

Senator Ben Sasse
Questions for Office of Legal Counsel Nominee Steven Engel

The American people's confidence in our institutions of government has been seriously eroded. This problem has festered for many years, but it has only worsened due to events in the course of the 2016 presidential election and subsequent fallout. In light of these developments, rebuilding trust in our institutions is one of the most important tasks facing our leaders today.

As head of the Office of Legal Counsel (OLC)—the organ of government at the crossroads of the Executive Branch's duty to hold itself accountable to the law—you will have particularly powerful responsibility to protect the rule of law even in difficult circumstances. I want to ensure your commitment to the norms and best practices of the Office that have proven so critical over the years to ensuring the Office's ability to offer sound, independent legal advice to different components of the Executive Branch:

1. Under what circumstances is OLC bound to respect the precedents set by previous OLC opinions?

Response: OLC's Best Practices Memorandum provides that the Office 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 where appropriate.

2. What factors counsel for and against either limiting or overruling a precedent set by a previous OLC opinion?

Response: OLC's respect for its precedents helps ensure that the Office fulfills its mission to provide candid, independent, and principled legal advice. In my experience, the most common reason why OLC would revisit an earlier opinion would be to reflect subsequent developments in the law. The Office's analysis of the facts and law pertinent to a particular matter also may lead to either distinguishing or revisiting positions articulated in previous opinions.

3. How would you define which agencies have cognizable equities regarding a particular matter before OLC?

Response: I think that it is difficult to answer this question without a legal and factual context. In some cases, the interested agencies themselves bring the matter to the Office for a decision. In others, the inter-agency process may help determine which agencies have cognizable equities.

4. Under ordinary circumstances, should agencies with equities at issue be shown drafts of OLC opinions?

Response: During my prior experience at OLC, the Office would permit interested agencies to provide comments to draft opinions to ensure that the Office had not made any mistakes or overlooked any material issues in its analysis. OLC's revised Best Practices Memorandum, issued in July 2010, suggested that the sharing of drafts had since become the exception, rather than the rule. If I am fortunate enough to be confirmed, I will consult with the experienced lawyers at the Department to determine the best way to proceed.

5. Under what types of circumstances would it be appropriate for OLC to refrain from showing opinion drafts to agencies with equities at issue in the matter at hand?

Response: The hypothetical described in this question did not arise in my previous OLC experience. If I am confirmed and this question arose, I would work with others in the Department to determine an appropriate way forward.

6. Besides sharing draft opinions with agencies with equities at issue, how will you ensure that OLC opinions receive sufficient scrutiny from potential disagreeing viewpoints before they are finalized?

Response: In my experience, OLC has always had a rigorous and robust process for considering different, and potentially conflicting, views within the process that leads to its opinions. If I am confirmed, I would expect to continue that process.

7. Should a presumption of publication within a reasonably short amount of time apply to OLC opinions?

Response: The question of whether publication is appropriate really depends upon the opinion itself. It is also not a decision that the Office should make unilaterally, but requires consultation with the agencies that have equities in the matter. In some instances, an opinion's continuing confidentiality is important to the effectiveness of the program that is the subject of the opinion, but in other instances, publication may be important for other reasons. The Office has had established procedures to consider publication on a case by case basis. If I am confirmed, I would expect to continue that process.

8. If so, under what circumstances should such a presumption be overridden?

Response: Please see the previous response.

9. What concrete affirmative steps would you take to maximize transparency as is legal and prudent in OLC's work, both for formal opinions and more informal advice?

Response: I recognize the importance of transparency regarding government programs and other actions. Transparency can help build understanding of a government program, and it can potentially improve and strengthen the legal justifications for a program. Since I am not in the Department, it is difficult to provide information about what concrete steps might be taken at OLC. If I am confirmed, I would expect to consider this issue further in consultation with others in the Department.

10. How would you work to restore OLC's position as the last word—barring being overruled by the Attorney General or the President—on the legal views of the Executive Branch?

Response: I believe that, based upon long-standing policy and practice, OLC's advice is considered to be authoritative within Executive Branch agencies. Because I am not in the Department, I do not know whether any action is needed to continue that tradition.

11. How would you propose to avoid the sort of irregular “forum shopping” between different agencies’ lawyers, as is reported¹ to have occurred under previous administrations?

Response: Because I am not in the Department, I am not in a position to evaluate the extent to which this may be an issue or, if it is, whether or how OLC should address it.

12. What steps would you take to ensure transparency for Congress and the American people in the event that an entity or individual attempts to influence an OLC opinion or other authoritative legal interpretation of the Executive Branch in a manner that could reasonably create the appearance of a conflict of interest or other ethical infirmity?

Response: As I said at the Committee’s hearing, I am committed to the independence and integrity of OLC and the advice it provides within the Executive Branch. If I am confirmed, that will be a fundamental, central purpose in my leadership. Because I am not in the Department at this point, I cannot speak to whether or what steps should be taken to ensure that result.

¹ See, e.g., Charlie Savage, *2 Top Lawyers Lose Argument on War Power*, N.Y. TIMES, June 17, 2011, <http://www.nytimes.com/2011/06/18/world/africa/18powers.html>.