

November 9, 2022

The Honorable Jack Reed
Chairman, Senate Armed Services Committee
728 Hart Senate Office Building
Washington, DC 20510

The Honorable Dick Durbin
Chairman, Senate Judiciary Committee
711 Hart Senate Office Building
Washington, DC 20510

The Honorable James Inhofe
Ranking Member, Senate Armed Services Committee
205 Russell Senate Office Building
Washington, DC 20510

The Honorable Chuck Grassley
Ranking Member, Senate Judiciary Committee
135 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Reed, Ranking Member Inhofe, Chairman Durbin, and Ranking Member Grassley:

We, the undersigned groups, representing perspectives from across the political spectrum and concerned about the prevalence of Executive branch-created secret law, urge you to support inclusion of the OLC Transparency Amendment (S. Amdt. 6246) in the final bicameral National Defense Authorization Act for Fiscal Year 2023 (H.R. 7900). Senate Amendment 6246 would require the Department of Justice to publicly disclose all its Office of Legal Counsel (OLC) opinions, with appropriate exceptions. With the window for the 117th Congress to enact pro-transparency legislation for OLC opinions rapidly closing this year, it is vital for you to take this opportunity now to rein in the excessive secrecy that has shrouded the OLC and undermined our democracy for far too long.

The Department of Justice's Office of Legal Counsel (OLC) asserts that its "core function" is providing "controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government."¹ This advice, memorialized in legal opinions, "may effectively be the final word on the controlling law," yet these opinions are routinely withheld from Congress and the public. Many of us have written previously about why disclosure of OLC opinions is of critical importance.²

Congress's Constitutionally mandated legislative and oversight roles are threatened when Members are not given the opportunity to examine how the laws they author have been implemented by the Executive branch, and the rights of the American people are threatened by the existence of a large corpus of secret law—particularly when the implicated issues pertain to defense and national security matters. In addition, former OLC attorneys have publicly stated that transparency would improve the quality and integrity of the opinions.³ That is why the undersigned civil society

¹ Memorandum for Attorneys of the Office, Department of Justice (July 16, 2010), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf>.

² *See, e.g.*, Civil Society Letter to Christopher Schroeder, Assistant Attorney General for the Office of Legal Counsel (May 26, 2021), https://s3.amazonaws.com/demandprogress/letters/Letter_Assistant_Attorney_General_OLC_2021-05-26.pdf.

³ *See, e.g.*, Annie Owens, "Reforming the Office of Legal Counsel: Living up to Its Best Practices," American Constitution Society (Oct. 2020), <https://www.acslaw.org/wp-content/uploads/2020/12/Owens-Reforming-OLC-Final.pdf>; Elizabeth Goitein, "The New Era of Secret Law," Brennan Center for Justice (2016), https://www.brennancenter.org/sites/default/files/publications/The_New_Era_of_Secret_Law.pdf.

organizations, numerous former DOJ officials,⁴ and legal luminaries have been urging OLC to publicly disclose its final opinions.⁵ The OLC Transparency Amendment to the Senate NDAA would accomplish this very goal, providing public and congressional access to OLC opinions, with appropriate redactions, and would address some of the dangers of secret law.

Neither Congress nor the public is aware of the number of OLC opinions currently in effect, much less their legal conclusions. Relying on the Department of Justice to decide whether to release an opinion is fundamentally unworkable; its current “Best Practices for OLC Legal Advice and Written Opinions” memorandum, as actually implemented, produces the opposite of the openness and disclosure that DOJ claims to value. This status quo is unacceptable. Congress must intervene to ensure that the OLC adopts a bona fide presumption of transparency.

The OLC Transparency Amendment does not attempt to resolve the policy issues that arise in OLC opinions. Instead, it protects a foundational principle in our democracy: the right of Congress and the public to know how the laws of the land have been implemented by the Executive branch.

Thank you for your leadership, and we stand ready to assist you in this important effort.

Sincerely,

American Oversight
Americans for Prosperity
Anne Weismann, Esq. (FOIA Litigator)
Brennan Center for Justice at New York University School of Law
Center for Biological Diversity
Citizens for Responsibility and Ethics in Washington (CREW)
Demand Progress
The Digital Democracy Project
Electronic Frontier Foundation
Fix Democracy First
Government Information Watch
Inclusive America
Knight First Amendment Institute at Columbia University
National Security Archive
National Security Counselors
National Taxpayers Union
NETWORK Lobby for Catholic Social Justice
Open The Government Coalition
Project on Government Oversight (POGO)
Public Citizen
R Street Institute
Reporters Committee for Freedom of the Press
Stand Up America

⁴ Walter Dellinger, et al., “Principles to Guide the Office of Legal Counsel” (Dec. 21, 2004), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2927&context=faculty_scholarship.

⁵ “The Office of Legal Counsel and the Rule of Law,” American Constitution Society (Oct. 2020), <https://www.acslaw.org/wp-content/uploads/2020/10/OLC-ROL-Doc-103020.pdf>.