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Testimony on the FY22 Appropriations Bill for the Senate 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 Shaheen, Ranking Member Moran, and members of the committee:

Thank you for the opportunity to submit testimony on improving transparency and accountability for legal opinions rendered by the Office of Legal Counsel at the Department of Justice.

Background

The Office of Legal Counsel's (OLC) 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 OLC legal opinions 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 our democracy.

Secrecy also poisons the operations of the Office of Legal Counsel. Public scrutiny would create an invisible but 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 Building transparency into the process helps ensure that OLC legal analyses face scrutiny by Congress, scholars, and members of the public.

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

In December 2004, 19 former senior DOJ officials — including the now-nominee for Assistant Attorney General for OLC, Christopher Schroeder — endorsed a document calling for increased transparency, entitled *Principles to Guide the Office of Legal Counsel*.⁴ One principle was that “OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.”⁵ 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.⁶

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.⁷ 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.”

Recommendations

The good news is Congress can remedy this secret law problem. Our request is twofold. First, direct the Office of Legal Counsel to make its opinions publicly available upon promulgation, except in narrow circumstances. Second, direct the Office of Legal Counsel to release an index of all current OLC opinions and keep it up-to-date.

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

⁴ “Principles to Guide the Office of Legal Counsel” (Dec. 21, 2004), available at: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2927&context=faculty_scholarship. In 2020, a related statement was released by the American Constitution Society, entitled “The Office of Legal Counsel and the Rule of Law,” and a comparable constellation of legal experts contributed to that document. It endorses a strong presumption in favor of publishing final OLC opinions, disclosing its classified, privileged, and sensitive material to Congress when an agency relies upon OLC advice to justify a major policy decision or executive action, and releasing a public index of its memos.

<https://www.acslaw.org/wp-content/uploads/2020/10/OLC-ROL-Doc-103020.pdf>

⁵ *Id.*

⁶ *Id.* (emphasis added)

⁷ “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>.

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 first articulated in the *Principles* document to disclosure of OLC legal opinions regardless of format.

The default rule must be that OLC legal opinions will be made publicly available contemporaneously with their issuance. While there will be exceptions to public disclosure, those exceptions should be narrow, constrained, and used only when absolutely necessary. Congress should still be informed.

Congress should also direct OLC to publicly release an index of all its opinions and to keep that list up to date. It should contain 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; identify whether the opinion has been withdrawn; and other salient information.

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.⁸ A resulting 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.⁹ Similarly, the 2020 statement by legal experts endorsed indices.

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 It fails, however, to include a presumption of disclosure and creates multiple veto points. 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.”

Legislative Text

The committee report accompanying the House CJS Appropriations Committee included language in FY 2021 and FY 2020 that, if written into bill text, would favorably resolve the issue.¹¹ We recommend that the Senate adopt that language:

⁸ P.L. 114-185 (114th Congress). <https://www.congress.gov/bill/114th-congress/senate-bill/337>

⁹ The Knight First Amendment Institute at Columbia University is publishing the index on its website. <https://knightcolumbia.org/reading-room/olc-opinions>.

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 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/billsthisweek/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,

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 superseded in the joint explanatory statement for FY 2021 and FY 2020 that make the request more diffuse and, in light of recent experience, was unduly deferential to the Justice Department. As the underlying issue persists, we respectfully suggest it is time to take a more robust approach.

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.