Opening Statement of Dawn E. Johnsen
Hearing before the United States Senate Judiciary Committee
Nomination, Assistant Attorney General, Office of Legal Counsel
February 25, 2009

Mr. Chairman, Ranking Member Specter, and Members of the Committee, it is a great honor to be here today. I would like to thank each of you and your staffs for your time and attention to my nomination. I also would like to thank Senator Richard Lugar and Senator Evan Bayh and my Representative, Baron Hill, and their staffs for their help during this process and for their service to Indiana and the United States.

I am so grateful to friends and family who have traveled to be at this hearing: my husband, John Hamilton and our sons, Matthew age 12 and Eric age 10, my mother Carolyn Johnsen, my grandmother Ruth Dalland, sisters Jill Johnsen and Jennifer Johnsen, Aunts and Uncles Edward and Lynette Dalland and Diana Cacciola (who is a longtime employee of the FBI, as is my uncle, her husband), other relatives Nancy Hamilton, Beverly Andracchi, Dawn Guarriello, Joanna Dalland, Michael Dalland, and Barbara and Shawn Turner, and close friends, Claudia and Luke Allen, Walter and Anne Dellinger, Shirley Brandman, Zack Shapiro, and Sue Todd.

One person who could not be here but who would have loved this day is my father, Don Johnsen, who passed away several years ago. My father worked hard for thirty years as a letter carrier for the United States Postal Service, and he always worked a second job as well, to provide for his family, to send me and my sisters and brother all to college and beyond, an opportunity that he did not have. He took great pride in his service in the United States Navy on a destroyer in the 1950s. My father deeply loved both his family and his country. He is very much in our thoughts today.

In 1976, the year of the bicentennial of the Declaration of Independence, at age 14, I entered an essay contest on what makes America great. I won a $100 savings bond, and the chance to read my essay aloud at the Fourth of July Fair on the grounds of the Carle Place public schools. I do not have a copy of that essay, and have long-since spent the savings bond, but I'm quite certain I quoted Robert F. Kennedy as follows, from my favorite poster then hanging on the wall of the bedroom I shared with my two sisters:

> The future does not belong to those who are content with today . . . . Rather it will belong to those who can blend vision, reason and courage in a personal commitment to the ideals and great enterprises of American Society.

I have endeavored throughout my life to do what I can to serve the ideals and great enterprises of our great country.

When I finished law school and my federal clerkship twenty-plus years ago, I loved the law and especially constitutional law. One of the most interesting and consequential issues at that time, involving the intersection of constitutional law and public policy, was the right to privacy, to reproductive liberty. It was a time when the Supreme Court

seemed poised to overrule *Roe v. Wade*. I believed, then as now, that whether and when to bear a child is a highly personal and complex decision, not appropriate for the government. For my first job as a lawyer, I chose to work on issues of reproductive liberty.

I am deeply mindful of the fact that this is an area of great controversy over which there is profound disagreement in this country, an area in which I share the hope of President Obama that we can move toward common ground approaches. More broadly, I deeply believe that as Americans, we do share some bedrock values and commitments:

> to respect conflicting viewpoints and understand that people of good will inevitably disagree and that in our system such debate makes us stronger and better;
>
> to protect the physical safety of the American people, especially today from post 9/11 terrorist threats;
>
> to uphold our Constitution and our basic values, including our commitment to a limited government that is effective in protecting both our physical safety and our fundamental liberties;
>
> and finally, to uphold the rule of law.

Commitment to the rule of law is my overriding passion: love for our constitutional democracy and the imperative that the government belongs to the people, that the government officials who lead it are not above the law, but rather are entrusted with fulfilling and respecting the law as well as with making it.

I learned most intimately of that imperative when I served at the Office of Legal Counsel from 1993 to 1998, initially as a deputy to Walter Dellinger and the last year and a half as the acting head of OLC. During those five years I came to understand that above all, OLC must provide the President and officials throughout the Executive Branch with accurate, honest legal interpretations; that my personal views on a subject were not what mattered; and that OLC must look to the Constitution and to statutes enacted by this body, to judicial and executive branch precedent, and to the career professionals at OLC and throughout the government who bring essential experience, expertise and judgment. In the ten years since, as a law professor at Indiana University, I have focused much of my research and writing on issues of presidential power and government lawyering.

As war often does, 9-11 tested our commitment to the rule of law.

Indiana is now my home, but I was born and raised in New York, on Long Island where my mother still lives. My sister Jennifer had a view of the twin towers from her lower east-side Manhattan apartment. My sister Jill is an elementary school teacher in the New York City public schools, and when the planes hit she had in her care her class of fourth graders. I have many relatives and dear friends who live in New York and Washington,

D.C., some of whom lost loved ones in that terrible attack on our country.

My thoughts and concerns those first days were of course most powerfully with my loved ones and others who suffered personal losses. They also were professionally very much with the government lawyers who bore the tremendous responsibility of helping our government respond, keeping our Nation safe from future attacks. My service at OLC I believe gave me a special appreciation for what they confronted, and for the outstanding work of countless dedicated men and women in the years since to protect our citizens, bring justice to perpetrators, and to show the strength of our democracy to the rest of the world.

My prior government service also gave me a feeling of special responsibility to speak out when, later, on a few occasions, I believed that OLC—the office that I know best—had failed to live up to its best traditions. I principally was concerned about what I saw as excessive Executive Branch claims of a right to act contrary to valid federal statutes, duly enacted by Congress, and to do so in secret. In particular, the federal statute prohibiting torture and the Foreign Intelligence Surveillance Act.

I therefore in my work as an academic have sought to be constructive and to explore the proper scope of presidential power and the proper role of government lawyers. I have urged caution and precision from those who would critique the prior administration, and have recently written that "Critics should be precise with their objections and recommendations in order to avoid undermining future Presidents' legitimate authorities or otherwise disrupting the proper balance of governmental powers." (88 Boston U. Law Review 395, 396 (2008)).

Most notably in 2004 I brought together 19 former OLC lawyers and led an effort to draft what we called "Principles to Guide the Office of Legal Counsel." We drew those ten principles from OLC's best nonpartisan traditions, though I have been quick to acknowledge that deviations from these best practices can be found in many administrations, of both political parties.

Over the last several years I have testified to this committee and I have written about the ten principles. I have submitted to this Committee a copy of the principles appended to my written testimony and will not review them all here, but will close with a brief description of the first principle.

As I wrote in a recent article, "[t]he Guidelines come down squarely on the side of accuracy over advocacy, and most of its ten principles follow from and elaborate on the [] first and most fundamental principle: '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 . . . inadequately promotes the President's constitutional obligation to ensure the legality of executive action.'" (54 UCLA Law Review 1559, 1580 (2007)).

The remaining nine principles describe processes aimed at ensuring this is achieved,

including involving career professionals from around the government and notifying Congress any time the Executive Branch does not fully comply with a federal statute. I also worked last year with Senator Feingold's staff and with Brad Berenson, who served President George W. Bush in the White House Counsel's office, to help draft a bill that would require such reporting. We did so after Senators from both parties suggested in a hearing at which Brad and I testified that they would welcome such an effort.

I have had the great privilege of growing up in a loving, supportive, working class family and attending fine public schools and private universities. That allowed me to serve my country – its ideals and great enterprises – in humbling and gratifying ways.

Nothing exemplified that more than serving for five years at OLC, at the Department of Justice, a few blocks up Pennsylvania Avenue from here. In the mornings, as I would cross Pennsylvania Avenue to go to work, I would look down at the magnificent view of the Capitol and be reminded of the small but important part OLC plays in helping this great country achieve our goals.

I look forward, should the Senate confirm my appointment, to serving President Obama, Attorney General Holder, and the people of the United States in ways that support the rule of law, that protect our nation, and that enhance our constitutional democracy. Should I be so fortunate as to receive your support, I look forward to working with you toward those ends that we share. Thank you very much.

**Principles to Guide the Office of Legal Counsel**
**December 21, 2004**

The Office of Legal Counsel (OLC) is the Department of Justice component to which the Attorney General has delegated the function of providing legal advice to guide the actions of the President and the agencies of the executive branch. OLC's legal determinations are considered binding on the executive branch, subject to the supervision of the Attorney General and the ultimate authority of the President. From the outset of our constitutional system, Presidents have recognized that compliance with their constitutional obligation to act lawfully requires a reliable source of legal advice. In 1793, Secretary of State Thomas Jefferson, writing on behalf of President Washington, requested the Supreme Court's advice regarding the United States' treaty obligations with regard to the war between Great Britain and France. The Supreme Court declined the request, in important measure on the grounds that the Constitution vests responsibility for such legal determinations within the executive branch itself: "[T]he three departments of government … being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions seems to have been purposely as well as expressly united to the executive departments." Letter from John Jay to George Washington, August 8, 1793, *quoted in* 4 The Founders' Constitution 258 (Philip B. Kurland & Ralph Lerner, eds. 1987).

From the Washington Administration through the present, Attorneys General, and in recent decades the Office of Legal Counsel, have served as the source of legal determinations regarding the executive's legal obligations and authorities. The resulting body of law, much of which is published in volumes entitled Opinions of the Attorney General and Opinions of the Office of Legal Counsel, offers powerful testimony to the importance of the rule-of-law values that President Washington sought to secure and to the Department of Justice's profound tradition of respect for the rule of law. Administrations of both political parties have maintained this tradition, which reflects a dedication to the rule of law that is as significant and as important to the country as that shown by our courts. As a practical matter, the responsibility for preserving this tradition cannot rest with OLC alone. It is incumbent upon the Attorney General and the President to ensure that OLC's advice is sought on important and close legal questions and that the advice given reflects the best executive branch traditions. The principles set forth in this document are based in large part on the longstanding practices of the Attorney General and the Office of Legal Counsel, across time and administrations.

*1. 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 legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action.*

OLC's core function is to help the President fulfill his constitutional duty to uphold the Constitution and "take care that the laws be faithfully executed" in all of the varied work of the executive branch. OLC provides the legal expertise necessary to ensure the lawfulness of presidential and executive branch action, including contemplated action that raises close and difficult questions of law. To fulfill this function appropriately, OLC must provide advice based on its best understanding of what the law requires. OLC should not simply provide an advocate's best defense of contemplated action that OLC actually believes is best viewed as unlawful. To do so would deprive the President and other executive branch decisionmakers of critical information and, worse, mislead them regarding the legality of contemplated action. OLC's tradition of principled legal analysis and adherence to the rule of law thus is constitutionally grounded and also best serves the interests of both the public and the presidency, even though OLC at times will determine that the law precludes an action that a President strongly desires to take.

2. *OLC's advice should be thorough and forthright, and it should reflect all legal constraints, including the constitutional authorities of the coordinate branches of the federal government–the courts and Congress–and constitutional limits on the exercise of governmental power.*

The President is constitutionally obligated to "preserve, protect and defend" the Constitution in its entirety–not only executive power, but also judicial and congressional power and constitutional limits on governmental power–and to enforce federal statutes enacted in accordance with the Constitution. OLC's advice should reflect all relevant legal constraints. In addition, regardless of OLC's ultimate legal conclusions concerning whether proposed executive branch action lawfully may proceed, OLC's analysis should disclose, and candidly and fairly address, the relevant range of legal sources and substantial arguments on all sides of the question.

*3. OLC's obligation to counsel compliance with the law, and the insufficiency of the advocacy model, pertain with special force in circumstances where OLC's advice is unlikely to be subject to review by the courts.*

In formulating its best view of what the law requires, OLC always should be mindful that the President's legal obligations are not limited to those that are judicially enforceable. In some circumstances, OLC's advice will guide executive branch action that the courts are unlikely to review (for example, action unlikely to result in a justiciable case or controversy) or that the courts likely will review only under a standard of extreme deference (for example, some questions regarding war powers and national security). OLC's advice should reflect its best view of all applicable legal constraints, and not only legal constraints likely to lead to judicial invalidation of executive branch action. An OLC approach that instead would equate "lawful" with "likely to escape judicial condemnation" would ill serve the President's constitutional duty by failing to describe all legal constraints and by appearing to condone unlawful action as long as the President could, in a sense, get away with it. Indeed, the absence of a litigation threat signals special need for vigilance: In circumstances in which judicial oversight of

executive branch action is unlikely, the President–and by extension OLC–has a special obligation to ensure compliance with the law, including respect for the rights of affected individuals and the constitutional allocation of powers.

*4. OLC's legal analyses, and its processes for reaching legal determinations, should not simply mirror those of the federal courts, but also should reflect the institutional traditions and competencies of the executive branch as well as the views of the President who currently holds office.*

As discussed under principle 3, jurisdictional and prudential limitations do not constrain OLC as they do courts, and thus in some instances OLC appropriately identifies legal limits on executive branch action that a court would not require. Beyond this, OLC's work should reflect the fact that OLC is located in the executive branch and serves both the institution of the presidency and a particular incumbent, democratically elected President in whom the Constitution vests the executive power. What follows from this is addressed as well under principle 5. The most substantial effects include the following: OLC typically adheres to judicial precedent, but that precedent sometimes leaves room for executive interpretive influences, because doctrine at times genuinely is open to more than one interpretation and at times contemplates an executive branch interpretive role. Similarly, OLC routinely, and appropriately, considers sources and understandings of law and fact that the courts often ignore, such as previous Attorney General and OLC opinions that themselves reflect the traditions, knowledge and expertise of the executive branch. Finally, OLC differs from a court in that its responsibilities include facilitating the work of the executive branch and the objectives of the President, consistent with the requirements of the law. OLC therefore, where possible and appropriate, should recommend lawful alternatives to legally impermissible executive branch proposals. Notwithstanding these and other significant differences between the work of OLC and the courts, OLC's legal analyses always should be principled, thorough, forthright, and not merely instrumental to the President's policy preferences.

*5. OLC advice should reflect due respect for the constitutional views of the courts and Congress (as well as the President). On the very rare occasion when the executive branch—usually on the advice of OLC—declines fully to follow a federal statutory requirement, it typically should publicly disclose its justification.*

OLC's tradition of general adherence to judicial (especially Supreme Court) precedent and federal statutes reflects appropriate executive branch respect for the coordinate branches of the federal government. On very rare occasion, however, Presidents, often with the advice of OLC, appropriately act on their own understanding of constitutional meaning (just as Congress at times enacts laws based on its own constitutional views). To begin with relatively uncontroversial examples, Presidents at times veto bills they believe are unconstitutional and pardon individuals for violating what Presidents believe are unconstitutional statutes, even when the Court would uphold the statute or the conviction against constitutional challenge. Far more controversial are rare cases in which Presidents decide to refuse to enforce or otherwise comply with laws they deem unconstitutional, either on their face or in some applications. The precise

contours of presidential power in such contexts are the subject of some debate and beyond the scope of this document. The need for transparency regarding interbranch disagreements, however, should be beyond dispute. At a bare minimum, OLC advice should fully address applicable Supreme Court precedent, and, absent the most compelling need for secrecy, any time the executive branch disregards a federal statutory requirement on constitutional grounds, it should publicly release a clear statement explaining its deviation. Absent transparency and clarity, client agencies might experience difficulty understanding and applying such legal advice, and the public and Congress would be unable adequately to assess the lawfulness of executive branch action. Indeed, federal law currently requires the Attorney General to notify Congress if the Department of Justice determines either that it will not enforce a provision of law on the grounds that it is unconstitutional or that it will not defend a provision of law against constitutional challenge.

*6. OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.*

OLC should follow a presumption in favor of timely publication of its written legal opinions. Such disclosure helps to ensure executive branch adherence to the rule of law and guard against excessive claims of executive authority. Transparency also promotes confidence in the lawfulness of governmental action. Making executive branch law available to the public also adds an important voice to the development of constitutional meaning–in the courts as well as among academics, other commentators, and the public more generally–and a particularly valuable perspective on legal issues regarding which the executive branch possesses relevant expertise. There nonetheless will exist some legal advice that properly should remain confidential, most notably, some advice regarding classified and some other national security matters. OLC should consider the views regarding disclosure of the client agency that requested the advice. Ordinarily, OLC should honor a requestor's desire to keep confidential any OLC advice that the proposed executive action would be unlawful, where the requestor then does not take the action. For OLC routinely to release the details of all contemplated action of dubious legality might deter executive branch actors from seeking OLC advice at sufficiently early stages in policy formation. In all events, OLC should in each administration consider the circumstances in which advice should be kept confidential, with a presumption in favor of publication, and publication policy and practice should not vary substantially from administration to administration. The values of transparency and accountability remain constant, as do any existing legitimate rationales for secret executive branch law. Finally, as discussed in principle 5, Presidents, and by extension OLC, bear a special responsibility to disclose publicly and explain any actions that conflict with federal statutory requirements.

*7. OLC should maintain internal systems and practices to help ensure that OLC's legal advice is of the highest possible quality and represents the best possible view of the law.*

OLC systems and processes can help maintain high legal standards, avoid errors, and safeguard against tendencies toward potentially excessive claims of executive

authority. At the outset, OLC should be careful about the form of requests for advice. Whenever possible, agency requests should be in writing, should include the requesting agency's own best legal views as well as any relevant materials and information, and should be as specific as circumstances allow. Where OLC determines that advice of a more generally applicable nature would be helpful and appropriate, it should take special care to consider the implications for its advice in all foreseeable potential applications. Also, OLC typically should provide legal advice in advance of executive branch action, and not regarding executive branch action that already has occurred; legal "advice" after the fact is subject to strong pressures to follow an advocacy model, which is an appropriate activity for some components of the Department of Justice but not usually for OLC (though this tension may be unavoidable in some cases involving continuing or potentially recurring executive branch action). OLC should recruit and retain attorneys of the highest integrity and abilities. OLC should afford due respect for the precedential value of OLC opinions from administrations of both parties; although OLC's current best view of the law sometimes will require repudiation of OLC precedent, OLC should never disregard precedent without careful consideration and detailed explanation. Ordinarily OLC legal advice should be subject to multiple layers of scrutiny and approval; one such mechanism used effectively at times is a "two deputy rule" that requires at least two supervising deputies to review and clear all OLC advice. Finally, OLC can help promote public confidence and understanding by publicly announcing its general operating policies and procedures.

*8. Whenever time and circumstances permit, OLC should seek the views of all affected agencies and components of the Department of Justice before rendering final advice.*

The involvement of affected entities serves as an additional check against erroneous reasoning by ensuring that all views and relevant information are considered. Administrative coordination allows OLC to avail itself of the substantive expertise of the various components of the executive branch and to avoid overlooking potentially important consequences before rendering advice. It helps to ensure that legal pronouncements will have no broader effect than necessary to resolve the question at hand. Finally, it allows OLC to respond to all serious arguments and thus avoid the need for reconsideration.

9. *OLC should strive to maintain good working relationships with its client agencies, and especially the White House Counsel's Office, to help ensure that OLC is consulted, before the fact, regarding any and all substantial executive branch action of questionable legality.*

Although OLC's legal determinations should not seek simply to legitimate the policy preferences of the administration of which it is a part, OLC must take account of the administration's goals and assist their accomplishment within the law. To operate effectively, OLC must be attentive to the need for prompt, responsive legal advice that is not unnecessarily obstructionist. Thus, when OLC concludes that an administration proposal is impermissible, it is appropriate for OLC to go on to suggest modifications

that would cure the defect, and OLC should stand ready to work with the administration to craft lawful alternatives. Executive branch officials nonetheless may be tempted to avoid bringing to OLC's attention strongly desired policies of questionable legality. Structures, routines and expectations should ensure that OLC is consulted on all major executive branch initiatives and activities that raise significant legal questions. Public attention to when and how OLC generally functions within a particular administration also can help ensure appropriate OLC involvement.

*10. OLC should be clear whenever it intends its advice to fall outside of OLC's typical role as the source of legal determinations that are binding within the executive branch.*

OLC sometimes provides legal advice that is not intended to inform the formulation of executive branch policy or action, and in some such circumstances an advocacy model may be appropriate. One common example: OLC sometimes assists the Solicitor General and the litigating components of the Department of Justice in developing arguments for presentation to a court, including in the defense of congressional statutes. The Department of Justice typically follows a practice of defending an act of Congress against constitutional challenge as long as a reasonable argument can be made in its defense (even if that argument is not the best view of the law). In this context, OLC appropriately may employ advocacy-based modes of analysis. OLC should ensure, however, that all involved understand whenever OLC is acting outside of its typical stance, and that its views in such cases should not be taken as authoritative, binding advice as to the executive branch's legal obligations. Client agencies expect OLC to provide its best view of applicable legal constraints and if OLC acts otherwise without adequate warning, it risks prompting unlawful executive branch action.

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