

Testimony on the FY 2025 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,  
May 23, 2024  
Debra Perlin, Policy Director  
Gabiella Cantor, Senior Policy Associate

Chair Shaheen, Ranking Member Moran, and members of the Subcommittee, thank you for the opportunity to submit testimony regarding the Department of Justice's Office of Legal Counsel (OLC) and Congressional oversight of the Executive Branch.

Citizens for Responsibility and Ethics in Washington (CREW) is a non-profit, non-partisan organization committed to promoting ethical governance, ensuring the integrity of our government institutions, and protecting our democracy. We firmly believe that an open and transparent government is necessary to address the threats our democracy faces today. To advance this mission, CREW has taken legal action to shed light on OLC's secret interpretations of the law and has supported efforts to compel OLC to proactively disclose records memorializing those opinions.<sup>1</sup>

Since 2016, CREW has filed 9 FOIA requests to obtain OLC documents, but to date has only received a third of these records. CREW has yet to receive any OLC memoranda we requested years ago on presidential pardons,<sup>2</sup> executive orders,<sup>3</sup> and other consequential matters. These examples are only a fraction of the many unanswered FOIA requests for OLC documents filed by individuals and organizations around the country.<sup>4</sup> Furthermore, because OLC rarely discloses memoranda as a result of a FOIA request, when organizations like ours are successful in getting OLC materials it is only after extensive FOIA litigation, a process that can often take years and requires significant organizational and government resources.

It is in the long-term interest of all citizens to have access to the legal advice given to the executive branch, irrespective of which political party is currently in power. It is also essential that Congress have access to OLC opinions in order to provide effective oversight and serve as a check on potential overreach by the executive branch. When Congress makes

---

<sup>1</sup> CREW gets secret Barr memo on Trump obstruction, CREW (August 24, 2022), <https://www.citizensforethics.org/news/press-releases/crew-gets-secret-barr-memo-on-trump-obstruction/>.

<sup>2</sup> FOIA Request by CREW, to the Office Legal Counsel (July 1, 2020), <https://www.citizensforethics.org/wp-content/uploads/2022/10/2020-7-1-Presidential-Self-Pardons-1.pdf>.

<sup>3</sup> FOIA Request by CREW, to the Office Legal Counsel (January 31, 2017), <https://www.citizensforethics.org/wp-content/uploads/2022/10/2017-1-31-OLC-FOIA.pdf>.

<sup>4</sup> See, e.g., FOIA To OLC For Communications And Directives About Events At Capitol During Congressional Certification Of 2020 Election Results, American Oversight (January 11, 2021), <https://www.americanoversight.org/document/foia-to-olc-for-communications-and-directives-about-events-at-capitol-during-congressional-certification-of-2020-election-results> and Exhibit A, Knight First Amendment Institute (March 15, 2019), <https://knightcolumbia.org/documents/1552c902e4>.

laws, the courts issue decisions or the president takes executive action, each almost always does so on the record. So too, binding legal guidance issued by OLC should be made public in a timely manner.

We are pleased that in recent years both House and Senate Appropriators have included strong language regarding the disclosure of OLC opinions, including most recently in the Joint Explanatory Statement of the FY 2024 Appropriations bill.<sup>5</sup> However, given that OLC has not responded by beginning the process of proactive disclosure it is clear that stronger language is needed to ensure that OLC is compliant with these reporting requirements.

Accordingly, we urge the subcommittee to adopt language similar to the provisions on OLC opinions in House Report 117–97.<sup>6</sup>

**Recommended Report Language:**

Office of Legal Counsel (OLC) opinions.—The Committee is aware that in 2004, nineteen former senior OLC officials authored a document entitled “Principles to Guide the Office of Legal Counsel,” which included a principle that “OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.” The signers noted that such disclosure “. . . helps to ensure executive branch adherence to the rule of law [and]...promotes confidence in the lawfulness of governmental action. [It] also adds an important voice to the development of constitutional meaning . . . and a particularly valuable perspective on legal issues regarding which the executive branch possesses relevant expertise. . . .” The Committee agrees with this argument for transparency, and its alignment with the precedent for the public reporting of judicial decisions. While the Committee understands that some OLC advice should properly remain confidential, it also agrees with the views of the OLC signers noted above that OLC should “consider the circumstances in which advice should be kept confidential, with a presumption in favor of publication.”

The Committee therefore directs the Attorney General to direct OLC to publish on a publicly accessible website all legal opinions and written OLC communication of non-legal guidance, 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 Section 552 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

---

<sup>5</sup> Joint Explanatory Statement Accompanying the Consolidated Appropriations Act, 2024 (P.L. 118-24), <https://www.congress.gov/118/crec/2024/03/05/170/39/CREC-2024-03-05.pdf>.

<sup>6</sup> H.R. Rep. No. 97, 117th Cong. (1st Sess, 2021), <https://www.congress.gov/117/crpt/hrpt97/CRPT-117hrpt97.pdf>.

a written explanation detailing why the text was withheld and, to the extent possible, release that explanation to the public.

In addition, not later than 180 days after the issuance of this report, the Attorney General should submit to the Committee and publish online a report that lists each OLC opinion currently in effect that has been: designated by the Attorney General or his/her designee as final; followed by government officials or contractors; relied on to formulate current legal guidance; or cited in another OLC opinion. For each such opinion, with information withheld only as provided by Section 552 of Title 5 of the United States Code and with due consideration to the presumption in favor of disclosure, the report should indicate the title and date of issuance, the signer, and the recipient identified in the opinion. An update of this list should be submitted to the Committee with its future annual budget requests.

Thank you for your ongoing efforts to increase transparency of the DOJ's Office of Legal Counsel. If CREW can provide any additional insight into questions regarding OLC reform and transparency, we are always happy to assist.