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SUBMITTED TO THE HOUSE APPROPRIATIONS COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES SUBCOMMITTEE CONCERNING THE FY 2020 APPROPRIATIONS BILL

Chairman Serrano, Ranking Member Aderholt, and members of the Subcommittee, thank you for the opportunity to submit testimony regarding the FY 2020 Commerce, Justice, Science, and Related Agencies Appropriations Bill. My organization, Citizens for Responsibility and Ethics in Washington (CREW), is a non-profit, non-partisan organization committed to protecting the rights of citizens to be informed about the actions of government officials, ensuring their integrity, and protecting our democracy from corruption and deceit. My organization relies heavily on government records that are made publicly available by agencies to advance this mission through its research, litigation, advocacy, and public education. Based on my experiences engaging in this work for the past 16 years, today I offer testimony regarding the need for increased transparency and accountability at the Department of Justice — specifically with regard to the body of secret law that continues to be embedded within Office of Legal Counsel (OLC) opinions despite clear congressional intent to eliminate this undemocratic practice.

OLC serves a critical function within the executive branch. Exercising delegated statutory authority afforded the Attorney General,[1] OLC provides definitive interpretations of laws and other legal obligations that bind federal agencies, officers, and employees until overturned. OLC is a unique entity within the executive branch. The Attorney General and President of the United States are the only two individuals who may reject OLC's conclusions. Unless and until that happens, OLC's formal opinions stand as the conclusive views of the executive branch. In the words of its own directive, "OLC's central function is to provide, pursuant to the Attorney General's delegation, ***controlling*** legal advice to Executive Branch officials in furtherance of the President's constitutional duties to preserve, protect, and defend the Constitution, and to 'take Care that the Laws be faithfully executed.'"[2] Indeed, the full weight of these opinions is reflected in the fact that federal employees who rely on their conclusions enjoy immunity from prosecution.[3]

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[1] The Judiciary Act of 1789 charged the Attorney General with, *inter alia*, "giving his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments[.]" The current codification of this law, found at 28 U.S.C. § 523, directs the Attorney General to render opinions when requested by the President or heads of executive departments "on questions of law arising in the administration of his department." Pursuant to 28 U.S.C. § 510, the Attorney General has delegated the responsibility to render opinions on "questions of law arising in the administration or his department" to OLC.

[2] *See* Memorandum for Attorneys of the Office, from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, *Re: Best Practices for OLC Legal Advice and Written Opinions* (July 16, 2010), *available at* https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf.

[3] *Id*.

As controlling interpretations of laws that are binding on federal agencies, officers, and employees, OLC's formal opinions create their own body of law. The reach of this body of law extends beyond the federal workforce to members of the public who are profoundly affected by OLC's legal interpretations. These opinions determine the lawfulness of a range of conduct from warrantless surveillance to targeted killing of Americans on foreign soil. Consider for a moment the potential impact of the OLC opinion concluding a sitting president is not subject to indictment or criminal prosecution, which has been offered as grounds for why President Donald Trump cannot be prosecuted for obstruction of justice while in office. That opinion may bind only the Special Counsel appointed by the Deputy Attorney General, but its impact on Senate and House investigations, as well as the conduct of the other persons who are subject to those investigations, is inevitable. OLC's opinion has the potential to alter the course of history, as did OLC's opinions authorizing the use of torture on enemy combatants.

Congress has long recognized the body of law that is composed of OLC and other agency opinions, and it has long endeavored to protect our democracy from the detrimental effect that would result from allowing this body of law to function in the dark. Since 1946 and the enactment of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"), Congress has required all federal agencies to publish in the Federal Register or otherwise make publicly available specified categories of records without a triggering request to do so. Particularly relevant provisions of earlier versions of the APA are Section 3(a), which directed every agency to make publicly available "substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public,"[4] and Section 3(b), which directed agencies to make publicly available "all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents)."[5]

In 1965, upon noting a disturbing trend of agencies exploiting the various loopholes in Section 3 of the APA to "deny legitimate information to the public," and "as an excuse for secrecy,"[6] Congress proposed legislation to clarify that "section 3 of the Administrative Procedure Act is not a withholding statute but a disclosure statute[.]"[7] Echoing the words of James Madison, supporters of the proposal noted, "[a] popular government without popular information or the means of acquiring it, is but a prologue to a farce, or a tragedy, or perhaps both."[8] The following year, the House Committee on Government Operations observed that these agency policy statements and interpretations were "the end product of Federal administration" with the "force and effect of law in most cases," yet so many "have been kept secret from the members of the public affected by the decisions."[9] These concerns led Congress to strengthen 5

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[4] *See* Attorney General's Manual on the Administrative Procedure Act, Section 3 – Public Information (1947) (1947 AG Manual), citing 92 Cong. Rec. 56750 (Sen. Doc. P. 357), *available at* http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=3869&context=ilj (last accessed May 31, 2017).
[5] *Id*.
[6] S. Rep. No. 89-913, at 38 (1965).
[7] *Id*. at 40.
[8] *Id*.
[9] H.R. Rep. No. 1497, 89th Cong., 2d Sess. 7 (1966).

U.S.C. § 552(a)(2) (also known as the "reading room provision") and incorporate it into the newly-enacted Freedom of Information Act ("FOIA"), with the goal of eliminating secret law.[10]

Despite this long history of Congress's unambiguous intent to eliminate secret laws, OLC opinions have been used at times to justify circumventing congressional efforts embodied in the APA and the FOIA to promote the publication of laws and regulations, shielding authoritarian executive actions from public scrutiny. This is a dangerous practice that undermines our democratic system of checks and balances. For example, some members of this subcommittee may recall when, in 2007, Senator Whitehouse uncovered a secret OLC opinion that upheld the president's ability to unilaterally abrogate an executive order without public notice.[11]

CREW's own experience with OLC opinions demonstrates both the weight of their conclusions when the government chooses to wield them to its benefit, and their self-serving nature when the government chooses to weaponize the culture of secrecy that surrounds them to justify its actions.[12] For example, in defending the legality of the President's decision to circumvent the senate confirmation process in designating Matthew Whittaker as Acting Attorney General, the President cited to the publicly available OLC opinion finding that the designation was authorized by the Vacancies Reform Act and consistent with the Appointments Clause. In contrast, when CREW sought copies under the FOIA of White House visitor records that the Secret Service creates and maintains, the White House claimed the records are actually presidential and therefore not available to the public, relying in part on an OLC opinion that it refused to produce. Similarly, when CREW sought from the Office of Administration — a component of the Executive Office of the President ("EOP") that had operated as an agency subject to the FOIA since its inception — records relating to the mysterious disappearance of millions of emails from White House servers, the White House about-faced and claimed OA was no longer an agency, basing its position on yet another secret OLC opinion.

As CREW has steadfastly maintained in its litigation-based efforts to hold the government accountable to its democratic duty of transparency, the current codification of the reading room provision requires every agency to make publicly available "(A) final opinions . . . as well as orders, made in the adjudication of cases" and (B) "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register."[13] Furthermore, by application of current DOJ guidance, the reading room provision also imposes on federal agencies a duty to "proactively identify" records falling within its scope "and to make those records 'available for public inspection and copying' automatically . .

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[10] *See, e.g.*, *U.S. Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 796 n.20 (1989) (the FOIA's "primary objective is the elimination of 'secret law'") (quoting Frank H. Easterbrook, Privacy and the Optimal Extent of Disclosure Under the Freedom of Information Act, 9 J. Legal Studies 774, 777 (1980)); *Ctr. for Effective Gov't v. U.S. Dep't of State*, 7 F. Supp. 3d 16, 29-30 (D.D.C. 2013) ("engag[ing] in what is in effect governance by 'secret law' . . . conflicts with the very purpose of FOIA").

[11] *See* Statement of Sen. Whitehouse, Dec. 7, 2007, Congressional Record, pp. S15011-15012, *available at* http://www.fas.org/irp/congress/2007_cr/fisa120707.html.

[12] *See Designating an Acting Attorney General*, Op. O.L.C. (November 14, 2018), *available at* https://www.governmentattic.org/12docs/OLCstyleManula_2013.pdf.

[13] 5 U.S.C. §§ 552(a)(2)(A), (B).

.without waiting for a FOIA request."[14] The latter requirement has been a sticking point as at least one court has found it lacked the authority under the FOIA to compel OLC to proactively make its opinions available to the public at large,[15] and could therefore benefit from legislative clarity.

CREW is still engaged in a legal battle to obtain copies of all formal OLC opinions and indices of those opinions that OLC is required to make available for public inspection pursuant to the FOIA's reading room provision. In that litigation, OLC has claimed that none of its opinions are subject to § 552(a)(2) because they merely provide legal advice that an agency is free to ignore. This defense cannot be reconciled with the already published body of OLC opinions that clearly and expressly dictate how agencies must act in light of OLC's controlling legal interpretations, and the public statements of former OLC senior officials about the obligation agencies have to comply with OLC's interpretations. CREW's case is currently before the United States Court of Appeals for the District of Columbia Circuit awaiting a decision.

This ongoing legal battle highlights an essential need for Congress to further clarify OLC's ongoing duty to (1) proactively identify records falling within the scope of § 552(a)(2); (2) make those records available for public inspection and copying without a triggering FOIA request; and (3) make publicly available "current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by § 552(a)(2) to be made available or published[.]"[16] Such clarity can prevent the kind of protracted legal battle in which CREW has been engaged for the last six years, and the very real ills that flow from allowing OLC's binding decisions to hide in the dark.

Thank you for the opportunity to address the subcommittee.

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[14] Department of Justice Guide to the Freedom of Information Act 10 (2014) citation omitted), *available at* https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/proactive-disclosures-2009.pdf (last accessed May 31, 2017).

[15] *See CREW v. Dep't of Justice*, 846 F.3d 1235 (D.C. Cir. 2017).

[16] 5 U.S.C. § 552(a)(2) (final paragraph E).