

STATEMENT

The Office of Legal Counsel and the Rule of Law¹

Background

The Department of Justice (DOJ) is in need of a renewal. When exercising their authority to enforce federal law, the Attorney General and the officials of the Department should act as guardians of a suite of rule-of-law values. A well-functioning Department enforces the law evenhandedly and without malice toward political opponents. The DOJ also plays a vital role in protecting and defending the Constitution through the positions it takes on behalf of the United States government in litigation and by ensuring that the president and executive branch agencies adhere to the limits of the law. But DOJ has not always met these standards. Over the past four years, its credibility and integrity have eroded to the point of crisis. In particular, actions of the Department's leadership have cast doubt on its independence from the partisan and personal interests of the president. In its refusal to collaborate with Congress on oversight matters, the Department has retreated into a defensive, isolationist crouch.

The DOJ's Office of Legal Counsel (OLC) historically has played a special role in sustaining a rule-of-law culture within the Department and throughout the executive branch.² At its best, the Office serves as a foothold for constitutional values amidst inevitable political contestation within an administration. An OLC committed to the core mission of providing executive branch actors its best view of the law—to providing rigorously vetted advice that pays scrupulous attention to the limits the law places on executive power—can help promote fidelity to law beyond DOJ.³ When abiding by its best

¹ The following individuals provided significant contributions to the recommendations contained in this statement. The American Constitution Society is appreciative of their participation in an August 2020 private convening on Revitalizing the Office of Legal Counsel as well as their input and contributions here: Walter E. Dellinger III, Douglas B. Maggs Professor Emeritus of Law at Duke Law; Russ Feingold, President of the American Constitution Society; Daniel Goldman, Member of the Board of Directors of the American Constitution Society; Jameel Jaffer, Executive Director of the Knight First Amendment Institute at Columbia University; Dawn Johnsen, Walter W. Foskett Professor of Law at Indiana University Mauer School of Law; Leah Litman, Assistant Professor of Law at the University of Michigan Law School; William P. Marshall, William Rand Kenan, Jr. Distinguished Professor of Law at University of North Carolina School of Law; Barbara McQuade, Professor from Practice at the University of Michigan Law School; Neil Kinkopf, Professor of Law at Georgia State University; Annie L. Owens, Senior Counsel at the Institute for Constitutional Advocacy and Protection at Georgetown University Law Center; Cristina Rodriguez, Leighton Homer Surbeck Professor of Law at Yale Law School; Micah Schwartzman, Hardy Cross Professor of Law at the University of Virginia School of Law; Peter Shane, Jacob E. Davis and Jacob E. Davis II Chair in Law at Ohio State Moritz College of Law; and Michael Vatis, Partner at Steptoe & Johnson LLP.

² Judiciary Act of 1789, 1 Stat. 73; 28 U.S.C. §§ 511-513 (“The Attorney General shall give his advice and opinion on questions of law when required by the President.”); 28 C.F.R. § 0.25 (delegating to OLC the authority to prepare formal opinions for the Attorney General and to provide legal advice to executive agencies, as well as the authority to assist the Attorney General in fulfilling his role as legal advisor to the president).

³ See [Memorandum](#) from David Barron, Acting Assistant Attorney Gen., Office of Legal Counsel, to Attorneys of the Office (July 16, 2010); see also [Principles to Guide the Office of Legal Counsel](#) 1 (Dec. 21, 2004) (“When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration’s pursuit of desired policies.”).

practices, the Office also ensures a healthy respect for the separation of powers, by respecting Supreme Court precedent and displaying comity and good faith when articulating and defending the interests of the executive branch in relation to a co-equal Congress.⁴

But OLC itself has been in crisis for some time. It suffered severe reputational injury during the administration of President George W. Bush when the opinions it produced providing legal justification for torture became known to the public.⁵ In other instances it has been perceived by critics as providing legal cover for presidential and national security policies that stretch or exceed the law's limits.⁶ Some of the publicly known positions taken by the Office over the last four years also mark sharp departures from its best traditions, discussed below. The current moment thus demands a project of recovery—a guide for burnishing and securing OLC's independence and credibility, in order to advance the larger goal of resetting DOJ on its rule-of-law mission.

Guiding Principles

The work of OLC should be based on a commitment to three sets of interlocking principles that historically have defined the work of the Office and presented its lawyers with their greatest challenges: respect for the separation of powers, providing independent legal advice, and accountability.

First, and above all, OLC in its work explicates and defends our constitutional separation of powers, through careful consideration of the authorities and interests of the different branches of government. Separation of powers principles consist of a set of relationships defined by the Constitution and recognized and elaborated by the Supreme Court through precedent. But these principles also have developed over time through interactions and clashes between the political branches. They cannot be reduced to simple formulas easily applied across cases. OLC must strive to integrate these various strands of the separation of powers as it advises the executive branch about the scope of its authority and its relations with Congress. In some instances, this analysis entails defending the constitutional prerogatives of the executive branch, but often it requires the executive to acknowledge and yield to the interests or conclusions of the other co-equal branches of government.

Second, OLC at its best strives to provide independent legal advice—advice that makes clear the

⁴ See *id.*; see also [Constitutional Separation of Powers Between the President and Congress to Fed. Gov't Gen. Counsels](#), 20 Op. O.L.C. 124 (May 7, 1996).

⁵ See generally Kathleen Clark, [Ethical Issues Raised by the OLC Torture Memorandum](#), 1 J. NAT'L SEC. L. 455 (2005); Dawn E. Johnsen, [Faithfully Executing the Laws: Internal Legal Constraints on Executive Power](#), 54 UCLA L. REV. 1559 (2007); Jack Goldsmith, *THE TERROR PRESIDENCY: LAW AND JUDGEMENT INSIDE THE BUSH ADMINISTRATION* (2009).

⁶ See [ACLU v. DOJ - FOIA Case for Records Relating to Killing of Three U.S. Citizens](#), ACLU (Dec. 30, 2016); Press Release, [Justice Department Releases Bush Administration Torture Memos](#), ACLU (Apr. 16, 2009); Oona A. Hathaway, [The Soleimani Strike Defied the U.S. Constitution](#), ATLANTIC (Jan 4, 2020); [ACLU v. DOJ - Lawsuit to Enforce NSA Warrantless Surveillance FOIA Request](#), ACLU (last visited Sept. 22, 2020); OLC's influence and prominence within the executive branch also have waned, as the White House Counsel's Office has expanded and as lawyers from agencies across the administration have become more integrated into presidential decision-making. See generally Daphna Renan, [The Law Presidents Make](#), 103 VA. L. REV. 805 (2017); Jack Goldsmith, [The Decline of OLC](#), LAWFARE (Oct. 28, 2015); Jack Goldsmith, [More on the Decline of OLC](#), LAWFARE (Nov. 3, 2015). For a call for reducing the size of the White House Counsel's Office and expanding OLC, see Bob Bauer & Jack Goldsmith, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* 271-271 (2020).

limits the Constitution and statutes place on the executive's authority to act and that also helps ensure that executive action is clearly supported by legal authorities. Performing this function serves the separation of powers by ensuring that executive action respects the prerogatives of Congress and the courts while also enabling the exercise of executive authority. A commitment to articulating what it believes to be the best or strongest interpretation of the law, independent of political considerations, helps to legitimate executive action by reflecting acceptance of constraint on that action.

Third, OLC must help to promote accountability for the executive branch, which requires demonstrating a good-faith and robust commitment to transparency. OLC provides legal advice concerning the most sensitive matters of government, and the Office and the entities it advises therefore have an interest in candid deliberation shielded from scrutiny. OLC and executive branch officials must also protect classified information from exposure. But 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.

Recommendations

In pursuit of these principles, and in order to make publicly evident the Office's dedication to performing a constructive role within government, we offer the following:

1. Retrospective Review

When a new OLC leadership comes into place, it ought to conduct an accounting of the recent work of the Office, to identify opinions or advice that fail to promote a legitimate interpretation of the law at issue, or that advance a conception of the separation of powers that unduly shields the president or the executive branch from scrutiny and accountability. The decision whether to rescind opinions or advice on these grounds should go through the vigorous forms of review OLC conducts when providing advice in the first instance.⁷ Because the Office engages in wide-ranging and extensive work, the scope of this review should be guided by parameters to ensure both its feasibility and its legitimacy. The known matters of greatest concern fall into two basic categories: (1) relations with Congress and (2) deployment and use of law enforcement and national security authorities. The results of this review should be made public.

Over the last four years, the Office has issued and made publicly available opinions that arguably distort the separation of powers by brooking no recognition for Congress's prerogatives as a co-equal branch, in high-visibility disputes with Congress over politically charged legal questions. For instance, OLC issued an opinion justifying the decision by the Secretary of the Treasury to refuse to comply with a request from the Chairman of the House Ways and Means Committee for President Trump's tax returns, concluding that the Committee's asserted interest was pretextual and not in service of a legitimate

⁷ Because OLC typically provides advice in response to queries from the president, the Attorney General, and other executive branch actors, aspects of the retrospective review called for here could be initiated by a new White House Counsel, DOJ leadership, or heads of other agencies implicated by the advice at issue. The custom of reviewing past opinions for reconsideration in response to external queries need not obviate an OLC-driven accounting of how its precedents in these domains have evolved over the last four years, however.

legislative purpose.⁸ The view that OLC could discern such a pretext threatens the very viability of oversight, as congressional requests for information often occur in politically charged contexts, and partisan opponents will typically suspect ulterior motives of their counterparts. This opinion and others are highly suggestive of a sharp move away from an understanding of the separation of powers that acknowledges the critical importance of accommodating congressional interests and respecting congressional limits.⁹ A new OLC should assess the extent of this trend and repudiate those opinions that do not reflect an appropriate balance between the executive's interest in confidentiality and Congress's interests in carrying out its Article I functions.¹⁰

With respect to law enforcement and national security matters, it is less clear the extent to which OLC has facilitated or justified the most egregious abuses of delegated law enforcement authority of the past several years. Did OLC play a role in the mobilization of agents from the Bureau of Prisons, Drug Enforcement Administration, Customs and Border Patrol, or Immigration and Customs Enforcement to disperse protestors in Lafayette Park in June 2020, or on the streets of Portland ostensibly in defense of federal property, through an interpretation of the Insurrection Act?¹¹ Through its typical review for form and legality of executive orders and proclamations, the Office does appear to have placed its imprimatur on numerous highly controversial orders. The Office appears, for example, to have cleared President Trump's decision to divert funds from military construction projects to the construction of a border wall pursuant to his declaration of a national emergency.¹² The president also has issued a string of proclamations pursuant to his authority under 8 U.S.C. §1182 to deny the entry of "aliens" or any "class of aliens" to the United States if he deems exclusion to be in the interest of the United States. From the three proclamations denying entry to nationals from a shifting group of mostly Muslim-majority countries, to the proclamations denying entry to non-citizens unable to prove they have access to health insurance, to the orders citing labor market dislocation in light of the COVID-19 pandemic to justify halting various streams of legal immigration, these proclamations have tested the limits of the law and thwarted longstanding statutory policy.¹³

The extent to which OLC engaged in rigorous substantive review of any of these orders or otherwise articulated an OLC view of the law on the merits cannot be fully discerned from outside the executive branch. But it is precisely this sort of understanding that should be systematically sought by a new Office leadership. Such an understanding would aid in assessing whether and how the Office can continue to play a role in reviewing the assertion of delegated law enforcement and exclusion authorities

⁸ See [Congressional Committee's Request for the President's Tax Returns Under 26 U.S.C. § 6103 \(f\) for Gen. Couns. Dep't of Treasury](#), 43 Op. O.L.C. slip op. (2019).

⁹ See also [Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Testimony, Memorandum Opinion for Att'y Gen. and Couns. to President](#), 43 Op. O.L.C. slip op. (2019) (taking an extreme view with respect to executive privilege).

¹⁰ Cf. Shalev Roisman, [The Real Decline of OLC](#), JUST SECURITY (Oct. 8, 2019).

¹¹ 10 U.S.C. § 252.

¹² See Josh Dawsey & Matt Zapotosky, [How President Trump Came to Declare a National Emergency to Fund His Border Wall](#), WASH. POST. (Feb. 15, 2019).

¹³ The fact that the Supreme Court in *Trump v. Hawaii* upheld the third iteration of the president's 2017 entry-ban proclamation as consistent with his statutory authority and rejected the constitutional challenge to the order does not mean that OLC's review for potential constitutional concerns was not deficient with respect to that order or the two previous versions. See [Trump v. Hawaii](#), 138 S. Ct. 2392, 2423 (Kennedy, J. concurring).

to restrain abuses of power, or whether its review simply counts as a rubber stamp.

A form of *stare decisis* traditionally governs OLC decision-making, such that the Office considers itself bound by its own past advice across administrations, unless and until that advice is formally withdrawn after an extensive research and vetting process that resembles the opinion's formulation in the first instance. This retrospective review would help determine whether and to what extent such reconsideration is required for OLC to sustain its credibility as a source of legal interpretation appropriately insulated from policy and political pressures.

2. Best Practices and a New Separation of Powers Charter

An OLC restoration must also have a constructive component through which the Office articulates its rule-of-law values as principles and practices to bind its interpretation and analysis across cases and for the future. This constructive project should have at least two dimensions. First, it should include the affirmation of a set of best practices both tied to Office traditions and reflective of the changing structure and distribution of authority within the executive branch. Second, the Office should draft a new charter that takes account of developments over the last quarter century in the law and politics of the separation of powers and articulates the law and policy of relations between the executive and Congress for a new decade, to guide Office work on these perennial but evolving constitutional questions.

OLC Best Practices. A best practices memorandum should begin with the principles laid out by previous administrations to organize Office opinion writing and advice giving through the articulation of clear processes and goals.¹⁴ This memorandum should also emphasize three inter-related commitments that long have guided OLC's work. First, OLC should strive to provide the president and executive branch actors with its best view of what the law requires, rather than with advice that gives the imprimatur of the Office to legal justifications that are merely colorable or arguably defensible. Second, the Office must articulate structural and substantive strategies for ensuring that its advice remains independent from partisan political pressures. Third, the Office should demonstrate its commitment to ensuring executive branch accountability through transparency by articulating a strong presumption in favor of publishing its final formal opinions.

OLC's commitment to providing an interpretation of the law that it believes is the best representation of the law's meaning helps to give OLC's advice stature and credibility and is arguably what makes its counsel worth following.¹⁵ The so-called "best" view of the law is not a statement that the law is always determinate or can be objectively and mechanically determined. Moreover, the legal questions posed to OLC, because they are difficult and sometimes novel, often involve ambiguous or unclear statutory language, or the application of open-ended constitutional principles where doctrinal guidance is limited.

¹⁴ See [Memorandum](#) from David Barron, Acting Assistant Attorney Gen., Office of Legal Counsel, to Attorneys of the Office 3, 4 (July 16, 2010); see also [Principles to Guide the Office of Legal Counsel](#), at 1 (emphasizing, among other principles, that OLC should provide an "accurate and honest appraisal of applicable law, even if it will constrain the administration's pursuit of desired policies").

¹⁵ OLC does sometimes provide its views outside of its typical role of giving advice that binds actors within the executive branch, as when it assists the Office of the Solicitor General or other components of DOJ in developing their litigating positions. It is important that OLC be clear when it is playing this role. See [Principles to Guide the Office of Legal Counsel](#), at 6.

When OLC offers its best view of the law, then, it does not provide the only interpretation the law can bear. Instead, OLC provides a view of the law that can withstand scrutiny and excludes less persuasive interpretations that litigators might be able to defend in court. Put slightly differently, it is not enough for OLC to provide a legally colorable defense of contemplated executive action.

Any best practices memo should also outline methods of helping to ensure OLC independence from political actors. As long as OLC is located within DOJ, which is ultimately accountable to the president, complete independence from politics will not be possible. In addition, for OLC to remain a relevant source of legal advice, especially to the president, but also to agency officials, it should collaborate with agencies to enable them to achieve their policy objectives while comporting with the law.¹⁶ This line can be enormously difficult to walk and demands the highest integrity and dexterity on the part of OLC lawyers. But steps can be taken to preserve a discernable line between the legal analysis provided by OLC and the political deliberations of the White House, so as to ensure that OLC legal analysis is not distorted by political pressures, which in turn enhances the credibility of the Office and the policies it determines are legally sound.

The prioritization of independence must begin at the top, with an Attorney General who recognizes and defends the value of OLC's legal advice, grounded in the best view of the law, within the executive branch.¹⁷ Safeguards of independence should also include an express agreement between OLC and the White House Counsel's Office about the nature of their relationship. Ideally that relationship would be at arms' length, with the expected channels of communication clearly articulated and regularized. Certain routine forms of interaction between OLC and the White House should also be subject to ex ante agreement about how those interactions will proceed, such as with respect to how signing statements and statements of administration policy might be drafted. Officials should also require communications from the Counsel's office to be initiated with OLC leadership, not line attorneys, to prevent pressure from being placed on the latter. To be sure, particularly when it comes to the interests of the presidency, OLC should engage in its legal analysis aware of those interests and with the president's powers and equities in mind, but without pressure to approve a policy simply because it is favored by the president or his advisors.

The New Separation of Powers. OLC plays a special role in interpreting and applying the separation of powers structures and principles of the Constitution to the actions and policies of the executive branch, including in its relations with Congress. And among the most difficult and indeterminate questions OLC is often asked are those that implicate the separation of powers. Supreme Court doctrine covers some of

¹⁶ See Randolph D. Moss, [Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel](#), 52 ADMIN. L. REV. 1303, 1329–30 (2000) (“[T]he executive branch lawyer can serve the interest of democratic accountability, without departing from the best view of the law, in one additional and equally important manner. When the lawyer concludes that a proposed course of action is not legally available, he or she can explore what legally available alternatives might exist. On almost a daily basis, the Office of Legal Counsel works with its clients to refine and reconceptualize proposed executive branch initiatives in the face of legal constraints.”); see also *Principles to Guide the Office of Legal Counsel*, at 5 (emphasizing that OLC, whenever possible, should seek the views of affected agencies and DOJ components before giving advice).

¹⁷ See *Principles to Guide the Office of Legal Counsel*, at 1 (“As a practical matter, the responsibility for preserving this tradition [of respecting rule-of-law values] cannot rest with OLC alone. It is incumbent upon the Attorney General and the President to ensure that OLC's advice is sought on important and close legal questions and that the advice given reflects the best executive branch traditions.”).

this terrain, and OLC in its best practices has always and should continue to acknowledge that the executive branch is bound by Supreme Court precedent. But much of the back-and-forth between the president and Congress, particularly when it comes to questions of oversight and executive privilege, implicates practice, customs, and norms, not clear legal doctrine. As a result, OLC must often apply open-ended and general legal principles.

In the past, OLC has been guided by memoranda drafted for the purpose of answering this suite of questions, such as *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124 (1996), which lays out Supreme Court doctrine and the principles it embodies alongside past OLC precedent on common separation of powers issues. This general guidance needs updating to take account of the numerous doctrinal developments that have occurred over the last 25 years, including with respect to the scope of congressional oversight, the appointments clauses of the Constitution, and the removal power. New guidance must also take account of the rise of extreme partisan polarization and its effects on inter-branch relations in times of divided government. Indeed, some of OLC's recent opinions about the scope of congressional oversight, as noted above, reflect this extreme polarization and the rejection of inter-branch comity and accommodation.

A recommitment by OLC to a less combative, more functional and consistent separation of powers demands that OLC take a step back from ongoing disputes or tensions between the branches to take stock of the many dimensions of the separation of powers as they have developed over the last quarter century. This would require a serious study of separation of powers jurisprudence that has emerged since 1996, as well as a study of the major separation of powers conflicts between Congress and the executive branch that may never have reached the courts, or as they played out before the Supreme Court intervened, including the opinions produced by the Office that have been part of that conflict. The goal of this project would be to provide the attorneys of the Office and throughout the executive branch with a new reference guide or touchstone when engaged in the work of the Office that entails applying separation of powers doctrine and principles to questions posed by the president and other officials within the executive branch.

3. Publication and Transparency

One of OLC's primary functions within the executive branch is to ensure that executive actions are accountable to the law. But OLC alone cannot ensure executive branch accountability, and OLC itself must also be accountable for its decision-making and interpretation. Transparency of decision-making helps to ensure accountability by opening it up to scrutiny outside the Office—scrutiny that can also help prevent the politicization of OLC decision-making. While OLC's deliberations themselves must remain confidential to ensure candor in internal discussions with the agencies or officials seeking advice, the prospect that its final opinions and formalized legal analysis will be subject to scrutiny creates incentives for OLC to adhere to interpretations of the law that can be well defended. Publication also provides an opportunity for members of Congress, as well as civil society organizations, to probe or question the legal analysis offered by the executive branch to support its actions.

In the interests of transparency and accountability, OLC should maintain a strong presumption in favor of publishing its final opinions within a reasonable period of time after they have been issued. Not

everything in the OLC’s final opinions should be published—there will be exceptions for classified, privileged, or sensitive material. But the value of transparency in promoting accountability should guide OLC’s decision-making. This presumption should be especially strong where the White House or an agency intends to rely on OLC advice to justify a major policy decision or other executive action. Where general public dissemination is not possible, OLC should consider disclosing its advice to relevant congressional committees for their review. In addition, where OLC withholds its memos from the public, it should nonetheless release an index listing those memos individually by date and providing at least a high-level description of their subjects, in order to inform the public and Congress as to the matters that have come before OLC for review.

Conclusion

Our recommendations aim to reposition OLC around its core tradition of providing independent legal advice that offers its attorneys’ best view of the law to the president and executive branch actors. It is vital that an office within government perform this function to help ensure ongoing respect for a basic principle of our constitutional system—that executive action is constrained by law. It is in the interest of future presidential administrations to turn to OLC for advice of this sort, to bolster the credibility and legitimacy of the policies and actions of the president and the executive agencies. Especially in this hyper-polarized moment, the government has a profound need for legal analysis that strives to transcend political pressure so that officials can act credibly and effectively. These objectives demand the attention of the future guardians of the executive branch.