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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

June 16, 2021

The Honorable Merrick B. Garland  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue NW  
Washington, D.C. 20530

Dear Attorney General Garland:

We write to follow up on our May 14 letter expressing serious concerns about the Trump-era Department of Justice's (DOJ) apparent misrepresentations to a federal court regarding the March 24, 2019 Office of Legal Counsel (OLC) memorandum on President Trump's obstruction of Special Counsel Mueller's investigation. We request that DOJ provide the complete, unredacted OLC memo to the Senate Judiciary Committee.

The Senate Judiciary Committee has equities in this matter, given significant questions over the relationship between this OLC memo and the infamous March 24, 2019 letter that then-Attorney General Barr sent to this Committee, which misrepresented the findings of the Mueller investigation. The OLC memo purported to aid Barr in determining whether the Mueller Report contained facts that would support charging President Trump with obstruction. In a recent court filing, DOJ contended that the OLC memo memorializes pre-decisional advice on which Attorney General Barr relied when summarizing the Mueller Report in his March 24, 2019 letter.

Barr's letter selectively omitted key aspects of Mueller's obstruction findings and downplayed the nature and extent of Trump's contacts with Russia, causing D.C. District Judge Reggie Walton to "question whether Attorney General Barr's intent was to create a one-sided narrative ... that is clearly in some respects substantively at odds with" the Mueller Report itself.<sup>1</sup> D.C. District Judge Amy Berman Jackson ordered DOJ to release the OLC memo in response to a Freedom of Information Act (FOIA) request after concluding that the memo was not protected by the deliberative process privilege. She also wrote that the unredacted OLC memo "reveals" that Barr and DOJ had been "disingenuous" and that Judge Walton was "well-founded" in criticizing Barr for "distort[ing] the findings" of the Mueller Report when Barr transmitted his misleading summary of Mueller's findings to this Committee.<sup>2</sup>

This was not the only occasion on which the Trump-era DOJ generated an OLC memo in the course of concealing information from Congress. For example, in September 2019, OLC issued

<sup>1</sup> *Elec. Priv. Info. Ctr. v. U.S. Dep't of Justice*, 442 F. Supp. 3d 37, 49 (D.D.C. 2020) ("EPIC").

<sup>2</sup> *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Justice*, No. 19-1552, 2021 WL 1749763 at \*13 (D.D.C. May 3, 2021); *EPIC*, 442 F. Supp. 3d at \*49.

a memo in an effort to prevent the Intelligence Community Inspector General from sending Congress the whistleblower complaint that later led to Trump's first impeachment. The Council of Inspectors General on Integrity and Efficiency called the memo "wrong as a matter of law and policy" and warned that it could "seriously impair whistleblowing."<sup>3</sup> And in January 2020, OLC issued a memo timed to coincide with the start of Trump's first impeachment trial and that defended his obstruction of the impeachment inquiry.

The Committee has a longstanding interest in the transparency of OLC's memos. For example, in 2008 the Committee issued a subpoena for several post-September 11, 2001 OLC memos following a years-long effort by then-Chairman Leahy, Ranking Member Specter, and several other Committee members to voluntarily obtain OLC's memos regarding the Bush administration's detainee interrogation and detention practices. The Committee also undertook lengthy efforts to obtain memos containing OLC's justification for the Bush administration's warrantless wiretapping program and an Obama-era drone strike targeting an American citizen. The transparency of OLC memos remains of utmost concern to the Committee given the role OLC plays in justifying executive branch policies of enormous consequence. Only in rare circumstances should OLC legal opinions be kept confidential, and even then they should be provided to the Committee, which has a constitutional responsibility to oversee DOJ on behalf of the American people.

Although these memos predate your confirmation as Attorney General, the Department you now lead bears responsibility for ensuring that OLC is not misused to justify harmful policies or inappropriately conceal information from Congress. In the interest of transparency and given the March 24, 2019 OLC memo's apparent role in misleading the Committee about Mueller's findings, the Committee requests that you produce the full memo without redactions. Please provide the memo, or your legal justification for withholding it, to the Committee by June 30, 2021.

Thank you for your time and consideration. We look forward to a prompt reply.

Sincerely,



RICHARD J. DURBIN  
Chair



PATRICK LEAHY  
United States Senator



DIANNE FEINSTEIN  
United States Senator



SHELDON WHITEHOUSE  
United States Senator

<sup>3</sup> Letter from Council of the Inspectors General on Integrity and Efficiency to the Honorable Steven A. Engel, Oct. 22, 2019.



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