

Testimony of
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STATEMENT OF
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BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND PROPERTY RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ENTITLED
"SECRET LAW AND THE THREAT TO DEMOCRATIC
AND ACCOUNTABLE GOVERNMENT"
APRIL 30, 2008

Mr. Chairman, Ranking Member Brownback, and Members of the Subcommittee, I appreciate the opportunity to appear here today to discuss how the Office of Legal Counsel ("OLC") works to balance the values of transparency, accountability, and the confidentiality that are essential to good governance.

Let me say at the outset that the Department of Justice appreciates, and shares, this Subcommittee's interest in ensuring that our Government operates in as transparent and accountable a fashion as possible. Indeed, our Office frequently publishes opinions that address issues of interest to the Executive Branch, to Congress, and to the public, and our approach to publication is consistent with the approach of prior Administrations. At the same time, as Administrations of both parties have recognized, it cannot be denied that policy makers within the Executive Branch, like any other decision maker, sometimes have the need to consult with attorneys within the confidential bounds of the attorney-client relationship. Although there are times where the national interest requires that OLC advice remain confidential, at least for a time, I hope to dispel the notion that such legal advice constitutes in any sense "secret law" governing the lives of Americans.

The Office of Legal Counsel assists the Attorney General in his role as legal adviser to the President and to executive departments and agencies. Under our constitutional system, the Executive Branch must be able to come to a unified interpretation of the law in order to carry out the President's constitutional duty to execute the law faithfully, and doing so necessarily requires the ability to seek and obtain confidential, authoritative legal advice within the Executive Branch. That essential function has been recognized since the Judiciary Act of 1789, which

provides that the President and the heads of the executive departments may request the opinion of the Attorney General on any question of law. For 54 years, the Attorney General's traditional function of providing legal opinions for the internal use of the Executive Branch has been assigned to OLC.

In connection with this function, OLC provides advice and prepares documents addressing a wide range of legal questions involving Executive Branch operations. Agencies ask OLC for advice and analysis on difficult and unsettled legal issues, often in connection with complex and sensitive operations that implicate national security interests. Our advice reflects the attorney-client relationship that exists between OLC and other executive offices, and, as in other attorney-client relationships, our advice is confidential. Protecting the confidentiality of OLC opinions helps ensure that decisionmakers will be willing to seek legal advice before they act. Indeed, without confidentiality, officials may be reluctant to seek our advice at precisely those critical times when it is most needed. Confidentiality also helps to ensure that the legal advice that policymakers receive will be completely candid.

I would like to address directly the concern that, by issuing confidential legal advice, OLC makes "secret law." It is true that, subject to the President's authority under the Constitution, OLC opinions are controlling within the Executive Branch on questions of law. However, OLC does not "make law" in the same sense that Congress or the courts do. While OLC's legal advice and analysis may inform the decisionmaking of its clients, the legal advice rarely, if ever, compels the adoption of any particular policy; rather, it remains up to policymakers to decide whether and how to act. OLC thus lacks the ability to affect private parties directly, and its legal views are not binding on the Legislative Branch, the courts, or members of the general public. If the Executive Branch adopts a policy that OLC has declared legally permissible, the policy will be public unless it is classified, and appropriate officials may be called upon to explain the policy, including its basis in law. (Classified activities are, of course, subject to review by the intelligence committees.) But effective policymaking is not possible if officials are inhibited by concerns that the advice they receive or their other internal, pre-decisional deliberations will be made public.

At the same time, OLC recognizes that many of its opinions address issues of interest to the government or to the public. It is our policy to publish such opinions whenever doing so is consistent with the legitimate confidentiality interests of the President and the Executive Branch, and this publication policy is sensitive to Congress's interests in understanding the legal reasoning relied upon by executive agencies. There has historically been a time lag between when an opinion is signed and when it is considered for publication, which reflects the need for confidentiality in the course of ongoing decisionmaking. Moreover, before publishing an opinion, OLC seeks approval from the office that requested it and generally solicits the views of other agencies and entities within the Executive Branch whose work may be affected by the opinion, a process that sometimes takes several months. There has been fundamental continuity from one Administration to the next in the criteria and procedures that OLC employs to make publication decisions. The Office's current approach to publication is consistent with historical practice. The publication review process has largely been completed for opinions signed in the years 1993-2000 but is ongoing for opinions signed since 2001. As a result, fewer of these more recently signed opinions have been published at this time. But during my tenure at OLC, the rate

of publication has increased, and the period of time between opinion signature and opinion publication has decreased.

Since the beginning of 2005, OLC has published 81 of its opinions on its Web site. See <http://www.usdoj.gov/olc/whatsnew.htm>. Three more opinions were released in response to requests under the Freedom of Information Act, one was released in redacted form, and one was declassified and publicly released in response to a congressional inquiry. In all, 86 opinions have been made public since the beginning of 2005, more than 90 percent of which were signed during this Administration. The number of opinions made public since the beginning of 2005 thus exceeds the 71 unclassified opinions that the Office has signed during that time.

The Office of Legal Counsel remains committed to sharing our work product with the public, consistent with the need to protect policy makers' ability to obtain confidential legal advice. We are also committed to working with Congress, when it expresses interest in the work of the office. From time to time, Congress requests access to opinions that cannot be disclosed because they constitute confidential legal advice. Some other OLC opinions have been classified for reasons of national security, typically because they incorporate classified information provided by another agency or office. OLC acknowledges the importance of congressional oversight, however, and we remain committed to working with Congress to find appropriate ways to keep Congress well informed about the basis in law for Executive Branch policies, while at the same time respecting the attorney-client confidentiality and national security sensitivity of our work. For instance, the Department may provide a congressional committee with a statement of its position on a legal issue of interest to the Committee, while preserving the confidentiality of legal advice on that issue from OLC to an Executive Branch client. To take one concrete example, in response to congressional and public interest in the surveillance activities of the National Security Agency described by the President in December 2005, the Department of Justice prepared a 42-page white paper providing our views concerning the legal authorities supporting that program. In addition, during my tenure at OLC, representatives of the Office have appeared before numerous Committees to publicly discuss our legal views, and we have had many more private conversations with Members and staff on topics of mutual interest.

In sum, OLC recognizes the value of openness in government, which promotes public confidence that the government is making its decisions through a process of careful and thoughtful reasoning. By publishing OLC opinions when appropriate, we ensure that Executive Branch views are part of the public conversation on topics for which the Executive possesses relevant expertise. As we work to balance the values of transparency, accountability, and the confidentiality essential to good governance, our publication decisions will continue to reflect our commitment to a basic policy of openness, as well as to the important constitutional function of congressional oversight.