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Testimony on the FY22 Appropriations Bill for the House Appropriations
Commerce, Justice, Science Subcommittee
Concerning Transparency and the Public Availability of Opinions Issued by the
Justice Department's Office of Legal Counsel

Dear Chairman Serrano, Ranking Member Aderholt, 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 Ginger McCall and I am the Legal Director of Demand Progress. I am here today to urge you to ensure congressional and public access to information about legal opinions rendered by the Office of Legal Counsel (OLC) at the DOJ.

Background

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

Secrecy undermines democracy. Congress must understand how the executive branch interprets the Constitution and implements laws enacted by Congress. Furthermore, voters must understand how the executive branch carries out the law — and who is responsible for those laws — so they can make informed decisions at the polls and hold public officials accountable. Secrecy of OLC opinions also ensures that the most salient incentive for OLC attorneys is to lean towards a legal opinion that a given administration desires — not the legal opinion which best represents the law. This is not merely a theoretical problem: OLC has a history of rendering legal opinions that are controversial, even dubious or shoddy, from both legal interpretation and a public opinion standpoint.

A prominent example of the dangers of secrecy are the OLC opinions justifying the Bush Administration's use of "enhanced interrogation" tactics, known colloquially as the "Torture Memos." The Torture Memos, which were drafted in 2002, were secret until one of the opinions leaked to the press in 2004³ — *after* the CIA had committed numerous abuses (most famously Abu Ghraib). Once the opinions were public, legal scholars were quick to point out the poor quality of the legal reasoning.⁴ The Department of Justice's own Office of Professional Responsibility found that the authors of these

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 PBS, Frontline, Redefining Torture, available at: <https://www.pbs.org/wgbh/pages/frontline/torture/themes/redefining.html>

⁴ See e.g. *id.*

opinions, John Yoo and Jay Bybee, had “committed professional misconduct” when they failed to “exercise independent legal judgment and render thorough, objective, and candid legal advice.”⁵ Public availability of the opinions belatedly gave Congress the opportunity to conduct its own hearings and exercise its oversight responsibilities. In a February 26, 2010 hearing on *The Office of Professional Responsibility Investigation into the Office of Legal Counsel Memoranda*, Senator Patrick Leahy noted:

The fundamental question here is not whether these were shoddy legal memos. They were shoddy legal memos. Everybody knows that. The legal work of Yoo and Bybee and Steven Bradbury, the acting head of OLC who reaffirmed the CIA interrogation program, was flawed. It failed to cite significant case law; it twisted the plain meaning of statutes. **The legal memoranda were designed to achieve an end.** That is not what the Office of Legal Counsel should do, nor has ever done in any other administration, Republican or Democratic.⁶

The secrecy of these opinions shrouded their legal inadequacies from public scrutiny. Without Congressional or public oversight, the administration was able to rely on shoddy legal reasoning to engage in unchecked human rights abuses. Secrecy ensured that OLC attorneys were incentivized to enable the administration’s questionable agenda without public scrutiny serving as a counter-incentive to provide high quality, legally sound advice that might have thwarted the administration’s torture program. When the shroud was lifted, OLC withdrew the opinions, but the damage was done.⁷

Had Congress been given timely access to these opinions, or at least have been aware of their existence, Congress might have been better able to exercise its oversight capabilities to prevent Abu Ghraib and other human rights abuses. And surely senators would have also welcomed information about the drafting attorneys’ professional misconduct during subsequent nomination confirmation hearings. Had legal scholars been able to scrutinize the quality of the legal analysis and offer timely critical pushback, it might have been more apparent to the DOJ, the CIA, and the entire administration that the legal arguments in the Torture Memos were specious and should not be relied upon. Moreover, opinions justifying something so heinous as torture might not have been written in the first place had the authors expected their work would become publicly available.

In a democracy, secret law represents a uniquely egregious breach of the public trust. Allowing legal opinions with the force of law to remain secret thwarts oversight, removes consequences for harmful agency behavior, and allows executive agencies to engage in

⁵ Department of Justice, Office of Professional Responsibility, Investigation into the OLC’s Memoranda Concerning Issues Relating to the CIA’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists, July 29, 2009, available at: https://www.thetorturedatabase.org/files/foia_subsite/20090729_opr_final_report_with_20100719_declassifications_0.pdf

⁶ Hearing before the Committee on the Judiciary, United States Senate, 111th Congress, Feb. 26, 2010, available at: https://fas.org/irp/congress/2010_hr/opr-olc.pdf.

⁷ “Withdrawal of Office of Legal Counsel CIA Interrogation Opinions,” Office of Legal Counsel, April 15, 2009, available at <https://fas.org/irp/agency/doj/olc/withdraw-0409.pdf>.

behaviors that are counter to the will of the public they claim to serve. Furthermore, it is a longstanding practice that the Department of Justice will not prosecute people who follow OLC's legal advice, and secret OLC opinions are a "get out of jail free" card for the practitioners of unconscionable abuses.

The good news is that Congress can end this perverse incentive and remedy the secret law problem. By ensuring greater transparency in OLC opinions, Congress can protect its own oversight capabilities, incentivize OLC attorneys to produce high quality legal analysis, reduce the frequency of criminal acts performed under color of law, and ensure that every member of the public understands what laws the country is actually operating under. This does not remedy every problem created by the existence of OLC opinions, but it would bring the opinions into the light of day.

Recommendations

OLC opinions should be available to the public. Publicly releasing OLC opinions is consistent with a letter signed by a bipartisan group of 19 former senior DOJ officials, many of whom served in the Office of Legal Counsel, and one of whom, Chris Shroeder, is the current nominee to lead the office. In 2006, these 19 officials declared "OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure."⁸ We agree. To the extent OLC already releases some legal opinions,⁹ that practice is haphazard, is limited to only formal opinions, is commonly beset by delay, and is subject to numerous vetoes. Instead, OLC should implement a presumption of prompt disclosure for legal opinions.

We note that OLC legal opinions are rendered both as "formal opinions" and "informal advice." Both constitute legal advice, 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, "informal advice" may be rendered as an email or in verbal form, which is then reduced to a memo for the record.

There may be some instances where there are substantial reasons that certain contents of these opinions cannot be released to the public. For example, protecting the privacy of an individual or protecting properly classified information. In these circumstances, the reasons for withholding should be acknowledged to Congress so that it may follow up and exercise its oversight responsibilities. The strong presumption, however, should be for public disclosure.

⁸ See "Principles to Guide the Office of Legal Counsel," December 21, 2004, available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2927&context=faculty_scholarship

⁹ 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>

The DOJ should also publish a publicly-available, machine-readable index of all currently controlling OLC opinions. This should include, for each opinion: the full name of the opinion; the date it was finalized or revised; each author's name (i.e., the person who signed it); each recipient's name; a unique identifier assigned to each final or revised opinion; the format of the opinion; and whether the opinion has been withdrawn. At the very least, Congress and the public should know how many OLC legal opinions exist. Currently, no one outside the executive branch knows how many opinions are in effect, secretly controlling agency actions. Accountability and democracy require there be no secret laws.

Bill Language

We recommend that you once again include language concerning the Department of Justice that was contained in the report (H. Rept. 116-455) that accompanied the Commerce, Justice, Science, and Related Agencies Appropriations Act for FY 2021:

To serve the public interest, and in keeping with transparency and the precedent of public reporting of judicial decisions, the Committee asks the Attorney General to direct OLC to publish on a publicly accessible website all legal opinions and related materials, except in those instances where the Attorney General determines that release would cause a specific identifiable harm to the national defense or foreign policy interests; information contained in the opinion relates to the appointment of a specific individual not confirmed to Federal office; or information contained in the opinion is specifically exempted from disclosure by statute (other than sections 552 and 552b of title 5, United States Code). For final OLC opinions for which the text is withheld in full or in substantial part, the Attorney General should provide Congress a written explanation detailing why the text was withheld.

In addition, the Attorney General should also direct OLC to publish on a publicly accessible website a complete index of all final OLC opinions in both human-readable and machine-readable formats, arranged chronologically, within 90 days of the enactment of this Act, which shall be updated immediately every time an OLC opinion or a revision to an opinion becomes final. The index shall include, for each opinion: the full name of the opinion; the date it was finalized or revised; each author's name; each recipient's name; a unique identifier assigned to each final or revised opinion; and whether an opinion has been withdrawn.

The language was watered down in the joint explanatory statement for FY 2021 and FY 2020, and we recommend the House insist upon its original language in FY 2022.

To ensure an informed public, to protect against secret law, and to allow Congress to exercise its oversight responsibilities, OLC legal opinions must be available to the public and Congress. Thank you again for the opportunity to submit this testimony. I would welcome the opportunity to answer any questions you might have.