Formal Statement

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

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Good Morning, Mr. Chairman, Senator Brownback, and members of the subcommittee. Thank you for the opportunity to appear before you to discuss a critical but seldom reviewed topic dealing with the increasing conflation of secrecy and law in the Federal government.

Several months ago, I retired from the Federal service after a career of over 34 years. While I am neither a lawyer nor a constitutional scholar, I have been a public servant for my entire adult life, during which I have been thoroughly immersed in the world of government secrecy. The last position in which I served was as the Director of the Information Security Oversight Office, often called "ISOO." The President established this position, as well as the organization I directed, in section 5.2 of Executive Order 12958, as amended, "Classified National Security Information."

ISOO is within the National Archives and Records Administration. It receives policy guidance from the Assistant to the President for National Security Affairs. Under the Order and applicable Presidential guidance, ISOO has substantial responsibilities with respect to the classification, safeguarding, and declassification of information by agencies within the Executive branch. Included is the responsibility to develop and promulgate directives implementing the Executive Order on "Classified National Security Information." This is accomplished through ISOO Directive No. 1 (32 CFR Part 2001).

Before being appointed as the Director, ISOO, I spent almost 30 years in the Department of Defense (DoD) and served as the Deputy Assistant Secretary of Defense (Security & Information Operations) in both the Clinton and George W. Bush administrations. In that position, I was responsible for programmatic and technical issues relating to the DoD's information assurance, critical infrastructure protection, counterintelligence, security, and information operations programs.

This morning I would like to focus my attention on the recently "declassified" March 14, 2003, Department of Justice (DoJ) memorandum on interrogation of enemy combatants. At the risk of emphasizing form over substance, I plan to concentrate my observations on the classified status of this and similar legal products of the Executive branch that have the force of law yet are intended to remain unknown to the American public, and oftentimes to the Congress and the courts as well. I will leave it to others more competent than I to comment on the quality and reasonableness of the legal rationale for such products.

The March 14, 2003, memorandum on interrogation of enemy combatants was written by DoJ's Office of Legal Counsel (OLC) to the General Counsel of the DoD. By virtue of the memorandum's classification markings, the American people were initially denied access to it. Only after the document was declassified were my fellow citizens and I able to review it for the first time. Upon doing so, I was profoundly disappointed because this memorandum represents one of the worst abuses of the classification process that I had seen during my career, including the past five years when I had the authority to access more classified information than almost any other person in the Executive branch. The memorandum is purely a legal analysis – it is not operational in nature. Its author was quoted as describing it as "near boilerplate."[1] To learn that such a document was classified had the same effect on me as waking up one morning and learning that after all these years, there is a "secret" Article to the Constitution that the American people do not even know about.

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[1] Dan Eggen and Josh White, "Memo: Law Didn't Apply to Interrogators," *Washington Post*, April 2, 2008, p. A1

Whoever affixed classification markings to this document had either profound ignorance of or deep contempt for the process set forth by the President in which he delegates to certain government officials his inherent constitutional authority to restrict the dissemination of specific information in the interest of national security. This process is set forth in the previously-referenced Executive Order 12958, as amended.

The classification of this memo is wrong on so many levels. For example, within the Federal government, while there are over 3 million people with a security clearance, only 4,000 of them have the authority to classify information in the first instance. These people must be authorized in writing by the President, agency heads, or other officials designated by the President. In this instance, the OLC memo did not contain the identity of the official who designated this information as classified in the first instance, even though this is a fundamental requirement of the President's classification system. In addition, the memo contained neither declassification instructions nor a concise reason for classification, likewise basic requirements. Equally disturbing, the official who designated this memo as classified did not fulfill the clear requirement to indicate which portions are classified and which portions are unclassified, leading the reader to question whether this official truly believes a discussion of patently unclassified issues such as the President's Commander-in-Chief authorities or a discussion of the applicability to enemy combatants of the Fifth or Eighth Amendment would cause identifiable harm to our national security. Furthermore, it is exceedingly irregular that this memorandum was declassified by DoD even though it was written, and presumably classified, by DoJ.

What is equally disturbing is that this memo was not some obscure, meaningless document written by a low-level bureaucrat who did not know any better and had inadequate supervision. Rather, the memo was written by the Deputy of the OLC, the very entity which has the responsibility to render interpretations of all Executive Orders, a responsibility that includes interpreting the governing order that distinguishes between the proper and improper classification of information. In addition, the memo was addressed to the most senior legal official within the DoD and was reportedly shared with some of the most senior officials in the Executive branch, including the then White House Counsel as well as the then Counsel to the Vice President. Like all people with a security clearance, per the President's direction in the

governing Executive Order, each of these government officials had the affirmative responsibility to challenge the inappropriate classification of information.[2] There is no evidence to suggest that any of them did so in this case – even though the memorandum failed on almost every level in fulfilling the President's direction concerning conditions under which information will be classified.

What is most disturbing is that at the exact same time these officials were writing, reviewing, and being briefed on the classified nature of this memorandum, they were also concurring with the President's reaffirmation of the standards for proper classification, which was formalized the week after the OLC memo was issued when the President signed his amended version of the Executive Order governing classification.[3]

Furthermore, while it is entirely appropriate that we consistently hold accountable, both criminally and administratively, people who are responsible for the unauthorized disclosure of classified national security information, the President's governing Executive Order makes it abundantly clear that people who "classify or continue the classification of information in violation of [the] order or any implementing directive ... shall be subject to sanctions ... [to] include reprimand, suspension without pay, removal, termination of classification authority, loss or denial of access to classified information, or other sanctions..."[4] There is no evidence to suggest that such sanctions have been imposed in this instance. Failure to apply sanctions makes it increasingly difficult to preserve the integrity and credibility of the classification system, a process that is an essential national security tool. Senior officials lead by example; as such, the threat to our national security that overclassification represents appears to be a bane that our nation – as well as the members of our military and intelligence services whose well-being depends upon the classification system's integrity – will be compelled to endure for the foreseeable future.

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[2] E.O. 12958, as amended, Section 1.8(a).

[3] The OLC memo was signed on March 14, 2003. The President signed his amendment to E.O. 12958 on March 25, 2003, following coordination with OLC, DoD and the Office of the Vice President, as well as others.

[4] Section 5.5, ibid.

While only the official who inappropriately assigned classification markings to the OLC memo can attest to the reasons for that decision, the effects of it are visible to all. In addition to keeping the information in the memo from the American people and the two co-equal branches of government, use of classification in this instance is a prime example of how classification is used, not for purposes of national security, but rather as a bureaucratic weapon to blunt potential opposition. Reportedly, top lawyers for the military services did not receive a final copy of the OLC memo,[5] in part because they opposed the harsh interrogation techniques endorsed in the memo, as well as the lack of transparency about how we handle enemy combatants. Our military lawyers fully recognize that our young men and women we send into battle as combatants are subject to capture and that we needlessly increase their exposure to potential abuse in this and future conflicts by ceding the moral high ground in the treatment of detainees. This is not to say that our enemy in the current conflict is anything but brutal; however, the first pillar of our national security strategy as articulated by the current administration is, not to reduce ourselves to the level of our adversary; rather it is to promote freedom, justice, and human dignity, which includes offering people throughout the world a positive vision rooted in America's beliefs, thereby isolating and marginalizing violent extremists.

Unfortunately, overclassification in the area of policy development is not new. Based upon my experience, there is a veritable hierarchy with respect to the appropriateness of classification decisions. Usually, when applied to the design, capabilities, and vulnerabilities of weapons systems, overclassification is a rarity. Likewise, classification with respect to the application of intelligence sources and methods is usually appropriate; however, the absence of a viable definition of what constitutes an intelligence source or method can lead to overclassification. In addition, the application of classification to information derived from intelligence sources or methods is often misapplied if the information is not source revealing.

Finally, the area of policy development is the one where, I believe, classification authority is most frequently abused, which by no coincidence also corresponds to the type of classified information that, I believe, is most frequently "leaked." Officials often rightfully do not want senior officials, including the President, to be denied the opportunity to make the final decision

[5] Eggen and White, "Memo."

on policy options – thus the frequent desire to keep policy-development information out of the public domain and thereby avoid being subject to numerous external pressures. Classification is often turned to as an easy means to control the flow information during the policy-development phase, even if the information is not of a nature that would endanger national security in the event of its unauthorized disclosure.

In addition, as we see in the case of this specific OLC memo, classification is often used as a bureaucratic weapon to blunt potential internal opposition. A prime example of indiscriminate secrecy was recently revealed by Jack Goldsmith, the former head of the OLC. Goldsmith wrote in his 2007 book *The Terror Presidency* that senior officials within the government "blew through [the Foreign Intelligence Surveillance Act] in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis for the operations." Goldsmith further recounted one of his first experiences with such extraordinary concealment in late 2003, when, as he recalls, David Addington of the Office of the Vice President (OVP) angrily denied a request by the National Security Agency's (NSA) Inspector General to see a copy of OLC's legal analysis supporting the oft-discussed secret NSA terrorist-surveillance program. Goldsmith wrote: "Before I arrived in OLC, not even NSA lawyers were allowed to see the Justice Department's legal analysis of what NSA was doing."[6]

Based upon my experience, pure legal analysis, especially when it lays new claims to inherent powers, should never be classified. Nonetheless, it is not unusual for a legal analysis to also discuss the specifics of a classified military operation or the application of a classified intelligence source and method, and those discussions would properly be classified. However, even in those instances, the President's own classification order states that "[t]he classification authority shall, whenever practicable, use a classified addendum whenever classified information constitutes a small portion of an otherwise unclassified document."[7] As such, legal analyses that claim novel inherent powers are ideal candidates for a classified addendum if specifics of a classified operation must be disclosed.

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[6] Jeffry Rosen, "Conscience of a Conservative," *New York Times Magazine*, September 9, 2007.

[7] E.O. 12958, as amended, Section 1.6 (g).

I have often talked about how secrecy is a two-edged sword. For example, denying information to the enemy on the battlefield also increases the risk of a lack of awareness on the part of our own forces, contributing to the potential for fratricide or other failures. Similarly, strict compartmentalization in handling human agents increases our own vulnerability to deception as a consequence of using sources that ultimately prove to be unreliable. Simply put, secrecy comes at a price – sometimes a deadly price – oftentimes through its impact upon the decision-making process. Whether seeking advances in science and technology, formulating government policy, developing war plans, or assessing intelligence, the end product can always be enhanced as a consequence of a far-reaching give and take during which underlying premises are challenged and alternate approaches are considered. As such, secrecy and compartmentalization just about guarantee the absence of an optimized end product. The challenge is ensuring that this tradeoff – that is, accepting something less than the optimal result in exchange for denying a potential adversary insight into or knowledge of our capabilities or intentions – is taken into account when making a decision to cloak certain information in secrecy.

The OLC memo at issue is a prime example of the costs of excessive secrecy. Disclosure of the information in the document gives no advantage to the enemy. At the same time, restrictions on its dissemination led directly to the creation of a legal product that was so lacking in its analysis that DoJ had to advise DoD to no longer rely upon its legal reasoning a scant nine months after the memorandum's issuance, a reportedly unprecedented step for OLC to take within the same administration in which the withdrawn opinion was issued.

Furthermore, the inappropriate classification of this memo arguably led to the very damage to our national security that classification, when properly applied, is intended to preclude. Specifically, the endorsement of abusive conduct severely undermined our national security strategy of providing the world populace with a positive vision of the United States and thereby isolating and marginalizing violent extremists. It is unlikely that this endorsement would have occurred had the preparation of this memo not been shrouded in secrecy.

The OLC memo in question is but one example of what has the potential to be a significant issue with respect to the balance of constitutional powers. It has long been recognized that the President must have the ability to interpret and define his constitutional authorities and, at times,

to act unilaterally. The tools at his disposal to do this include Executive Orders, memoranda, National Security Directives, proclamations, executive agreements, signing statements and the like. OLC legal opinions can be another tool, especially when such opinions provide legal advice to the Executive branch on constitutional issues.

The limits of the President's authority to act unilaterally are defined by the willingness and ability of the Congress and the courts to constrain it. Of course, before the Congress or the courts can act to constrain Presidential claims to inherent unilateral powers, they must first be aware of those claims. Yet, a long recognized power of the President is to classify and thus restrict the dissemination of information in the interest of national security. The combination of these two powers of the President – that is, when the President lays claim to inherent powers to act unilaterally, but does so in secret – can equate to the very open-ended, non-circumscribed, executive authority that the Constitution's framers sought to avoid in constructing a system of checks and balances. Added to this is the reality that the President is not irrevocably bound by his own Executive Orders, and this administration claims the President can depart from the terms of an Executive Order without public notice. Thus, at least in theory, the President could authorize the classification of the OLC memo, even though to do so would violate the standards of his own governing Executive Order. Equally possible, the President could change his Executive Order governing secrecy, and do so in secret, all unbeknownst to the Congress and the courts. It is as if Lewis Carroll, George Orwell, and Franz Kafka jointly conspired to come up with the ultimate recipe for unchecked executive power.

The above is not that farfetched. In some regards, it already occurred, in part, last year when the issue arose of the applicability of the Executive Order governing secrecy to officials in the OVP. I was personally informed that the President did not intend for the Executive Order to mean what a plain-text reading of the order said it meant. I fully recognize the President's authority to say an Executive Order means what he says it means. However, to do so in secret can truly represent a threat to democratic and accountable government, as can other unilateral and secret claims to executive authority.

There are, I believe, a number of tools at the disposal of Congress to address this issue. First, I have been an ardent supporter of agency Inspectors General (IGs) becoming involved in auditing

the appropriateness of agency classification decisions as one means to address the critical issue of overclassification. IGs, of course, have a dual reporting responsibility to both the executive and legislative branches. The DoJ IG can be asked to review and report back to Congress on the appropriateness of the instant case of the March 2003 OLC memo, but also could be asked to provide an assessment as to the appropriateness of the classification of other purportedly classified recent OLC legal analyses. If the March 2003 memo is representative, the abuse of classification authority in this area may be significant. The DoJ IG could draw upon the expertise of my former office, ISOO, in conducting this review.

In addition to the above, a few years ago Congress established the Public Interest Declassification Board (the Board) and last year expanded the Board's role and authority. Specifically, the Board can now respond directly to a request from a committee of jurisdiction to declassify certain records. The Board can elect on its own to conduct a review and, after the review, make a recommendation to the President as to whether specific documents should be declassified or not. Of course, the final decision is the President's to make.

I should point out that the Board is composed of exceedingly knowledgeable and conscientious men and women who are committed to preserving the integrity of the classification process. I know some have questioned the Board's effectiveness in the past; however, I believe any concerns were due to the imprecise language of the original statute, which was remedied with last year's statutory revisions. Unfortunately, since then the Congress has yet to avail itself of this new avenue to resolve disputes with the Executive branch centered on the appropriateness of classification decisions.

While the utilization of existing avenues such as the IGs and the Board may prove beneficial in addressing some of the most egregious instances of the executive laying claim to novel, inherent and unilateral powers in secrecy, Congress should consider institutionalizing a process that ensures that such unilateral claims are known to all, not just the Congress and the courts, but the American people as well. The entire concept of "secret law" violates our most fundamental understandings of what constitutes the democratic and accountable form of government that has been bestowed on us by previous generations of Americans at great expense.

In addition, while the President has traditionally established the process whereby information is classified in the interest of national security, Congress at the least should insist that whatever process the President establishes is transparent. The standards and criteria should be known to all, and the Congress and the courts should be able to ensure that the Executive branch follows its own procedures. Classification is and must remain more than a simple assertion by the executive. That the very concept of "secret" secrecy standards is antithetical to the entire concept of checks and balances should go without saying. However, recent experience indicates that Congress should make this precept explicit.

I applaud this subcommittee's initiative to examine this oft-overlooked aspect of challenges to maintaining the checks and balances crafted by the Constitution's original framers. I appreciate the opportunity to provide my perspective on this critical issue, and I look forward to any questions or comments that members of the subcommittee may have.