Statement of

The Honorable Russ Feingold

United States Senator
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Opening Statement of U.S. Senator Russ Feingold

Hearing on "Secret Law and the Threat to Democratic and Accountable Government"

Senate Judiciary Committee, Subcommittee on the Constitution

As Prepared For Delivery

"More than any other Administration in recent history, this Administration has a penchant for secrecy. To an unprecedented degree, it has invoked executive privilege to thwart congressional oversight and the state secrets privilege to shut down lawsuits. It has relied increasingly on secret evidence and closed tribunals, not only in Guantanamo but here in the United States. And it has initiated secret programs involving surveillance, detention, and interrogation, some of the details of which remain unavailable today, even to Congress.

"These examples are the topic of much discussion and concern, and appropriately so. But there is a particularly sinister trend that has gone relatively unnoticed - the increasing prevalence in our country of secret law.

"The notion of 'secret law' has been described in court opinions and law treatises as 'repugnant' and 'an abomination.' It is a basic tenet of democracy that the people have a right to know the law. In keeping with this principle, the laws passed by Congress and the case law of our courts have historically been matters of public record. And when it became apparent in the middle of the 20th century that federal agencies were increasingly creating a body of non-public administrative law, Congress passed several statutes requiring this law to be made public, for the express purpose of preventing a regime of 'secret law.'

"That purpose today is being thwarted. Congressional enactments and agency regulations are for the most part still public. But the law that applies in this country is determined not only by statutes and regulations, but also by the controlling interpretations of courts and, in some cases, the executive branch. More and more, this body of executive and judicial law is being kept secret from the public, and too often from Congress as well.

"The recent release of the March 2003 John Yoo torture memorandum has shone a sobering light on this practice. A legal interpretation by the Justice Department's Office of Legal Counsel, or OLC, binds the entire executive branch, just like a regulation or the ruling of a court. In the words of former OLC head Jack Goldsmith, 'These executive branch precedents are "law" for the executive branch.' The Yoo memorandum was, for a nine-month period in 2003 until it was

withdrawn by Mr. Goldsmith, the law that this Administration followed when it came to matters of torture. And of course, that law was essentially a declaration that few if any laws applied.

"This entire memorandum was classified and withheld from Congress and the public for years on the claim that it contained information that could not be disclosed without harming national security. Now it may be appropriate, prior to public disclosure of an OLC memorandum, to redact information about, for example, specific intelligence sources or methods. But as we now know, this 81-page document contains no information about sources, methods, or any other operational information that could compromise national security. What it contains is a shocking glimpse of the 'law' that governed the Administration's conduct during the period this memo was in effect. And the many, many footnoted references to other OLC memos we've never seen suggests that there is an entire regime of secret law that may be just as shocking.

"Another body of secret law is the controlling interpretations of the Foreign Intelligence Surveillance Act that are issued by the Foreign Intelligence Surveillance Court. FISA, of course, is the law that governs the government's ability in intelligence investigations to conduct wiretaps and search the homes of people in the United States. Under that statute, the FISA Court is directed to evaluate wiretap and search warrant applications and decide whether the standard for issuing a warrant has been met - a largely factual evaluation that is properly done behind closed doors. But with the evolution of technology and with this Administration's efforts to get the Court's blessing for its illegal wiretapping activities, we now know that the Court's role is broader, and that it is very much engaged in substantive interpretations of the governing statute.

"These interpretations are as much a part of this country's surveillance law as the statute itself. Without access to them, it is impossible for Congress or the public to have an informed debate on matters that deeply affect the privacy and civil liberties of all Americans. While some aspects of the FISA Court's work involve operational details and should not be publicly disclosed, I do not believe that same presumption must apply to the Court's purely legal interpretations of what the statute means. Yet the Administration has fought tooth and nail against public disclosure of how the Court interprets the law, and has strictly limited even congressional access to some of those decisions.

"The Administration's shroud of secrecy extends to agency rules and executive pronouncements, such as Executive Orders, that carry the force of law. Through the diligent efforts of my colleague Senator Whitehouse, we have learned that OLC has taken the position that a President can 'waive' or 'modify' a published Executive Order without any notice to the public or Congress - simply by not following it.

"Now, none of us disputes that a President can withdraw or revise an Executive Order at any time; that's every President's prerogative. But abrogating an Executive Order without any public notice works a secret change in the law. Worse, because the published Order stays on the books, it actively misleads Congress and the public as to what the law is. That has the effect - presumably, the intended effect - of derailing any accountability or oversight that could otherwise occur.

"And that gets us to the heart of the problem. In a democracy, the government must be accountable to the people, and that means the people must know what their government is doing.

Through the classification system and the common law, we've carved out limited exceptions for highly sensitive factual information about military operations, intelligence sources and methods, nuclear programs, and the like. That is entirely appropriate and important to protecting our national security. But even in these areas, Congress and the courts must maintain some access to the information to ensure that the President is acting in accordance with the law and the Constitution. And when it comes to the law that governs the executive branch's actions, Congress, the courts, and the public have the right and the need to know what law is in effect. An executive branch that operates pursuant to secret law makes a mockery of the democratic principles and freedoms on which this country was based.

"We'll hear today from several experts who can help us understand the extent of this problem and help us begin to think about solutions."