

Senate Judiciary Committee
Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights
“Breaking the Logjam Part 2: The Office of Legal Counsel’s Role in Shaping Executive Privilege Doctrine”
Questions for the Record
for Assistant Attorney General Chris Schroeder
Submitted October 25, 2022

Senator Sheldon Whitehouse
Questions for the Record

1. OLC’s theory of absolute testimonial immunity for senior presidential advisers “does not affect 99.9% of the accommodations processes and congressional requests,” but it is a related notion and can be instructive insofar as it reflects broader practices within OLC. As I mentioned during the hearing, two Article III courts have firmly rejected OLC’s absolute immunity theory on the merits. You stated that you have “no agenda to reconsider prior OLC opinions,” and that, unless directed by the Attorney General or President, OLC will not “simply take up prior opinions and review them spontaneously.”
 - a. Does this mean that OLC does not review opinions or theories after they are expressly rejected by an Article III court?

OLC provides legal advice to Justice Department officials, agencies, and the White House upon request, and in that context, it may have occasion to review its prior opinions. In preparing its legal advice, OLC considers all relevant sources, including subsequent developments in judicial caselaw as well as prior OLC opinions, and will reconsider previous positions as appropriate. If the Supreme Court has resolved a legal question in a way that is contrary to OLC’s earlier analysis, then OLC treats such holdings as authoritative when preparing legal advice in response to a request from Justice Department officials, agencies, or the White House. OLC also carefully considers lower-court precedents, even while a legal question remains open and contested.

- b. Why wait to review those opinions and what effect does OLC expect that has on reliance by executive agencies on those unreviewed OLC opinions?

See answer to question 1(a).

- c. Are agency counsel expected to ignore OLC opinions where Article III courts have rejected their conclusions and reasoning?

See answer to question 1(a).

- d. What criteria does OLC use when determining whether a decision by an Article III court is binding on the executive branch? Does OLC consider the district court decision in *United States House of Representatives v. Miers* binding on the executive

branch? How does OLC account in its analysis for the fact that a second district court rejected absolute immunity on the merits in *Committee on the Judiciary v. McGahn*?

In cases where the government is a party, the final judgment of an Article III court, including a district court, is binding on the government. Although district courts generally do not create precedent that binds the government in future cases, OLC carefully considers all relevant district court decisions and their factual circumstances when analyzing a legal question.

- e. In *Committee on the Judiciary v. McGahn*, then-Judge Jackson’s opinion stated that the original 1971 memorandum on absolute immunity by then-AAG William Rehnquist “does not cite to a single case that stands for the asserted proposition [of absolute immunity], and the ten-plus subsequent publicly available statements by OLC that DOJ points to in support of this immunity simply reference back to the 1971 Memorandum without providing any court authority.”¹ Do you disagree with any portion of her statement?

At the time of Assistant Attorney General Rehnquist’s 1971 memorandum, congressional committees had rarely issued subpoenas to senior presidential advisors and the questions of whether and in what circumstances those advisors must comply with such subpoenas had never been the subject of litigation or addressed by any court. Subsequent OLC opinions on testimonial immunity have discussed intervening judicial opinions that have addressed the question, including the decisions in *Miers* and *McGahn*. See, e.g., *Testimonial Immunity Before Congress of the Former Counsel to the President*, 43 Op. O.L.C. __ (May 20, 2019); *Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach From Congressional Subpoena*, 38 Op. O.L.C. 5 (2014). As relevant and appropriate, the Department also references and relies upon these judicial opinions in litigation.

- f. That 1971 Memorandum included the caveats that its conclusions were “necessarily tentative and sketchy” and that its historical examples were “obviously quite inconclusive.”² In a memorandum the next year, OLC described the theory as “firmly established, as a matter of principle and precedents.”³ What changed?

This matter predates my time at OLC and so I cannot say why the office adopted a less equivocal approach the following year. I note, however, that OLC issued other writings on testimonial immunity in 1972 that include further analysis on the subject. See Memorandum for John W. Dean III, Counsel to the President, from Ralph E. Erickson, Assistant Attorney General, Office of Legal Counsel, *Re: Power of Congressional Committee to Compel Appearance of Testimony of Presidential Assistant* (Apr. 10, 1972), <https://www.justice.gov/olc/page/file/1543486/download>; Memorandum for John W. Dean III, Counsel to the President, from Ralph E. Erickson, Assistant Attorney General, Office of Legal

¹ 415 F. Supp. 3d 148, 204 (D.D.C. 2019).

² OLC Memo, *Re: Power of Cong. Comm. to Compel Appearance of Testimony of “White House Staff”* at 6-7 (1971).

³ OLC Memo, *Re: Immunity of Presidential Assistants from being required to testify before Congressional Committees* at 1 (1972), available at <https://knightcolumbia.org/documents/ngyiiwh226>.

Counsel, *Re: Appearance of Presidential Assistant Peter M. Flanigan Before a Congressional Committee* (Mar. 15, 1972), <https://www.justice.gov/olc/page/file/1543466/download>.

2. During the hearing, I referenced an exchange with then-Attorney General Jeff Sessions in which he refused to answer questions because doing so could interfere with former President Trump's ability to assert executive privilege over that information.⁴ Attorney General Sessions engaged in a similar exchange with Senator Heinrich before the Senate Select Committee on Intelligence.⁵
 - a. Under the Reagan Memo, may an executive branch official who is not the president ignore congressional requests indefinitely because the president *might* assert executive privilege?

As the Reagan Memo explains, the policy of the Executive Branch is to comply with information requests from Congress to the fullest extent consistent with the Executive Branch's constitutional and statutory obligations. Memorandum for the Heads of Executive Departments and Agencies, from Ronald Reagan, *Re: Procedures Governing Responses to Congressional Requests for Information* (Nov. 4, 1982). This Administration is firmly committed to that policy.

Where a congressional request for information implicates important Executive Branch confidentiality interests, the Reagan Memo provides that "good faith negotiations between Congress and the Executive Branch" should be "the primary means of resolving conflicts between the Branches." *Id.* at 1. Only if and when those negotiations reach an impasse does the President consider whether and to what extent to assert executive privilege. Although certain confidential information may be withheld initially as the accommodation process proceeds, the fact that the information falls within a category over which the President might assert executive privilege does not excuse agencies from engaging in good faith in an accommodation process regarding the congressional request.

- b. Is it OLC's position that in those circumstances, it will not step in until a subpoena is issued? If not, what means do Members of Congress have to activate OLC's role?

Issuance of a congressional subpoena is not a prerequisite for OLC to become involved in an agency's response to an oversight request. Upon request from an agency, typically through their general counsel's office, or the White House, OLC provides informal counseling to help the responding agency or the White House navigate the accommodation process. The counseling often will entail descriptions of Congress's oversight authority and of the Executive Branch's confidentiality interests and relevant positions and practices, emphasizing that the goal should be to work with the requesting committee to reach an acceptable solution that meets the needs of both Branches to the greatest extent possible. OLC will sometimes suggest for the agency's consideration potential paths forward of the kind identified in my written testimony, such as considering ways the agency might produce or permit modes of access to certain information while requesting that the committee narrow or clarify its request with respect to other

⁴ *Justice Department Oversight: Hearing Before the S. Comm. on Jud.*, 115th Cong. (2017).

⁵ *Open Hearing with Attorney General of the United States, Jeff Sessions: Hearing Before the S. Select Comm. on Intel.*, 115th Cong. (2017).

information. If and when the parties reach an impasse, the responding agency then will decide whether to recommend a presidential assertion of executive privilege. As the Reagan Memo describes, it is only at that point that conversations begin among the agency, the White House Counsel's Office, and OLC, concerning what to advise the President about a possible assertion of executive privilege.

- c. You stated that OLC typically enters into accommodations discussions only when those discussions “break down,” and that there is no “trigger mechanism” for OLC entering the accommodation process. How does that comport with the Reagan Memo, which requires agency officials to notify OLC and the Office of White House Counsel whenever a request “raises a substantial question of executive privilege”?

See answer to question 2(b).

- d. As I requested during the hearing, please provide a summary of the typical process by which OLC becomes involved in accommodations of executive privilege assertions. To the extent possible, please include specific details about how these questions move through and are resolved within the executive branch.

See answer to question 2(b).

- 3. Does OLC stand by its 2017 OLC opinion that the executive branch has no obligation to accommodate requests from members of Congress who are not committee or subcommittee chairs—including no duty to accommodate requests from ranking members?⁶ Did that conclusion comport with historical practice regarding accommodations for oversight requests from ranking members?

The 2017 memorandum was effectively superseded by a more comprehensive OLC opinion in 2019. *See Requests by Individual Members of Congress for Executive Branch Information*, 43 Op. O.L.C. __ (Feb. 13, 2019), <https://www.justice.gov/olc/file/1356251/download>. The 2019 OLC opinion recognizes that although the two Houses of Congress have typically delegated their oversight authorities only to committees and committee chairs—and the Constitution imposes the obligations of the accommodation process only with respect to requests made pursuant to that delegated oversight authority—“[i]ndividual members, even those who are not chairmen of committees that have been delegated the oversight authority of a House of Congress, . . . may request . . . information from the executive agencies about Executive Branch programs or activities—whether for legislation, constituent service, committee activities, or other purposes arising from members’ legislative responsibilities (such as Senators’ role in providing advice and consent for presidential appointments).” *Id.* at *7 (internal quotation marks omitted).

To be sure, and as the 2019 opinion explains, the House and Senate have generally delegated specific oversight authorities (e.g., the power to issue subpoenas) to committees and their chairs rather than to individual members, and those differences affect how the Executive Branch responds to requests. Nonetheless, “[a]s a matter of comity, the Executive Branch’s appropriate

⁶ OLC Memo, *Auth. of Individual Members of Cong. to Conduct Oversight of Exec. Branch* (2017).

respect for the legislative functions of individual members supports Executive Branch officials' practice of giving due weight and sympathetic consideration to [their] requests." *Id.* at *2.

4. On January 8, 2021, OLC released an opinion concluding that Congress has little constitutional authority to direct oversight requests to the President.⁷
 - a. What triggered this opinion? Was it prepared in response to any specific request or question?

This matter predates my time at OLC and so I cannot say what prompted the opinion.

- b. Is it OLC's present view that Congress has no legitimate interest in investigating the President's exercise of core Article II functions, which according to OLC include "the powers to pardon, to sign or veto legislation, to nominate and appoint officers of the United States, and to remove officers and other officials," as well as the President's Article II "powers in the area of diplomacy and national defense," and control of classified information?⁸

OLC recently addressed the issue of "legitimate legislative purpose," explaining that "[t]he Executive Branch should . . . presume that congressional agents are acting pursuant to their constitutional authority and in good faith when evaluating the constitutionality of committee requests for information." *Ways and Means Committee's Request for the Former President's Tax Returns and Related Tax Information Pursuant to 26 U.S.C. § 6103(f)(1)*, 45 Op. O.L.C. ___, at *22 (July 30, 2021). The Supreme Court has observed that there are some actions the President may take in the exercise of the President's constitutional authority with respect to which Congress may not legislate—for example, the President's decision about whether to sign or veto a bill. And "[s]ince Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of [the Executive Branch]." *Barenblatt v. United States*, 360 U.S. 109, 111–12 (1959).

- c. What deference does OLC give to Congress regarding whether an oversight request is supported by a legitimate legislative purpose?

See answer to question 4(b). In addition, as noted, the policy of the Executive Branch is to comply with information requests from Congress to the fullest extent consistent with the Executive Branch's constitutional and statutory obligations.

5. What guardrails can OLC apply to restrict or prevent future administrations from refusing to adhere to OLC opinions or inter-branch agreements regarding oversight accommodations?

The legal conclusions in OLC opinions are controlling within the Executive Branch unless OLC withdraws them or they are overruled by OLC, the Attorney General, or the President. OLC's publication of certain opinions regarding accommodation helps to ensure that agency responses to oversight requests across administrations are consistent and adhere to longstanding Executive

⁷ OLC Memo, *Congressional Oversight of the White House* (Jan. 8, 2021).

⁸ *Id.* at 18-21.

Branch positions. OLC's informal counseling role in the oversight process also helps ensure that consistency and adherence. And if it comes to OLC's attention that an agency is not acting in a way that the Constitution or the Reagan Memo and other binding documents require, OLC does not hesitate to explain those obligations to the agency general counsel.

6. What is OLC's understanding of the executive branch's obligation to respond to Questions for the Record from Congress in a timely and thorough manner? What about Questions for the Record from the Senate in particular?

As Attorney General Garland has made clear, and as I stated in my written testimony, "it is important for the [Justice] Department," as it is for all agencies, "to be responsive to Congress in a timely fashion as appropriate." Responses to Questions for the Record to Judge Merrick Garland, Nominee to Be United States Attorney General at 35. That principle applies to answering Questions for the Record from both Houses of Congress.

7. Does OLC view all unanswered information requests as expiring at the end of each Congress?

Although congressional subpoenas expire at the end of each Congress, the Executive Branch has a "longstanding practice of responding voluntarily to information requests from congressional committees . . . during adjournment *sine die* periods." *Legal Effectiveness of Congressional Subpoenas Issued After an Adjournment Sine Die of Congress*, 20 Op. O.L.C. 372, 378 n.10 (1996). Even after adjournment, Congress may request information and the Executive Branch may, "as a matter of policy (based on the comity afforded another branch of government), respond voluntarily to such a request." *Id.* With respect to information requests that remain outstanding at the end of a Congress, it is good practice for the responding agency and the requesting committee to confer at the beginning of the new Congress about what information the committee continues to seek.

Senator John Kennedy Questions for the Record

1. In 2004, you—Assistant Attorney General Schroeder—signed a document titled "Principles to Guide the Office of Legal Counsel." In that document, you stressed that "OLC's advice should be thorough and forthright, and it should reflect all legal constraints, including the constitutional authorities of the coordinate branches of the federal government—the courts and Congress—and constitutional limits on the exercise of governmental power." The letter went on to argue that "The President is constitutionally obligated to preserve, protect and defend the Constitution *in its entirety*—not only executive power, but also judicial and congressional power and constitutional limits on governmental power...."

In 2017, and again in 2019, the Office of Legal Counsel issued opinions claiming that individual members of Congress and ranking minority members on committees lack constitutional authority to conduct oversight of the executive branch. Just more than a year ago, every Senate ranking member signed a letter to Attorney General Merrick Garland calling for the rescission of the 2017 opinion, particularly because it "misinterpret[s] the constitutional responsibilities of Congress for monitoring the activities of the Executive Branch."

- a. Do you think the 2017 and 2019 OLC opinions live up to the "Principles to Guide the Office of Legal Counsel" memorandum?

I continue to believe in the principles articulated in the 2004 document, as well as to those of OLC's 2010 memorandum on best practices. *See* Memorandum for Attorneys of the Office, from David J. Barron, Acting Assistant Attorney General, *Re: Best Practices for OLC Legal Advice and Written Opinions* (July 16, 2010) ("Best Practices Memorandum"). Although I was not at OLC at the time the 2017 and 2019 opinions were issued, I can say that the 2017 opinion was effectively superseded by the more comprehensive 2019 opinion. The 2019 OLC opinion recognizes that "[i]ndividual members, even those who are not chairmen of committees that have been delegated the oversight authority of a House of Congress, . . . may request . . . information from the executive agencies about Executive Branch programs or activities—whether for legislation, constituent service, committee activities, or other purposes arising from members' legislative responsibilities (such as Senators' role in providing advice and consent for presidential appointments)." *Requests by Individual Members of Congress for Executive Branch Information*, 43 Op. O.L.C. ___, at *7 (Feb. 13, 2019), <https://www.justice.gov/olc/file/1356251/download> (internal quotation marks omitted).

2. The 2017 opinion, in particular, which advises departments and agencies that ranking members of congressional committees are not entitled to equal document access as committee chairs, has the effect of forcing minority committee leadership to request documents through the Freedom of Information Act (FOIA) when the chair refuses to support an inquiry.

Since FOIA does not apply to Congress, and since the statute contains a variety of exemptions that allow redactions and the withholding of documents, this arrangement severely erodes congressional oversight and impedes on the legislative branch's constitutional authority.

- a. Will you commit to reviewing, and possibly rescinding, this opinion?

While, as the 2019 opinion explains, the House and Senate have generally delegated greater authorities (e.g., the power to issue subpoenas) to committees and their chairs than they have to individual members, and those differences affect how the Executive Branch responds to requests, "[a]s a matter of comity, the Executive Branch's appropriate respect for the legislative functions of individual members supports Executive Branch officials' practice of giving due weight and sympathetic consideration to [their] requests." *Id.* at *2. "[A]n Executive Branch policy of providing good-faith responses to [individual members'] requests exhibits a proper respect for

members of a coordinate branch of the government.” *Id.* at *7. And in providing such responses, “the Executive Branch may—and often does—provide information to individual members that is more than what is required under the Freedom of Information Act,” including “correspondence that answers substantive questions, supplies a reasoned justification for existing policy, or explains why the Executive Branch’s established confidentiality interests preclude it from providing requested information.” *Id.* at *8.

3. In the 2004 letter, you also endorsed a model for disclosure of OLC opinions, which declared that “OLC should follow a presumption in favor of timely publication of its written legal opinions.” The House and Senate have also made clear through recent appropriations report directives—most recently in FY2023 appropriations for the Department of Justice—that OLC opinions should be proactively disclosed to the public. Yet, Congress still does not even know how many final OLC opinions exist, let alone have access to their contents.

- a. What steps have you taken since Senate confirmation as Assistant Attorney General to disclose OLC legal opinions proactively, both to Members and Committees leading congressional oversight and to the public?

Since my confirmation, OLC has published the majority of the opinions I have signed. I reiterate the Office’s commitment, embodied in the Best Practices Memorandum, to apply a “presumption that [OLC] should make its significant opinions fully and promptly available to the public.” Best Practices Memorandum at 5. More broadly, this Administration is committed to keeping Congress and the public informed of the legal basis for the actions of the Executive Branch. Accordingly, OLC has recently posted to its website hundreds of historical memoranda.

- b. What steps have you taken to ensure, at the very least, the public disclosure of the list of final OLC legal opinions in existence?

The Best Practices Memorandum, with the addendum that I added on June 9, 2022, reflects the Office’s goal to “maximize its efforts to post opinions online quickly and systematically in advance of any public request.” Best Practices Memorandum at 6 n.* (addendum). The Office has recently posted online, without redaction, a list of all unclassified OLC legal advice documents from 1945 through February 15, 1994. Redacted lists of OLC opinions from 1998 to April 2019 are already available online, and the Office is reevaluating those redactions as well as preparing lists covering the periods not yet addressed in the posted lists (i.e., 1994 through 1997 and 2019 to present). The Office is also engaged in the process of preparing to release a list of many classified OLC documents from 1945 to the present, redacted only as necessary.

- c. If you have not taken steps to require the timely and proactive release of OLC legal opinions, what are your justifications given that those memos represent largely controlling and authoritative interpretations of law?

Although the Office has taken many such steps, confidentiality of OLC legal advice is necessary in certain circumstances in order to protect classified or other sensitive information, and for other compelling reasons. As the Best Practices Memorandum explains, “[t]he 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.” Best Practices Memorandum at 6. Nonetheless, as mentioned, OLC applies a presumption that it will publish its legal opinions.

4. Only a subset of OLC opinions become publicly available, and general policy within this office favors nondisclosure. OLC’s current policy, per the Best Practices Memorandum, is to seek approval from agencies that sought the legal memo in the first place—thereby granting each department or agency veto power over disclosure to Congress.
 - a. Do you endorse the view that a department or agency should have veto power over the right and need of Congress and the American public to know what binding legal interpretations are issued?

The relevant portion of the Best Practices Memorandum explains that “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 [any] competing considerations.” Best Practices Memorandum at 6. OLC takes agencies’ input into account, but agencies do not have a veto power over publication. OLC’s consideration of agencies’ views reflects the fact that those with equities in the information reflected in an opinion should have input with respect to whether and when that information should be publicly shared.

5. As Assistant Attorney General, will you commit to updating the office’s “Best Practices Memorandum” to require proactive timely public disclosure of all OLC opinions, with limited exceptions, and to create a public index of all final opinions?

See answers to questions 3(a), (b), and (c).

6. Do you believe secret law, shielded both from Congress and the public, has any place in a representative democracy—especially one whose Constitution only clearly provides the legislative branch with lawmaking powers?

See answers to questions 3(a), (b), and (c). Moreover, as noted above, even in cases where some documents or information cannot be published, this Administration is committed to keeping Congress and the public informed of the legal basis for the actions of the Executive Branch to the greatest extent possible.

7. Did the Office of Legal Counsel (OLC) provide any advice, counsel, or guidance, in a formal or informal manner, to the Justice Department related to its decision not to enforce 18 U.S.C. 1507, which criminalizes any individual seeking to “influenc[e] any judge, juror, or witness in the discharge of his duty”, as protestors gathered outside the home of U.S. Supreme Court Justice Brett Kavanaugh, among other justices, following the leaked draft opinion in the *Dobbs* case?
 - a. If so, describe that guidance and provide Congress with a copy as soon as possible.

The Attorney General has stated that the “Justice Department will not tolerate violence or threats of violence against judges or any other public servants at work, home, or any other location.” Dep’t of Justice, Press Release, Attorney General Merrick B. Garland Meets with Supreme Court Officials regarding Judicial Security (May 18, 2022), <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-meets-supreme-court-officials-regarding-judicial-security>. As to the question posed, it has been the Department’s longstanding practice across administrations of both parties generally to maintain the confidence of the nature, timing, and content of confidential legal advice provided by OLC’s lawyers, including whether OLC’s advice was sought on a particular question.

8. In response to questions submitted for the record prior to your confirmation as Assistant Attorney General in 2021, you acknowledged that “[t]he Office of Legal Counsel could be asked to interpret an aspect of the Gun Control Act, or another federal law bearing on permissible gun regulation under statutes that Congress has enacted.”
 - a. Has OLC provided any guidance, in a formal or informal manner, to the Department or any component of the Biden administration regarding the Bipartisan Safer Communities Act of 2022? If so, please explain that guidance below and provide Congress a copy as soon as possible.

As noted in response to Question 7, it has been the Department’s longstanding practice across administrations of both parties generally to maintain the confidence of the nature, timing, and content of confidential legal advice provided by OLC’s lawyers, including whether OLC’s advice was sought on a particular question.

9. Two days after you appeared before the Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Constitutional Rights, the Department of Defense issued a memorandum entitled “Ensuring Access to Reproductive Health Care” after requesting an advisory opinion from OLC. The opinion concluded that the Department “may lawfully expend funds to pay for service members and their dependents to travel to obtain abortions.”
 - a. Since OLC’s opinion is dated prior to your testimony before the Subcommittee but did not become public until Secretary Austin’s announcement days after your appearance, did your office coordinate with officials at the Department of Defense, or any component of the Biden administration, regarding the order’s public release date to avoid congressional scrutiny of its reasoning?

No.

10. Will you commit to testifying before the Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Constitutional Rights during a regular work period within the next calendar year if so requested?

The Department’s Office of Legislative Affairs is available to respond to requests for Departmental witnesses at a congressional hearing.