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Testimony on the FY23 Appropriations Bill for the Senate Appropriations
Subcommittee on Commerce, Justice, Science, and Related Agencies
Concerning the Public Availability of Opinions Issued by the Justice Department's
Office of Legal Counsel, Submitted May 17, 2022

Dear Chair Shaheen, Ranking Member Moran, and members of the committee:

Thank you for the opportunity to submit testimony on improving transparency and accountability at the Department of Justice (DOJ). My name is Daniel Schuman and I serve as Policy Director at Demand Progress. We urge you to ensure congressional and public access to legal opinions rendered by the Office of Legal Counsel (OLC) at the Justice Department that are afforded the force of law.

Before I begin, please allow me to thank you for including language in the FY 2022 and FY 2021 Commerce, Justice, Science Appropriations Committee Joint Explanatory Statement concerning OLC opinions. We urge you to further strengthen that language.

Background

OLC's core function, according to an OLC memoranda, is to provide "controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government."¹ This legal advice "may effectively be the final word on the controlling law," yet it is routinely withheld from both Congress and the public.² This withholding in effect creates secret law that controls agency actions but is shielded from both public debate and Congressional oversight.

Secrecy undermines accountability. Congress must understand how the Executive branch interprets the Constitution and implements laws enacted by Congress. Allowing legal opinions that are accorded precedential value and the force of law to remain the sole province of the Executive branch thwarts Congress's lawmaking and oversight prerogatives. It removes consequences for agency decisions and short-circuits the public feedback process integral to a functioning democracy.

Secrecy also poisons the operations of the Office of Legal Counsel. Public scrutiny would create persistent pressure for the promulgation of responsible, high quality, objective legal opinions. By contrast, OLC legal opinion secrecy ensures the most salient incentive for OLC attorneys is to lean towards a legal opinion that a given administration desires — not the legal opinion that best reflects the law. There are high profile examples of this happening.³ In some instances, the OLC ultimately withdrew its

¹ Department of Justice, Memorandum for Attorneys of the Office re: Best Practices for OLC Advice and Written Opinions, July 16, 2010, available at:

<https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf>

² *Id.*

³ See, for example, a statement by Sen. Patrick Leahy at a February 26, 2010 hearing before the Senate Committee on the Judiciary entitled *The Office of Professional Responsibility Investigation into the Office of Legal Counsel Memoranda*, in which he said, "The fundamental question here is not whether these were shoddy legal memos. They were shoddy legal memos. Everybody knows that.... It failed to cite significant case law; it twisted the plain meaning of statutes. The legal memoranda were designed to achieve an end." (emphasis added). See also a letter from select

own legal opinions when they came to light; in at least one instance, the OLC secretly concluded explicit statutory language was unconstitutional and, therefore, inapplicable to the Executive branch.⁴ Building transparency into the process helps ensure that OLC legal analyses face scrutiny by Congress, scholars, and members of the public.

In December 2004, 19 former senior DOJ officials — including the now-Assistant Attorney General for the Office of Legal Counsel, Christopher Schroeder — endorsed a document calling for increased transparency, entitled *Principles to Guide the Office of Legal Counsel*.⁵ One principle was that “OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.”⁶ According to the *Principles* document, public disclosure of written legal opinions is important because:

Such disclosure helps to ensure executive branch adherence to the rule of law and guard against excessive claims of executive authority. Transparency also promotes confidence in the lawfulness of governmental action. Making executive branch law available to the public also adds an important voice to the development of constitutional meaning — in the courts as well as among academics, other commentators, and the public more generally — and a particularly valuable perspective on legal issues regarding which the executive branch possesses relevant expertise.⁷

A similar statement on the Office of Legal Counsel and the rule of law was released in October 2020, with significant contributions from a comparable array of legal experts.⁸ It endorsed publication of and transparency for OLC opinions. Specifically, the statement endorsed: a strong presumption in favor of publishing final OLC opinions; disclosing OLC advice deemed classified, privileged, or sensitive to congressional committees when an agency relies upon that advice to justify a major policy decision or executive action; and releasing a public index of its memoranda. “OLC exercises a form of public trust, and because its views of the law’s meaning shape executive action and policy, Congress and the public both have compelling interests in understanding the legal basis of executive action.”

members of the Senate Committee on the Judiciary to Attorney General Garland urging the Department of Justice to not appeal D.C. District Judge Amy Berman Jackson’s May 3, 2021 decision ordering the release of an OLC memorandum (May 14, 2021), available at

<https://www.durbin.senate.gov/imo/media/doc/2021-05-14%20Letter%20to%20AG%20Garland.pdf>. “Given the gravity of the misconduct underlying OLC’s March 2019 memo and DOJ’s apparent misrepresentations when attempting to conceal the memo from the public...”

⁴ “Report on the President’s Surveillance Program,” by the Offices of the Inspectors General of the Department of Defense, the Department of Justice, the Central Intelligence Agency, the National Security Agency, and the Office of the Director of National Intelligence (July 10, 2009), at 14, available at <https://oig.justice.gov/reports/2015/PSP-09-18-15-full.pdf>

⁵ “Principles to Guide the Office of Legal Counsel” (Dec. 21, 2004), available at:

https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2927&context=faculty_scholarship.

⁶ *Id.*

⁷ *Id.* (emphasis added)

⁸ “The Office of Legal Counsel and the Rule of Law,” American Constitution Society (October 2020), available at: <https://www.acslaw.org/wp-content/uploads/2020/10/OLC-ROL-Doc-103020.pdf>.

Transparency strengthens our constitutional order. It helps ensure that the checks and balances between the Legislative and Executive branches function as the framers intended. Congress *must* have visibility into how the Executive branch interprets the Constitution and implements laws enacted by Congress.⁹ The OLC must be incentivized to render legal opinions that apply the law without fear or favor.

We note that OLC legal opinions are rendered both as “formal opinions” and “informal advice.” Both constitute legal advice that is binding within the Executive branch, follow a formal approval process, have precedential value within OLC, and are tracked in an OLC database. The major distinction is only the *format* in which the advice is rendered: a “formal opinion” is turned into a carefully formatted, written document and some are published online, whereas “informal advice” may be rendered as an email or in verbal form, which is then reduced to a memo for the record. Accordingly, we would apply the principle of transparency articulated in the *Principles* document to disclosure of OLC legal opinions regardless of format.

We are aware of some limited disclosure provisions within the 2010 Office of Legal Counsel *Memorandum for Attorneys of the Office: Best Practices for OLC Legal Advice and Written Opinions*.¹⁰ However, the last dozen years have demonstrated that this memorandum does not go far enough to protect the integrity of OLC legal opinions or confidence in the work of OLC attorneys. Indeed, the 2020 statement by legal experts declares “OLC itself has been in crisis for some time.” The process outlined in section III of the 2010 *Memorandum*, under a heading entitled *Opinion Publication and Other Public Disclosure*, is exactly the wrong approach. It describes a system that creates a presumption that OLC opinions will be withheld unless an arduous process is followed, with multiple consultations and veto points, and no end date. It requires that the publication committee *affirmatively* decide to publish an opinion.

Recommendations

Our request is twofold. First, we ask you to direct the Office of Legal Counsel to make its opinions publicly available upon issuance, except in narrow circumstances. The default for the government should be openness.¹¹ Second, we request you direct the Office of Legal Counsel to release an index of all current OLC opinions and to update that index on a regular basis.

⁹ For example: the Department of Justice issued a secret Office of Legal Counsel opinion at the request of the Executive branch that authorized Executive branch employees to engage in torture. The opinion was unfounded and withdrawn when it came to light. Nevertheless, the DOJ would not prosecute the officials who obtained the advice because they were acting in conformity with an OLC opinion and the DOJ as a policy declines to prosecute those who follow its advice. This kind of circular reasoning undermines the rule of law. See “Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees,” Office of Public Affairs (June 30, 2011) “I made clear at that time that the Department would not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees.”

<https://www.justice.gov/opa/pr/statement-attorney-general-regarding-investigation-interrogation-certain-detainees>

¹⁰ See “Best Practices for OLC Legal Advice and Written Opinions,” Office of Legal Counsel (July 2010), available at <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf>

¹¹ See “Freedom of Information Act, Memorandum for the Heads of Executive Departments and Agencies,” The White House (January 21, 2009), available at

<https://obamawhitehouse.archives.gov/the-press-office/freedom-information-act>; “Freedom of Information Act Guidelines,” Office of the Attorney General (March 15, 2022), available at <https://www.justice.gov/ag/page/file/1483516/download>

The default rule must be that OLC legal opinions will be made publicly available contemporarily with their issuance. While there necessarily will be exceptions to disclosure, those exceptions should be narrow, constrained, and used only when necessary. Only Congress can guarantee this will happen. The FOIA is a powerful remedy, but it is slow, limited, and evaded by the Executive branch. The language included in the Joint Explanatory Statements accompanying the FY 2021 and FY 2022 Appropriations bills has thus far been unavailing on OLC opinion transparency.¹²

To address disclosure exceptions, Congress should direct the OLC to publicly release and maintain an index of all its opinions. OLC should publish the name of the opinion; the date it was finalized or revised; the author's name (i.e., the person who signed it); each recipient's name; identify whether the opinion has been withdrawn; and other salient information. Congress and the public should know how many OLC legal opinions exist. It is astonishing that there has yet to be a full accounting of the opinions.¹³

There is precedent for an index. The *FOIA Improvement Act*, enacted in 2016, established a 25-year limit for the Executive branch to assert deliberative process privilege as an exemption to a FOIA request.¹⁴ A recent lawsuit brought by the Knight First Amendment Center, *Francis v. DOJ*, resulted in an agreement whereby the DOJ is producing indexes of OLC opinions more than 25 years old.¹⁵ Similarly, the 2020 statement by legal experts endorsed indices.

We urge that you adopt more vigorous language concerning the Office of Legal Counsel contained in the report (H. Rept. 117-97) that accompanied the House Commerce, Justice, Science, and Related Agencies Appropriations Act for FY 2022. It would fully address the issues raised above and limit the Justice Department's ability to evade Congress's directive to make OLC opinions publicly available.

Thank you again for the opportunity to submit this testimony.

¹² While the report language included by the CJS Appropriations Subcommittee in the House of Representatives addressed these issues squarely, the superseding Joint Explanatory Statement language on OLC opinions provides wiggle room and defers to the DOJ. See Report, *Commerce, Justice, Science and Related Agencies Appropriations Bill, 2021*, H. Rpt. 116-455, p. 59, <https://www.congress.gov/116/crpt/hrpt455/CRPT-116hrpt455.pdf>, superseded by Joint Explanatory Statement, p. 61, <https://docs.house.gov/bills/thisweek/20201221/BILLS-116RCP68-JES-DIVISION-B.pdf>; see Report, *Commerce, Justice, Science and Related Agencies Appropriations Bill, 2020*, H. Rpt. 116-101, pp. 45-46, <https://www.congress.gov/116/crpt/hrpt101/CRPT-116hrpt101.pdf>, superseded by Joint Explanatory Statement, p. 30, <https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/HR%201158%20-%20Division%20B%20-%20CJS%20SOM%20FY20.pdf>.

¹³ Congress has previously considered legislation on OLC opinions. For example, the Senate Judiciary Committee favorably reported the *OLC Reporting Act of 2008* (S. 3501, 110th Congress). We note the introduction in the 117th Congress of the *DOJ OLC Transparency Act* (S. 3858) and the *SUNLIGHT Act of 2022* (H.R. 7619).

¹⁴ P.L. 114-185 (114th Congress). <https://www.congress.gov/bills/114th-congress/senate-bill/337>

¹⁵ The Knight First Amendment Institute at Columbia University is publishing the index on its website. <https://knightcolumbia.org/reading-room/olc-opinions>.