

Testimony for the Senate Appropriations Committee Subcommittee on Commerce, Science, Justice, and Related Agencies

Regarding: The Department of Justice

Submitted by: Daniel Schuman, Policy Director at Demand Progress

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Dear Chairman Shelby, Ranking Member Mikulski, and members of the subcommittee:

Thank you for the opportunity to submit testimony regarding appropriations for the Department of Justice. I am writing on behalf of Demand Progress, a national grassroots organization with more than two million affiliated activists who fight for 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 write regarding transparency and accountability at the Department of Justice.

Our testimony today will address the following components: the FARA Registration Unit, the Office of Legal Counsel, and the Office of Information Policy.

The FARA Registration Unit

Knowing when agents of foreign governments are lobbying the federal government to act or forebear action is an important aspect of the policymaking process. Foreign lobbying has been an issue raised by lawmakers and the president. It also has been the topic of news coverage.¹ However, the mechanism by which agents of foreign government report is inadequate to the task and impedes the ability of the Department of Justice to properly enforce the law.²

During his first presidential campaign, candidate Obama pledged to "create a centralized Internet database of lobbying reports ... in a searchable, sortable, downloadable format."³ While persons who lobby on behalf of domestic entities have their information published in this way,⁴ reporting practices for lobbyists for foreign entities have not been similarly modernized. The Department of Justice oversees reporting under the Foreign Agents Registration Act⁵ under its

¹ See, e.g., "THE MISINFORMATION INDUSTRY: U.S. lobbying, PR firms give human rights abusers a friendly face—From Azerbaijan to Saudi Arabia, countries with poor human rights records spend millions to polish public image," Center for Public Integrity (December 2015), available at

<http://www.publicintegrity.org/2015/12/17/19051/us-lobbying-pr-firms-give-human-rights-abusers-friendly-face>.

² See, e.g., "Loopholes, Filing Failures, and Lax Enforcement: How the Foreign Agents Registration Act Falls Short," Project on Government Oversight (December 2014), available at <http://www.pogo.org/our-work/reports/2014/loopholes-filing-failures-lax-enforcement-how-the-foreign-agents-registration-act-falls-short.html>.

³ http://change.gov/agenda/ethics_agenda/

⁴ https://www.senate.gov/legislative/Public_Disclosure/database_download.htm

⁵ 22 U.S.C. § 611 et seq.

FARA Registration Unit.⁶ The FARA Registration Unit maintains an online database of reports.⁷ It currently permits registrants to submit paper documents and publishes those documents as PDFs. This publication methods obscures the useful information contained in the reports and hinders the Justice Department's ability to prosecute violators of the law.⁸

Transparency advocates expend significant energy trying to transform these paper files into a searchable, sortable, downloadable database. The Sunlight Foundation, for example, built an online tool called the "Foreign Influence Explorer" that digitized more than 7,000 records.⁹ The staffer who built that tool now works inside GSA's technology consultancy, 18F, which provides technology assistance to federal agencies. We also have met with members of the FARA Registration Unit in an effort to encourage and them to improve their database. We met with some success. We also successfully recommended that the Justice Department include in its third Open Government Plan the following commitment:

In the process of implementing the Open Government Plan, the FARA Registration Unit, in conjunction with the National Security Division Information Technology Section, has begun to assess the feasibility of generating additional features to the current online portal, which will enable the public to search, sort, and print information from the database more easily. Over the next two years, the Department will continue to review the FARA website and electronic filing system, while soliciting reasonable and concrete suggestions and feedback from the public, and will work to make feasible and appropriate modifications to the database. Throughout this process, **the Department will specifically investigate collecting and publishing registration information as structured data in a machine-readable format.**¹⁰ (emphasis added)

Unfortunately, this process has ground to a halt. Despite repeated attempts, the FARA Registration Unit appears currently uninterested in consulting with the public and disinclined to investigate "collecting and publishing registration information as structured data in a machine-readable format."

We believe the Department of Justice should require all filings be made in an electronic format where the information can easily flow into a machine-processable digital format. In turn, that information should be released to the public in bulk as structured data so that the data it contains may be searched and sorted. It would empower the use of analytics by DOJ as well.

We request the committee include language in its committee report requiring the FARA Registration Unit to complete its consultations with the public and technologists and publicly

⁶ <http://www.fara.gov/>

⁷ <http://www.fara.gov/search.html>

⁸ See "The Misinformation Industry" above; also see generally "Post Government Employment Restrictions and Foreign Agent Registration," Government Accountability Office (July 2008), available at www.gao.gov/new.items/d08855.pdf.

⁹ See <http://foreign.influenceexplorer.com/>. See also "A better way to explore foreign influence," Sunlight Foundation (May 2014), available at <https://sunlightfoundation.com/blog/2014/05/07/a-better-way-to-explore-foreign-influence/>.

¹⁰ Department of Justice Open Government Plan 3.0, p. 8 (May 2014), available at <https://www.justice.gov/open/doj-open-government-plan.pdf>.

report to the committee within 3 months on a plan to publishing registration information as structured data in a machine-readable format. We further request the committee urge the Justice Department to implement publication in a structured-data format within a reasonable timeframe.

The Office of Legal Counsel

Congressional and public access to the final opinions of the Office of Legal Counsel are essential for the proper functioning of government. They often act serve as a final interpretation of the law for the executive branch; adherence to its advice will cause the Justice Department to forebear prosecution for wrongdoing. Unfortunately, an unknown subset of these opinions has been actively kept secret by the executive branch under claims of executive privilege, deliberative process, and attorney-client privilege. Their concealment undermines the system of checks and balances wrought by the framers. At times, the withholding served to conceal wrongdoing and faulty legal interpretations¹¹ and may include examples of executive overreach.

In an Executive Order,¹² President Obama wrote that "agencies should take affirmative steps to make information available to the public" and should "adopt a presumption in favor of disclosure." His first nominee to head the Office of Legal Counsel, Dawn Johnsen, joined by many others who served in the Justice Department, called on OLC to "publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure."¹³ OLC, in its "best practices" memo, declares 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."¹⁴ We have found, however, that many opinions are not available to the public.¹⁵

We believe the policy of the Justice Department should be to require disclosure of all opinions to congress and the public by default, except public disclosure may be limited in certain circumstances. A determination to withhold publication should be made at the highest levels within the DOJ and be based upon clearly articulated rules. To the extent a document is withheld in full or in substantial part, a detailed unclassified summary of the opinion should be made available to the public in a timely way that conveys the essence of the opinion. In addition, the OLC should publish a complete list of all final opinions and contemporaneously update the list.

We request the committee include legislative language to require the Justice Department to public report to the committee: (1) the total number of final OLC opinions currently in effect, (2) the standard by which the Justice Department concluded an opinion was "final" and "currently in effect," (3) the dates of the opinions, (4) the legal issue at stake, and (5) an unclassified summary of each opinion. In addition, the Justice Department should be required to

¹¹ See, e.g., "Testimony sheds new light on the torture issue," David Johnson and Scott Shane, the New York Times (April 2008), available at <http://www.nytimes.com/2008/04/03/washington/03intel.html>.

¹² <http://www.whitehouse.gov/the-press-office/freedom-information-act>.

¹³ http://www.acslaw.org/files/Microsoft%20Word%20-%202011_Johnsen_OLC.pdf.

¹⁴ <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf>.

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

provide the full text of all final opinions still in effect to the subcommittee, the Senate Judiciary Committee, and other committees of jurisdiction.

The Office of Information Policy

The Office of Information Policy (OIP) in the Department of Justice has responsibility for government-wide oversight of the Freedom of Information Act. As has been recently reported,¹⁶ the Justice Department actively lobbied against FOIA legislation that would have codified the administration's own language on instantiating a presumption of openness. Related legislation passed the Senate,¹⁷ accompanied by a stern scolding of the Justice Department from government transparency organizations.¹⁸ There are examples of where the Office of Information Policy has been insufficiently zealous in promoting the proper implementation of FOIA.¹⁹ In fact, concerns about OIP in part prompted the creation of a FOIA watchdog in another agency.

The Office of Information Policy has three major areas of responsibility—processing FOIA requests for seven senior management offices within the Justice Department; adjudicating administrative appeals for all units within the Department of Justice; and (government-wide) FOIA policy and compliance. These responsibilities likely create issues with respect to prioritization of tasks and mixed incentives.

I reviewed how OIP allocated its resources to meet these tasks and ran into some difficulty getting clear information.²⁰ However, it appears that FOIA policy and compliance has the fewest resources to carrying out that mission.

We request the committee require OIP to publicly report on the funding it receives and how it allocates it among these three areas of responsibilities. We request a breakdown of the number of staff and contractors that work on issues in each functional unit. In addition, we request that GAO be tasked with reviewing whether OIP is devoting sufficient resources to FOIA policy and compliance, an assessment of whether OIP is properly performing its duties with respect to FOIA policy and compliance, and whether mixed incentives arise by housing these three function units under the same director and possible remedies.

¹⁶ See "It Took a FOIA Lawsuit to Uncover How the Obama Administration Killed FOIA Reform," Jason Leopold, VICE (March 2016), available at <https://news.vice.com/article/it-took-a-foia-lawsuit-to-uncover-how-the-obama-administration-killed-foia-reform>.

¹⁷ See "Freedom of Information Bill Passes the Senate," Daniel Schuman, Demand Progress (March 2015), available at <https://medium.com/demand-progress/freedom-of-information-bill-passes-the-senate-6d8928963c6b#.t8wmlvan7>.

¹⁸ See Letter to Barrack Obama (March 2016), available at https://s3.amazonaws.com/new.demandprogress.org/letters/2016-03-16_Letter_to_the_President_on_FOIA_reform.pdf ("The Justice Department's positions are at variance with the underlying intent of the FOIA, good public policy, common sense, and the administration's oft-stated position on transparency.")

¹⁹ See, e.g., "FOIA is Broken: A Report," U.S. House of Representatives Committee on Oversight and Government Reform (January 2016), available at <https://oversight.house.gov/wp-content/uploads/2016/01/FINAL-FOIA-Report-January-2016.pdf>.

²⁰ See "FOIA Oversight: The Budget Perspective," Daniel Schuman, Citizens for Responsibility and Ethics In Washington (June 2014), available at <http://www.citizensforethics.org/blog/entry/foia-oversight-the-budget-perspective>.