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Written Testimony Submitted to the Senate Committee on Appropriations Subcommittee
on Commerce, Justice, and Science, and Related Agencies Concerning the FY 2020
Appropriations Bill, the Department of Justice, and the Office of Legal Counsel

Dear Chairman Moran, Ranking Member Shaheen, and members of the subcommittee:

Thank you for the opportunity to submit testimony regarding the FY 2020 Commerce, Justice, Science, and Related Agencies Appropriations Bill. I am testifying on behalf of Demand Progress, a national grassroots organization with more than two million affiliated activists who fight for the basic rights and freedoms needed for a modern democracy. Our policy agenda encompasses civil liberties, civil rights, money in politics, and government reform. Today we testify regarding increasing transparency and accountability at the Department of Justice, specifically with regard to the growing body of secret law embedded within Office of Legal Counsel opinions.

The Office of Legal Counsel

Opinions by the Justice Department's Office of Legal Counsel ("OLC") can have the effect of law within the executive branch, but they are regularly withheld from Congress and the public. The executive branch withholds not only the substance of these opinions but also basic information about them, such as when and to whom they are issued, the subject of their analyses, and even how many are currently in effect. Worse, the OLC may and has issued final opinions that are at variance with interpretations of law made by Congress and the courts. The Subcommittee on Commerce, Justice, Science, and Related Agencies can take the first step toward addressing this problem by requiring the Department of Justice to report on the volume of OLC opinions that have been produced with taxpayers' money.

Office of Legal Counsel opinions pose a serious threat to the rule of law, and secrecy around them has caused significant harm. For example, the now-infamous "torture memos," which declared legal under domestic and international law life-threatening "enhanced interrogation techniques" in secret CIA prisons, are, in fact, OLC opinions.¹ One of these opinions acknowledged three times that OLC "cannot predict with confidence whether a court would agree with this conclusion," but nevertheless concluded that the "question is unlikely to be subject to judicial inquiry."² The Department of Justice's Office of Professional Responsibility concluded that one author, John Yoo, "committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice."³

¹ <https://www.nytimes.com/2004/06/27/world/reach-war-interrogations-aides-say-memo-backed-coercion-already-use.html>

² <https://www.justice.gov/sites/default/files/olc/legacy/2013/10/21/memo-bradbury2005.pdf>

³ https://www.aclu.org/files/pdfs/natsec/opr20100219/20090729_OPR_Final_Report_with_20100719_declassifications.pdf

After the matter did encounter public scrutiny, then-Attorney General Eric Holder articulated another power of OLC opinions: “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.”⁴ Office of Legal Counsel opinions are similarly at the heart of a number of other controversies, like whether a sitting president may be indicted,⁵ whether the president may use an autopen to sign a bill,⁶ under what circumstances an American citizen can be targeted by a drone strike,⁷ the ban on immigrants from Muslim countries,⁸ and individuals’ eligibility for certain senior government positions.⁹

Withholding OLC opinions is not only against the interests of the rule of law and transparency writ large, it is also at odds with express Congressional intent and agency policy. Congress incorporated a “presumption of openness” in the 2016 FOIA Improvement Act, which codified an Obama-era executive order that prohibited an agency from withholding documents except in situations where disclosure would result in foreseeable harm.¹⁰ In the context of OLC opinions specifically, twenty prominent former OLC attorneys wrote a memorandum on best practices in 2006 calling on the OLC to “publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.”¹¹ And the Office of Legal Counsel itself, in a 2010 “best practices” memo, asserted that “the Office operates under the presumption that it should make its significant opinions fully and promptly available to the public,” including considering “disclosing documents even if they technically fall within the scope of a FOIA exemption.”¹²

Considering the guidance, policies, actions by Congress, and the significance of OLC opinions detailed above, the policy of the Justice Department should be to disclose all opinions to congress and the public by default, except in certain limited circumstances. The government instead argues, however, that OLC opinions are not final, but rather “predecisional” and “deliberative,” putting them at times outside the reach even of the Freedom of Information Act, an argument with which some courts have agreed.¹³ This stands in contrast to the OLC’s “best practices” memorandum, which describes its “core function” as providing “controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government.”¹⁴ That memorandum further acknowledged that OLC is “frequently asked to opine on issues of first impression that are unlikely to be resolved by the courts” and

⁴ <https://www.justice.gov/opa/pr/statement-attorney-general-regarding-investigation-interrogation-certain-detainees>

⁵ <https://www.justice.gov/olc/opinion/sitting-president%E2%80%99s-amenability-indictment-and-criminal-prosecution>

⁶ <https://www.justice.gov/olc/opinion/whether-president-may-sign-bill-directing-his-signature-be-affixed-it>

⁷ https://www.washingtonpost.com/world/national-security/legal-memo-backing-drone-strike-is-released/2014/06/23/1f48dd16-faec-11e3-8176-f2c941cf35f1_story.html

⁸ <https://assets.documentcloud.org/documents/3442905/EO-Foreign-Terrorist-Entry.pdf>

⁹ <https://www.justice.gov/olc/file/1078061/download>

¹⁰ Public Law No: 114-185, available at <https://www.congress.gov/bill/114th-congress/senate-bill/337/>

¹¹ https://web.archive.org/web/20090624234142/http://www.acslaw.org/files/Microsoft%20Word%20-%2011-Johnsen_OLC.pdf

¹² <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf>

¹³ See [https://www.cadc.uscourts.gov/internet/opinions.nsf/BA847AE67CFA826785257C550053C612/\\$file/12-5363-1473387.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/BA847AE67CFA826785257C550053C612/$file/12-5363-1473387.pdf)

¹⁴ <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf>

that in such circumstances “OLC's advice may effectively be the final word on the controlling law.”¹⁵

This subcommittee need not resolve all of the issues concerning OLC opinions today. Rather, before this subcommittee is an opportunity to assess the scope of secret law emanating from the Justice Department by requiring a basic accounting of OLC opinions that are currently in effect. The Department of Justice obscures the scope of the problems discussed here, and makes OLC opinions even harder to reach through the Freedom of Information Act, by failing to disclose even the existence of an unknown number of OLC opinions. A 2012 review by the Sunlight Foundation, for instance, found that the Department of Justice redacted the titles of 36% of at least 509 opinions issued from 1998 to 2012.¹⁶

We recognize that due to classification, national security, and privacy concerns, not all OLC reports can be fully released to the public. Nevertheless, there is an analogous situation with federal Inspectors General and the Government Accountability Office. Several executive branch IGs and other oversight institutions have found ways to restrict access to sensitive reports without keeping the public in the dark about the reports’ existence. For example, the Department of Defense Inspector General and the Government Accountability Office currently provide basic information, such as a report title or report number, in cases when some or all of a report’s contents must remain nonpublic. If the Department of Defense — which produces a large number of classified and sensitive reports — can provide this level of transparency, a similar remedy should suit the Office of Legal Counsel. By providing this information, the Department of Justice would provide the information it determines can be shared publicly, and would empower the public to request the report through the Freedom of Information Act when a dispute around publication persists.

In sum, an unknown subset of OLC opinions has been actively kept secret by the executive branch from Congress and the public. Their concealment undermines the system of checks and balances created by the framers, and at times the withholding of these opinions has served to conceal wrongdoing and faulty legal interpretations.¹⁷ This subcommittee has the opportunity to take a step toward addressing this body of secret law by requiring the Department of Justice take the simple step of reporting to the House and Senate Committees on Appropriations and the public a complete list of all final opinions.

We therefore request this subcommittee and the Appropriations Committee include the following legislative language in the FY 2020 Commerce, Justice, Science, and Related Agencies Appropriations Bill and accompanying committee report:

Report to Committee on Office of Legal Counsel Opinions: Not later than 90 days after enactment of this legislation, and every 90 days thereafter, the Department of Justice shall submit to the House Committee on Appropriations and the Senate Committee on Appropriations and publish on its website a report that includes the following:

¹⁵ *Id*

¹⁶ <https://sunlightfoundation.com/blog/2012/08/15/39-of-office-of-legal-counsel-opinions-kept-from-the-public/>

¹⁷ <http://www.nytimes.com/2008/04/03/washington/03intel.html>

- (a) A complete list of final OLC opinions currently in effect, where ‘final’ is defined as:
- (1) designated by the Attorney General or his designee as final; or
 - (2) government officials or government contractors are following its guidance; or
 - (3) it has been relied upon to formulate current legal guidance; or
 - (4) it is directly or indirectly cited in another final Office of Legal Counsel opinion.
- (b) For each opinion included in (a), the Department of Justice shall include --
- (1) The signer of the opinion;
 - (2) The recipient identified in the opinion;
 - (3) The date of issuance; and
 - (4) The title of the opinion, subject only to redactions provided for by 5 USC § 552 (b)(1), (b)(3)(A)(i), (b)(6), and (b)(7) and only to the extent the specific interest protected in withholding the information is greater than the public interest in disclosure.¹⁸

We thank the subcommittee for the opportunity to submit this testimony, and urge it to order this report to stave off a growing body of secret law.

¹⁸ 5 USC § 552 (b)(1), (b)(3)(A)(i), (b)(6), and (b)(7) are the Freedom of Information Act exemptions for classified information, information prohibited from disclosure by law, personnel and medical files, and records compiled for law enforcement purposes.