

## **Create Accountability for DOJ's Office of Legal Counsel Opinions**

The Department of Justice's Office of Legal Counsel (OLC) issues interpretations of law that the executive branch views as authoritative, but these opinions are often not available for review by Congress or the public, which undermines our traditional lawmaking process.

The **OLC SUNLIGHT Act (H.R. 4556)** would protect Congress's role of deciding what constitutes the law of the land.

### **OLC opinions carry the effect of law in the executive branch and profoundly impact public policy**

- The Office of Legal Counsel is the authoritative legal advisor to the executive branch.
- The OLC's "best practices" memorandum describes its "core function" as providing "controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government."
- The same memorandum states that "OLC's advice may effectively be the final word on the controlling law."
- Known OLC opinions address: whether a sitting president may be indicted; whether video segments that do not disclose they were produced by the government violate the "covert propaganda" prohibition in appropriations statutes; whether "enhanced interrogation" constitutes torture; and individuals' eligibility for senior government positions.
- OLC opinions also serve to shield executive branch officials from prosecution, even when the opinion relied upon is the product of "intentional professional misconduct."

### **OLC opinions are often kept secret from Congress and the public and are not subject to judicial review**

- Despite the assertion that OLC opinions are binding on the executive branch, the Department of Justice has argued that OLC opinions are not final, but rather "predecisional" and "deliberative," and therefore not available to Congress or the public, at times even under the Freedom of Information Act.
- Courts rarely have the opportunity to weigh in on the legal issues that OLC opines on. One of the "torture memos" acknowledged three times that OLC "cannot predict with confidence whether a court would agree with [OLC's] conclusion," but nevertheless concluded that the "question is unlikely to be subject to judicial inquiry."
- A 2012 review by the Sunlight Foundation estimated that the Department of Justice redacted the titles of 39% of the 509 OLC opinions issued from 1998 to 2012. Over-redactions are commonplace.
- Even discovering the existence of an OLC opinion can be an insurmountable hurdle. The Project on Government Oversight, for example, had to appeal an initial Freedom of Information Act response to discover the subjects and publication dates of several innocuous OLC opinions issued in 2017 (example included on back page).

### **The OLC SUNLIGHT Act would create transparency around this secret law while protecting sensitive information by:**

- Requiring the Office of Legal Counsel to publish its final opinions, subject to redactions for sensitive information, such as medical, personnel, or properly classified information;
- Requiring unclassified summaries for any opinions that are substantially or fully redacted, which mirrors practices by the Department of Defense Inspector General and the Department of Justice Inspector General; and
- Creating an index of final opinions so that Congress and the public can quickly identify what questions of law have been interpreted by the executive branch.

*Example of over-redaction: Initial response to the Project on Government Oversight's Freedom of Information Act request for a list of Office of Legal Counsel opinions:*

**LIST OF OLC OPINIONS**  
January, 2017 through December, 2017

1. [REDACTED] (b) (5)
2. [REDACTED] (b) (5)
3. [REDACTED] (b) (5)
4. [REDACTED] (b) (5)
5. Counsel to the President: Memorandum re "Application of the Anti-Nepotism Statute to a President Appointment in the White House Office (b) (6)" dated **January 20, 2017**
6. [REDACTED] (b) (5)
7. Counsel to the President: Letter re "Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch" (b) (6) dated **May 1, 2017**

*After appeal:*

**LIST OF OLC OPINIONS**  
January, 2017 through December, 2017

1. Counsel to the President: Memorandum re "Administration of the John F. Kennedy Centennial Commission" (Newland) dated **January 10, 2017**
2. [REDACTED] (b) (5)  
[REDACTED] (b) (6) dated **January 11, 2017**
3. Acting General Counsel/HHS: Memorandum re "The Authority of the Department of Health and Human Services to Pay for Private Counsel to Represent an Employee before Congressional Committees (Colborn, Shaub) dated **January 18, 2017**
4. Acting General Counsel/HHS: Memorandum re "Who Qualifies as a "Very Senior" Employee Under 18 U.S.C. § 207(d)(1)(B)" (Flynn) **January 19, 2017**
5. Counsel to the President: Memorandum re "Application of the Anti-Nepotism Statute to a President Appointment in the White House Office (b) (6)" dated **January 20, 2017**
6. Counsel to the President: Memorandum re "Appointment of United States Representative (Newland) dated **March 13, 2017**
7. Counsel to the President: Letter re "Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch" (Colborn, (b) (6)) dated **May 1, 2017**