

Daniel Schuman, Policy Director, Demand Progress Action
Testimony on the FY19 Appropriations Bill for the
Senate Appropriations Commerce, Justice, & Science Subcommittee
Concerning the Department of Justice with Specific Regard to the
Transparency and the Public Availability of Information Concerning
Opinions Issued by the Office of Legal Counsel and
Lobbyist Filings Under the Foreign Agents Registration Act

Dear Chairman Moran, Ranking Member Shaheen, and members of the Senate Commerce, Justice, and Science, and Related Agencies Appropriations subcommittee:

Thank you for the opportunity to submit testimony on improving transparency and accountability at the Department of Justice. My testimony is focused on congressional and public access to information about two sets of government documents: (1) final opinions promulgated by the Office of Legal Counsel at the Department of Justice, and (2) lobbying disclosure forms collected pursuant to the Foreign Agents Registration Act.

Providing to Congress an Index of Current DOJ Office of Legal Counsel Opinions

Opinions by the Justice Department’s Office of Legal Counsel often have the effect of law within the executive branch, but many opinions with legal effect and precedential value have been withheld from Congress and the public despite the Justice Department’s “proactive disclosure” policy. Indeed, no one outside the executive branch knows how many opinions are currently in effect. In addition, the OLC has at times reached legal conclusions that are at variance with the understanding of the law held by Congress or interpretations that would be rendered by the Courts— but the OLC did not enlighten Congress regarding the difference of opinion.

We believe it is essential that Congress and the public have notice of the existence of legal interpretations contained in final OLC opinions so that our system of checks and balances can operate effectively. This is consonant with a letter signed by a bipartisan group of 19 senior former DOJ officials in 2006 that declared “OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.”¹

We recommend that the General Provisions account of the portion of the CJS Appropriations bill concerning the Department of Justice include the following legislative language that would require: a report detailing the total number of final OLC opinions in

¹ See “Guidelines for the President’s Legal Advisors,” the American Constitution Society (May 2006), available at http://www.acslaw.org/files/Microsoft%20Word%20-%202011_Johnsen_OLC.pdf.

effect, the opinion's subject line, the date it was finalized or updated, the agency that requested it, and the creation of an unclassified summary. The definition of what constitutes a final OLC opinion is drafted narrowly to cover only promulgations of executive branch policy that have been put into effect.

Bill language:

The Attorney General shall publicly report to Congress within 180 days and contemporaneously thereafter—

(A) The number of final OLC opinions in effect;

(B) A list of final OLC opinions in effect that includes for each opinion—

- (a) An unclassified summary;
- (b) The subject line, subject to classified redaction;
- (c) The date finalized/updated;
- (d) The agency/entity requesting it;
- (e) Whether it is newly issued, updated, or withdrawn.

(C) A final Office of Legal Counsel opinion is a document in written or electronic form that expresses the opinion of the Attorney General on questions of law or final opinions made in the resolution of inter-agency disputes, rendered in accordance with 28 USC §511-513, and—

- (1) The Attorney General or his/her designee determines that it is final; or
- (2) Government officials or contractors follow its guidance; or
- (3) It is relied upon to formulate legal guidance; or
- (4) It is cited directly/indirectly in another Office of Legal Counsel opinion.

Improved Disclosure of Foreign Agent Filings Under the Foreign Agents Registration Act (FARA)

Reports by Foreign Agents on their lobbying are important, but they are gathered and published by the Justice Department's FARA Unit in difficult-to-use formats. The use of modern technology and techniques, long embraced by other components in government, would improve the FARA Unit's ability to ensure compliance with the law and improve congressional and public ability to scrutinize the filings. There is a decade-long effort to

encourage the Department of Justice to modernize its practices, but it has failed to do so.² In light of agency inaction we believe it is appropriate for Congress to step in.

We recommend that the General Provisions account of the portion of the CJS Appropriations bill concerning the Department of Justice include the following report language. In summary, it requests a public consultation and report on (1) requiring filings by foreign agents under FARA to be in an electronic and structured format, and (2) the publication of those report in a bulk, structured data format for public reuse. This would help transform FARA from a paper exercise into something that helps effectuate the purposes behind the Foreign Agents Registration Act of tracking information about agents of foreign governments.

Report language:

Review of Reports from Foreign Lobbyists: The Attorney General of the United States shall review the United States Department of Justice's implementation of the Foreign Agent Registration Act, which should include a review of the recent DOJ Inspector General Report on FARA and consultation with public stakeholders, and within 6 months of enactment of this act issue a report to Congress that is publicly available and addresses (1) the feasibility and steps necessary to require all filings by foreign agents to be made in an electronic, structured data format where the information can flow into a machine processable digital format; (2) the publication by the FARA Unit of filing information to the public in bulk in a structured data format so it can be searched, sorted, and downloaded by the public.

Thank you again for the opportunity to submit this testimony. I would welcome the opportunity to answer any questions you might have. My email is daniel@demandprogress.org and my phone number is 240-237-3930.

² See Civil Society Comments to the FARA Unit (April 7, 2017), available at https://s3.amazonaws.com/demandprogress/letters/2017-04-07_Civil_Society_Comments_on_FARA.pdf