



**U.S. Department of Justice**

Office of Legislative Affairs

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*Office of the Assistant Attorney General*

*Washington, D.C. 20530*

September 15, 2015

The Honorable Charles E. Grassley  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

This responds to your letter to the Attorney General dated January 8, 2015, requesting that the Department of Justice (the Department) publicly disclose any predecisional legal advice provided by the Department in advance of the decision to transfer five Guantanamo Bay detainees without providing thirty days' advance notice to Congress. You also asked "for public disclosure of any similar Department or OLC opinions, analyses, conclusions or other advice documents related to the President's other uses of executive action since January 2014."

As your letter recognizes, the Department's Office of Legal Counsel (OLC) plays a vital role within the Executive Branch in providing unbiased and thorough legal advice with respect to the issues its clients ask the Office to consider. As in any attorney-client relationship, the willingness of clients to seek legal advice from the Department on sensitive matters and to receive frank advice uninhibited by concerns about its potential disclosure depends upon the relationship of trust and confidence between the client and attorney. Consequently, in order to ensure that agencies and the President continue to approach OLC on sensitive matters, and to ensure that they remain willing to seek and receive full and frank advice that considers all sides of every issue, the Department generally does not disclose confidential legal advice OLC has provided, whether in a formal opinion or in a more informal way (except through the established publication process referenced below). Instead, where there is congressional or public interest in understanding the legal basis for government conduct, generally the government entity or entities responsible for the decision to undertake a given course of action are in the best position to provide the Executive Branch's explanation of the legal basis for that conduct.

In response to your prior requests on this subject, we enclosed with our letter of December 9, 2014, a paper setting forth the legal rationale for the Administration's conclusion that the transfer was lawful, notwithstanding the absence of thirty days' advance notice. As noted in our letter, that paper sets forth the Administration's views, in which both the Department and the Department of Defense concur. In addition, both the Secretary of Defense and the General Counsel to the Department of Defense have testified at congressional hearings regarding the lawfulness of the transfers and have acknowledged that the Department provided legal advice regarding the lawfulness of the transfers. And in the enclosed recent letter to the

House Armed Services Committee, the Department of Defense provided additional information about the timing of and the legal rationale for the Administration's conclusion that the transfer was lawful, notwithstanding section 1035 of the National Defense Authorization Act for Fiscal Year 2014.

The Department recognizes that there are circumstances in which it is appropriate and desirable to make a formal OLC opinion available to the public—a recent example of which is the release of the OLC opinion concerning the Department of Justice Inspector General's access to information protected under various federal statutes. See <http://www.justice.gov/olc/opinions>. The Department has in place a longstanding and careful process for determining when an OLC opinion is appropriate for publication. That process, explained in detail in the enclosed Memorandum, Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010), involves weighing an array of factors, including making sure that publishing the opinion would not compromise internal Executive Branch deliberative processes or the attorney-client relationship between OLC and other agencies or officials. We also note that in addition to its formal written opinions, as described in the Best Practices Memorandum, OLC provides advice in many other forms with varying degrees of formality—including through emails and orally—which are generally not appropriate for publication or otherwise disclosed outside of the Executive Branch.

We appreciate your understanding that Executive Branch institutional interests, including the need to protect the confidentiality of attorney-client communications and internal predecisional Executive Branch deliberative materials, preclude us from committing to disclose the content of all OLC communications providing legal advice relating to Executive Branch actions, except through the Department's established process for considering OLC's formal opinions for publication. The Department is committed to continuing to work with other departments and agencies of the Executive Branch to accommodate your interest in understanding the legal basis for Executive Branch conduct in a manner that does not compromise the ability of Executive Branch officials to receive candid and confidential legal advice to inform their deliberations and decision-making.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,



Peter J. Kadzik  
Assistant Attorney General

Enclosures

cc: The Honorable Patrick J. Leahy  
Ranking Member



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE  
1600 DEFENSE PENTAGON  
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GENERAL COUNSEL

JUL 17 2015

The Honorable Mac Thornberry  
Chairman  
Committee on Armed Services  
United States House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

I am writing in response to the Committee's interest, as expressed in section 1040 of H.R. 1735, the National Defense Authorization Act for Fiscal Year 2016 passed by the House, and in correspondence between the Department of Defense and the Department of Justice dated between January 1, 2014, and June 1, 2014, relating to the transfer of five detainees held at Guantanamo Bay, Cuba, in exchange for Sergeant Bowe Bergdahl. Specifically, section 1040 requests any such correspondence that includes legal analysis of section 1035 of the National Defense Authorization Act for Fiscal Year 2014 ("NDAA for FY 2014"), Pub. L. 113-66; section 8111 of the Consolidated Appropriations Act (P.L. 113-76), 2014; the Antideficiency Act (31 U.S.C. 1341); or Article II of the Constitution.

The Executive Branch has substantial confidentiality interests in legal advice provided by the Department of Justice, and, therefore, such advice is generally not disclosed. The Department of Defense does, however, appreciate your interest in understanding the legal rationale for the Administration's conclusion that the transfer of the five individuals was lawful. To accommodate that interest, we have previously provided the Committee with significant information on this topic. The Department's General Counsel testified about this issue before the Committee in both open and closed session, and has been interviewed by Committee staff. The Department also provided the Committee with a letter, dated December 5, 2014, reporting the views of the Department regarding the opinion of the U.S. Government Accountability Office (GAO) that the Department of Defense's transfer of five detainees from Guantanamo Bay to Qatar without 30 days' advance notice to Congress violated section 8111 of the Department of Defense Appropriations Act, 2014. That letter included a statement of the Administration's legal views on the application of section 8111 and section 1035, in which both the Department of Justice and Department of Defense concurred. The letter concluded that GAO's failure to take into account potential constitutional infirmities when construing these statutes rendered GAO's legal analysis incomplete and the stated legal conclusion unfounded.

We understand from Committee staff that you would like information on the timing and the legal rationale for the Administration's conclusion that the transfer was lawful under section 1035 of the NDAA for FY 2014. This letter therefore provides additional information on those two specific topics.



As Secretary Hagel noted in his congressional notification of May 31, 2014, we consulted with the Department of Justice about the application of the notification requirement in section 1035(d) to the transfer of five detainees to Qatar. Specifically, on May 6, 2014, the Department of Justice was consulted as to whether proceeding with the transfer of detainees without 30-days' notice to Congress might be lawful given the extraordinary circumstances at issue here – in which providing 30-days' notice would put into peril the life of a service member in captivity. The Department of Justice provided preliminary legal views on this question shortly thereafter. On May 22, 2014, the Department of Defense provided the Department of Justice with a description of the specific circumstances at issue in the proposed transfer of five detainees in exchange for Sergeant Bergdahl. Based on that description, prior to the decision to proceed with the transfer, the Department of Justice advised that the described facts did not alter its earlier preliminary analysis.

As previously described to the Committee, the Administration's view is that under the particular circumstances presented, the transfer of the five individuals at issue was lawful under section 1035, notwithstanding the absence of 30-days' advance notice to Congress. Although questions have been raised about the Administration's compliance with the notice requirement in section 1035(d), the transfer itself was lawful under section 1035, because section 1035 does not make notice a precondition of transfer.

Section 1035(b) states that, except as provided in section 1035(a), “the Secretary of Defense may transfer an individual detained at Guantanamo to the custody or control of ... [a] foreign country[] only if the Secretary determines” that—

(1) actions have or will be taken that substantially mitigate the risk that the individual will engage in activity that threatens the United States or United States persons or interests; and

(2) the transfer is in the national security interest of the United States.

Section 1035(c) lists several factors that the Secretary “shall specifically evaluate and take into consideration” “[i]n making the determination specified in subsection (b),” but section 1035 does not impose any other preconditions on the Secretary's authority under section 1035(b) to make transfers. In the case of the transfer of the five individuals, the Secretary made the two determinations required by section 1035(b) after evaluating and taking into consideration the factors specified in section 1035(c). The transfer was therefore lawful under section 1035.

The fact that the Secretary did not provide notice 30 days before the transfer as described in section 1035(d) does not alter that conclusion. Section 1035(d) states that the Secretary “shall notify the appropriate committees of Congress of a determination . . . under subsection . . . (b) not later than 30 days before” a covered transfer, but section 1035(d) specifies no consequence for the failure to make that notification. Thus, while section 1035(d) imposes a legal requirement that the Secretary provide Congress with notice 30 days before making certain transfers, neither it nor any other provision of section 1035 or the NDAA for FY 2014 states that a transfer that is otherwise authorized by section 1035(b) is rendered unlawful by the absence of the notification.

The language of the transfer restriction in the preceding year's National Defense Authorization Act, section 1028 of the National Defense Authorization Act for Fiscal Year 2013 ("FY 2013 NDAA"), Pub. L. 112-239, 10 U.S.C. 801 note, supports this plain language reading of the NDAA for FY 2014. The transfer restriction in the NDAA for FY 2013 stated that, subject to a limited exception, the Secretary could not use any funds available to the Department of Defense to make a transfer "unless the Secretary submit[ted] to Congress" a certification containing specified findings "not later than 30 days before the transfer" (section 1028(a)(1) of FY 2013 NDAA). Unlike the language in section 1035 of the NDAA for FY 2014, the language of the NDAA for FY 2013 expressly conditioned the lawfulness of a transfer on the Secretary notifying Congress 30 days in advance of the transfer. Congress's deliberate decision not to use that language in the NDAA for FY 2014 strongly suggests that the NDAA for FY 2014—as its plain text indicates—does not condition the lawfulness of the transfer itself on the provision of notice.

Although the transfer of the five detainees was lawful under the plain language of section 1035, the fact that the transfer was authorized does not resolve the question of whether the Secretary violated section 1035(d) by failing to provide notice in the circumstances at issue in this specific case. Under the particular circumstances of this transfer, the Administration determined that the absence of 30-days' advance notice did not violate section 1035(d) for the following reasons.

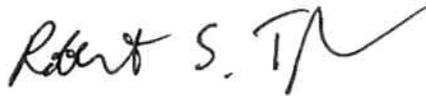
First, section 1035(d) might be construed as having been inapplicable to this particular transfer. The transfer was necessary to secure the release of a captive U.S. soldier, and the Administration had determined that providing notice as specified in the statute could jeopardize negotiations to secure the soldier's release and endanger the soldier's life. In those circumstances, providing notice would have interfered with the Executive's performance of two related functions that the Constitution assigns to the President: protecting the lives of Americans abroad and protecting U.S. service members. Such interference would "significantly alter the balance between Congress and the President," and courts have required a "clear statement" from Congress before they will interpret a statute to have such an effect. *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991). Congress may not have spoken with sufficient clarity in section 1035(d) because the notice requirement does not in its terms apply to a time-sensitive prisoner exchange designed to save the life of a United States soldier. *Cf. Bond v. United States*, 134 S. Ct. 2077, 2090-93 (2014).

Second, if section 1035(d) were construed as applicable to the transfer, the statute would be unconstitutional as applied because requiring 30-days' notice of the transfer would have violated the constitutionally mandated separation of powers. Compliance with a 30-days' notice requirement in these extraordinary circumstances would have "prevent[ed] the Executive Branch from accomplishing its constitutionally assigned functions," *Morrison v. Olson*, 487 U.S. 654, 695 (1988), without being "justified by an overriding need" to promote legitimate objectives of Congress, *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 443 (1977). As noted in the preceding paragraph, the Administration had determined that providing notice as specified in the statute would undermine the Executive's efforts to protect the life of a U.S. soldier. Congress's desire to have 30 days to weigh in on the determination that the Secretary had already made, in

accordance with criteria specified by Congress, that the transfer did not pose the risks that Congress was seeking to avoid, was not a sufficiently weighty interest to justify this frustration of the Executive's ability to carry out these constitutionally assigned functions. Thus, even though, as a general matter, Congress had authority under its constitutional powers related to war and the military to enact section 1035(d), that provision would have been unconstitutional to the extent it applied to the unique circumstances of this transfer.

We look forward to continuing to work with you in your oversight of this matter. Please let us know if you have any additional questions.

Sincerely,

A handwritten signature in black ink that reads "Robert S. Taylor". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Robert S. Taylor  
Acting General Counsel

cc:  
The Honorable Adam Smith  
Ranking Member



U.S. Department of Justice

Office of Legal Counsel

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Office of the Assistant Attorney General

Washington, D.C. 20530

July 16, 2010

**MEMORANDUM FOR ATTORNEYS OF THE OFFICE**

*Re: Best Practices for OLC Legal Advice and Written Opinions\**

By delegation, the Office of Legal Counsel (OLC) exercises the Attorney General's authority under the Judiciary Act of 1789 to provide the President and executive agencies with advice on questions of law. OLC's core function, pursuant to the Attorney General's delegation, is to provide controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government. In performing this function, OLC helps the President fulfill his or her constitutional duties to preserve, protect, and defend the Constitution, and to "take Care that the Laws be faithfully executed." It is thus imperative that the Office's advice be clear, accurate, thoroughly researched, and soundly reasoned. The value of OLC advice depends upon the strength of its analysis. OLC must always give candid, independent, and principled advice—even when that advice is inconsistent with the aims of policymakers. This memorandum reaffirms the longstanding principles that have guided and will continue to guide OLC attorneys in all of their work, and then addresses the best practices OLC attorneys should follow in providing one particularly important form of controlling legal advice the Office conveys: formal written opinions.

**I. Guiding Principles**

Certain fundamental principles guide all aspects of the Office's work. As noted above, 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." To fulfill this function, OLC must provide advice based on its best understanding of what the law requires—not simply an advocate's defense of the contemplated action or position proposed by an agency or the Administration. Thus, in rendering legal advice, OLC seeks to provide an accurate and honest appraisal of applicable law, even if that appraisal will constrain the Administration's or an agency's pursuit of desired practices or policy objectives. This practice is critically important to the Office's effective performance of its assigned role, particularly because it is frequently asked to opine on issues of first impression that are unlikely to be resolved by the courts—a circumstance in which OLC's advice may effectively be the final word on the controlling law.

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\* This memorandum updates a prior memorandum, "Best Practices for OLC Opinions," issued May 16, 2005.

In providing advice, the Office should focus intensively on the central issues raised by a request and avoid addressing issues not squarely presented by the question before it. As much as possible, the Office should be attentive to the particular facts and circumstances at issue in the request, and should avoid issuing advice on abstract questions that lack the concrete grounding that can help focus legal analysis. And regardless of the Office's ultimate legal conclusions, it should strive to ensure that it candidly and fairly addresses the full range of relevant legal sources and significant arguments on all sides of a question. To be sure, the Office often operates under severe time constraints in providing advice. In such instances, the Office should make clear when it needs additional time to permit proper and thorough review of the relevant issues. If additional time is not available, the Office should make clear that its advice has been given with only limited time for review, and thus that more thorough consideration of the issue has not been possible.

On any issue involving a constitutional question, OLC's analysis should focus on traditional sources of constitutional meaning, including the text of the Constitution, the historical record illuminating the text's meaning, the Constitution's structure and purpose, and judicial and Executive Branch precedents interpreting relevant constitutional provisions. Particularly where the question relates to the authorities of the President or other executive officers or the allocation of powers between the Branches of the Government, precedent and historical practice are often of special relevance. On other questions of interpretation, OLC's analysis should be guided by the texts of the relevant documents, and should use traditional tools of construction in interpreting those texts. Because OLC is part of the Executive Branch, its analyses may also reflect the institutional traditions and competencies of that branch of the Government. For example, OLC opinions should consider and ordinarily give great weight to any relevant past opinions of Attorneys General and the Office. The Office should not lightly depart from such past decisions, particularly where they directly address and decide a point in question, but as with any system of precedent, past decisions may be subject to reconsideration and withdrawal in appropriate cases and through appropriate processes.

Finally, OLC's analyses may appropriately reflect the fact that its responsibilities also include facilitating the work of the Executive Branch and the objectives of the President, consistent with the law. As a result, unlike a court, OLC will, where possible and appropriate, seek to recommend lawful alternatives to Executive Branch proposals that it decides would be unlawful. Notwithstanding this aspect of OLC's mission, however, its legal analyses should always be principled, forthright, as thorough as time permits, and not designed merely to advance the policy preferences of the President or other officials.

## **II. Opinion Preparation**

While the Office frequently conveys its controlling legal advice in less formal ways, including through oral presentations and by e-mail, the best practices for preparing the Office's formal written opinions merit particular attention. These opinions take the form of signed memoranda, issued to an Executive Branch official who has requested the Office's opinion.

**A. *Evaluating opinion requests.*** Each opinion request is assigned initially to at least one Deputy Assistant Attorney General and one Attorney-Adviser, who will review the question

presented and any relevant primary materials, prior OLC opinions, and leading cases to determine preliminarily whether the question is appropriate for OLC advice and whether it appears to merit a signed written opinion. The legal question presented should be focused and concrete; OLC generally avoids providing a general survey of an area of law or issuing broad, abstract legal opinions. There should also be a practical need for the written opinion; OLC should avoid giving unnecessary advice, such as where it appears that policymakers are likely to move in a different direction. A written opinion is most likely to be necessary when the legal question is the subject of a concrete and ongoing dispute between two or more executive agencies. If we are asked to provide an opinion to an executive agency the head of which does not serve at the pleasure of the President (*e.g.*, an agency head subject to a “for cause” removal restriction), our practice is to issue our opinion only if we have received in writing from that agency an agreement that it will conform its conduct to our conclusion. As a prudential matter, OLC generally avoids opining on questions likely to arise in pending or imminent litigation involving the United States as a party (although the Office may provide assistance to Justice Department divisions engaged in ongoing litigation). Finally, the opinions of the Office should address legal questions prospectively; OLC avoids opining on the legality of past conduct (though from time to time we may issue prospective opinions that confirm or memorialize past advice or that necessarily bear on past conduct in addressing an ongoing legal issue).

**B. *Soliciting the views of interested agencies.*** Before we proceed with an opinion, our general practice is to ask the requesting agency for a detailed memorandum setting forth the agency’s own analysis of the question; in many cases, we will have preliminary discussions with the requesting agency before it submits a formal opinion request to OLC, and the agency will be able to provide its analysis along with the opinion request. (A detailed analysis is not required when the request comes from the Counsel to the President, the Attorney General, or one of the other senior management offices of the Department of Justice.) In the case of an interagency dispute, we will ask each side to submit such a memorandum. We expect the agencies on each side of a dispute to share their memoranda with the other side, or permit us to share them, so that we may have the benefit of reply comments, when necessary. When appropriate and helpful, and consistent with the confidentiality interests of the requesting agency, we will also solicit the views of other agencies not directly involved in the opinion request that have subject-matter expertise or a special interest in the question presented. We will not, however, circulate a copy of an opinion request to third-party agencies without the prior consent of the requesting agency.

**C. *Researching, outlining, and drafting.*** A written OLC opinion is the product of a careful and deliberate process. After reviewing agency submissions and relevant primary materials, including prior OLC opinions and leading judicial decisions, the Deputy and Attorney-Adviser should meet to map out a plan for researching the issues and preparing an outline and first draft of the opinion. The Deputy and Attorney-Adviser should set target deadlines for each step in the process and should meet regularly to review progress on the opinion. Consultation with others in the Office is encouraged, as are meetings, as needed, with other Deputies and the Assistant Attorney General (AAG). An early first draft often will help identify weaknesses or holes in the analysis requiring greater attention than initially anticipated. As work on the opinion progresses, it will generally be useful for the Deputy and the Attorney-Adviser to meet from time to time with the AAG to discuss the status and direction of the draft opinion.

The Office must strive in our opinions for clear and concise analysis and a balanced presentation of arguments on each side of an issue. If the opinion resolves an issue in dispute between executive agencies, we should take care to consider fully and address impartially the points raised on both sides. In doing so, we generally avoid characterizing agencies with differing views as the “prevailing” and “losing” parties. OLC’s obligation is to provide its view of the correct answer on the law, taking into account all reasonable counterarguments, whether provided by an agency or not.

**D. Review of draft opinions.** Before an OLC opinion is signed it undergoes rigorous review within OLC. When the primary Deputy and the Attorney-Adviser responsible for the opinion are satisfied that the draft opinion is ready for secondary review, they should provide the draft opinion to a second Deputy for review. Along with the draft opinion, the Attorney-Adviser should provide to the second Deputy copies of any key materials, including statutes, regulations, important cases, relevant prior OLC opinions, and the views memoranda received from interested agencies. Once the second Deputy review is complete and the second Deputy’s comments and proposed edits have been addressed, the primary Deputy should circulate the draft opinion for final review by the AAG, the remaining Deputies (though it is not necessary in each case for each of them to review an opinion), and any other attorneys within the Office with relevant expertise.

Because OLC issues opinions pursuant to the Attorney General’s delegated authority, the Office keeps the Office of the Attorney General and the Office of the Deputy Attorney General apprised of its work through regular meetings and other communications. This practice ensures that the leadership offices are kept informed about OLC’s work, and also permits OLC to benefit from suggestions about additional interests OLC should consider or views OLC should solicit before finalizing its opinions, which are nevertheless based on its own independent analysis and judgment. The Office also keeps the Office of the Counsel to the President appropriately apprised of its work.

Consistent with its tradition of providing advice that reflects its own independent judgment, OLC does not ordinarily circulate draft opinions outside the Office. However, as part of our process, we may share an aspect of a draft opinion’s analysis with the requestor or others who will be affected by the opinion, particularly when their submissions have not addressed issues that arise in the draft. In some other cases, OLC may share the substance of an entire draft opinion or the opinion itself within the Department of Justice or with others, primarily to ensure that the opinion does not misstate any facts or legal points of interest.

**E. Finalizing opinions.** Once all substantive work on an opinion is complete, it must undergo a thorough cite-check by our paralegal staff to ensure that all citations are accurate and that the opinion is consistent with the Office’s rules of style. After all cite-checking changes have been approved and implemented, the final opinion should be printed on bond paper for signature. Each opinion ready for signature should include a completed opinion control sheet signed by the primary and secondary Deputies and the Attorney-Adviser. If the opinion is unclassified, after it is signed and issued to the requesting agency it must be loaded into our ISYS database and included in the Office’s unclassified Day Books. A separate file containing a copy of the signed opinion, the opinion control sheet, and copies of key materials not readily

available, such as the original opinion request, the views memoranda of interested agencies, and obscure sources cited in the opinion, should also be retained in our files for future reference.

### **III. Opinion Publication and Other Public Disclosure**

Pursuant to Executive Order 12146 and directives from the Attorney General, OLC has a longstanding internal process in place for regular consideration and selection of significant opinions for official publication. At the first stage of the process, the attorneys who have worked on an opinion and the front-office personnel who have reviewed it are asked for a recommendation about whether the opinion should be published. After these recommendations are collected, the opinion is forwarded to an internal publication review committee, made up of attorneys from the front office, as well as at least one career attorney. If the committee makes a preliminary judgment that the opinion should be published, the opinion is circulated to the requesting Executive Branch official or agency and any other agencies that have interests that might be affected by publication, to solicit their views on whether there are reasons why the opinion should not be published. Taking this input into account, the publication committee then makes a final judgment about whether the Office should publish the opinion. After the Office makes a final decision to publish an opinion, the opinion is rechecked and reformatted for online publication; a headnote is prepared and added to the opinion; and the opinion is posted to the Department of Justice Web site at [www.usdoj.gov/olc/opinions.htm](http://www.usdoj.gov/olc/opinions.htm). All opinions posted on the Web site as published opinions of the Office are eventually published in OLC's hardcover bound volumes.

In deciding whether an opinion is significant enough to merit publication, the Office considers such factors as the potential importance of the opinion to other agencies or officials in the Executive Branch; the likelihood that similar questions may arise in the future; the historical importance of the opinion or the context in which it arose; and the potential significance of the opinion to the Office's overall jurisprudence. In applying these factors, the Office operates from the presumption that it should make its significant opinions fully and promptly available to the public. This presumption furthers the interests of Executive Branch transparency, thereby contributing to accountability and effective government, and promoting public confidence in the legality of government action. Timely publication of OLC opinions is especially important where the Office concludes that a federal statutory requirement is invalid on constitutional grounds and where the Executive Branch acts (or declines to act) in reliance on such a conclusion. In such situations, Congress and the public benefit from understanding the Executive's reasons for non-compliance, so that Congress can consider those reasons and respond appropriately, and so that the public can be assured that Executive action is based on sound legal judgment and in furtherance of the President's obligation to take care that the laws, including the Constitution, are faithfully executed.

At the same time, countervailing considerations may lead the Office to conclude that it would be improper or inadvisable to publish an opinion that would otherwise merit publication. For example, OLC will decline to publish an opinion when disclosure would reveal classified or other sensitive information relating to national security. (Declassification decisions are made by the classifying agency, not OLC.) Similarly, OLC will decline to publish an opinion if doing so would interfere with federal law enforcement efforts or is prohibited by law. OLC will also

decline to publish opinions when doing so is necessary to preserve internal Executive Branch deliberative processes or protect the confidentiality of information covered by the attorney-client relationship between OLC and other executive offices. The President and other Executive Branch officials, like other public- and private-sector clients, sometimes depend upon the confidentiality of legal advice in order to fulfill their duties effectively. An example is when an agency requests advice regarding a proposed course of action, the Office concludes it is legally impermissible, and the action is therefore not taken. If OLC routinely published its advice concerning all contemplated actions of uncertain legality, Executive Branch officials would be reluctant to seek OLC advice in the early stages of policy formulation—a result that would undermine rule-of-law interests. Some OLC opinions also may concern issues that are of little interest to the public or others besides the requesting agency. OLC’s practice of circulating opinions selected for publication to the requesting Executive Branch official or agency and any other agencies that have interests that might be affected by publication helps ensure that the Office is aware of these competing considerations. In cases where delaying publication may be sufficient to address any of these concerns, OLC will reconsider the publication decision at an appropriate time.

OLC also receives a large number of Freedom of Information Act (FOIA) requests for its unpublished legal opinions. The volume of such requests has increased substantially in recent years, particularly with respect to opinions concerning national security matters. By definition, these requests seek disclosure of documents that the Office has not yet chosen to release pursuant to its own internal publication procedures. In responding to these requests, OLC is guided by President Obama’s January 21, 2009 FOIA Memorandum and Attorney General Holder’s March 19, 2009 FOIA memorandum. As the Attorney General’s memorandum observes, various FOIA exemptions protect “national security, . . . privileged records, and law enforcement interests.” OLC will consult with relevant agencies in determining whether particular requested documents fall within and should be withheld under any applicable FOIA exemptions. If a requested document does not fall within an exemption, OLC will disclose it promptly. In addition, OLC will consider disclosing documents even if they technically fall within the scope of a FOIA exemption. As the Attorney General also stated in his March 19, 2009 memorandum, “an agency should not withhold information simply because it may do so legally.” In particular, consistent with President Obama’s directions, the Office will not withhold an opinion merely to avoid embarrassment to the Office or to individual officials, to hide possible errors in legal reasoning, or “because of speculative or abstract fears.”

OLC has a unique mission, and a long-established tradition—sustained across many administrations—as to how its work should be carried out. The Office depends not only upon its leadership but also upon each of its attorneys to ensure that this tradition continues.



David J. Barron  
Acting Assistant Attorney General