

## OpenTheGovernment.org Recommendations for Increased Transparency and Oversight of Office of Legal Counsel Opinions on National Security Issues

The Department of Justice's Office of Legal Counsel (OLC) "[is frequently asked to opine on issues of first impression that are unlikely to be resolved by the courts,](#)" and its opinions are often "effectively be the final word on the controlling law" for the federal government. OLC has written that because of this, "the Office operates from the presumption that it should make its significant opinions fully and promptly available to the public." But OLC does not apply this presumption, or even review an opinion for public release if the memo contains classified information relating to national security, on grounds that "[d]eclassification decisions are made by the classifying agency, not the OLC."

It is precisely those opinions, though, where public interest in disclosure is highest, and where the OLC's conclusions are least likely to be reviewed by the courts. The [2002, 2005 and 2007 OLC torture memos](#) were originally classified at the Top Secret level. Although those memoranda have been [withdrawn](#) by OLC, their existence has [helped prevent the prosecution of any CIA officials for torturing prisoners, even in cases of homicide.](#)

OLC opinions containing classified national security information are also routinely withheld from the Congressional oversight committees. As an example, the intelligence committees have been denied access to 7 of 11 OLC memos setting forth the legal justification for the CIA drone program, despite the fact that members and staff of those committees have high-level security clearances, and despite the National Security Act's [requirement that](#) the Executive Branch provide information within its control "requested by either of the congressional intelligence committees in order to carry out its authorized responsibilities."

As Senator Dianne Feinstein noted at a [confirmation hearing for the CIA General Counsel, Carolyn Krass](#), the intelligence committee doesn't seek access to OLC's opinions out of "idle curiosity, it's really to understand the direction and rules under which certain programs operate...And we've found that these opinions are actually indispensable to effective oversight." Ms. Krass acknowledged that the CIA had a "duty and an obligation to make sure that this committee understands the legal basis for any activities that are being conducted by the CIA." But she said the Executive Branch was not obliged to provide the OLC opinions setting forth that legal basis because

The OLC opinions represent pre-decisional confidential legal advice that's been provided. And protecting confidentiality of that legal advice preserves space for there to be a full and frank discussion amongst clients and policy makers and their lawyers within the executive branch.

At the same hearing, Senator Carl Levin responded,

At some point there's a decision which is made, by a president by someone in the executive branch, presumably the president. At that point, would you agree that we, in Congress, have a right to know what that decision was based on legally?

Krass replied that although “you have the right to know both what course of action they’re pursuing as well as to be provided with a full understanding of the legal basis,” the OLC opinions that explain the legal basis remain “predecisional legal advice” to which Congress has no right.

Krass’s statements conflict with the OLC’s written policy on the release of opinions. The OLC’s memorandum on “[Best Practices for OLC Legal Advice and Written Opinions](#)” does contemplate withholding some OLC opinions on grounds of privilege. The major examples given of this, however, are: (1) a situation where “an agency requests advice regarding a proposed course of action, the Office concludes it is legally impermissible, and the action is therefore not taken”; and (2) “issues that are of little interest to the public or others besides the requesting agency.” Neither of these applies to the OLC memoranda on targeted killing. The CIA and Department of Defense have acted in reliance on OLC advice in hundreds of strikes that killed thousands of individuals, including four U.S. citizens.

Despite the contradiction of OLC’s written “best practices”, withholding any meaningful information about the office’s opinions on grounds of privilege has become the norm. OLC recently [responded](#) to a reporter’s Freedom of Information Act (FOIA) request for a list of its unclassified opinions in 2013 by redacting all information about nine of ten opinions on the list. OLC has also [refused to disclose](#) the number of classified opinions it has issued over the last several years.

The courts have recently signaled, however, that the administration cannot indefinitely conceal OLC opinions on life-and-death matters. Last month, the [Second Circuit ordered](#) the release of the legal analysis from a July 16, 2010 OLC memo by David Barron explaining the justification for drone strikes targeting U.S. citizens. The court held that “legal analysis is not an intelligence source and method,” and “whatever protection the legal analysis might once have had has been lost by public statements of public officials at the highest levels and official disclosure of” a [DOJ White Paper](#) summarizing the OLC memo.

The Court’s holding that releasing a summary of an OLC memo is a waiver of privilege has important implications for Congressional oversight as well as public disclosure. The Executive Branch does not dispute that the intelligence community is required to inform the Congressional oversight committees of the legal basis for its actions. The Second Circuit has now held that the Executive cannot invoke OLC memos in explaining the legal basis for its actions, and then withhold the memos themselves.

## RECOMMENDATIONS

- 1. The Department of Justice should not appeal the Second Circuit’s order regarding disclosure of the July 16, 2010 Office of Legal Counsel opinion and other information about the legal basis for the targeted killing program.*
- 2. Once the intelligence community conducts operations in reliance on advice in a Department of Justice Office of Legal Counsel opinion, that opinion becomes the*

*“working law of the United States.” As such, it must be provided to the Congressional intelligence committees in order to comply with the National Security Act’s notification requirements.*

3. *The Office of Legal Counsel should not rule out public release of all opinions that contain classified national security information. Rather, it should:*
  - a. *redact properly-classified operational information, but publicly release its legal analysis.*
  - b. *ask the appropriate officials within the Executive Branch, including the Original Classification Authority, the Public Interest Declassification Board and/or the Interagency Security Classification Appeals Panel, to review any information that may not be properly classified.*