

May 15, 2019

The Honorable Jerry Moran  
Chairman  
Senate Subcommittee on Commerce,  
Justice, Science, and Related Agencies  
521 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable José Serrano  
Chairman  
House Subcommittee on Commerce, Justice,  
Science, and Related Agencies  
2354 Rayburn House Office Building  
Washington, DC 20515

The Honorable Jeanne Shaheen  
Ranking Member  
Senate Subcommittee on Commerce,  
Justice, Science, and Related Agencies  
506 Hart Senate Office Building  
Washington, DC 20510

The Honorable Robert Aderholt  
Ranking Member  
House Subcommittee on Commerce, Justice,  
Science, and Related Agencies  
1203 Longworth House Office Building  
Washington, DC 20515

Re: Transparency of Final Opinions Issued by the Office of Legal Counsel

Dear Chairmen Moran and Serrano and Ranking Members Shaheen and Aderholt:

The undersigned organizations write to request that you include language in your FY 2020 Commerce, Justice, Science, and Related Agencies Appropriations Bill to require the Department of Justice to provide a list of the titles, authors, and dates of issuance of all final Office of Legal Counsel (OLC) opinions.<sup>1</sup> We represent organizations that fall on a wide spectrum of values and priorities. Despite the differences in our work, we all agree that OLC operates with too much secrecy, to the detriment of Congressional oversight and public understanding of the law.

OLC is tasked with providing authoritative legal advice to the president, the Attorney General, and other executive branch agencies, which bind the executive branch on the legal question addressed. However, the executive branch often withholds from Congress and the public not only the substance of these opinions but also basic information about them, such as when and to whom they are issued, the subject of their analyses, and even how many are currently in effect. By failing to disclose even the existence of an unknown number of OLC opinions and resorting to unnecessary secrecy in response to Freedom of Information Act requests for this information,<sup>2</sup> the Department of Justice continues to hinder meaningful oversight of OLC's work.

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<sup>1</sup> Sean Vitka, "Written Testimony Submitted to the Senate Committee on Appropriations Subcommittee on Commerce, Justice, and Science, and Related Agencies Concerning the FY 2020 Appropriations Bill, the Department of Justice, and the Office of Legal Counsel," Demand Progress, April 2019, pp. 3-4.

[https://s3.amazonaws.com/demandprogress/testimony/Senate\\_CJS\\_Appropriations\\_OLC\\_testimony\\_FY\\_2020.pdf](https://s3.amazonaws.com/demandprogress/testimony/Senate_CJS_Appropriations_OLC_testimony_FY_2020.pdf)

<sup>2</sup> Daniel Van Schooten and Nick Schwellenbach, "Justice Department's 'Secret Law' Still Prevalent, Documents Show," Project On Government Oversight, March 22, 2017. <https://www.pogo.org/investigation/2017/03/justice-departments-secret-law-still-prevalent-documents-show/>; Daniel Van Schooten, "Office of Legal Counsel Publishes New 'Secret Law' Opinions," Project On Government Oversight, September 26, 2018. <https://www.pogo.org/analysis/2018/09/office-of-legal-counsel-publishes-new-secret-law-opinions/>

The Subcommittees on Commerce, Justice, Science, and Related Agencies can take the first step toward addressing this problem by requiring the Department of Justice to report basic information on the volume of OLC opinions that are in effect.

We recognize that due to national security and privacy concerns, not all OLC opinions can be released to the public without any redactions. Nevertheless, there is an analogous situation in which the Department of Defense Inspector General and the Government Accountability Office release basic information, such as a report title or report number, in cases when some or all of a report's contents must remain nonpublic. If even the Department of Defense—which produces a large number of classified and sensitive reports—has been able to create a system through which it can provide this level of transparency, OLC should be able to create a similar system.

One way that OLC effectively creates “secret law” is by internally distributing legal advice applying a statute but refusing to share this advice externally. Laws implemented in secret restrict Congress's ability to conduct oversight and make legislative correction and the public's ability to conduct oversight and engage in public debate—ultimately threatening the foundations of our constitutional democracy. This situation must not be allowed to continue, and we urge you to begin correcting it by requiring the Department of Justice to take the simple step of reporting to the House and Senate Committees on Appropriations and the public a list of all final opinions.

Sincerely,

American Association of Law Libraries  
American Civil Liberties Union (ACLU)  
Americans for Prosperity  
Campaign for Liberty  
Cause of Action Institute  
Citizens for Responsibility and Ethics in Washington (CREW)  
Defending Rights & Dissent  
Demand Progress  
Electronic Frontier Foundation (EFF)  
FreedomWorks  
Government Information Watch  
The Nation  
National Security Archive  
National Security Counselors  
Open the Government  
Project On Government Oversight (POGO)  
Protect Democracy  
Reporters Committee for Freedom of the Press  
Transparency International  
X-Lab