tone set by the administration--with regard to the rule of law, dealings with the coordinate branches, and openness in government--the next Attorney General will face dramatic pressures and constraints. He nonetheless must persevere and withstand pressures to misrepresent what the law requires. If necessary, he must be prepared to resign or be fired.

The Bush administration has chosen to treat the Constitution's distribution of power, designed to protect the nation from a dominating branch, as an internal struggle for power in which any unilateral action by the President is counted as a victory because it is power seized from Congress. It has viewed laws constraining executive action or protecting civil liberties as obstacles to be skirted rather than expressions of democracy to be obeyed. Too often, it has rendered legal opinions designed to serve the President's agenda instead of the rule of law. It is past time for Congress, the courts, and the public to insist that the President return to our bipartisan tradition of Congress and the President working together to protect the American people, under the laws of our nation.

For a more detailed analysis of the principles that should guide OLC's work, see Dawn E. Johnsen, Faithfully Executing the Laws: Internal Legal Constraints on Executive Power, 54 UCLA L. REV. 1559 (2007).

U.S. CONST. art. II, § 3.
Jack Goldsmith, THE TERROR PRESIDENCY (2007).
Id. at 10.
Id. at 97.

Preserving the Rule of Law in the Fight Against Terrorism: Hearing Before the S. Comm. on the Judiciary, 110th Cong. (2007) (testimony of Jack Goldsmith, former Assistant Attorney General for the Office of Legal Counsel) (not yet published by the Government Printing Office); Dan Eggen, White House Secrecy on Wiretaps Described, WASH. POST, Oct. 3, 2007, at A5 (describing testimony).

Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?: Hearing Before the S. Comm. on the Judiciary, 110th Cong. (2007) (testimony of James B. Comey, former Deputy U.S. Attorney General, Department of Justice) (not yet published by the Government Printing Office).
Id. at 146.

Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002).
Id. at 35.
U.S. CONST. art. I, § 8, cl. 11.
Id. at cl. 14.

See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

The OLC Principles are reprinted in their entirety at the conclusion of this testimony and also are published as an appendix to Johnsen, supra note 1.

Scott Shane, David Johnston & James Risen, Secret U.S. Endorsement of Severe Interrogations, N.Y. TIMES, Oct. 4, 2007, at A1.

See, e.g., Goldsmith, supra note 3; Charlie Savage, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY (2007); Barton Gellman & Jo Becker, A Different Understanding with the President, WASH. POST, June 24, 2007, at A1; Barton Gellman & Jo Becker, Pushing the Envelope on Presidential Power, WASH. POST, June 25, 2007, at A1; Jo Becker & Barton Gellman, A Strong Push from Backstage, WASH. POST, June 26, 2007, at A1; Jo Becker & Barton Gellman, Leaving No Tracks, WASH. POST, June 27, 2007, at A1.

126 S. Ct. 2749 (2006).