

Testimony of Michael Stern Before the House Appropriations Subcommittee on the Legislative Branch for Fiscal Year 2022

Chairman Ryan, Ranking Member Herrera Beutler, and Members of the Subcommittee, thank you for the opportunity to submit this testimony regarding the Fiscal Year 2022 budget request of the Office of General Counsel for the U.S. House of Representatives (OGC). I am Michael Stern, and I have served in various capacities on the Hill as a lawyer and staffer. Most relevant to today's subject, from 1996 to 2004 I was senior counsel in OGC, where I handled a broad range of legal matters for the House and its leadership, members, officers, committees, and staff. Since then I have written on numerous congressional legal issues, including at the Point of Order Blog, and have worked with various groups interested in congressional capacity, transparency, and reform. Although my testimony has been prepared in coordination with Demand Progress, it is submitted solely on my own behalf.

Today I will address the need for an enhanced public-facing role for OGC and greater transparency for its activities and those of the Bipartisan Legal Advisory Group (BLAG), which advises the Speaker with regard to the functioning of OGC and is responsible for articulating the institutional position of the House in all litigation matters. While OGC has a website with some information on areas of the law most relevant to its practice, this information is largely general in nature and does not appear to be frequently updated. Moreover, BLAG itself has no website and there appears to be little if any information about its operations in any official House source.

This lack of transparency is particularly concerning because it is in the House's institutional interest for the public to have more information about its legal positions and how they are formulated. A member of the public seeking to learn about the House's views on important legal controversies would find it very difficult to do so. Legal scholars and commentators are similarly disadvantaged by the lack of access to the opinions of the House's most knowledgeable experts. By contrast, the Justice Department's Office of Legal Counsel maintains a website on which its numerous legal opinions in support of executive power can easily be accessed. This imbalance of information undermines the House's institutional legal positions in court and with the public, particularly on oversight and other separation of powers issues where it frequently clashes with the executive.

It may be helpful in this regard to have a basic understanding of how OGC and BLAG developed and what they do.

A Brief History of OGC and BLAG

The origins of OGC may be found in the immediate post-Watergate period, when members of Congress came to believe that Congress as an institution required legal advice and representation independent of the Department of Justice (DOJ). The matters giving rise to these concerns included (1) direct legal conflicts between the legislative and executive branches, such as the enforcement of congressional subpoenas against the executive, where DOJ clearly could

not provide representation; (2) cases in which DOJ had an indirect conflict of interest, for example, where a broad or vigorous defense of congressional powers or privileges might undermine the executive's legal position or interests in other cases; (3) DOJ's insistence on maintaining control of decisionmaking with regard to all litigation for which it provided representation; and (4) DOJ's refusal to defend the constitutionality of certain federal laws, which gave rise to a need for independent representation of congressional interests as an intervenor or amicus.

As initially conceived, the Ethics in Government Act would have established an Office of Congressional Counsel to provide this independent legal advice and representation, but ultimately the House did not agree to this provision and the bill was changed to establish only a Senate Legal Counsel. See 2 U.S.C. § 288 et seq. The problems addressed by the original bill did not go away, however, and gradually the House's need for independent representation was filled by the General Counsel to the Clerk, who represented the House and its interests in a number of significant cases in the late 1970s and early 1980s and was eventually given the title of General Counsel to the House.

During the 1980s OGC performed many of the same functions as the Senate Legal Counsel, but unlike the latter it lacked any formal authorization or delineation of its roles and responsibilities. This on occasion gave rise to controversy about whether OGC had been properly authorized to undertake a particular representation or whether the House as a whole was adequately informed of its activities.

In the wake of the House bank and post office scandals of the early 1990s, the House adopted a package of administrative reforms which, among other things, directed the Committee on House Administration to develop a formal authorization of an Office of General Counsel to the House and to do so in a manner ensuring appropriate coordination with and participation by the majority and minority leaderships in representational and litigation matters. (Congressional Record, Apr. 9, 1992, p. 9040). The latter requirement responded to concerns that the minority had been excluded from decisionmaking and information regarding OGC's activities. An alternative offered by the minority, which was not adopted, would have specified the office's functions in some detail, had it report directly to a bipartisan leadership group, and placed several other requirements and limitations on the office, including a requirement that the lawyers in the office keep timesheets in the manner of private law firms. (Congressional Record, Apr. 9, 1992, p. 9051).

The rule adopted by the House in the following Congress (Congressional Record, Jan. 5, 1993, H. Res. 5, p. 49) eschewed this detailed approach, but simply established an Office of General Counsel "for the purpose of providing legal assistance and representation to the House," which was to "be provided without regard to political affiliation." The rule also provided that OGC "shall function pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships." This rule remains to this day the primary source of OGC's authority and responsibilities, although subsequent statutory enactments provide some additional minor details about its functions and

administration. See 2 U.S.C. § 5571 (authorizing automatic pro hac vice admission for OGC lawyers to state and federal courts and requiring the Attorney General to notify OGC, among other congressional officials, of a determination not to defend the constitutionality of a federal law).

For the most part, therefore, OGC's functions and methods of operation have been developed through practice and informal understandings over time. For example, OGC is required (or at least was during my time of service) to provide notice of subpoenas received by House officers to the Speaker, Minority Leader, and Parliamentarian, an unwritten mandate known as the "three amigos" process. Many of OGC's functions and practices are obscure even to most members and staff of the House, much less to the general public.

As for BLAG, during my tenure the only formal existence of that body consisted of the single reference in the House rule establishing OGC. Since that time, the House rules have been amended to provide that BLAG "speaks for, and articulates the institutional position of, the House in all litigation matters," but there is to my knowledge no public information about how BLAG exercises that responsibility, whether it meets regularly (or at all), whether there are any rules governing its deliberations, or anything else about its activities.

Unlike the Senate Legal Counsel, which is required by statute to make publicly available court papers and research memoranda relating to significant congressional legal issues and court proceedings (2 U.S.C. § 288g(b)), OGC has no mandated public-facing or educational role. OGC (unlike Senate Legal Counsel) does have a public website, but its "Notable Cases" tab simply provides links to significant court decisions and a few amicus briefs filed in recent years. This information does not appear to have been updated since 2019. Other than a bare reference to BLAG's existence, there is no information about that body at all.

Recommendation

It is in the public interest to understand how OGC and BLAG operate and fulfill the important functions they are given under the House rules. It is also in the House's interest to educate the public regarding the substance of the positions that it has taken on important legal controversies of the day and to provide some balance to legal arguments made by executive branch lawyers at the Office of Legal Counsel and elsewhere. While the House cannot compete on an even playing field with the legal resources of the executive branch, it can take modest steps to improve its outreach and communicate more effectively with the public.

Accordingly, I urge the subcommittee to ensure that OGC's funding for FY 2022 is adequate to enhance its capacity to improve its website and provide important legal information to the public. OGC should be directed to expand its website to provide non-privileged information about its legal advice and representation, including court filings, legal opinions, and select explanatory or historical documents that would shed light on its operations and the legal views of the House. It should also include basic information about the BLAG, such as a description of

what the BLAG is, who serves on it, how it functions, and instances when the BLAG authorizes or directs OGC to take a legal position.

Thank you again for the opportunity to submit this testimony.