

Statement of

# **The Honorable Patrick Leahy**

United States Senator  
Vermont  
April 30, 2008

Statement Of Senator Patrick Leahy (D-Vt.),  
Hearing On "Secret Law And The Threat  
To Democratic And Accountable Government"  
Before The Subcommittee On The Constitution  
Senate Judiciary Committee  
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I thank Senator Feingold for holding this important hearing. To paraphrase James Madison, if men were angels we would need no laws. We are not angels, and our government needs laws to guide its actions. But laws that are created, defined, or interpreted in secret might as well not exist. Secret law is not a check on the government; when law is kept secret, the rule of law suffers.

This administration has, for years, set out to shield itself from constraint and accountability by employing unprecedented secrecy. Key members of this administration have long held the view that when it comes to national security the President should not be encumbered by laws, the Congress, or the courts. To accomplish this vision of executive power, the White House has insisted on limiting knowledge of important legal decisions and interpretations to a tiny, powerful group of like-minded lawyers. If you might disagree, you are not allowed in the discussion. Congress, at all costs, is to be denied input into or knowledge of these critical matters.

The role of the Justice Department's Office of Legal Counsel (OLC) has been a casualty of this drive for secrecy. The OLC is a small but very important office within the Justice Department. Some of the best legal minds in the country have been OLC lawyers. The job of the lawyers at OLC is to give principled, neutral assessments of the law to guide the Executive Branch. The OLC's opinions have traditionally carried great weight in the Executive Branch; in fact, they are considered binding

Because of their practical authority, it is critical that OLC opinions be as transparent as possible. The prospect of review and challenge by peers, Congress, and even the public ensures a stronger, more thoughtful opinion. If an OLC opinion interprets the law in a way that permits action that Congress believes is or should be illegal, Congress should know. Congress writes the laws. If the Executive is not "faithfully executing" the law but wrongly interpreting or implementing them, Congress needs to call the Executive to task through oversight or, in the extreme case, to amend the law to reiterate its intention and clarify the law's meaning. Obviously an opinion kept secret from Congress makes that impossible.

But in this administration the tool of secrecy has been used to pervert the role of OLC. The OLC's opinions in the critical area of counter-terrorism were written to support preordained results and to justify illegal conduct. They were not shared with anyone who might criticize their analysis. Opinions that interpreted our obligations under international treaties were not even shared with the State Department - which has obvious expertise on those legal issues and the consequences of adopting particular positions. Opinions on warrantless surveillance were kept from the NSA, which was charged with carrying them out, and for years even from the Deputy Attorney General.

When a conservative lawyer, Jack Goldsmith, came in briefly to head OLC and reviewed some of these opinions, he found, as he has written in his book, they were "deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President." Opinions about the warrantless wiretapping program were "a legal mess" and opinions on torture "in effect gave interrogators a blank check." In addition, the opinions "lacked the tenor of detachment and caution that usually characterizes OLC work" and sounded instead "like a bad defense counsel's brief." Mr. Goldsmith rescinded and corrected some of these opinions, but he was in the job for less than a year.

The veil of secrecy continues at OLC. I have sought on literally dozens of occasions to review key OLC opinions on detainee treatment and the government's other actions in fighting terrorism. I have been stonewalled at every step. They have even refused my repeated requests even to provide an index of OLC opinions. Think about that - they do not even want the Senate Judiciary Committee to be aware of the subjects on which OLC has opined. That is how resistant this administration has been and remains to any review or accountability.

An OLC opinion has been described as akin to an "advance pardon" because of how difficult it would be to prosecute someone who relied on an OLC legal interpretation. That may explain why this administration has chosen to pervert the role of OLC. It seems part of a deliberate effort to create a form of self-serving immunization for its actions.

The perversion of OLC is only one aspect of this administration's problem with secret law. They have distorted claims of executive privilege beyond recognition in order to keep Congress in the dark and have overused claims of the state secrets privilege to avoid review by the courts. They have used presidential signing statements to obscure rather than clarify the law, as I have said to sign the law with one hand but to keep the other behind the President's back with his fingers crossed. They have manipulated the classification system, which is designed to protect national security, using it instead to shield their misdeeds and flawed legal analysis.

We see the disastrous effects of this secret law all around us today. We see it in a system of detention that, rather than being above reproach and an example to the world, has lost credibility with our allies and is a powerful rhetorical tool for our enemies. We see it in the terrible abuses at Abu Ghraib. It is now clear those abuses resulted directly from OLC's secretly procured and preordained legal interpretations. We see it in the distrust on the part of Americans about actions and pronouncements of its government.

I am grateful to the excellent witnesses at today's hearing. I am confident their testimony will help shed new light on this important issue. History will judge this era harshly for its distortion of the rule of law.

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