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Heidi Kitrosser,
Associate Professor, University of Minnesota Law School

Testimony of Heidi Kitrosser, Associate Professor, University of Minnesota Law School

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

INTRODUCTION AND SUMMARY

Thank you for inviting me to testify on secret law and the threat that it poses to democratic and accountable government. My testimony will consider the light that constitutional law sheds on the topic. I teach constitutional law at the University of Minnesota Law School and I have written extensively on the constitutional separation of powers, government secrecy, and free speech.

I wish to make two main points today. First, the text, structure, and history of the Constitution reflect a brilliant design that reconciles the dangers of government secrecy with the occasional need for secrecy. Under the Constitution, policy decisions presumptively are transparent in nature, but the executive branch retains some limited leeway to implement those transparent policies in secret. Furthermore, the Constitution gives us structural mechanisms – such as Congress' oversight capacity – to check even secret implementation of transparent policies to ensure that it does not cloak circumvention of the law. Second, over the past several years, we have seen a disturbing trend whereby the executive branch has taken its structural capacities to secretly *implement* law and abused them to secretly *make* new law and to *circumvent* established law. The damage of this trend is exacerbated by the fact that the executive branch has circumvented not only substantive law but also procedural law, such as statutory mandates to share information with Congress.

On the first point, of constitutional design, we see a careful balance between secrecy's virtues and its risks in the Constitution's text and structure. Specifically, we see a negative correlation in the Constitution between the relative openness of each political branch and the relative control that each branch has over the other. Congress is relatively transparent and dialogue-driven. The executive branch, in contrast, is structurally capable of much secrecy, but it also is largely beholden to legislative directives. Thus, the

executive branch can be given much leeway to operate in secret, but remains subject to being overseen or otherwise restrained in its secrecy by the legislature. Looking to history, we see an understanding by the founders that such a balance would indeed be struck. Among the President's claimed virtues was a structural capacity for secrecy. Yet it was equally crucial to the founders that the President would be constrained through legislation, oversight, and other means. As Alexander Hamilton put it, one person "will be more narrowly watched and most readily suspected." In short, then, the Constitution reconciles competing needs for openness and secrecy by giving us an executive branch that has the structural capacity to keep secrets, but that must operate within policy parameters that are themselves transparent and subject to revision.

On the second point, as to recent events, we increasingly see a dangerous breakdown in this constitutional structure. For example, we now know that for years the administration relied on a series of secret executive orders and secret legal opinions – many of which to this day remain classified – in order to run secret surveillance and interrogation programs. These programs not only operated under a regime of secret law, but they secretly circumvented statutory mandates. Their existence was made possible in part by the additional circumvention of statutory disclosure mandates. For example, as is now well known, the administration did not comply with its statutory obligation to inform the full congressional intelligence committees of its secret surveillance program.

These events turn the constitutional structure upside down, seizing for the executive branch the power not only to legislate, but to create secret, alternate legislative regimes. The only thing that could make matters worse would be for such events to become normalized in the eyes of Americans. Given the length of time in which these events have been unfolding and given the administration's continuing lack of cooperation with congressional and public information requests, I fear that we have already started down this road. I urge Congress to use its substantial constitutional powers of legislation and oversight to make clear to the executive branch and to all Americans that secret law has no place in our constitutional system.

I. The Constitutional Design: Policy Transparency and Limited Leeway for Secret Implementation[1]

A. Overview of the Constitutional Design

The Constitution's founders recognized their crucial task to "combin[e] the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form."[2] One of the most important ways in which they met this challenge was

[1]Much of this discussion is drawn, and in some cases quoted directly (including internal citations), from three articles: Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049 (2008); Heidi Kitrosser, *Macro-Transparency as Structural Directive: A Look at the NSA Surveillance Controversy*, 91 MINN. L. REV. 1163 (2007); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L.REV. 489 (2007).

[2] The Federalist No. 37, at 194 (James Madison) (Clinton Rossiter ed., 1961).

by granting policy-making powers to the relatively open, transparent, and dialogue-driven legislature while leaving policy implementation predominantly to an executive branch with substantial capacities for secret, energetic, and efficient operation. The founders thus designed a Constitution under which laws and law-making presumptively are transparent and subject to political checking and revision. The laws themselves, however, can provide some room for secret implementation.

Of course, the line between law-making and law-implementation often is a fine one. As the Supreme Court observed in Mistretta v. U.S.,[3] "Congress simply cannot do its job absent an ability to delegate power under broad general directives."[4] Law implementation thus can entail the crafting of sub-policies, or "quasi-legislating."[5] But important protections remain to ensure that executive branch policy-making does not give way to a regime of secret law. First, the executive branch remains subject to statutes and thus cannot craft policies which circumvent (let alone secretly circumvent) those statutes. In this sense, the executive branch is obliged to act under a transparent statutory framework, however broad that framework might be. Second, Congress – both through legislation and through its constitutional power to create its internal rules[6] -- may craft policies for conducting oversight to ensure that the executive branch does not secretly circumvent statutory law or otherwise abuse its implementation powers. Third, Congress can craft legislation requiring openness in executive branch policy-making. Congress did just this, for example, in creating the Administrative Procedure Act ("APA"). It created the APA partly to ensure that the administrative state not become a parallel, secret law-making regime.[7] Fourth, the judiciary retains the power to reign in executive branch activity that crosses the line from statutory implementation to unconstrained law-making. It famously did just this in the seminal case of Youngstown Sheet & Tube Co. v. Sawyer.[8] It also did this when it invalidated two delegations of power to the administrative state before the latter was constrained statutorily through the APA.[9]

B. Constitutional Text, Structure, and History

That the Constitution creates a structure in which policy-making presumptively must be open and subject to political checks is exemplified by several aspects of constitutional text, structure, and history.

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[3] 488 U.S. 361 (1989).
[4] *Id.* at 372.
[5] "Quasi-legislation" is a term often used in administrative law to describe agency crafting of rules under broad statutory directives. It is perhaps in administrative law, particularly in discussions of the non-delegation doctrine, that the line between policy-making and policy-implementation has been most thoroughly considered.
[6] U.S. Const., art. I, §5, cl. 2.
[7] *See, e.g.*, Erik Luna, *Transparent Policing*, 85 IOWA L.REV. 1107, 1165 (2000); William Mock, *On the Centrality of Information Law: A Rational Choice Discussion of Information Law and Transparency*, 17 JOHN MARSHALL J. OF INFO. & COMPUTER L., 1069, 1098 (1999).
[8] 343 U.S. 579 (1952).
[9] Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935)). *See also, e.g.*, Cass Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 446-48 (1987).

First, there is a negative correlation between the relative openness of each political branch and the relative control that each branch has over the other. Congress is a relatively transparent and dialogue-driven branch,[10] and its core tasks are to pass laws that the executive branch executes and to oversee such execution.[11] The executive branch, in contrast, is capable of much secrecy,[12] but also is largely beholden to legislative directives in order to act.[13] This creates a rather brilliant structure in which the executive branch can be given leeway to operate in secret, but remains subject to being overseen or otherwise restrained in its secrecy by the legislature.

Second, historical references to secrecy as an advantage of a single President (as opposed to an executive council) – particularly two widely cited Federalist papers[14] -- also cite accountability and the ability of other branches and the people to uncover wrongdoing as a major advantage of a single President. For instance, Alexander Hamilton famously stated that a single President is desirable because "[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number."[15] Yet Hamilton, in the same Federalist Paper in which he made this statement, followed the statement with an approving explanation of the responsibility and potential transparency of a single President. Hamilton argued that "multiplication of the executive adds to the difficulty of detection," including the "opportunity of discovering [misconduct] with facility and clearness." One person "will be more narrowly watched and most readily suspected."[16] Similar observations were made at the Philadelphia convention in which the Constitution was written[17] and throughout the constitutional ratification period.[18] For example, William Davie explained in the North Carolina ratification debate:

> With respect to the unity of the Executive, the superior energy and secrecy wherewith one person can act, was one of the principles on which the Convention went. But a more predominant principle was, the more obvious responsibility of one person. It was observed that, if there were a plurality of persons, and a crime should be committed, when their conduct was to be examined, it would be impossible to fix the fact on any one of them, but that the public were never at a loss when there was but one

[10] *See, e.g.,* U.S. Const., art. I, §5, cl. 2 (requiring Congress to keep and to publish journals of its proceedings); U.S. Const., Art. I, § 7 (laying out relatively open and dialogic process of legislating, including requirements that legislation be approved by both branches, that any presidential objections be communicated to Congress and considered by them, and that "the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively").
[11] *Compare, e.g.,* U.S. Const., art. I, § 8 to U.S. Const., art. II, § 2.
[12] *See, e.g.,* The Federalist No. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); The Federalist No. 64, at 392-93 (John Jay) (Clinton Rossiter ed., 1961)).
[13] *See, e.g.,* Saikrishna Prakash, *A Critical Comment on the Constitutionality of Executive Privilege,* 83 MINN. L. REV. 1143, 1154-69 (1999).
[14] *See supra* n. 12.
[15] *See* Hamilton, *supra* n. 12, at 424.
[16] *Id.* at 427-30.
[17] 1 The Records of the Federal Convention of 1787, at 74, 254 (Max Farrand, ed., Yale Univ. Press 1966).
[18] *See, e.g.,* Daniel N. Hoffman, Governmental Secrecy and the Founding Fathers 29-32 (1981).

man.[19]

The historical evidence thus reflects a balanced constitutional design whereby executive secrecy is expected but remains tethered to political accountability.

Third, the only explicit textual reference to secrecy occurs in Article I, § 5, of the Constitution, which requires Congress to keep journals of its proceedings, but allows each chamber to exempt "such Parts as may in their Judgment require Secrecy."[20] That fact by itself does not tell us very much, as one could argue that a secret-keeping prerogative is intrinsic in the President's executive and commander-in-chief duties. What it does reflect, however, is a constitutional structure that permits secrecy only under conditions that will ensure some political awareness of and ability to check such secrecy. The very framing of the congressional secrecy provision as an exception to an openness mandate, combined with a logical and historical expectation that a large and deliberative legislative body generally will operate in sunlight suggest a framework wherein final decisions as to political secrecy are trusted only to bodies likely to face internal and external pressures against such secrecy.

Finally, an executive branch that can keep secrets but that can be reigned in by Congress reflects the most logical reconciliation of competing constitutional values. On the one hand, the Constitution clearly values transparency as an operative norm. This is evidenced by myriad factors, including the necessities of self-government, the First Amendment, and Article I's detailed requirements for a relatively open and dialogic legislative process. On the other hand, the Constitution reflects an understanding that secrecy sometimes is a necessary evil, evidenced both by the congressional secrecy allowance and by the President's structural secrecy capabilities. Permitting executive branch secrecy, but requiring it to operate within policy parameters themselves open and subject to revision, largely reconcile these two values.

C. Justice Jackson's Three Zones of Presidential Power

The above analysis complements Justice Jackson's influential analysis from his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.[21] In *Youngstown*, Justice Jackson described three basic zones of presidential power.[22] Presidential power is "at its maximum" in zone one.[23] In this first zone, "the President acts pursuant to an express or implied authorization of Congress."[24] In zone two, presidential power is at an uncertain, intermediate level.[25] In this second zone, "the President acts in absence of either a congressional grant or denial of authority."[26] Here, the President:

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[19] Id. at 30 (quoting 3 The Records of the Federal Convention, supra note 17, at 347).
[20] U.S. Const., art. I, § 5, cl. 3.
[21] 343 U.S. 579, 634 (1952) (Jackson, J., concurring).
[22] *Id.* at 635-38.
[23] *Id.* at 635.
[24] *Id.*
[25] *Id.* at 637
[26] *Id.*

> can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.[27]

In zone three the President's "power is at its lowest ebb."[28] In this third zone, he "takes measures incompatible with the express or implied will of Congress."[29] He thus "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[30]

The first zone is the simplest from the perspective of the constitutional presumption of transparent law and policy. The President's authority is at his highest in this zone because his actions are legitimized by statutory authority, which itself is legitimized partly by the relative transparency of the legislative process. Hence, even where secrecy characterizes aspects of the President's implementation, the policy framework under which he operates itself is transparent. The second zone raises the possibility of inherent presidential powers or presidential powers pursuant to very broad, ambiguous statutory authority, while the third zone raises the barely more than theoretical possibility of a situation in which the president alone, and not Congress, is empowered to act. Actions in the respective zones indeed have progressively less presumptive legitimacy. The absence of a relatively clear policy-making process means the absence of legislative transparency. And in the third zone, not only is such process absent but in its place is a known, established policy whose presence gives false assurance to the public and to other branches.

II. Swallowing the Transparency Rule: The Arrival of Secret Law[31]

Secret law poses a very real and present threat to our constitutional system. Some striking, non-exhaustive, examples include the following.

A. Secret Warrantless Electronic Surveillance Program

Shortly after September 11, 2001, the National Security Agency began secretly to employ warrantless electronic surveillance of some calls between the United States and foreign

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[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] Some discussion in sections A & D, including some direct quotations (which incorporate their internal citations) is drawn from two articles: Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels,* 29 CARDOZO L. REV. 1049 (2008); Heidi Kitrosser, *Macro-Transparency as Structural Directive: A Look at the NSA Surveillance Controversy*, 91 MINN. L. REV. 1163 (2007).

nations.[32] According to a very recent report, then Attorney General John Ashcroft "signed off on the surveillance program [in October 2001] at the direction of the White House with little in the way of a formal legal review. . . . Mr. Ashcroft complained to associates at the time that the White House, in getting his signature for the surveillance program, 'just shoved it in front of me and told me to sign it.'"[33] According to the same report:

> [N]ervousness among Justice Department officials led the administration to secure a formal opinion from John Yoo, a deputy in the Office of Legal Counsel ["OLC"], declaring that the president's wartime powers allowed him to order the N.S.A. to intercept international communication of terror suspects without a standard court warrant.
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> The opinion itself remains classified and has not been made public. It was apparently written in late 2001 or early 2002, but it was revised in 2004 by a new cast of senior lawyers at the Justice Department, who found the earlier opinion incomplete and somewhat shoddy, leaving out important case law on presidential powers. . . . Even after the final legal opinions were written, lawyers at the National Security Agency were not allowed to see them . . . . [34]

The program did not become public until 2005 when its existence was revealed in an article in the New York Times.[35]

As I and many others have discussed at length elsewhere, those parts of the program that now are publicly known appear to violate the requirements of the Foreign Intelligence Surveillance Act ("FISA").[36] Furthermore, the Administration appears to have violated its statutory requirement to keep the full intelligence committees of the House and Senate informed of the program.[37]

Because the arguments that the administration did not really violate FISA or its intelligence reporting requirements are extremely weak, the administration ultimately must rely on the notion that the President constitutionally was empowered secretly to

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[32] James Risen & Eric Lichtblau, Bush Lets U.S. Spy on Callers Without Courts, N.Y. Times, Dec. 16, 2005, at A1; see also James Risen, State of War: The Secret History of the CIA and the Bush Administration 43-44 (2006); Eric Lichtblau & James Risen, Eavesdropping Effort Began Soon After Sept. 11 Attacks, N.Y. Times, Dec. 18, 2005, at A44; David E. Sanger, In Address, Bush Says He Ordered Domestic Spying, N.Y. Times, Dec. 18, 2005, at A1.

[33] Eric Lichtblau, Debate and Protest at Spy Program's Inception, N.Y. Times, March 30, 2008.

[34] *Id.* Reports also long have indicated that, in 2002, President Bush issued a secret executive order that authorized the program. *See* Risen & Lichtblau, *supra* note 32; Memorandum from Elizabeth B. Bazan & Jennifer K. Elsea, Legislative Attorneys, Am. Law Div (Jan. 5, 2006), available at http://www.fas.org/sgp/crs/intel/m010506.pdf.

[35] *See* Risen & Lichtblau, *supra* note 32.

[36] *See, e.g.*, Letter from Law Professors Curtis A. Bradley et al., to Members of Congress 3 – 7 (Jan. 9, 2006), http://www.fas.org/irp/agency/doj/fisa/doj-response.pdf [hereinafter Law Professors Letter]; John Cary Sims, *What NSA is Doing … And Why It's Illegal*, 33 Hastings Const. L.Q. 105, 128-32 (2006).

[37] I explain this argument in detail in Kitrosser, *Congressional Oversight, supra* note 31, at 1053-64.

circumvent FISA and also to circumvent his statutory reporting obligations.[38] With respect to its violation of FISA, the administration would have to demonstrate that somehow a *Youngstown* zone three action was justified. They would have to demonstrate, in other words, that somehow Congress constitutionally was disabled from acting while the President constitutionally was entitled to take exclusive action, and to do so in secret. The Administration has not come close to meeting, or even attempting to meet, this burden. Rather, they simply have asserted that it would have been dangerous to go through the constitutionally mandatory legislative process to amend FISA. In other words, the administration makes the remarkable assertion that the program's *very existence*, as opposed to its case-by-case implementation, would have been so damaging as to require that it remain hidden. The Administration's failure even to approach its heavy burden of justification is reflected in an attempt by former Attorney General Alberto Gonzales to articulate such an explanation before the Senate Judiciary Committee in 2006. Gonzales argued:

> I think, based on my experience, it is true. You would assume that the enemy is presuming that we are engaged in some kind of surveillance. But if they are not reminded about it all the time in the newspapers and in stories, they sometimes forget, and you're amazed at some of the communications that exist. And so, but when you keep sticking it . . . in their face that we are involved in some kind of surveillance, even if it is unclear in these stories, it can't help but make a difference, I think.[39]

On such speculation, then, rested the Administration's apparent belief that it was legally entitled to operate contrary to FISA, that it had the constitutional power to do so in secret for a period of many years, and that Congress had no constitutional role to play in the matter.

B. Secret Torture Program

Shortly after 9/11, the administration began secretly to alter longstanding statutory, treaty-based and regulatory limits on the methods that the CIA and the military could use to interrogate prisoners.[40] The changes apparently were justified through a series of memoranda issued by the OLC.[41] A few of these memoranda have been leaked or declassified and now are publicly known. Among the memoranda arguing that interrogation restrictions could be substantially loosened is a 2002 opinion written by John Yoo of OLC and signed by (now Judge) Jay Bybee and a 2003 opinion written and signed by John Yoo. The 2002 opinion was leaked to the press in 2004.[42] Jack

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[38] *Id.* at 1052-58.

[39] Wartime Executive Power and National Security Agency's Surveillance Authority: Hearing Before Comm. on Judiciary, 109th Cong. 107 (2006), available at http://fas.org/irp/congress/2006-hr/nsasurv.pdf.

[40] For a list of some longstanding statutory and treaty-based limitations on torture, *see, e.g.,* Marty Lederman, *Now Why Didn't I Think of That? Washington Post Proposes That Senate Ban Torture!,* Balkinization website, November 2, 2007.

[41] *See, e.g.,* Jack Goldsmith, The Terror Presidency 141-76 (2007); Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times, October 4, 2007.

[42] *See* Shane, Johnston & Risen, *supra* note 41; Goldsmith, *supra* note 41, at 157.

Goldsmith, who as OLC head in 2004 withdrew the 2002 and 2003 opinions,[43] writes that the opinions evinced an "unusual lack of care and sobriety in their legal analysis,"[44] and that they "seemed more an exercise of sheer power than reasoned analysis."[45]

The 2003 opinion remained classified until roughly one month ago when it was released in unclassified form.[46] Yet while the 2002 and 2003 memoranda were withdrawn by OLC in 2004, "the White House never repudiated [them] and, as the New York Times reported last October, two more secret torture memos were issued in 2005 saying the CIA could continue to use torture."[47] Furthermore, court documents indicate that "*more than seven thousand pages* of documents still [are] hidden within the Executive branch dealing with the CIA's 'enhanced interrogation' practices and 'black sites' and renditions programs. (This does not even include the DOD materials.) The documents . . . include at least eight OLC final opinions and opinion letters in the period between September 2004 and February 2007 alone."[48] What is more, Attorney General Mukasey recently declined a request to reveal to the Senate Judiciary Committee, even in closed session, the current scope of and legal justifications for CIA interrogation techniques.[49]

Goldsmith is critical not only of the OLC opinions' substance, but of the intense secrecy in which they were written and followed. He deems such secrecy not only unnecessary, but counter-productive. He writes:

> On the theory that expert criticism improves the quality of opinions, OLC normally circulates its draft opinions to government agencies with relevant expertise. The State Department, for example, would normally be consulted on the questions of international law implicated by the interrogation opinions. But the August 2002 opinion, though it contained no classified information, was treated as an unusually 'close hold' within the administration. Before I arrived at OLC, Gonzales made it a practice to limit readership of controversial legal opinions to a very small group of lawyers. And so, under directions from the White House, OLC did not show the opinion to the State Department, which would have strenuously objected. This was ostensibly done to prevent leaks. But in this and other contexts, I eventually came to believe that it was done to control outcomes in the opinions and minimize resistance to them.

Martin Lederman, a professor at Georgetown Law School and a former OLC attorney is similarly critical of the torture program's secrecy. He emphasizes the absence of reasonable justification for keeping its parameters and underlying legal analysis secret. He explains:

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[43] Goldsmith, *supra* note 41, at 142-43, 146, 153, 158.
[44] *Id.* at 148.
[45] *Id.* at 150
[46] *See, e.g.,* Marty Lederman, *[Post No. 1] The March 2003 Yoo Memo Emerges!*, Balkinization website, April 1, 2008.
[47] Editorial, *Agenda for the Next President: A New Torture Policy*, Sacramento Bee, Feb. 12, 2008.
[48] Marty Lederman, *The Torture Papers*, Balkinization website, April 24, 2008 (emphasis in original).
[49] Marty Lederman, *Disdain*, Balkinization website, January 30, 2008 (emphasis in original).

> The notion that discussing the techniques will tell the enemy what it should prepare for is a transparently flimsy excuse. . . . [N]one of the techniques in question here is unknown. They all have a very lengthy historical pedigree, and they have all been documented in excruciating detail. . . . .
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> What is more, this is information that is *revealed to the enemy as soon as it is implemented*. Thus, it can't possibly be legitimately classified, because those upon whom we have inflicted these techniques know about them and can describe their treatment to anyone they wish. The premise behind the classification, therefore, must be **an assumption that none of these detainees will ever be permitted to speak to anyone in the outside world ever again** -- that without any process at all, they all have been *permanently* relegated to a black hole without any human contact. Otherwise, they are of course free to describe the techniques to their hearts' content. Classification simply makes no sense in this context, unless we've already decided that these detainees will never see another human face.[50]

What is more, the Administration, as in the case of electronic surveillance, bases an alternate, secret legal regime on these thin justifications. As with the case of electronic surveillance, such questionable reasoning hardly demonstrates that the Administration's secret legal regime is constitutionally legitimate, let alone that it constitutionally trumps the nation's public statutory and treaty obligations.

C. Secret Override of Public Executive Orders

After requesting and receiving its declassification from the White House, Senator Whitehouse recently revealed an OLC legal proposition to the effect that "An executive order cannot limit a President. There is no constitutional requirement for a President to issue a new executive order whenever he wishes to depart from the terms of a previous executive order. Rather than violate an executive order, the President has [, by departing from it] instead modified or waived it."[51] The potential practical implications of such a proposition are limited only by the number and nature of executive orders that exist. And by definition, the extent to which the implications are realized will remain largely unknown in light of the secrecy that the proposition embraces. Nonetheless, Senator Whitehouse notes one very immediate possible implication. He writes:

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[50] Marty Lederman, *CIA Agent Reveals Highly Classified Interrogation Techniques, and, Inexplicably, the Sky Does Not Fall,* Balkinization website, December 11, 2007 (emphasis in original).

[51] Floor Speech of Senator Whitehouse, December 7, 2007. The legal proposition, along with two others that were declassified at Senator Whitehouse's request, were discovered by the Senator in his review of "highly classified secret [OLC] legal opinions" on surveillance. Senator Whitehouse gained limited access to the opinions as a member of the Senate Intelligence Committee.

> Bear in mind that the so-called Protect America Act that was stampeded through this great body in August provides no – zero – statutory protections for Americans traveling abroad from government wiretapping. . . . The only restriction is an executive order called 12333, which limits executive branch surveillance to Americans who the Attorney General determines to be agents of a foreign power. That's what the executive order says. . . . . [In light of the OLC's proposition on executive orders, however,] unless Congress acts, here is what legally prevents this President from wiretapping Americans traveling abroad at will: Nothing.[52]

Professor Lederman addressed Senator Whitehouse's comments, noting:

> If the President publicly rescinded 12333, there would be a huge outcry. It would prompt Congress to act immediately.
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> Which is presumably why he didn't do so in public. Whitehouse suggests that the President secretly transgressed 12333. If so -- if in fact the President chose to ignore 12333 without notifying the public or Congress, it's quite outrageous -- constitutional bad faith, really, to announce to the world that you are acting one way (in large part to deter the legislature from acting), while in fact doing exactly the opposite.[53]

D. Some Key Conflicts between These Events and Constitutional Design

Some of the examples discussed above reflect direct violations of the constitutional separation of powers. At minimum, they all reflect a clash with the principles and purposes underlying the same. What follows are some key aspects of these conflicts.

1. Youngstown Zone Three Action as Troubling New Norm

Among the striking aspects of the warrantless surveillance and torture programs are the weakness in each case of the administration's claim that it complies with existing statutes and thus its implicit (and to some degree explicit) reliance on the notion that the administration may secretly circumvent existing statutes. In short, the administration in both cases is in Justice Jackson's *Youngstown* zone three, whereby the President "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." As discussed earlier, *Youngstown* zone three actions carry a deep presumption of illegality for very good reason. Such actions bypass the transparent and dialogic protections of the legislative process. And because they conflict with existing statutes, they mislead the public, particularly when the circumventing actions occur in secret.

Despite its exceedingly weak statutory arguments, the administration in each case provided no basis to conclude that Congress constitutionally was disabled from acting

[52] Whitehouse Speech, *supra* note 51.
[53] Marty Lederman, *Misdirected Outrage,* Balkinization blog, December 8, 2007.

and that the Administration thus had exclusive constitutional right to craft and follow its own laws and to do so in secret. Instead, the administration offered bald assertions about the danger of making public the very existence of our laws. As explained earlier, those assertions barely pass the "laugh test."[54]

2. The Intra-Executive-Branch Analogue of the Zone Three Problem

While it may not share the legal ramifications of the secret override of statutes, secret revision by the executive branch of its own publicly announced policies – such as its executive orders – violates core purposes of separated powers. As with *Youngstown* zone three actions, such secret policy changes implicitly assure the public that certain policies are in place when in fact they have been altered or withdrawn. The President thus retains the power of law-making while avoiding political accountability.

Congress can and should take legislative and/or oversight action to prevent such abuses by the executive branch. As detailed throughout this statement and at greater length elsewhere,[55] Congress has ample constitutional prerogative to set legislative parameters by which the President may act in secret and by which he must disclose information to Congress or to the public.

3. Disregard for Statutory Oversight Mandates and for Congressional Oversight Generally

Effective congressional oversight must take place if limits on secret law-making are to be more than theoretical. Such oversight is a means, for example, to determine if legislatively sanctioned secrecy has been harnessed to cloak unauthorized policy-making or policy-circumvention. Yet as the experience with the surveillance and torture programs demonstrate, the oversight system too often cracks under the weight of executive branch disregard and legislative acquiescence in the same. Such disregard and acquiescence is facilitated in part by the same arguments used to justify the circumvention of substantive statutory directives. That is, the executive branch often simply asserts that statutorily required disclosures or requested disclosures would prove too dangerous, and these assertions too often are met with acquiescence.

This breakdown in oversight, in which the executive branch effectively calls the shots, gets things exactly backwards from a constitutional perspective. As discussed throughout this statement and in the sources cited throughout, the executive branch constitutionally is constrained by Congress' policy directives regarding information-sharing. It is for Congress, through statutory terms and through its constitutional power to make rules for its proceedings, to set the policy framework under which information disclosure, including negotiations about the same, can take place. Current statutory and chamber rules indeed strike myriad balances and provide flexibility to accommodate secrecy and

[54] Indeed, the testimonial explanation of then Attorney General Gonzales as to the need to keep the warrantless surveillance program secret literally did not pass the laugh test. The transcript reflects audience laughter following his stated justification. Gonzales Testimony, *supra* note 39, at 107.

[55] *See* sources cited, *supra* note 1.

other needs as they arise in hearings.[56] Openness can, of course, pose dangers. But so can secrecy, as recent events attest. The Constitution's founders struck a balance by leaving it to Congress to openly debate and establish policies, including rules on information disclosure. The executive is left to implement the rules, sometimes in secret, and sometimes through give-and-take with Congress as the rules provide.

4. The Troubling Ease With Which Secrecy "Needs" are Invoked Generally

In the *Youngstown* zone three contexts described above and more generally, the administration has repeatedly invoked claims of "national security necessity" to justify secret policy-making. Yet as already noted, these claims often are made cavalierly, rarely rising beyond mere assertion. Congress ought not to accede to such empty claims.

[56] *See, e.g.*, Kitrosser, *Congressional Oversight, supra* note 31, at 1073-75, 1080-83, 1084-86 (detailing such rules).

CONCLUSION

Congress should use its substantial legislative and oversight powers to make clear to the administration and to the American people that secret law has no place in the United States of America.

Thank you for soliciting my views on this important topic. Please do not hesitate to let me know if I can be of further assistance.