

Statement of
The Honorable Patrick Leahy

United States Senator
Vermont
February 25, 2009

STATEMENT OF SENATOR PATRICK LEAHY
CHAIRMAN, SENATE JUDICIARY COMMITTEE
ON NOMINATIONS TO BE ASSISTANT ATTORNEYS GENERAL FOR THE OFFICE OF
LEGAL COUNSEL AND NATIONAL SECURITY DIVISION
FEBRUARY 25, 2009

Today, the Senate Judiciary Committee will hear from two more of President Obama's highly-qualified nominees who have chosen to return to the Department of Justice, where they previously distinguished themselves. Dawn Johnsen and David Kris come before the Committee recommended for the critical positions to which they have been nominated by numerous letters of support from Republicans and Democrats alike.

Our renewed oversight efforts in the last two years brought into sharper focus what for years had been clear-- that during the last eight years, the Bush administration repeatedly ignored the checks and balances wisely placed on executive power by the Founders.

In the wake of the tragic attacks on September 11, 2001, and toward the end of President Bush's first year in office, this country had an opportunity to show that we could fight terrorism, secure our nation, and bring the perpetrators of those heinous acts to justice, all in a way that was consistent with our history and our most deeply valued principles. A number of us reached out to the White House in an effort to craft a thoughtful, effective, bipartisan way forward. The White House, supported by the Republican leadership in Congress, chose another path. They diverted our focus from al Qaeda and capturing Osama bin Laden to war and occupation in Iraq. They chose to enhance the power of the President and to turn the Office of Legal Counsel at the Department of Justice into an apologist for White House orders--from the warrantless wiretapping of Americans to torture. In my view, that approach made our country less safe.

We are all too familiar now with the litany of disastrous actions by that administration: rejecting the Geneva Conventions - which the President's Counsel referred to as "quaint" - against the advice of the Secretary of State; establishing a system of detention at Guantanamo Bay in an effort to circumvent the law and accountability; attempting to eliminate the Great Writ of habeas corpus for any non-citizen designated by the President as an enemy combatant; setting up a flawed military commission process that took six years to result in its first trial of a terrorist after more than 80 had been tried successfully in our court system; and permitting cruel interrogation practices that in the worst cases amount to officially sanctioned torture.

Among the most disturbing aspects of those years was the complicity of the Justice Department, particularly the Office of Legal Counsel, which provided cover for the worst of these practices. Its secret legal memoranda sought to define torture down to meaninglessness, sought to excuse

warrantless spying on Americans contrary to our laws and made what Jack Goldsmith, a conservative former head of OLC, rightly called a "legal mess" of it all. The costs have been enormous, to our core American ideals, the rule of law, and the principle that in America, no one - not even a President - is above the law.

We need to get to the bottom of what happened in those eight years -- and why -- so we make sure it never happens again. My desire to find a path to reach a reckoning for the actions of the past eight years has led me to suggest a commission of inquiry. We need a fair-minded pursuit of what actually happened. Sometimes the best way to move forward is getting to the truth, finding out what happened, so we can make sure it does not happen again. Today I am setting a hearing for next week to explore the idea so that we can find a way forward to a shared understanding of the failures of the recent past.

Of course, we have already taken a significant step forward by confirming Eric Holder as Attorney General. In his answer to my first question to him at his confirmation hearing, now Attorney General Holder declared that "waterboarding is torture" and that no one is above the law. It would not "depend on the circumstances" as the Bush Attorneys General maintained. I am confident that our new Attorney General will not sit in the room while others in our Government approve the secret wiretapping of Americans in violation of our laws, or approve torture.

Today we hear from two nominees for key positions to our national security team. David Kris has been nominated to head the National Security Division and Dawn Johnsen has been nominated to head the Office of Legal Counsel. We should be mindful as we consider these nominations of President Obama's call during his inaugural address for Americans "to reject as false the choice between our safety and our ideals."

The Office of Legal Counsel at the Justice Department is one of those institutions that was hijacked and must be restored. The role of OLC is to provide impartial and independent legal advice for the executive branch. I recall Professor Goldsmith's testimony about his efforts when he took over the office to ensure that the Bush administration complied with the law, which included rescinding several OLC opinions issued in secret by his predecessor predicated on extreme theories of executive power. His efforts were met with enormous resistance within the Bush administration, including the Vice President's office, which actively interfered with the normally independent role of the OLC. This led to one of the most shocking examples of this interference with OLC's independence, the now infamous visit by then-White House Counsel Alberto Gonzales and Chief of Staff Andrew Card to the hospital room of ailing Attorney General John Ashcroft. They sought to get him to reauthorize the administration's secret warrantless surveillance program, after being refused by Acting Attorney General, James Comey.

The new leadership at the Department, including the new head of OLC, must review and revise that office's legal work of the last eight years, when so much of that work was kept secret.

Dawn Johnsen, a five-year veteran of the office she has been nominated to lead and who served from 1997-1998 as Acting Assistant Attorney General in charge of the office, has a deep understanding of what such a review must entail. Indeed, when the excesses of the Bush administration's detainee policy were becoming horrifyingly clear in 2004 with the revelations about Abu Ghraib, Professor Johnson took action to try to protect OLC's integrity and processes.

She brought together 19 former OLC attorneys and led them in the formulation of 10 "Principles to Guide the Office of Legal Counsel" based on longstanding practices of OLC under both Democratic and Republican administrations.

These are guidelines that stem from the fundamental principle that, as Professor Johnsen wrote, "OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies." If confirmed, Professor Johnsen would not be an advocate who would look at ways to circumvent the law and find loopholes, but would, instead, help return OLC to its non-ideological tradition of providing legal advice to help guide the actions of the President and the administration.

Professor Johnsen has worked in a bipartisan manner to help craft legislation that would bring greater transparency and accountability to OLC, garnering praise from Brad Berenson, a veteran of the Bush administration's White House counsel's office, with whom she worked on the legislation. Mr. Berenson described Professor Johnson as "fair and reasonable" and "a thoughtful lawyer motivated primarily by a concern for good government and a desire to see our democratic system work properly." Mr. Berenson wrote that the opinions Professor Johnsen expressed during the negotiations over that legislation "reflected a balanced view of the separation of powers and an appropriate respect for the interests of the branch of government that will become her client if she is confirmed."

Like Dawn Johnsen, David Kris is a highly-regarded veteran of the Department of Justice. He is former Federal prosecutor who spent eight years as a career attorney in the Criminal Division at the Department, handling complex cases in Federal trial and appellate courts, including the Supreme Court. Mr. Kris was then a political appointee under both President Clinton and President Bush, serving as Associate Deputy Attorney General from 2000-2003, supervising the government's use of the Foreign Intelligence Surveillance Act (FISA), representing the Justice Department at the National Security Council and in other inter-agency settings, briefing and testifying before Congress, and assisting the Attorney General in conducting oversight of the U.S. intelligence community.

Like Professor Johnsen, Mr. Kris understands the role the Bush administration's excesses have played in undermining the Department of Justice and the rule of law. In 2006, Mr. Kris released a 23-page legal memorandum critical of the legal rationale offered by the Bush administration and in support of the legality of the National Security Agency's warrantless wiretapping program. Mr. Kris was an early advocate for the creation of the National Security Division he has now been nominated to lead, leaving a lucrative practice as in-house counsel for a major corporation to return to government service.

Mr. Kris' nomination has also earned support from both sides of the aisle. Former Bush administration Solicitor General Ted Olson, who worked with Mr. Kris at the Department, describes Mr. Kris as "a very sound lawyer," who "is committed to the defense of the United States and its citizens, and respects the rule of law and civil rights." Former Deputy Attorney General Larry Thompson, who asked Mr. Kris to remain in his post during the Bush administration, writes that he asked Mr. Kris to stay after finding that "he had a passion for national security issues but also a deep respect and appreciation for the related civil liberties concerns." Former Bush administration Homeland Security Secretary Michael Chertoff and

former Attorneys General Janet Reno and John Ashcroft have all written in support of Mr. Kris' nomination.

I hope we can move quickly to consider and confirm Professor Johnson and Mr. Kris to their important positions at the Department. Before our recess, I had hoped the Committee could have moved quickly to report out the nomination of David Ogden to be the Deputy Attorney General, another critical national security post. Unfortunately some Senators did not get their follow up questions to him in time for the Committee to consider his nomination before recess I trust that when we consider his nomination at our business meeting tomorrow, along with the nominations of Elena Kagan to be the first woman confirmed as Solicitor General and Tom Perrelli to be Associate Attorney General, all Senators will be prepared to debate and vote on the nominations. The problems and threats confronting the country are too serious to delay. The Attorney General needs the other members of his Justice Department leadership team in place at the earliest opportunity.

Last night, the President reminded Americans and the world that, "to overcome extremism, we must also be vigilant in upholding the values our troops defend - because there is no force in the world more powerful than the example of America." President Obama reminded us that "living our values doesn't make us weaker, it makes us safer and it makes us stronger."

The nominees before the Committee today understand the moral and legal obligations to protect the fundamental rights of all Americans and to respect the human rights of all. They know as the President and the new Attorney General know that we must ensure that the rule of law is restored as the guiding light for the work of the Department of Justice.

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