

Testimony Submitted for the Record
Senate Committee on the Judiciary
Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights
Hearing on “Breaking the Logjam Part 2: The Office of Legal Counsel’s Role in Shaping
Executive Privilege Doctrine”

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Chairman Whitehouse, Ranking Member Kennedy, and members of the Subcommittee, thank you for the opportunity to submit testimony regarding the 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.

CREW’s recent litigation victory in obtaining a critical OLC memorandum demonstrates the importance of making opinions issued by the OLC accessible to the public, while also highlighting the onerous and flawed process currently in place to access these opinions. In April 2019, CREW filed a Freedom of Information Act request for OLC documents given to then-Attorney General Barr about whether Special Counsel Robert Mueller’s evidence was sufficient to establish if Donald Trump obstructed justice.¹ CREW did not obtain the secret memorandum until August 2022.²

For more than three years, the Department of Justice (DOJ) used the courts to try to keep this memorandum hidden from public view. Both the trial and appellate courts rejected the DOJ’s arguments for withholding the memorandum. The trial court found that the DOJ’s assertion of attorney-client privilege was improper, and the DOJ abandoned this argument on appeal. Both the trial and appellate courts concluded that the DOJ had failed to prove that “deliberative-process privilege” justified the withholding of the memorandum.³ The release of this memorandum is of significant importance to members of the public and Congress

¹ “CREW requests OLC views on whether Trump obstructed justice, CREW (April 18, 2019), available at <https://www.citizensforethics.org/reports-investigations/foia-requests/crew-requests-olc-views-on-whether-trump-obstructed-justice/>

² CREW gets secret Barr memo on Trump obstruction, CREW (August 24, 2022), available at <https://www.citizensforethics.org/news/press-releases/crew-gets-secret-barr-memo-on-trump-obstruction/>

³ CREW v. DOJ, 45 F.4th 963 (D.C. Cir. 2022), available at <https://www.citizensforethics.org/wp-content/uploads/2022/08/Final-opinion.pdf>

because it was used by Attorney General Barr to substantiate his public (and false) exoneration of President Trump for obstruction of justice in connection with Special Counsel Mueller's investigation into potential Russian election interference.

CREW's success in obtaining this DOJ memorandum, however, is not easily replicable. The DOJ declined to pursue and support a theory of privilege that could have prevailed if it had been willing to admit that OLC was providing public relations, as opposed to legal advice. Moreover, the district court in this case took the unusual step of reviewing the records at issue *in camera*; in most FOIA lawsuits, the court relies exclusively on the government's descriptions of a record. In many other circumstances, OLC's advice to another component of the executive branch will be covered squarely by the deliberative process privilege because it will reflect a genuine attempt to guide agency action rather than an attempt to characterize a hypothetical decision.

These dynamics and other impediments to transparency mean that the vast majority of OLC opinions remain hidden from the public. 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,⁴ executive orders,⁵ and other consequential matters. These examples are only a fraction of the many unanswered FOIA requests for OLC documents filed by organizations around the country.⁶

Furthermore, when CREW has been successful in gaining access to OLC documents through FOIA litigation, the process has taken far too long. The memorandum to Attorney General Barr was released 3 years after CREW requested it, long after it was used by Attorney General Barr to wrongly exonerate President Trump for obstruction of justice and long after it would have been valuable to the American people and their representatives in Congress. The pressing importance of this OLC document (and others of its kind) to the American public calls for a more efficient process.

To resolve the issues presented here and in this hearing, CREW urges the committee to take action to mandate OLC transparency and thus help facilitate congressional oversight. The

⁴ FOIA Request by CREW, to the Office Legal Counsel (July 1, 2020), *available at* <https://www.citizensforethics.org/wp-content/uploads/2022/10/2020-7-1-Presidential-Self-Pardons-1.pdf>

⁵ FOIA Request by CREW, to the Office Legal Counsel (January 31, 2017), *available at* <https://www.citizensforethics.org/wp-content/uploads/2022/10/2017-1-31-OLC-FOIA.pdf>

⁶ *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), *available at* <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), *available at* <https://knightcolumbia.org/documents/1552c902e4>

committee should markup the DOJ OLC Transparency Act (S. 3858).⁷ This bill, sponsored by Senator Duckworth and Senator Leahy, mandates that OLC opinions be published no later than 48 hours after the date of issuance, with appropriate exceptions for maintaining national security.⁸ CREW has previously joined a diverse group of good-government organizations in calling on leaders in the Senate to pass this bill.⁹ While CREW continues to support this legislation, we encourage lawmakers to expand the bill's definition of "OLC opinion."

At present, the bill defines an OLC opinion as a "matter of legal interpretation communicated by the Office of Legal Counsel."¹⁰ This definition thus likely excludes communication by the OLC that is non-legal but still guides agency action. The Barr memorandum obtained by CREW is an example of an OLC communication that may not qualify as legal guidance but is nonetheless of critical importance to the public.

To ensure that bill encompasses both legal and non-legal guidance, we propose the following two changes: First, in Section 2(B)(i), the phrase "on a matter of legal interpretation," should be stricken; second, at the end of Section 2(B)(ii), the clause "and (IV) written OLC communication of non-legal guidance" should be added.¹¹

The passage of the DOJ OLC Transparency Act with our recommended changes would also make it possible to obtain documents of which we are currently unaware. These memoranda may be of critical importance to the American public because they likely provide binding legal advice to executive branch agencies on issues such as election integrity, regulation of firearms, surveillance, and abortion access.

Lastly, the transition to the proactive disclosure of OLC opinions will reduce the unnecessary resource drain placed on good-government organizations, the DOJ, and the courts filing, responding to, and litigating FOIA requests. Each lawsuit concerning OLC records requires hundreds of hours of both attorneys and court time, making efforts to increase transparency expensive and time-consuming. OLC records that function as the internal law of the executive branch should be made publicly accessible without these hurdles.

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

⁷S.3858 - 117th Congress (2021-2022): DOJ OLC Transparency Act, S.3858, 117th Cong. (2022), <https://www.congress.gov/bill/117th-congress/senate-bill/3858>

⁸ 29 U.S.C. § 521

⁹ Coalition letter to the Senate, (March 16th, 2022), *available at* https://www.citizensforethics.org/wp-content/uploads/2022/10/2022-03-16_Orgs_Supporting_OLC_Transparency.pdf

¹⁰ S.3858 - 117th Congress (2021-2022): DOJ OLC Transparency Act, S.3858, 117th Cong. (2022), <https://www.congress.gov/bill/117th-congress/senate-bill/3858>

¹¹ *Id.*

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. Passing the legislation described in this testimony will be a critical step forward in the ongoing fight for transparency in the DOJ and our government writ large.

If CREW can provide any additional insight into questions regarding OLC reform and transparency, we are always happy to assist.