

Suggested Questions for Senate Judiciary Committee
Confirmation Hearing of Steven Engel as Assistant Attorney General for the Office of Legal Counsel
May 10, 2017

Questions: OLC opinions

The secrecy surrounding Office of Legal Counsel opinions continues to be a matter of public concern. Many OLC opinions are concealed from the public and shared with only select members or committees of Congress. One estimate says nearly 40% of formal OLC opinions are not publicly disclosed in any way.

Restricting access to OLC opinions constrains Congressional oversight and decreases government accountability, by, for example, preventing IG access to agency records, limiting GAO oversight of the intelligence community, and fostering the government's reliance on "secret law."

1. As Assistant Attorney General for OLC, would you support releasing information to the public on how many formal OLC opinions are in effect right now and what percentage of those are not available to all Members of Congress or the public? What steps would you undertake to make sure that, at a minimum, the total number, subject matter, and an unclassified summary of all OLC opinions will be made available to the public?
2. The Freedom of Information Act includes provisions that are intended to prevent the creation of a body of "secret law." Do you believe OLC has followed the spirit of the FOIA? Do you believe that OLC memorandums are "statements of policy and interpretations which have been adopted by the agency"? If so, are they covered under the proactive disclosure provision of the FOIA?
3. OLC has created a body of law with vast and significant implications for the American public, and has in the past provided legal justification for mass surveillance practices, targeted killing, and torture. Do you believe the public has a right to know what legal authority the government has to engage in such activities?

Follow-up questions:

1. OLC has defended in litigation its position that it does not have to check with its "clients," i.e., the agencies it writes opinions for, before withholding OLC opinions under the attorney-client privilege. In some cases, it turns out that the agency that OLC considers a "client" has actually already released the opinion that OLC is withholding as privileged. Since it is well-established that the *client* holds the privilege and an attorney cannot claim the privilege for a document the client agrees to release, do you agree that OLC should continue to claim privilege to withhold an opinion in cases where an agency agrees to release that opinion?
2. There is very little information available to the public regarding how OLC generally operates. As Assistant Attorney General, would you commit to disclosing more information about the process OLC uses to issue opinions; the kinds of opinions OLC issues, including formal and informal; the extent to which agencies are free to disregard OLC opinions; and the nature of the relationship between OLC and the agencies requesting its views?