November 30, 2022

The Honorable Patrick Leahy  
Chair, Senate Appropriations Committee  
Washington, DC 20510

The Honorable Rosa L. DeLauro  
Chair, House Appropriations Committee  
Washington, DC 20515

The Honorable Richard Shelby  
Vice Chair, Senate Appropriations Committee  
Washington, DC 20510

The Honorable Kay Granger  
Ranking Member, House Appropriations Committee  
Washington, DC 20515

Dear Chair Leahy, Chair DeLauro, Vice Chair Shelby, and Ranking Member Granger:

The undersigned civil society organizations urge you to ensure that the final Fiscal Year 2023 appropriations measure for the Department of Justice (DOJ) contains a robust requirement for all legal opinions issued by the DOJ’s Office of Legal Counsel (OLC) to be publicly disclosed to the greatest extent feasible and at the very minimum to give Congress and the public notice about their existence through a publicly accessible index. In particular, we urge you to build on past transparency directives from Congress¹ to impose an unmistakably clear, specific transparency mandate for OLC opinions. Although legislative language aimed at this goal is already poised to move as part of the year-end appropriations omnibus package, your leadership will be crucial to strengthening it and taking it across the finish line.

While we represent a wide spectrum of ideological views, we are united in our opposition to the excessive secrecy that currently shrouds OLC legal opinions and in our concerns about the resulting harms to our democracy, our security, and our constitutional rights. From green-lighting illegal torture to justifying warrantless surveillance, modern American history is rife with examples of federal agencies relying on OLC’s binding legal interpretations to conceal or justify improper executive actions. As shown by recent revelations² about OLC’s role in aggrandizing the executive branch’s war powers at the legislative branch’s expense, these harms also include grave damage to Congress’s oversight duties under the Constitution and to the mechanisms that enable basic accountability to the American people.

Our calls for transparency echo those of a group of former OLC attorneys who issued a statement of principles in which they explained that setting transparency as a default would reduce politicization inside the OLC and improve the quality of its work.³ The former OLC attorneys

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¹ See, e.g., the Explanatory Statement for P.L. 116-260 (H.R. 133), Consolidated Appropriations Act, 2021, which states that "the Attorney General is again strongly urged to direct OLC to publish all legal opinions and other materials that are appropriate for publication—in particular those materials that are the subject of repeated requests or that may be of public or historical interest."; the Explanatory Statement for P.L. 117-103 (H.R. 2471; Division B), Consolidated Appropriations Act, 2022, which states that "the Department [of Justice] is directed to continue following the directives in the joint explanatory statement accompanying Public Law 116-260 on . . . Office of Legal Counsel (OLC) Opinions."); and House Report 117-97 for the Commerce, Justice, Science, and Related Agencies Appropriations Act, 2022 (H.R. 4505), which states that "The Committee therefore asks the Attorney General to direct OLC to publish on a publicly accessible website all legal opinions and related materials’ and "the Attorney General should submit to the Committee a report that lists each OLC opinion currently in effect . . . ."


³ Walter Dellinger, et al., "Principles to Guide the Office of Legal Counsel" (Dec. 21, 2004), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2927&context=faculty_scholarship. See also,
observed that timely disclosure of OLC’s written legal opinions "helps to ensure executive branch adherence to the rule of law and guard against excessive claims of executive authority," as well as "promotes confidence in the lawfulness of governmental action." 4

In fact, these former OLC attorneys include now-Assistant Attorney General Christopher Schroeder, 5 who has since then ascended to the position of OLC’s top official and who recently testified before Congress that "when OLC issues controlling legal advice that an agency or department acts on, the country, the Congress, the general public is entitled to know the legal basis of those actions." As he noted, it is "a good operating practice when OLC issues advice to make it available to the public so that the public can be confident that the administration has seriously considered the legal permissibility of what it does." 6 We wholeheartedly agree.

Despite Mr. Schroeder’s statements, it is notable that the Department of Justice’s recent progress on OLC transparency has come only in response to lawsuits by civil society or new laws passed by Congress, such as the 2016 amendment to the Freedom of Information Act that forbids the federal government from using the deliberative process privilege to withhold records older than 25 years. Given the Department of Justice’s poor track record of actually making good on its promises of transparency, we strongly urge Congress to intervene to ensure that OLC adopts a genuine presumption of disclosure.

Thus we are calling on you to move swiftly and decisively to compel the executive branch to comply with Congress’s demands for OLC transparency — before another year elapses — during the lawmaking opportunities uniquely available during this year’s final post-election work period.

Specifically, as you negotiate a final government funding package, we urge you to build on language already included in the House Appropriations Committee report (H. Rept. 117-395) accompanying the Commerce, Justice, Science, and Related Agencies Appropriations Act, 2023 (H.R. 8256). This report language reminds the DOJ to comply with the Committee’s past OLC transparency instructions and directives — particularly to publish all legal opinions and related materials on a publicly accessible website and to provide the Committee with an index of OLC legal opinions in effect. 7

This language is a sensible transparency directive. We also urge you to consider other avenues to place the strongest possible transparency requirements on OLC, to ensure the executive branch’s clear recognition of and compliance with congressional wishes on the matter. For instance, you

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4 Dellinger, et al., supra note 3.
5 Ibid.
7 This report language provision states the following: "Office of Legal Counsel (OLC) opinions.—The Committee reminds the Department to comply with the directions and reporting requirements regarding its OLC opinions that were specified in House Report 117-97, and incorporated by reference the explanatory statement accompanying Public Law 117-103." For the relevant provisions contained in House Report 117-97 and Public Law 117-103, see supra note 1.
could include a binding OLC transparency mandate in the underlying bill text of either the omnibus appropriations legislation itself or any other "must-pass" legislation that Congress considers this winter. Bills that have already been introduced could serve as model legislative language, or you may wish to set forth a provision stating that the Attorney General shall publish all OLC legal opinions and related materials, as well as a list of OLC legal opinions in effect.\footnote{Two bills introduced in the 117th Congress, the SUNLIGHT Act of 2022 (H.R. 7619) and the DOJ OLC Transparency Act (S. 3858), the latter of which was introduced by Senator Tammy Duckworth and Senator Patrick Leahy, offer model legislative language.}

OLC opinions should be made publicly available by default, not at the sufferance of the executive branch. We urge you, as the leaders of the appropriations committees, to act boldly and clearly to fix the lack of openness and accountability at OLC, which undermines the public trust, Congress’s own oversight efforts, the constitutional rights threatened by governmental wrongdoing and abuse, and — as former OLC insiders themselves have recognized — the functioning of OLC itself.\footnote{For sample language that could form the basis of a new mandatory requirement, plus language outlining certain exceptions, one useful resource is the OLC transparency directive in House Report 117-97, which accompanies the Commerce, Justice, Science, and Related Agencies Appropriations Act, 2022 (H.R. 4505).} The time for Congress to act is now.

Thank you for your leadership and consideration. If you have any questions or comments, please contact Kate Oh at kate@demandprogress.org. We are eager to work with you and stand ready to provide our assistance.

Sincerely,

American Oversight
Anne Weismann, Esq. (FOIA Litigator)
Brennan Center for Justice at New York University School of Law
Broward for Progress
Center for Biological Diversity
Citizens for Responsibility and Ethics in Washington (CREW)
Clean Elections Texas
Demand Progress
Electronic Privacy Information Center (EPIC)
Fix Democracy First
Freedom of the Press Foundation
Friends Committee on National Legislation
Government Accountability Project
Government Information Watch
Information Trust
Knight First Amendment Institute at Columbia University
National Security Archive
National Security Counselors
NETWORK Lobby for Catholic Social Justice
Open The Government Coalition
Project on Government Oversight (POGO)
Public Citizen
R Street Institute

\footnote{Dellinger, et al., supra note 3.}
Reporters Committee for Freedom of the Press
Revolving Door Project
Stand Up America
The Digital Democracy Project
The Workers Circle