

May 26, 2021

Mr. Christopher Schroeder
Assistant Attorney General for the Office of Legal Counsel
Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Mr. Schroeder:

As organizations concerned about government oversight, openness, and accountability, we are writing to request the Department of Justice adopt a policy of transparency around Office of Legal Counsel (OLC) opinions. Specifically, we request the OLC proactively make its opinions publicly available upon promulgation except in narrow circumstances. We ask, additionally, that as head of OLC, you commit the office to release an index of all current OLC opinions and annually release an index of all legal opinions, without exception. This index should be a cumulative list of all OLC opinions that contains 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assigned to each final or revised opinion; identify the format of the opinion; and whether the opinion has been withdrawn.

In December of 2004, you — along with 18 other former senior DOJ officials — signed a document entitled *Principles to Guide the Office of Legal Counsel*.¹ One of the principles in that document was: “OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.”² 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.³

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.⁴ It endorsed publication of and transparency for OLC opinions. Specifically, the statement endorsed a strong

¹ “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

² *Id.*

³ *Id.*

⁴ “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>.

presumption in favor of publishing final OLC opinions; disclosing to congressional committees OLC advice classified, privileged, or sensitive 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.”

We agree. Public disclosure of OLC legal opinions is essential. 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. Accordingly, we would apply the principle of transparency you articulated to disclosure of OLC legal opinions regardless of format.

Secrecy undermines the operations of the Office of Legal Counsel. 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 that best represents the law. There are many examples of this happening, including some instances where OLC has withdrawn its own legal opinions. Transparency, on the other hand, helps ensure that OLC legal analysis faces scrutiny by scholars, members of the public, and Congress. Public scrutiny creates an invisible but persistent pressure for the promulgation of responsible, high quality, objective legal opinions.

Shrouding legal opinions in secrecy also is harmful to the Executive branch. It creates secret laws relied upon by agencies but invisible to the public. When uncovered, these secret laws undermine public confidence in the agencies, who in turn point at OLC. Confidence in the Justice Department is thereby undermined as it is saddled with condemnation for providing a veneer of legality to questionable agency actions.

Transparency protects OLC and the agencies it advises from avoidable public opprobrium. It also strengthens our constitutional order. Transparency helps ensure that the checks and balances between the Executive branch and the Legislative branch continue to function as the framers intended. In order to fulfill its legislative and oversight responsibilities, Congress must have visibility into how the Executive branch interprets the Constitution and implements laws enacted by Congress.

We are aware of some disclosure provisions within the 2010 Office of Legal Counsel *Memorandum for Attorneys of the Office: Best Practices for OLC Legal Advice and Written Opinions*;⁵ however, 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

⁵ 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>

attorneys. The process outlined in section III, Opinion Publication and Other Public Disclosure, is exactly the wrong approach. It describes a system that creates a presumption that OLC opinions will be withheld unless a long and tortuous process is followed, with multiple consultations, and no end-date. It requires that the publication committee *affirmatively* decide to publish an opinion.

The default should be openness, as former President Obama articulated as a guidance principle in his day one memorandum upon taking office.⁶ *The default assumption must be that OLC legal opinions will be made publicly available within a set number of days.* While there necessarily will be exceptions to that rule, those exceptions should be narrow, constrained, and used only when absolutely necessary. And even when the full legal opinion cannot be released, there should still be sufficient notice to Congress and the public that an opinion has been rendered and as much information about that opinion as possible should be made publicly available.

For all these reasons, we ask that you commit to making all OLC legal opinions publicly available except in certain well-defined, narrow, publicly-disclosed instances.

We applaud you for your efforts to ensure that our republic remains a nation of laws and advocacy for governmental transparency. We thank you for your attention to the issue of OLC legal opinions. We welcome the opportunity to discuss this with you further. Please contact Ginger McCall, Legal Director, Demand Progress at ginger@demandprogress.org.

Sincerely,

Americans for Prosperity
American Oversight
Brennan Center for Justice at NYU School of Law
Demand Progress
Defending Rights and Dissent
Digital Democracy Project
Electronic Frontier Foundation
Electronic Privacy Information Center
Federation of American Scientists
Government Accountability Project

Government Information Watch
Muckrock
National Security Archive
National Security Counselors
National Taxpayers Union
Open the Government
Project on Government Oversight
Protect Democracy
R Street
Revolving Door Project

⁶ See “Freedom of Information Act, Memorandum for the Heads of Executive Departments and Agencies,” The White House of President Barack Obama (January 21, 2009), available at <https://obamawhitehouse.archives.gov/the-press-office/freedom-information-act>