

Fall 2023

The DOJ OLC Transparency Act: Is Transparency Enough to Combat Problematic Norms in the Office of Legal Counsel?

Sarah Patrick
Northwestern Pritzker School of Law

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/njlsj>



Part of the [Law Commons](#)

Recommended Citation

Sarah Patrick, *The DOJ OLC Transparency Act: Is Transparency Enough to Combat Problematic Norms in the Office of Legal Counsel?*, 19 NW. J. L. & Soc. POLY. 121 (2023).
<https://scholarlycommons.law.northwestern.edu/njlsj/vol19/iss1/5>

This Note or Comment is brought to you for free and open access by Northwestern Pritzker School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of Law & Social Policy by an authorized editor of Northwestern Pritzker School of Law Scholarly Commons.

The DOJ OLC Transparency Act: Is Transparency Enough to Combat Problematic Norms in the Office of Legal Counsel?

Sarah Patrick*

ABSTRACT

Over the last two decades, the Office of Legal Counsel has come under scrutiny for controversial opinions that have advised the President on the constitutionality of his actions, from interrogation and detention of military detainees to presidential immunity from congressional investigation and subpoenas to testify. Its opinions tend to conform with the unitary executive theory and defer to the executive's position—and that's only the opinions the public knows about. The Office of Legal Counsel is not required to disclose its opinions, and often does not, citing concerns about national security and the need for confidentiality.

A recent legislative effort, the DOJ OLC Transparency Act, introduced in 2022, has attempted to address secrecy and deference to the executive in the Office of Legal Counsel. Although the bill has yet to be re-introduced in the 118th Congress, this Comment addresses whether the DOJ OLC Transparency Act is enough to combat OLC secrecy and deference to the executive, with the hope that future legislative efforts would take the criticisms in the Comment into consideration.

The Act would require the OLC to publish all opinions on the DOJ website and allow free access to the public. However, transparency alone is not enough to combat problematic norms in the Office of Legal Counsel. This Comment addresses concerns with the Act's scope, its class classification measures, and its enforcement mechanism.

Keywords: secret law, secrecy, classified information, DOJ OLC Transparency Act, Office of Legal Counsel, government transparency, reform, public trust, administrative law, U.S. Congress, Congress, legislation, legislative reform, accountability

* J.D., Northwestern Pritzker School of Law, 2024. I am deeply grateful to Professor Heidi Kitrosser for her guidance with this Comment, Noah Leshner for listening to me read this Comment aloud several times, Addison Eisley for dealing with my complex citations, and the exceptional Journal of Law and Social Policy staff for dealing with my run-on sentences.

Table of Contents

INTRODUCTION

I. THE OFFICE OF LEGAL COUNSEL AND SECRECY IN THE EXECUTIVE BRANCH

- A. *The Structure of the Office of Legal Counsel*
- B. *Secret Law and the Office of Legal Counsel*
- C. *Previous Attempts to Reform Executive Secrecy*

II. THE DOJ OLC TRANSPARENCY ACT

III. CRITIQUES OF THE DOJ OLC TRANSPARENCY ACT

- A. *The DOJ OLC Transparency Act's Definition of a Final Opinion*
- B. *Who Decides what is Classified in OLC Opinions and How?*
- C. *Flaws in the DOJ OLC Transparency Act's Oversight Mechanisms*
 1. The Merits of Transparency and Public Accountability
 2. Judicial Oversight and the Private Right of Action
 3. Is Internal Oversight of the Office of Legal Counsel Enough?
 4. Proposed External Oversight Mechanisms for the Office of Legal Counsel

CONCLUSION

INTRODUCTION

Presidents have always consulted advisors about the scope of their constitutional authority.¹ Under Article II of the United States Constitution, the President is vested with the power to “take care that the laws faithfully be executed.”² The scope of that authority is expansive and complex, and the President often requires advice on legal ambiguities to ensure the laws are faithfully executed. In 1933, Congress delegated to the Office of Legal Counsel (OLC) the authority to render opinions on questions of law requested by the executive branch.³

The OLC, despite its rendering of opinions since the 1930s, remained largely in the shadows until 2004. In June of that year, the Washington Post published an article exposing the first in a series of OLC memoranda that would later become collectively known as the

¹ The Judiciary Act of 1789 provided that the Attorney General was to “give his advice and opinion upon questions of law when required by the President” and advise other executive branch departments. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 (codified at 28 U.S.C. §§ 511–513). A notable example of an early President consulting the Attorney General about their actions is when President George Washington sought advice from Attorney General Edmund Randolph on the constitutionality of a bill to create a Bank of the United States. Letter from George Washington, President of the United States, to Alexander Hamilton, Secretary of the Treasury (Feb. 16, 1791), <https://founders.archives.gov/documents/Hamilton/01-08-02-0047> [<https://perma.cc/BJ55-AVE3>]. In the Antebellum period, Attorney General William Writ is “often credited with demoting the influence and authority of the office” by ensuring the Attorney General’s office provided uniform and consistent interpretation of the law. Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1471 (2010) [hereinafter Morrison, *Stare Decisis*].

² U.S. CONST. art. II, § 3.

³ 28 C.F.R. § 0.25 (2016). In 1933, opinion writing was delegated to the Assistant Solicitor General. See Independent Offices Appropriation Act of 1934, Pub. L. No. 73-78, § 16(a), 48 Stat. 283, 307–08. In 1950, this responsibility was assigned to a new office in the Department of Justice called the Executive Adjudications Division. Reorganization Plan No. 2, § 4, 64 Stat. 1261 (eff. May 24, 1950). In 1953, the office was renamed the Office of Legal Counsel. See Foreword, 1 Op. O.L.C. Supp., at vii (2013).

“torture memos.”⁴ The OLC torture memos were post-9/11 opinions that provided legal advice to the Bush Administration concerning the interrogation of detainees, the detention of United States citizens in military custody as enemy combatants, and the potential use of military force within the United States.⁵ Controversy surrounding the OLC continued through the Obama and Trump Administrations. In 2011, the Obama Administration resisted the publication of an OLC memo regarding the targeted killing of Anwar al-Awlaki, a United States citizen and member of Al Qaeda, in a drone strike in Yemen.⁶ The 2010 Targeted Killing Memo provided support for the executive branch to claim unilateral authority to kill a United States citizen overseas.⁷ During the Trump Administration, the OLC “repeatedly published opinions that placed then-President Donald Trump beyond the reach of congressional oversight.”⁸

⁴ Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST (June 8, 2004), <https://www.washingtonpost.com/archive/politics/2004/06/08/memo-offered-justification-for-use-of-torture/17910584-e7c3-4c8c-b2d1-c986959ebc6a/> [<https://perma.cc/JY9W-ZMMW>] (last visited Apr 28, 2023).

⁵ See Memorandum from Jay S. Bybee, Assistant Att’y Gen., Off. of Legal Couns., U.S. Dep’t of Just., for Alberto R. Gonzales, Couns. to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. § 2340–2340A (Aug. 1, 2002) [hereinafter OLC 2002 Interrogation Memo], <https://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> [<https://perma.cc/46FQ-HHAG>] (superseded by Memorandum from Daniel Levin, Acting Att’y Gen., Off. of Legal Couns., U.S. Dep’t of Just., for James B. Comey, Deputy Att’y Gen., Re: Legal Standards Applicable Under 18 U.S.C. § 2340–2340A (Dec. 20, 2004), https://www.globalsecurity.org/security/library/policy/national/doj-dag_torture-memo_30dec2004.pdf [<https://perma.cc/YZ5M-S49D>]); Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Off. of Legal Couns., U.S. Dep’t of Just., for Daniel J. Bryant, Assistant Att’y Gen., Off. of Legis. Affairs, Re: Applicability of 18 U.S.C. § 4001(a) to Military Detention of United States Citizens (June 27, 2002) [hereinafter OLC 2002 U.S. Citizen Detention Memo], <https://www.justice.gov/sites/default/files/olc/Legacy/2009/08/24/memodetentionuscitizens06272002.pdf> [<https://perma.cc/WU36-JB8P>]; Memorandum from John C. Yoo & Robert J. Delahunty, Off. of Legal Couns., U.S. Dep’t of Just., for Alberto R. Gonzales, Couns. to the President, & William J. Haynes, II, Gen. Couns., U.S. Dep’t of Def., Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States (Oct. 23, 2001) [hereinafter OLC 2001 Domestic Use of the Military Memo], <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memomilitaryforcecombatatus10232001.pdf> [<https://perma.cc/U4S3-Y35F>]; Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Off. of Legal Couns., U.S. Dep’t of Just., for William J. Haynes II, Gen. Couns. of the Dep’t of Def., Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States. (March 14, 2003) [hereinafter OLC 2003 Interrogation of Unlawful Combatants Outside the U.S. Memo], <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-combatantsoutsideunitedstates.pdf> [<https://perma.cc/478C-HUPG>].

⁶ In *N.Y. Times Co. v. U.S. Dep’t of Just.*, 752 F.3d 123, 126 (2d. Cir. 2014), the Second Circuit held that the July 2010 OLC memorandum should be published, with redactions to protect secret facts.

⁷ See Memorandum from David J. Barron, Acting Assistant Att’y Gen., Off. of Legal Couns., U.S. Dep’t of Just., for Eric H. Holder, Jr., Att’y Gen., Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi (July 16, 2010) [hereinafter OLC 2010 Targeted Killing Memo], https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16_-_olc_aaga_barron_-_al-aulaqi.pdf [<https://perma.cc/STQ5-5BJA>].

⁸ William S. Janover, *Indirect Constraints on the Office of Legal Counsel: Examining a Role for the Senate Judiciary Committee*, 73 STAN. L. REV. 1601, 1604 (2021). The controversial opinions included memos that concluded that “senior advisors to the President are ‘absolutely immune’ from being compelled to testify before Congress,” providing legal justification for the Department of the Treasury to avoid complying with a request for the President’s tax returns, and supporting “the Director of National Intelligence’s decision not to forward a whistleblower complaint regarding President Trump to Congress” which contained allegations

There was widespread moral outrage in response to the behavior that these memos endorsed. Additionally, the flawed legal reasoning within the memos incited debate about legal authority that requires compliance, but is concealed from the public—or secret law—between lawmakers, legal analysts, journalists, bloggers, and activists.⁹ Critics focused specifically on how classification and secrecy allowed weak legal reasoning in the leaked memos to go unchallenged during the drafting and finalization of the opinions.¹⁰ The leaked memos raised concerns about the contents and quality of drafting for other OLC opinions that have remained unpublished as well as questions about whether there is sufficient oversight on the OLC to provide a counterbalance to presidential influence. More than that, “[d]espite its near-total absence from mainstream political discourse, the stakes of OLC reporting reform are strikingly high from a policy perspective,” because classified OLC opinions may provide the governing executive position on important civil liberties.¹¹ The executive branch’s reliance on undisclosed OLC memoranda to ignore other legal authority poses a danger to the foundational tenets of democracy and political accountability.

OLC reform has been suggested by many scholars and practitioners, whose proposals span all three branches of government in a variety of ways. Proposed reforms must navigate the tension between a need for transparency and public accountability in lawmaking on one hand and a need for secrecy to protect national security and internal deliberations on the other. While some advocates for reform propose internal executive constraints on the OLC, others posit that the other branches or the public may be better situated to enforce oversight and accountability.¹²

In 2019, Democratic members of the House of Representatives introduced the latest proposed legislation to combat secret law—the SUNLIGHT Act of 2019.¹³ In 2022, Democratic senators introduced its counterpart in the Senate, the DOJ OLC Transparency

about Trump leveraging military aid to Ukraine in exchange for damaging information about then-candidate Joe Biden’s family. *Id.* The OLC also approved spending plans that emphasized unilateral or expansive presidential powers in other contexts. *Id.*

⁹ See Claire O. Finkelstein & Richard W. Painter, *Restoring the Rule of Law Through Department of Justice Reform*, in *OVERCOMING TRUMPERY: HOW TO RESTORE ETHICS, THE RULE OF LAW, AND DEMOCRACY* 128–29 (2022); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 *UCLA L. REV.* 1559, 1565 (2007).

¹⁰ *Id.*

¹¹ Daniel Cluchey, *Transparency in OLC Statutory Interpretation: Finding a Middle Ground*, 1 *CORNELL POL. REV.* 1, 68 (2011).

¹² See generally Barry Sullivan, *Reforming the Office of Legal Counsel*, 35 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 723 (2021); Jonathan Hafetz, *A Problem of Standards?: Another Perspective on Secret Law*, 57 *WM. & MARY L. REV.* 2141 (2016); Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 *HARV. NAT’L SEC. J.* 241, 249 (2015); Eric Messinger, *Transparency and the Office of Legal Counsel*, 17 *N.Y.U. J. LEGIS. & PUB. POL’Y* 239 (2014); BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2013); Trevor W. Morrison, *Constitutional Alarmism*, 124 *HARV. L. REV.* 1688 (2011) [hereinafter Morrison, *Constitutional Alarmism*]; David E. Pozen, *Deep Secrecy*, 62 *STAN. L. REV.* 257 (2010); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 *YALE L.J.* 2314 (2006); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 *MICH. L. REV.* 676 (2005); Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 *CARDOZO L. REV.* 513 (1993); Finkelstein & Painter, *supra* note 9; Johnsen, *supra* note 9; Janover, *supra* note 8; Morrison, *Stare Decisis*, *supra* note 1.

¹³ SUNLIGHT Act of 2019, H.R. 4556, 116th Cong. (2019).

Act.¹⁴ This legislation would require the publication of every opinion issued by OLC, with some exceptions.¹⁵ Although both bills have yet to be re-introduced in the 118th Congress, this Comment addresses whether the DOJ OLC Transparency Act is enough to combat OLC secrecy and deference to the executive, with the hope that future legislative efforts would take the criticisms in the Comment into consideration.

In Part I, I provide background on the issue of secret law and the OLC. In subpart I.A, I discuss the current structure of the OLC. In subpart I.B, I provide an overview of secret law in the OLC. In subpart I.C, I will review previous congressional attempts to address secret law in the executive branch.

In Part II, I review the DOJ OLC Transparency Act in detail, highlighting the portions of the Act that raise concerns in the larger context of secret law.

In subpart III.C, I critique the relevant provisions of the Act within the larger context of secret law. Subpart III.C.1 discusses the Act's failure to overcome the transparency issues that FOIA litigants currently face. Subpart III.C.2 predicts that the Act's classification procedure will not prevent abuses of classification and continued secrecy in the OLC. In subpart III.C.3, I discuss the Act's oversight provisions. I discuss the merits of transparency and argue that transparency and public accountability cannot provide means to mitigate OLC secrecy and deference to the executive. I also address the private right of action that the Act creates. I argue that the judiciary is not equipped to ensure that the OLC abides by the Act's standards. I review ongoing debate regarding whether the OLC can effectively self-regulate and adhere to transparency mandates. I conclude that an external oversight mechanism is necessary, though practical obstacles make external oversight by Congress unlikely.

I. THE OFFICE OF LEGAL COUNSEL AND SECRECY IN THE EXECUTIVE BRANCH

Professor Dakota Rudesill has noted that the executive branch is “especially prone to secret law.”¹⁶ In this Part, I provide background on the structure of the Office of Legal Counsel within the executive branch. Then, I provide a brief history of secret law, with particular focus on secret law in the executive branch. From there, I consider secret law in the context of the Office of Legal Counsel. I review debates about where OLC opinions should be confidential and whether the OLC systematically defers to the executive position when analyzing a legal issue. Finally, I provide a brief history of previous legislative attempts to address OLC secrecy.

A. *The Structure of the Office of Legal Counsel*

The Office of Legal Counsel's two chief responsibilities are to (1) provide constitutional review of legislation and proposed executive orders and respond to other executive requests for advice and (2) resolve legal disputes between executive agencies.¹⁷ The OLC is comprised of about two dozen lawyers.¹⁸ The OLC is “led by a presidentially nominated and Senate-confirmed Assistant Attorney General, several Attorney General-

¹⁴ DOJ OLC Transparency Act, S. 3858, 117th Cong. (2022).

¹⁵ See *infra* Part II.

¹⁶ Rudesill, *supra* note 12, at 284.

¹⁷ 28 C.F.R. § 0.25(a)–(c); see Messinger, *supra* note 12, at 245.

¹⁸ Morrison, *Constitutional Alarmism*, *supra* note 12, at 1710.

appointed Deputies, and one Deputy who is not politically appointed.”¹⁹ The OLC does not provide legal advice unless asked by a member of the executive branch.²⁰ It generally requires its clients to submit their requests in writing and to provide their own views on the issues as part of the request.²¹

OLC memoranda are the precedential and binding law of the executive branch, unless contradicted or withdrawn by the President, the Attorney General, or the OLC itself.²² Because the OLC is the primary interpreter of law within the executive branch and often addresses legal authority in areas where courts are not able to provide direct review, the OLC’s opinions “comprise the largest body of official interpretation of the Constitution and statutes outside the . . . federal court reporters.”²³ The OLC often addresses legal questions and “shape[s] legal authority in areas where courts [do] not provide direct review.”²⁴ Additionally, “it is ‘extraordinarily rare’ for the President not to follow the advice of the OLC,”²⁵ and reliance on an OLC opinion generally precludes prosecution.²⁶

In 2005, following the controversy surrounding the torture memos, the OLC “set forth an internal account of ‘Best Practices’ for the OLC to follow,”²⁷ which signaled its recommitment to certain ideals of executive branch legal interpretation.²⁸ The Best Practices Memo articulates the general principles that guide the OLC in rendering legal advice and written opinions. It reiterates the OLC’s commitment to “provid[ing] an accurate and honest appraisal of applicable law, even if that appraisal will constrain the Administration’s . . . pursuit of desired practices of policy objectives.”²⁹

The Best Practices Memo also provides for several factors that are considered when deciding whether to disclose an OLC opinion: “the likelihood that similar questions may arise in the future; the historical importance of the opinion or the context in which it arose;

¹⁹ *Id.*

²⁰ See Memorandum from David J. Barron, Acting Assistant Att’y Gen., Off. of Legal Couns., for Att’ys of the Off., Re: Best Practices for OLC Legal Advice and Written Opinions at 1 (July 16, 2010) [hereinafter OLC Best Practices Memo], <https://www.justice.gov/media/1226496/dl?inline> [<https://perma.cc/LFH7-75NQ>] (“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.” (emphasis added)).

²¹ Morrison, *Constitutional Alarmism*, *supra* note 12, at 1710.

²² OLC Best Practices Memo, *supra* note 20, at 1. In 2015, Acting OLC Head Karl Thompson emphasized that even OLC emails and oral advice can be binding on the executive branch. See Josh Gerstein, *Official: FOIA Worries Dampen Requests for Formal Legal Opinions*, POLITICO (Nov. 5, 2015, 3:05 PM), <http://www.politico.com/blogs/under-the-radar/2015/11/official-foia-worries-dampen-requests-for-formal-legal-opinions-215567> [<https://perma.cc/96K7-BWSN>].

²³ John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 376 (1993).

²⁴ Messinger, *supra* note 12, at 246.

²⁵ *Id.*; see also Trevor W. Morrison, *Libya, “Hostilities,” the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 73 (2011) (“OLC does not have the power to impose conclusive, binding legal obligations on the President, but by longstanding tradition its opinions are treated as presumptively binding and are virtually never overruled by the President or Attorney General.”).

²⁶ Rudesill, *supra* note 12, at 296.

²⁷ Messinger, *supra* note 12, at 250.

²⁸ Memorandum from Walter E. Dellinger, Assistant Att’y Gen., Off. of Legal Couns., et al., Principles to Guide the Office of Legal Counsel (Dec. 21, 2004), *reprinted in* Johnsen, *supra* note 9, at 1569.

²⁹ OLC Best Practices Memo, *supra* note 20, at 1.

and the potential significance of the opinion to the OLC’s overall jurisprudence.”³⁰ The OLC has published forty volumes of its opinions from 1977 to 2016.³¹ However, this publication is irregular and not comprehensive.³² The OLC presumes that “it should make...significant opinions fully and promptly available to the public,”³³ but that presumption is overcome (1) if the OLC decides that disclosure could “reveal classified or other sensitive information relating to national security” or “interfere with federal law enforcement efforts”; (2) if disclosure “is prohibited by law”; (3) if disclosure would violate the deliberative processes or attorney-client privilege between the OLC and other officials; or (4) if the opinion would be “of little interest to the public.”³⁴ As such, in spite of the presumption of disclosure, the OLC still conceals more opinions than it discloses.³⁵ That lack of transparency means that executive officials may comply with formal opinions that the American public does not even know exist.

B. *Secret Law and the Office of Legal Counsel*

Secret law refers to legal authority that requires compliance but is concealed from the public.³⁶ Secret law is not a new phenomenon. In 1988, a legal expert at the Library of Congress’ Congressional Research Service authored a concise history of publication of law in the United States, noting that the rise of the national security state circumvented publication norms.³⁷

Since 1988, national security concerns have increased secret law across all three branches. In the legislative branch, congressional committees routinely issue confidential reports; redact or withhold legislative history in the context of intelligence decision-making; and, at times, have even passed legislation that incorporates provisions of classified reports by reference.³⁸ The judicial branch received scrutiny for its own secret lawmaking after the creation of Foreign Intelligence Surveillance Courts, pursuant to the Foreign Intelligence Surveillance Act (FISA). FISA courts held secret proceedings and were designed to hear confidential information and make confidential rulings, which led to the approval of large-scale domestic surveillance without the public’s knowledge.³⁹ In the executive branch, the President is allowed to keep national security directives and changes

³⁰ *Id.* at 5.

³¹ See generally *Opinions of the Office of Legal Counsel*, U.S. DEP’T OF JUST., <https://www.justice.gov/olc/opinions-volume> [<https://perma.cc/J295-66DJ>] (last visited Oct. 6, 2023).

³² Messinger, *supra* note 12, at 252.

³³ OLC Best Practices Memo, *supra* note 20, at 5.

³⁴ *Id.* at 5–6.

³⁵ Messinger, *supra* note 12, at 252 (“[A] mid-2012 study from the Sunlight Foundation estimated that the OLC had withheld from online publication 201 of 509 known opinions issued between 1998 and 2012, or 39% of its known opinions from that time.”). Part III.C.1 discusses the merits of transparency as an oversight mechanism in greater detail.

³⁶ Rudesill, *supra* note 12, at 249. For a general review of secret law in all three branches, see also ELIZABETH GOITEIN, BRENNAN CTR. FOR JUST., *THE NEW ERA OF SECRET LAW* 1, 3 (Oct. 18, 2016), <https://www.brennancenter.org/our-work/research-reports/new-era-secret-law> [<https://perma.cc/8VF5-TKH3>].

³⁷ Harold C. Relyea, *The Coming of Secret Law*, 5 GOV’T INFO. Q. 97, 106 (1988).

³⁸ For a more detailed analysis of legislative secret law, see Rudesill, *supra* note 12. See also GOITEIN, BRENNAN CTR. FOR JUST., *supra* note 36, at 5.

³⁹ See Rudesill, *supra* note 12, at 300–03.

to executive orders confidential based on national security concerns.⁴⁰ Additionally, the President is often enabled to make unprecedented decisions based on confidential memos prepared by the OLC. Both OLC memos and FISA court opinions were authoritative legal interpretations that had the same legal force as the statutes that they interpreted. Additionally, both “were concealed from the public and shared only with select members or committees of Congress.”⁴¹

In his work on secret law, Rudesill has noted that there are several reasons for the executive branch’s proclivity for secret law.⁴² Specifically, the George W. Bush Administration’s attitude toward secrecy post-9/11, the rise of the unitary executive theory,⁴³ and the increased size of the executive branch created an environment favoring secrecy.⁴⁴

On April 30, 2008, the Senate Judiciary Committee sought testimony in a hearing on “Secret Law and the Threat to Democratic and Accountable Government,” which focused mainly on the torture memos and OLC secrecy.⁴⁵ In his opening statement, Senator Russ Feingold pointed out that the increase in executive secret law undermined congressional and judicial oversight:

More than any other administration in recent history, [the Bush] administration has a penchant for secrecy. To an unprecedented degree, it has invoked executive privilege to thwart congressional oversight and the state secrets privilege to shut down lawsuits. It has relied increasingly on secret evidence and closed tribunals . . . It is a basic tenant of democracy that the people have a right to know the law.⁴⁶

In her testimony in the same hearing, Professor Heidi Kitrosser outlined the constitutional concerns of secret law.⁴⁷ Kitrosser explained that Congress is structured to

⁴⁰ “During the George W. Bush Administration, [] OLC asserted that the President could waive, modify, or cancel [executive orders] without public notice.” *Id.* at 291; *see also* 155 CONG. REC. S13884 (daily ed. Dec. 23, 2009) (statement of Sen. Feingold). There is controversy whether the President can validly change or revoke an executive order without public notice. In 2008 and 2009, Senators Feingold and Whitehouse introduced legislation to require *Federal Register* notice of changes to executive orders or a classified report to Congress. *See* Executive Order Integrity Act of 2009, S. 2929, 111th Cong. (2009); Executive Order Integrity Act of 2008, S. 3405, 100th Cong. (2008).

⁴¹ GOITEIN, BRENNAN CTR. FOR JUST., *supra* note 36, at 2.

⁴² *See* Rudesill, *supra* note 12, at 284.

⁴³ The unitary executive theory is an “exclusive, minority executive power theory [that] endorses [es] virtually unlimited presidential power to act, interpret the law, and keep secrets beyond statutory regulation, especially in the name of national security.” *Id.* The unitary executive theory itself has faced criticism from legal scholars, but those arguments are outside the scope of this Comment.

⁴⁴ *See id.* at 284–85. Rudesill notes that “speed, secrecy, consequence (fear of harm to national security), and ego and personalities” are factors. *Id.* at 285. Regarding “ego and personalities,” Rudesill asserts that “[e]very person in this position [of being President] will perceive good reasons (e.g., protecting confidential sources and methods) and bad reasons (e.g., avoiding partisan and public scrutiny) to keep secrets.” *Id.* at 284. He also emphasizes the problems with using the OLC in crisis response because it comes at the cost of considering the long-term consequences. *Id.* at 284.

⁴⁵ *Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 110th Cong. 77–87 (April 30, 2008) [hereinafter *Secret Law and the Threat to Democratic and Accountable Government*].

⁴⁶ *Id.* at 1 (opening statement of Hon. Russell D. Feingold, U.S. Sen. from the State of Wisconsin).

⁴⁷ *Id.* at 137–49 (testimony of Heidi Kitrosser, Assoc. Professor, Univ. of Minn.).

be relatively transparent and dialogue driven, whereas the executive is afforded more leeway for secrecy.⁴⁸ Textually, this leeway is limited because the executive is still beholden to legislative directives. In the past twenty years, however, the other branches have not only allowed the executive to legislate, but further allowed the executive to create secret legislative regimes, which has caused a “dangerous breakdown in [this constitutional] structure.”⁴⁹ When the executive branch is allowed to secretly revise its own publicly announced policies, it violates the core purposes of separation of powers: the President is allowed to create law and avoid political accountability for his lawmaking. Further, it presents a troubling reality where the public believes that certain policies are still in place when in reality they have been secretly altered or withdrawn.⁵⁰

As many other commenters have noted, practical and philosophical issues stem from the existence of secret law.⁵¹ Philosophically, the Brennan Center for Justice has questioned whether secret law is consistent with our understanding of the law generally; whether it detracts from the law’s legitimacy; and whether it squares with the concept of democratic accountability for the political branches.⁵² For centuries, philosophers like Thomas Aquinas, Thomas Hobbes, and Immanuel Kant have posited that the law must be publicly available to have binding force.⁵³ These ideas are particularly relevant in a democracy, “where the legitimacy of the law stems from the open democratic process that generates it.”⁵⁴ As such, secret law detracts from the law’s legitimacy. Practically, secret law prevents executive officials from being held accountable by the public and by the other branches of government. Additionally, secret law prevents the government from being held accountable for violations of governmental norms or laws. Considering the example of FISA courts and OLC opinions, secrecy may even prevent individuals from asserting their legal rights against the government or protesting “the abrogation of their rights.”⁵⁵

Especially in the wake of the torture memos and the targeted killing of Al-Awlaki overseas, commenters have raised serious concerns about whether the OLC advises the President to act within existing constitutional norms. In general, the controversial memos from the Bush, Obama, and Trump Administrations provided substantial deference to the executive branch by adopting the unitary executive theory and asserting that Congress can almost never limit the President.⁵⁶ Some of the memoranda also construed the statutes governing interrogation and detention to not limit the President’s power by employing the

⁴⁸ *Id.* at 137–38.

⁴⁹ *Id.* at 138.

⁵⁰ See *supra* note 40 for a discussion on whether the President can validly change executive orders without notifying the other branches or the public.

⁵¹ GOITEIN, BRENNAN CTR. FOR JUST., *supra* note 36, at 3.

⁵² *Id.*

⁵³ *Id.* at 16 (citing THOMAS AQUINAS, *Summa Theologica*, Question 90, art. 4, in THE TREATISE OF LAW 145 (R.J. Henle, S.J., ed. & trans., Notre Dame Univ. Press 1993) (1485); THOMAS HOBBS, LEVIATHAN 240 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651); IMMANUEL KANT, *Perpetual Peace: A Philosophical Sketch*, in KANT: POLITICAL WRITINGS 126 (Hans Reiss ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1795)).

⁵⁴ GOITEIN, BRENNAN CTR. FOR JUST., *supra* note 36, at 16.

⁵⁵ *Id.* at 20.

⁵⁶ See generally, OLC 2002 Interrogation Memo, *supra* note 5; OLC 2002 U.S. Citizen Detention Memo, *supra* note 5; OLC 2001 Domestic Use of the Military Memo, *supra* note 5; OLC 2010 Targeted Killing Memo, *supra* note 7.

constitutional avoidance canon.⁵⁷ The OLC 2002 Interrogation Memo, one of the torture memos, went “to great lengths...to read the scope of the [Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment] in an exceedingly narrow manner and then to methodically explore all conceivable arguments whereby persons who engage in [torture] can escape conviction.”⁵⁸ The Memo asserted that “Congress may no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements to the battlefield.”⁵⁹ The Memo disregarded both Congress’ textually committed war powers and the directly relevant *Youngstown Sheet & Tube Co. v. Sawyer*, which sets forth the prevailing standard regarding congressional authority to limit the President.⁶⁰ The torture memos demonstrated an issue: that the OLC was “employ[ing] strained statutory-interpretation techniques to arrive at a pro-administration position” in other unpublished opinions.⁶¹

Professors Bruce Ackerman and Trevor Morrison have engaged in an ongoing back-and-forth about the legitimacy of the OLC and whether it is truly deferential to the President. Ackerman argues that although OLC opinions have a similar polished appearance to Supreme Court opinions, the difference is that the OLC “almost always conclude[s] that the [P]resident can do what he wants.”⁶² Morrison has responded to Ackerman’s criticism by positing that the OLC is committed to maintaining its role and value in the executive branch, which is derived from the “norms of detachment and professional integrity of its work.”⁶³ If the OLC “says yes too readily . . . it will no longer be useful.”⁶⁴ In other words, if the OLC wants to maintain its reputation and value to the executive, then the OLC cannot consistently defer to the President’s goals. Morrison also argues that as long as executive-sympathetic positions are in line with existing constitutional norms, they are not as problematic as Ackerman suggests.⁶⁵

Morrison also argues that Ackerman’s assertions of deference are flawed because he “offers no support for his statement.”⁶⁶ In a recent study, Adoree Kim examined 123 declassified OLC opinions and publicly available OLC memoranda and 79 opinions addressed to the general counsels of various executive agencies from between 1987 and 2017.⁶⁷ It is important to note that this study is limited because the DOJ is currently withholding approximately 39% of its 509 OLC opinions from between 1998 and 2012.⁶⁸ Kim found that during this time period, 92% of available OLC opinions supported expansion of presidential power.⁶⁹ Upon review of similar statistics of OLC opinions, Morrison argues that these results are skewed because the OLC may not write a formal

⁵⁷ See, e.g., OLC 2002 Interrogation Memo, *supra* note 5, at 33–35.

⁵⁸ Johnsen, *supra* note 9, at 1567; see also OLC 2002 Interrogation Memo, *supra* note 5, at 15–22.

⁵⁹ OLC 2002 Interrogation Memo, *supra* note 5, at 35.

⁶⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring); see also Johnsen, *supra* note 9, at 1568.

⁶¹ Janover, *supra* note 8, at 1612–13.

⁶² ACKERMAN, *supra* note 12, at 68.

⁶³ Morrison, *Constitutional Alarmism*, *supra* note 12, at 1722.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1717.

⁶⁶ *Id.*

⁶⁷ Adoree Kim, *The Partiality Norm: Systematic Deference in the Office of Legal Counsel*, 103 CORNELL L. REV. 757, 761 (2018).

⁶⁸ Messinger, *supra* note 12, at 252.

⁶⁹ Kim, *supra* note 67, at 765.

opinion when they are telling the President “no.”⁷⁰ However, Morrison bases his claims on his own experience at the OLC, not a formal rule governing the Office.⁷¹

In contrast, Kim argues that the OLC is deferential to the executive for systematic reasons.⁷² The President can exert unchecked influence over the OLC because the OLC is formally accountable to the President, the OLC owes duties to the President as its client, and the President has the power to appoint and remove OLC officers.⁷³ The staffing of the OLC is another factor. OLC staff members may be more willing to defer to the executive position because they do not want to be removed or fired from their positions or because they want to curry political favor and achieve larger political career goals.⁷⁴ Ultimately, this Comment takes the position that the OLC is deferential to the executive because there is no oversight or accountability structure that counterbalances the executive political pressure on the OLC.⁷⁵

There is also debate as to whether OLC memos can be considered law. Although they are controlling internal law of the executive branch,⁷⁶ OLC memos are not considered legally binding by courts.⁷⁷ However, some courts treat OLC opinions as “‘effective law and policy’ within the executive branch, a concept that is also known as ‘working law.’”⁷⁸ Judges treat OLC memos as binding (1) when an OLC memo is treated as having the force of law within the executive branch and (2) when agencies have adopted the OLC memo internally.⁷⁹ However, advocates for increased transparency often characterize OLC memos as law because they have the practical force of law,⁸⁰ enable the executive to act in ways that the public might otherwise object to, and can prevent the prosecution of officials for misconduct that was committed in reliance on OLC memos.⁸¹ Whether OLC memos should be formally considered law is outside the scope of this Comment.

When the executive branch and the OLC use the law as a political tool to achieve partisan goals, it undermines the rule of law. When controversial OLC memos from the last two decades were leaked and published, the public lost significant confidence in the

⁷⁰ Morrison, *Constitutional Alarmism*, *supra* note 12, at 1719.

⁷¹ *Id.*

⁷² Kim, *supra* note 67, at 780.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ OLC Best Practices Memo, *supra* note 20, at 1.

⁷⁷ See *Smith v. Jackson*, 246 U.S. 388, 390–91 (1918) (holding that court opinions control over attorney general opinions); *Cherichel v. Holder*, 591 F.3d 1002, 1016 n.17 (8th Cir. 2010) (“[T]he courts are not bound by [OLC opinions.]”); see also *Trump v. Vance*, 941 F.3d 631, 644 n.16 (2d. Cir. 2019) (“The President appropriately does not argue that we owe any deference to the OLC memoranda [concerning presidential immunity].”).

⁷⁸ Kimberly L. Wehle, “*Law and the OLC’s Article II Immunity Memos*,” 32 STAN. L. & POL’Y REV. 1, 18 (2021) (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975) (introducing working law doctrine as a means to discover whether secret agency guidance documents have enough legal animus to constitute secret law)); *N.Y. Times Co. v. DOJ*, 756 F.3d 100, 114–20 (2d Cir. 2014) (discussing why and to what extent an OLC memo constituted effective law and policy).

⁷⁹ Wehle, *supra* note 78, at 19.

⁸⁰ See Amended Complaint, *Campaign for Accountability v. Dep’t of Just.*, 486 F.Supp.3d 424 (D.D.C. 2020) (No. 1:16-cv-1068).

⁸¹ JACK GOLDSMITH, *THE TERROR PRESIDENCY* 96–97 (2007) (describing OLC opinions as “get-out-of-jail-free” cards).

government and the rule of law.⁸² “Damage to the rule of law can be accomplished in an instant, but repair takes time.”⁸³

C. *Previous Attempts to Reform Executive Secrecy*

Rudesill’s article on secret law provides a framework for analyzing the options for dealing with OLC secrecy and deference: live with the OLC as it is, end the OLC, or reform it.⁸⁴ He notes that those who advocate for living with secret law often base their arguments on the idea that secrecy is a necessary evil for government to protect national security and to provide space for deliberation.⁸⁵ In terms of oversight, “live with it” advocates argue that the current reporting requirements, internal executive oversight, and whistleblower leaks are enough to constrain executive secrecy.⁸⁶ In response, “end it” and “reform it” advocates argue that “the oversight mechanism is . . . [a] failure-proven[] and continually evolving amalgamation of formal and informal practices.”⁸⁷ At the other extreme, “end it” advocates⁸⁸ argue that secret law “does not live up to our constitutional values of the rule of law.”⁸⁹ However, the need for secrecy in the national security context often weighs against total abolition of secret law, and by extension the OLC’s role in providing constitutional guidance on national security issues. In his “reform it” framework, Rudesill discusses how reform efforts tend to focus on internal and external constraints on the OLC: for example, providing OLC opinions for review within and among the branches as well as publishing them publicly.⁹⁰

Congress has previously attempted to use transparency legislation to combat secrecy, especially in the wake of the administrative state’s rise. The Administrative Procedures Act of 1946 (APA)⁹¹ and the Freedom of Information Act of 1966 (FOIA)⁹² together require the executive to publish its rules of procedure in the *Federal Register* and make other legal authorities available to the public.⁹³ This includes statements of policy, precedential interpretations, staff manuals, final administrative opinions from adjudications, and other binding internal guidelines and agency level case law.⁹⁴ However, FOIA and the APA are not as effective at creating government transparency as they might appear. The Acts are limited by broad exceptions for national security and properly classified information.⁹⁵

⁸² Finkelstein & Painter, *supra* note 9, at 159.

⁸³ *Id.* at 129.

⁸⁴ Rudesill, *supra* note 12, at 325.

⁸⁵ *Id.*

⁸⁶ *Id.* at 328–30.

⁸⁷ *Id.* at 330.

⁸⁸ For example, Kenneth Culp Davis would prohibit all secret law because it is an abomination without exception. Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 797 (1967).

⁸⁹ Rudesill, *supra* note 12, at 332.

⁹⁰ *Id.* at 335.

⁹¹ Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 500–596) [hereinafter the APA].

⁹² Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552) [hereinafter FOIA].

⁹³ 5 U.S.C. § 552.

⁹⁴ *Id.*

⁹⁵ 5 U.S.C. § 553(a)(1) (2012) (APA rulemaking requirements do not apply to “a military or foreign affairs function of the United States”); 5 U.S.C. § 552(b)(1) (FOIA exemption for matters properly classified and

The exemptions allow the government to keep information secret from the public and avoid oversight because courts are often deferential to executive claims of national security concerns.⁹⁶

More recently, in response to the torture memos, Congress repudiated the OLC interrogation memos and required interrogation rules to be public.⁹⁷ In 2008, Senator Feingold introduced the OLC Reporting Act of 2008, which would have required the Department of Justice (and by extension the OLC) to report to Congress when the executive determines it does not have to observe a statutory requirement.⁹⁸ However, the OLC Reporting Act of 2008 received no further action after being referred to the Senate Committee on the Judiciary.⁹⁹ In 2023, Representative Adam Schiff introduced the Protecting Our Democracy Act.¹⁰⁰ Though largely aimed at other reforms, one section would require the OLC to publish opinions that instruct agencies on budget and appropriations law.¹⁰¹ Section 524 would provide exceptions allowing the OLC to withhold opinions containing classified information, opinions relating to the appointment of a specific individuals not confirmed to office, and opinions exempted from disclosure by various other statutes.¹⁰² While the Protecting Our Democracy Act has received many co-sponsors, its effect on the Office of Legal Counsel is limited.¹⁰³

Recently, Representative Matt Cartwright introduced the SUNLIGHT Act of 2019¹⁰⁴ and in 2022, Senator Tammy Duckworth introduced a companion version of the SUNLIGHT Act in the Senate, the DOJ OLC Transparency Act.¹⁰⁵ Senator Duckworth has proposed a similar version of this bill in the 116th Congress.¹⁰⁶ Both versions of the DOJ

“kept secret in the interest of national defense or foreign policy”). FOIA also has nine total statutory exemptions, including: (1) information classified as secret for the sake of national security; (2) purely internal personnel rules; (3) information that another statute has classified as exempt; (4) trade secrets and other privileged business information; (5) privileged communication between or among agencies; (6) information that if disclosed would invade someone's personal privacy; (7) compilations of certain information produced for law enforcement purposes; (8) information regarding the monitoring of financial institutions; and (9) geological information regarding wells. *Id.* at § 552(b)(1)–(b)(9).

⁹⁶ *Id.*

⁹⁷ Detainee Treatment Act of 2005, Pub. L. No. 109–148, §§ 1002, 1003, 119 Stat. 2680, 2739–44 (2004); National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114–92, § 1042, 129 Stat. 726, 977–79 (2015).

⁹⁸ Office of Legal Counsel Reporting Act of 2008, S. 3501, 110th Cong. (2008); *see also* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006) [hereinafter Morrison, *Constitutional Avoidance*] (arguing that Congress must be informed when the OLC endorses an interpretation of a statute based on the constitutional avoidance canon in an unpublished opinion). In the House, Representative Radley Miller introduced a companion bill. H.R. 6929.

⁹⁹ S. 3501 (110th): *OLC Reporting Act of 2008*, GOVTRACK (2008), <https://www.govtrack.us/congress/bills/110/s3501> [<https://perma.cc/CHJ7-RG6G>].

¹⁰⁰ Protecting Our Democracy Act, H.R. 5048, 118th Cong. (2023). Representative Schiff previously introduced the Protecting Our Democracy Act in the 116th Congress. Protecting Our Democracy Act, H.R. 8363, 116th Cong. (2020).

¹⁰¹ H.R. 5048, § 524. The current proposed version has 127 total co-sponsors. *H.R. 5048: Protecting Our Democracy Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/118/hr5048> [<https://perma.cc/P4PJ-MQ9K>].

¹⁰² H.R. 5048 § 524.

¹⁰³ *Id.*

¹⁰⁴ SUNLIGHT Act of 2019, H.R. 4556, 116th Cong. (2019).

¹⁰⁵ DOJ OLC Transparency Act, S. 3858, 117th Cong. (2022).

¹⁰⁶ DOJ OLC Transparency Act, S. 3334, 116th Cong. (2020).

OLC Transparency Act died in their respective Congresses. However, this Comment assumes that Senator Duckworth—among other members of Congress who have demonstrated concern with the OLC’s practices and executive secrecy—is likely to reintroduce a similar measure to address OLC transparency and deference to the executive. In the next Parts, I will discuss and criticize the DOJ OLC Transparency Act in greater detail to provide a roadmap for future legislative reform efforts.

II. THE DOJ OLC TRANSPARENCY ACT

The DOJ OLC Transparency Act,¹⁰⁷ as proposed, would require the OLC to publish all opinions on the DOJ website and allow free access to the public. Prospectively, the Act would require all OLC opinions to be published within forty-eight hours of being issued. Retroactively, the Act would require the OLC to make public previously unpublished opinions in accordance with deadlines established by the Act.¹⁰⁸

Section 1 of the Act would amend 28 U.S.C. § 521. Section 521 currently provides:

The Attorney General, from time to time—(1) shall cause to be edited and printed in the Government Publishing Office, such of his opinions as he considers valuable for preservation in volumes; and (2) may prescribe the manner for the distribution of the volumes. Each volume shall contain headnotes, an index, and such footnotes as the Attorney General may approve.¹⁰⁹

The DOJ OLC Transparency Act would include a provision specifically addressing OLC opinions. The Act’s definition of a final OLC opinion is an opinion

(i) that the Attorney General, Assistant Attorney General for the Office of Legal Counsel, or a Deputy Assistant General for the Office of Legal Counsel has determined is final; (ii) is relied upon by government officials or government contractors; (iii) is relied upon to formulate legal guidance; or (iv) is directly or indirectly cited in another OLC opinion.¹¹⁰

All OLC opinions are defined under an umbrella provision as

views on a matter of legal interpretation communicated by the Office of Legal Counsel of the Department of Justice to any other office or agency,

¹⁰⁷ S. 3858.

¹⁰⁸ *Id.* at § 2(b)(4). (providing for all OLC opinions issued between 2020 and 2023 to be published within thirty days of enactment of the Act; all OLC opinions issued between 2000 and 2019 to be published within sixty days; all OLC opinions issued between 1980 and 1999 to be published within ninety days; all OLC opinions issued between 1960 and 1979 to be published within one hundred twenty days; and for all OLC opinions issued before 1960 to be published within two years). If an opinion cannot be located, the Attorney General shall public a description of the opinion and submit certification to Congress that a good faith effort was made to locate the opinion and confirm that the text of the opinion was unavailable. *Id.* at § 2(b)(4)(C).

¹⁰⁹ 28 U.S.C. § 521 (2014).

¹¹⁰ S. 3858, § 2(b)(1)(A).

or person in an office or agency, in the Executive Branch . . . and rendered in accordance with sections 511 through 513 [of the APA].¹¹¹

The Act also requires that if the OLC’s views on a matter of legal interpretations are orally communicated, that communication is memorialized.¹¹²

In order to strike a balance between transparency and high stakes national security concerns, the Act would allow for the Attorney General to redact classified information from OLC opinions before publication.¹¹³ The Attorney General would be required to “establish and preserve an accurate record documenting each redaction from the OLC opinion, including information describing in detail why public online disclosure of classified information would have resulted in the associated harm that pertains to each level of classification.”¹¹⁴ The Act would further curtail the Attorney General’s ability to redact information that is sensitive but unclassified.¹¹⁵ However, the Act does not provide standards to determine when information is sensitive but unclassified. If an OLC opinion contains classified information, the Attorney General “shall submit the full opinion, without redaction, to any Member of Congress and any appropriately cleared congressional staff member.”¹¹⁶ At least once every ninety days, the Attorney General must review every published OLC opinion that contains any classified information and remove redactions that are no longer relevant under established classification standards.¹¹⁷

Finally, the Act would create a right of action for petitioners to bring a complaint if they have been harmed as a result of deprived access to an OLC opinion that should have been made public.¹¹⁸ If a case is brought before a court, the court will have de novo review over the matter and may examine the contents of the OLC opinion in camera to determine if any information within the opinion should be withheld under the classification standards of the Act.¹¹⁹

In the proceeding Part, I will argue that the Act’s definition of a “final opinion” fails to overcome the same issues that FOIA litigants face. I will argue that the Act’s classification provision fails to overcome existing problems with the general classification system. Finally, I will argue that the Act’s oversight mechanism will not hold the OLC accountable to transparency mandates nor will it counterbalance pressure to defer to the executive’s position.

III. CRITIQUES OF THE DOJ OLC TRANSPARENCY ACT

The DOJ OLC Transparency Act fails to overcome existing problems that have arisen in secret law. In subpart A, I discuss how the Act’s definition of a “final opinion” is too limited. First, the definition would provide another obstacle for the public to gain access to OLC opinions that remain secret within the Act’s parameters. Second, the definition

¹¹¹ *Id.* § 2(b)(1)(B).

¹¹² *Id.* § 2(b)(2).

¹¹³ *Id.* § 2(b)(3).

¹¹⁴ *Id.* 2(b)(3)(A)(ii).

¹¹⁵ *Id.* 2(b)(3)(B).

¹¹⁶ *Id.* 2(b)(3)(C).

¹¹⁷ *Id.* 2(b)(3)(D).

¹¹⁸ *Id.* § 2(b)(5).

¹¹⁹ *Id.* § 2(b)(5)(B).

should be revised to include informal communications that may govern the executive's position on critical civil liberties, so the public is aware of these positions.

In subpart B, I discuss how the Act refers to general classification standards, rather than prescribing its own more stringent standards. The current classification standards have led to over-classification of information that should be publicly available and abuses due to loopholes in the system. I review potential proposals for classification standards that could be included in the Act to render it more effective.

In subpart C, I will discuss the Act's critical flaw—the lack of an effective oversight mechanism. The Act provides for public oversight through its transparency measures and judicial oversight through its private right of action. However, I argue that transparency alone will not create effective oversight due to a disinterested public. Additionally, the private right of action fails to overcome judicial norms that preclude judicial review of executive secrecy. I then review the ongoing debate regarding whether the OLC can effectively self-regulate and adhere to transparency mandates. I conclude that an external oversight mechanism is necessary, though practical obstacles make external oversight by Congress unlikely.

A. *The DOJ OLC Transparency Act's Definition of a Final Opinion*

The DOJ OLC Transparency Act and FOIA would work in tandem to provide an avenue for the public to gain access to OLC opinions. Like the DOJ OLC Transparency Act, FOIA is intended to be a tool to keep the government accountable to the public.¹²⁰ As such, FOIA provides for both proactive and reactive disclosures.¹²¹ Subsection (a)(2) of the FOIA provides for reading room access, which requires agencies to routinely make certain records “available for public inspection and copying” in agency reading rooms.¹²² The reading room provision requires agencies to proactively disclose opinions or interpretations that have the force and effect of law, which includes final opinions, policy statements and interpretations, administrative staff manuals, and frequently requested records.¹²³

There has been recent controversy in the circuit courts as to how to apply FOIA's reading room provisions to the OLC. In 2017, the Citizens for Responsibility & Ethics in Washington (CREW), a non-profit aimed at government transparency, asked the court to compel the OLC to publicly post its opinions. The D.C. Circuit held that district courts do not have the authority under the APA to require the OLC to publish reading room records online.¹²⁴ In 2019, CREW renewed their request arguing that disclosure of OLC opinions was mandated under FOIA, rather than the APA.¹²⁵ In *CREW II*, the D.C. Circuit addressed the merits of the case and found that CREW's claim failed.¹²⁶ The court reasoned that

¹²⁰ See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

¹²¹ 5 U.S.C. § 552(a)(1)–(a)(3) (requiring agencies to both publish information and respond to requests for information).

¹²² *Id.* § 552(a)(2).

¹²³ *Id.*

¹²⁴ *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Just. (CREW I)*, 846 F.3d 1235, 1243 (D.C. Cir. 2017). In 2019, the Ninth Circuit held differently in *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 935 F.3d 858, 864–65 (9th Cir. 2019). The Ninth Circuit held that courts do have the ability to enjoin the agency from withholding the records and compel their production in the online reading room. *Id.* at 865.

¹²⁵ *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just. (CREW II)*, 922 F.3d 480, 486 (D.C. Cir. 2019).

¹²⁶ *Id.* at 487.

CREW did not prove that the requested OLC opinions were binding law because they were final opinions or prove that the requested opinions were statements of policy and interpretations that had been adopted by the agency under FOIA's mandatory disclosure requirements.¹²⁷ The court also held that CREW's request for the OLC to publish all its opinions was overbroad, because some of the opinions would likely be exempted pursuant to one of FOIA's exemptions.¹²⁸ *CREW I* and *CREW II* demonstrate the D.C. Circuit's reluctance to apply FOIA to order the OLC to publish its opinions, even if the opinions would qualify under FOIA for affirmative disclosure and the petitioners simply lack the information necessary to prove as much.

The DOJ OLC Transparency Act's definition of final, specifically that an OLC opinion is final if it is relied upon to formulate legal guidance,¹²⁹ would provide the courts with a metric for finality that petitioners could use to enforce FOIA's mandatory disclosure provisions. However, the definition is not expansive enough. In a comment to the Senate Judiciary Committee regarding the DOJ OLC Transparency Act, CREW urges for the Act to expand its definition of OLC opinions to include "communication of non-legal guidance."¹³⁰ Specifically, CREW emphasizes that OLC communications, like the Barr memo,¹³¹ would not be accessible to the public without a more expansive definition. The Barr memo was an unsolicited memo sent by Bill Barr before he was Attorney General, arguing that President Trump should not be required to answer special counsel Robert Mueller in his investigation of possible obstruction of justice charges against President Trump. The Barr memo is not a legal interpretation within the meaning of FOIA and it is not a final OLC opinion or memo according to the DOJ OLC Transparency Act. However, the Barr memo, and memos like it, may still informally guide agency action.¹³²

CREW asserts that amending the DOJ OLC Transparency Act to include language that covers OLC communication of non-legal guidance would "make it possible to obtain documents of which we are currently unaware," which may be critically important to the American public because "they likely provide binding legal advice to [the] executive . . . on [important civil liberties] such as election integrity, regulation of firearms, surveillance, and abortion access."¹³³ However, even if this language were added, the DOJ OLC Transparency Act would still allow OLC opinions to be exempt from mandatory disclosure under the FOIA exemptions for national security, internal communications, and law enforcement purposes. Without additional reform to the FOIA exemptions, the DOJ OLC Transparency Act will not overcome the difficulties FOIA petitioners currently face when litigating for disclosure.

¹²⁷ *Id.* at 486.

¹²⁸ *Id.* at 488.

¹²⁹ DOJ OLC Transparency Act, S. 3858, 117th Cong. § 2(b)(1)(A)(iii) (2022).

¹³⁰ *Breaking the Logjam Part 2: The Office of Legal Counsel's Role in Shaping Executive Privilege Doctrine: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 117th Cong. 3 (2022) [hereinafter CREW Testimony on the DOJ OLC Transparency Act] https://www.citizensforethics.org/wp-content/uploads/2022/10/CREW_OLC_Hearing_Statement.pdf [<https://perma.cc/ADC9-6SND>] (testimony of Debra Perlin, Policy Director, Citizens for Responsibility and Ethics in Washington (CREW)).

¹³¹ Memorandum from Bill Barr, former Att'y Gen., to Rob Rosenstein, Deputy Att'y Gen., & Steve Engel, Assistant Att'y Gen., Re: Mueller's "Obstruction" Theory (June 8, 2018) [hereinafter Barr Memo], <https://www.documentcloud.org/documents/5638848-June-2018-Barr-Memo-to-DOJ-Muellers-Obstruction> [<https://perma.cc/LF4U-T3PV>].

¹³² CREW Testimony on the DOJ OLC Transparency Act, *supra* note 130 at 3.

¹³³ *Id.* at 3.

Overall, the Act fails to overcome the challenges faced by many FOIA litigants—the broad standard for defining classified information can lead to difficulty accessing documents that should have been made public as well as limit judicial oversight. The Act’s definition may also prevent the public from accessing documents that impact the executive’s position on important civil liberties. While the DOJ OLC Transparency Act’s affirmative disclosure requirements may help overcome some of the difficulties seen in reactive FOIA litigation, the classification requirements would circumvent the benefits. Without clear bounds on how much of an OLC opinion can be classified by the Attorney General, as well as concerns about adherence to the classification standards, it is not clear that the DOJ OLC Transparency Act will be more effective at combatting OLC secrecy and deference.

B. *Who Decides what is Classified in OLC Opinions and How?*

While limitations to transparency may be warranted by a need for secrecy for certain information, the Act is flawed because it prescribes the same classification standards that are already abused by the executive branch and have led to a bloated, inefficient classification system.¹³⁴ The Act may prevent the Attorney General from “rubberstamping” opinions as classified by requiring them to provide an explanation for why they are classifying information, but the proposed legislation does not provide specific guidelines on what standard the explanations must meet.¹³⁵

The classification system is currently governed by Executive Order 13526, last amended on December 29, 2009.¹³⁶ Executive Order 13526 currently provides that information can be classified into three categories: information is designated (1) “Top Secret” if disclosure could reasonably be expected to cause *exceptionally grave* damage to national security; (2) “Secret” if disclosure could cause *serious* damage to national security; and (3) “Confidential” if disclosure could cause *damage* to national security.¹³⁷ The Act clarifies that information that is “sensitive but unclassified” should not be redacted from OLC opinions.¹³⁸ However, the Act does not provide examples of information that should be considered “sensitive but unclassified,” nor does it address how the Attorney General should evaluate whether disclosure would damage national security within the context of an OLC opinion.

Scholars and activists have criticized current classification standards and a recent trend of over-classification.¹³⁹ While scholars acknowledge that classification is necessary to protect national security, they point to flaws in the system’s design and

¹³⁴ See, e.g., ELIZABETH GOITEIN & DAVID M. SHAPIRO, BRENNAN CTR. FOR JUST., REDUCING OVERCLASSIFICATION THROUGH ACCOUNTABILITY (2011), <https://www.brennancenter.org/our-work/research-reports/reducing-overclassification-through-accountability> [<https://perma.cc/UC2M-J3ZG>].

¹³⁵ DOJ OLC Transparency Act, S. 3858, 117th Cong. § 2(b)(3)(A)(ii) (2022).

¹³⁶ Exec. Order No. 13,526, 15 C.F.R. Part 4a (2023). For a more detailed analysis of the legal framework of the classification system, see JENNIFER K. ELSEA, CONG. RES. SERV., THE PROTECTION OF CLASSIFIED INFORMATION: THE LEGAL FRAMEWORK (2017), <https://sgp.fas.org/crs/secr/RS21900.pdf> [<https://perma.cc/S8FN-35WH>].

¹³⁷ Exec. Order No. 13,526, 15 C.F.R. Part 4a (2023). The Executive Order provides a list of examples of potentially confidential information, including military plans, weapons systems, military operations, foreign government information, and intelligence activities. *Id.*

¹³⁸ S. 3858 § 2(b)(3)(B).

¹³⁹ See, e.g., GOITEIN & SHAPIRO, BRENNAN CTR. FOR JUST., *supra* note 134.

implementation—particularly the lack of incentive to declassify and the sheer number of classified documents that exist. The government reported more than 95 million documents were classified in 2012 and 49 million were classified in 2017.¹⁴⁰ In its 2021 annual report to the President on the classification system, the Information Security Oversight Office introduced its report by presenting proposed reforms to the classification system and emphasized that these reforms were urgently necessary, because

more than ever [] Americans must have faith in their government’s honesty and openness. This has become increasingly difficult. We are still emerging from a time when truths were called lies and many of our long-standing institutions and fundamental principles were challenged in ways that we have not seen since the Civil War.¹⁴¹

Two specific concerns are raised by the DOJ OLC Transparency Act regarding classification: who decides what to classify and how.¹⁴² Because the Attorney General is still an executive officer, they may be influenced by internal executive pressure to classify information that does not necessarily meet the standards for classification. The Act does not provide for any oversight to ensure that the Attorney General is accountable for adhering to the classification standards. Additionally, the existing classification standards are broad and abstract, which could lead to unnecessary redactions in OLC opinions.

In his testimony before the Senate Judiciary Committee, Bradford A. Berenson, former Associate Counsel to the President, acknowledged the difficulty of external oversight by a non-executive entity. Although Congress has the advantage of independence from the executive, Congress is at a disadvantage because it does not have the information necessary to make a sound, contextualized judgement in real time about whether the release of such information would jeopardize the national interest.¹⁴³ As such, the classification provision raises questions about which branch can effectively provide oversight.

Far from being merely a philosophical debate about the potential consequences of a vague classification standard, the lack of a coherent standard within the Act presents legitimate practical concerns—especially considering the existing OLC disregard for classification procedure. In his testimony before the Senate Judiciary Committee, former director of the Information Security Oversight Office J. William Leonard specifically focused on the declassified OLC 2003 Interrogation of Unlawful Combatants Outside the U.S. Memo.¹⁴⁴ The memorandum was prepared by John C. Yoo, Deputy Assistant Attorney General, and addressed to the general counsel of the Department of Defense and marked

¹⁴⁰ Matthew Connelly, *Op-Ed: Why We’re Drowning in a ‘Tsunami’ of Government Secrets*, L.A. TIMES (Sept. 4, 2022, 3:10 AM), <https://www.latimes.com/opinion/story/2022-09-04/secrets-classified-government-trump> [<https://perma.cc/Z5QP-WHCK>].

¹⁴¹ INFO. SEC. OVERSIGHT OFF., ANNUAL REPORT TO THE PRESIDENT 1, 3 (2021), <https://www.archives.gov/files/isoo/reports/isoo-2021-annual-report-to-the-president-final.pdf> [<https://perma.cc/74HQ-TNSK>].

¹⁴² *Secret Law and the Threat to Democratic and Accountable Government*, *supra* note 45, at 104 (testimony of Bradford A. Berenson, Former Associate Counsel to the President, Partner, Sidley Austin LLP).

¹⁴³ *Id.* at 105–06.

¹⁴⁴ *Secret Law and the Threat to Democratic and Accountable Government*, *supra* note 45, at 153 (testimony of J. William Leonard, Former Director, Information Security Oversight Office); *see* OLC 2003 Interrogation of Unlawful Combatants Outside the U.S. Memo, *supra* note 5.

classified.¹⁴⁵ Leonard noted that the decision to classify the memo was “one of the worst abuses of the classification process that [he had] seen” during his career.¹⁴⁶ The memo was purely legal analysis that was near boilerplate in nature.¹⁴⁷ Moreover, it was not clear that any information contained in the memo would cause identifiable harm to national security.¹⁴⁸ Beyond the subject matter, the memo failed to meet the bare minimum procedural elements of classification: (1) the memo did not provide the identity of the individual who classified it, (2) the memo did not contain declassification instructions or a concise statement explaining why it was classified, (3) the memo did not indicate which portions were classified and which were not, and (4) the memo was declassified by the Department of Defense, even though it was classified by the Department of Justice.¹⁴⁹ These procedural violations were especially egregious because the memo was written by a deputy of the OLC, addresses senior legal officials in the Department of Defense, and was shared with other senior officials in the White House.¹⁵⁰ Seemingly, none of these senior government officials flagged this document for its many violations of basic classification procedure. As such, to overcome abuse of the classification system by the OLC, the Act would be improved by more stringent articulated standards for classification.

Scholars have proposed reforms to classification standards and sunset provisions that could address these Act’s shortcomings if they were incorporated into the Act. Elizabeth Goitein, on behalf of the Brennan Center, argues for a change in the classification standard as applied to secret law.¹⁵¹ The standard for secret law, and by extension OLC opinions, should be more demanding than the current standard for classification: secret law could only be withheld if it is highly likely that disclosure would “result, either directly or indirectly, in loss of life, serious bodily harm, or significant economic or property damage,” rather than a potential threat of damage to national security.¹⁵² If this language were added to the Act, it would create a more tangible standard for the Attorney General to use when redacting OLC opinions.

Goitein also proposes that some categories of law could never be secret, including (1) laws that impose affirmative duties or criminal penalties on members of the public,¹⁵³ (2) pure legal analysis, and (3) legal interpretations that purport to exempt the executive branch from compliance with a statute or stretch statutory terms beyond their ordinary meanings.¹⁵⁴ If Goitein’s proposed classification standard were applied to the DOJ OLC Transparency Act, it would mitigate some of this Comment’s concerns with applying the existing classification standards. Goitein’s standard could also lead to more, or at least

¹⁴⁵ OLC 2003 Interrogation of Unlawful Combatants Outside the U.S. Memo, *supra* note 5.

¹⁴⁶ *Secret Law and the Threat to Democratic and Accountable Government*, *supra* note 45, at 11 (testimony of J. William Leonard, Former Director, Information Security Oversight Office).

¹⁴⁷ Dan Eggen & Josh White, *Memo: Laws Didn’t Apply to Interrogators*, WASH. POST, Apr. 2, 2008, at A1 (quoting Yoo as stating “Far from invention some novel interpretation of the Constitution, . . . our legal advice to the President, in fact, was near boilerplate”).

¹⁴⁸ *Secret Law and the Threat to Democratic and Accountable Government*, *supra* note 45, at 11 (testimony of J. William Leonard, Former Director, Information Security Oversight Office).

¹⁴⁹ *Id.* at 154.

¹⁵⁰ *Id.*

¹⁵¹ GOITEIN, BRENNAN CTR. FOR JUST., *supra* note 36, at 65 (citing Rudesill, *supra* note 12, at 342–43).

¹⁵² *Id.* at 64–65.

¹⁵³ Rudesill, *supra* note 12, at 342–43.

¹⁵⁴ GOITEIN, BRENNAN CTR. FOR JUST., *supra* note 36, at 7; *see also* Morrison, *Constitutional Avoidance*, *supra* note 98, at 1237–39.

earlier, disclosure of memos that contain information that the Attorney General had previously redacted. Both Goitein and Rudesill also recommend a four-year sunset period for secret rules and authoritative legal precedent.¹⁵⁵ Rudesill argues that “an earlier presumptive declassification and publication date for [OLC opinions] would reflect [a] stronger constitutional norm against secret law.”¹⁵⁶ However, the Act would already require the Attorney General to review every published OLC opinion that contains any classified information and remove redactions that are no longer relevant at least once every ninety days.¹⁵⁷

Ultimately, the Act’s incorporation of existing classification standards fails to combat OLC secrecy and deference. The Act should provide for a clearer and more stringent standard for OLC opinions, such as Goitein’s proposal. Furthermore, the lack of an oversight mechanism or penalty for failing to adhere to specific classification procedures suggests that the classification provision will facilitate OLC secrecy rather than bolster transparency. In the next subpart, I will address the Act’s existing oversight provisions and propose alternative oversight mechanisms to better combat OLC secrecy and deference.

C. *Flaws in the DOJ OLC Transparency Act’s Oversight Mechanisms*

The Act’s critical flaw is its lack of an effective oversight mechanism. The Act provides for public oversight through its transparency measures and judicial oversight through its private right of action. However, transparency alone will not create effective oversight. In the following subparts, I will address the merits of transparency and the capability of each branch of government to provide oversight over the OLC.

1. The Merits of Transparency and Public Accountability

In the section, I will explore previous proposals for transparency, review arguments for and against transparency, and argue that transparency does not create public accountability and therefore fails as an oversight mechanism.

The DOJ OLC Transparency Act is not the first proposal to reform the OLC by making it more transparent. Many scholars who have debated the efficacy of various OLC reforms suggest some form of transparency. However, others question whether transparency alone is enough to combat OLC secrecy and systemic deference to the executive.

In transparency’s favor, Professor Harold Koh argues that transparency would result in accessibility, unveiling of the factual predicate upon which an opinion is based, and “prevent the [President] . . . from stripping a carefully nuanced opinion of all its subtleties and thereby reducing it to the simplistic conclusion that ‘OLC says we can do it.’”¹⁵⁸ Koh advocates for the prompt publication of opinions, especially when they overrule prior legal interpretations.¹⁵⁹ Professor Sudha Setty argues that Congress should force publication of

¹⁵⁵ GOITEIN, BRENNAN CTR. FOR JUST., *supra* note 36, at 68; Rudesill, *supra* note 12, at 353–54.

¹⁵⁶ Rudesill, *supra* note 12, at 353–54.

¹⁵⁷ See DOJ OLC Transparency Act, S. 3858, 117th Cong. § 2(b)(3)(D) (2022).

¹⁵⁸ Koh, *supra* note 12, at 517.

¹⁵⁹ *Id.* at 523.

almost every opinion.¹⁶⁰ Some advocates of transparency are not as focused on public accountability, arguing that public transparency may impact the internal deliberations necessary to the OLC. They argue that if full public transparency cannot be achieved, there should be a requirement that secret law is made available to Congress, even if classified by the executive branch.¹⁶¹

There are several arguments against transparency that emphasize the risks and inefficiency that can result. First, transparency could create a multi-faceted chilling effect. It could chill executive actors from consulting the OLC for legal advice generally.¹⁶² It could also prevent the OLC from issuing an opinion that endorses an unpopular view, even if it really is the best interpretation of the law.

Additionally, advocates arguing against transparency often posit that disclosure is impracticable because secret legal analysis cannot be unentwined from secret facts.¹⁶³ They argue that redacted details will be inferred from published legal analysis to the point that if OLC memos are published, sources and methods will be placed in peril or targets of surveillance will be given notice of possible surveillance.¹⁶⁴ However, “it is reasonable to believe that law can be scrubbed of operational details” to the extent that readers would not be able to identify secret factual circumstances.¹⁶⁵ For example, the OLC 2010 Targeted Killing Memo was allowed to be published in redacted form, despite operational risks.¹⁶⁶

It is also important to note that the OLC tends to respond to presidential requests in the face of crises.¹⁶⁷ The more transparency is mandated, the less efficient an agency can be. Given that the stakes of the OLC’s efficient legal interpretation are high, a delay in the process could have harmful consequences for national security and military operations. Finally, anti-transparency advocates argue that reforming the OLC will not prevent the creation of informal guidelines that the Act does not require to be published. Therefore, trying to enforce transparency in the OLC could result in greater evasion of the law or push secret law even further into the shadows.

However, transparency may result in a favorable deterrent effect. The possibility of public review could prevent the OLC from expanding existing law beyond reasonable interpretation and deferring to the executive’s policy goals as often.¹⁶⁸ Public access to OLC opinions could lead the OLC to produce “better work product, and also strengthen the Office’s sense of professional responsibility.”¹⁶⁹ Morrison argues that disclosure of OLC opinions will encourage the OLC to adhere to their prior precedents, leading to a

¹⁶⁰ Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn’t Let the Terrorists Win*, 57 U. KAN. L. REV. 579, 603 (2009).

¹⁶¹ Rudesill, *supra* note 12, at 356; Morrison, *Constitutional Avoidance*, *supra* note 98, at 1237–39. The DOJ OLC Transparency Act does provide that if an OLC opinion contains classified information, the Attorney General shall “submit the full opinion, without redaction, to any Member of Congress and any appropriately cleared congressional staff member.” S. 3858 § 2(b)(3)(C).

¹⁶² Rudesill, *supra* note 12, at 326–27; Messinger, *supra* note 12, at 263.

¹⁶³ Rudesill, *supra* note 12, at 326.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 333.

¹⁶⁶ Rudesill, *supra* note 12, at 333.

¹⁶⁷ *Id.* At 284–85.

¹⁶⁸ Morrison, *Stare Decisis*, *supra* note 1, at 1519.

¹⁶⁹ Messinger, *supra* note 12, at 257–58; *see also* Morrison, *Stare Decisis*, *supra* note 1, at 1525.

more cohesive body of law and providing an incentive for the OLC not to overreach in their interpretation of the law.¹⁷⁰

Transparency reforms are often predicated on the idea that the public will act as an external enforcement mechanism and hold the OLC accountable to constitutional and social norms. Once the public is more aware of the issue of OLC secrecy, it may also demand additional reforms and provide the incentive that political representatives need to take meaningful steps toward secret law reform more generally. However, the DOJ OLC Transparency Act may only create the illusion of accountability. Not only are there many exceptions that can allow the government to hide secret interpretations of the law from the public view, but transparency itself may not enhance public accountability.

When the average citizen lacks awareness or motivation to pay attention to the OLC, transparency is not enough to create public oversight that would hold the OLC accountable.¹⁷¹ Professors Gregory Porumbescu, Marcia Grimes, and Stephan Grimmelikhuijsen have evaluated transparency through a behavioral lens and concluded that, under some theories of behavior, transparency can affect “citizens’ expectations of government performance,” which may “enhance accountability in a political system.”¹⁷² However, when governments enact transparency measures, the mere fact that the government has announced a transparency initiative “may positively effect citizens’ trust in government bodies, . . . and may [diminish] suspicions and citizens’ inclination to ask nasty questions.”¹⁷³ As such, if transparency measures are predicated on the assumption that the public will enforce accountability, the reality is that transparency may only result in the illusion of accountability.

While there might be merits to increased transparency, mere transparency does not go far enough to combat the wider, systemic problems of executive secrecy without an enforcement mechanism beyond public accountability.¹⁷⁴ In the proceeding subparts, I will discuss whether the judicial, legislative, and executive branches can provide effective oversight over the OLC.

2. Judicial Oversight and the Private Right of Action

Within the separation of powers framework, the judiciary could provide a crucial check on executive abuse of secrecy. However, attempts at judicial oversight of the OLC are often thwarted by claims of privilege and the political question doctrine.¹⁷⁵

¹⁷⁰ Morrison, *Stare Decisis*, *supra* note 1, at 1519.

¹⁷¹ See, e.g., Jeffrey J. Hardan & Justin H. Kirkland, *Does Transparency Inhibit Political Compromise?*, 65 AM. J. OF POL. SCI. 493, 497 (2021) (discussing the effect of transparency on state government deliberations and evaluating state “sunshine laws” to conclude that increased public transparency does not create political incentive for politicians to compromise).

¹⁷² Gregory A. Porumbescu, Marcia Grimes, & Stephan Grimmelikhuijsen, *Capturing the Social Relevance of Government Transparency and Accountability Using a Behavioral Lens*, 4 J. OF BEHAV. PUB. ADMIN. 1, 5 (2021).

¹⁷³ *Id.*

¹⁷⁴ Hafetz, *supra* note 12, at 2145; Janover, *supra* note 8, at 1621–24; Messinger, *supra* note 12, at 257–66.

¹⁷⁵ The judiciary is also not available to serve as an alternative to the OLC, because the court is not able to make determinations that amount to advisory opinions. See *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 409 (1792) (noting that the case could likely not proceed without adversarial parties because it would result in an advisory opinion).

The Supreme Court recently decided two cases related to the state secrets privilege. In these cases, the Court emphasized the high degree of deference that courts should afford to the executive branch when they claim that disclosure may harm national security.¹⁷⁶ The political question doctrine provides another obstacle to judicial review of executive secrecy. In *Al-Aulaqi v. Obama*, Shaykh Anwar al-Awlaki's father sought an injunction to prohibit the United States from killing his son in a drone strike in Yemen.¹⁷⁷ The executive's claim of authority for this action stemmed in part from the OLC 2010 Targeted Killing Memo.¹⁷⁸ The D.C. Circuit determined that the case was nonjusticiable on political question grounds, noting that the court lacked the necessary information and expertise of the executive branch to determine the issues presented.¹⁷⁹ The court also noted that it was improper for the judiciary to second-guess executive decisions, because it would amount to an infringement on a power textually committed to the political branches.¹⁸⁰ At the same time, the court "recognize[d] the somewhat unsettling nature of its conclusion" that the executive branch could make a unilateral decision to kill a United States citizen overseas, based in part on an undisclosed OLC memo, without judicial review.¹⁸¹

In a later case in the D.C. Circuit, the estates of Salem bin Ali Jaber and Waleed bin Ali Jaber sought a declaration that United States executive officials had violated the Torture Victims Prevention Act and customary international law by firing four Hellfire missiles in Yemen that killed Salem and Waleed.¹⁸² In her concurrence, Judge Janice Rogers Brown criticized the way in which the political question doctrine prevents federal courts from effectively supervising executive decisions that may have far-reaching implications. Judge Brown questions this barrier in her concurrence: "if judges will not check this outsized power, then who will?"¹⁸³ Accordingly, based on the court's response to claims of national security and privilege, the judiciary likely cannot provide adequate oversight to the OLC.

The DOJ OLC Transparency Act provides for a private right of action for petitioners to bring a complaint if they have been harmed as a result of deprived access to an OLC opinion that should have been made public.¹⁸⁴ If a case is brought before a court, the court will have de novo review over the matter and may examine the contents of the OLC opinion in camera to determine if any information within the opinion should be withheld under the classification standards of the Act and based on the Act's definition of a "final opinion."¹⁸⁵

However, plaintiffs would face difficulty proving that an OLC opinion should be disclosed because they will not have access to contents of the opinion and the Act's classification standards err in favor of redacting or classifying opinions whose information could risk national security. The political question doctrine addresses the difficulty that the judiciary has in evaluating when information may cause damage to national security.

¹⁷⁶ See *FBI v. Fazaga*, 142 S. Ct. 1051 (2022); *United States v. Zubaydah*, 142 S. Ct. 959, 967 (2022) ("In assessing the Government's claim [of state secrets,] courts must exercise . . . 'reluctan[ce] to intrude upon the authority of the Executive in military and national security affairs.'" (internal citations omitted)).

¹⁷⁷ *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 8 (D.D.C. 2010).

¹⁷⁸ See OLC 2010 Targeted Killing Memo, *supra* note 7.

¹⁷⁹ *Al-Aulaqi*, 727 F. Supp. at 50.

¹⁸⁰ *Id.* at 44–52.

¹⁸¹ *Id.* at 51.

¹⁸² *Ali Jaber v. United States*, 155 F. Supp. 3d 70, 70 (D.D.C. 2016).

¹⁸³ *Jaber v. United States*, 861 F.3d 241, 253 (D.C. Cir. 2017).

¹⁸⁴ DOJ OLC Transparency Act, S. 3858, 117th Cong. § 2(b)(5) (2022).

¹⁸⁵ S. 3858 § 2(b)(5)(B)(i)(I).

Additionally, in the state secrets privilege context, courts seem willing to defer heavily to executive claims of national security.

The Act does not do enough to hold the judiciary accountable to police the executive branch, especially because it leaves in camera review to the discretion of the court. At the very least, the Act should require in camera review of the contents of the OLC opinion at issue before a judge can decide that it should remain confidential to protect national security. The Act could be further improved by the clearer classification standards suggested by Goitein and by a more expansive definition of a “final opinion” requiring disclosure.

Most proposals for reform do not mention a potential role for the judiciary to oversee secret law. The way that courts respond to state secrets privilege and national security questions demonstrates that they are willing to defer heavily to the executive. However, when it comes to secret law, freedom of information, and potential abuse and erosion of the public trust, the judiciary could have a more active role in policing the executive branch.¹⁸⁶ If Congress created legislation to overcome the current judicial norm of deference in the face of privilege claims or the political question doctrine, the judiciary could provide more effective oversight over the OLC. However, the judiciary would be limited to reactive oversight in the form of lawsuits brought by injured individuals. Without proactive oversight to enforce OLC accountability to transparency and constitutional norms, the judiciary cannot serve as the sole oversight mechanism.

To paraphrase Judge Brown, if the judiciary branch cannot provide oversight to the OLC, which branch can? Some advocates for reform emphasize that the executive branch is in the best position to internally constrain the OLC, while others emphasize the need for more independent oversight of the OLC by the legislative branch.¹⁸⁷

3. Is Internal Oversight of the Office of Legal Counsel Enough?

Advocates for internal oversight in OLC reform base their claims on the “demise of congressional checking function.”¹⁸⁸ They argue that Congress cannot provide adequate oversight over the OLC because Congress lacks the supermajority necessary to override a presidential veto and pass legislation that grants them oversight power over the OLC.¹⁸⁹

¹⁸⁶ One more attenuated proposal to achieve judicial oversight over the executive would be to reform the states secret privilege. See State Secrets Protection Act of 2008, S. 2533, 110th Cong. (2008) (introduced in the Senate as an attempt to reform the states secret privilege). The state secrets privilege has been invoked in cases to prevent adjudication of claims regarding unlawful detention and treatment of detainees based on a need for secrecy in national security. John Ames, Note, *Secrets and Lies: Reynolds’ Potential Bar to Discovery and the Future of States Secret Privilege*, 39 N.C. J. INT’L L. & COM. REG. 1067, 1078–79, 1089 (2014). Stephen Vladek has argued that legislation that expressly authorizes damages actions in suits challenging targeted killing and other contested government conduct would be one way to chip away at the power of the state secrets privilege. Stephen I. Vladek, Response, *Targeted Killing and Judicial Review*, 82 GEO. WASH. L. REV. ARGUENDO 11, 23–24 (2014).

¹⁸⁷ See *supra* note 12 for a list of scholars that debate the efficacy of internal or external oversight to reform the OLC.

¹⁸⁸ Katyal, *supra* note 12, at 2320 (noting that, at the time the article was published, Congress had not passed legislation after the torture memos were leaked and is no longer able to veto particular agency actions because the legislative veto was declared unconstitutional by the Supreme Court).

¹⁸⁹ See *id.*; Janover, *supra* note 8, at 1606.

Additionally, advocates have argued that the current reporting requirements, internal executive oversight, and whistleblower leaks are enough to constrain executive secrecy.¹⁹⁰

The OLC Best Practices Memo provides for the OLC to maintain internal checks, including review of opinions by two Deputies.¹⁹¹ A renewed adherence to that policy could provide the oversight necessary to resolve the issues of OLC deference and create a sounder decision-making process. The American Constitution Society (ACS) has a similar proposal. ACS proposes a change to the OLC mission statement, updating the guidelines of analysis, updating its charter with a new understanding of separation of powers law, and reviewing unpublished OLC opinions with the new mission statement in mind.¹⁹² However, these suggestions rely on the individuals within the OLC to adhere to the Best Practices Memo without external accountability or incentives.

The problem with updating the internal code or mission statement is that the update relies on attorneys to act on a sense of obligation to the OLC and to the public, without a formal enforcement mechanism. When faced with the decision of whether to disclose or classify information, the practical harms that could result from disclosure will always outweigh more ephemeral concerns about democratic values and public accountability. An enforcement mechanism cannot be based on an assumed obligation to a set of values without external oversight or incentives to outweigh the practical interests in favor of secrecy.

For example, John Yoo and Jay Bybee, authors of the infamous torture memos, did not face consequences for their controversial and harmful memos. “Almost without exception, those who were most supportive of the use of torture were promoted and found further positions in government, academia, or think tanks.”¹⁹³ Jay Bybee became a federal judge in 2003,¹⁹⁴ and John Yoo returned to academia as a chaired professor at the University of California at Berkeley School of Law.¹⁹⁵ Professor David Pozen notes that dissenters in the Bush administration, though present, “had no power. They were bullied into submission or exiled.”¹⁹⁶ Johnsen points to dissenters in the Bush Administration to support her skepticism of executive oversight over the OLC and conclusion that “internal checks alone . . . are insufficient.”¹⁹⁷ As such, current internal accountability standards have established a regime that tells attorneys at the OLC that they will not face consequences for their individual actions. Without external oversight or incentives, it is unlikely that career-oriented lawyers within the executive branch could subvert pressure in favor of secrecy and deference.

To the contrary, Pozen asserts that Congress should not be able to constrain all secret presidential decision making.¹⁹⁸ Pozen argues for increasing measures that create “internal

¹⁹⁰ Rudesill, *supra* note 12, at 328–330.

¹⁹¹ OLC Best Practices Memo, *supra* note 20, at 3–4.

¹⁹² Press Release, Am. Const. Soc’y, Statement on the Office of Legal Counsel and the Rule of Law 1, 3–8 (Oct. 20, 2020) [hereinafter ACS Statement on OLC], <https://www.acslaw.org/wp-content/uploads/2020/10/OLC-ROL-Doc-103020.pdf> [<https://perma.cc/2BAH-QRKV>].

¹⁹³ Finkelstein & Painter, *supra* note 9, at 132.

¹⁹⁴ Biography of Judge Jay S. Bybee, FED. JUD. CTR., www.fjc.gov/history/judges/bybee-jay-s [<https://perma.cc/8SC7-XXU7>] (last visited Aug. 30, 2023).

¹⁹⁵ Faculty Profile for Professor John Yoo, BERKELEY LAW, www.law.berkeley.edu/our-faculty/faculty-profiles/john-yoo/ [<https://perma.cc/BX6J-84DE>] (last visited Aug. 30, 2023).

¹⁹⁶ Pozen, *supra* note 12, at 336.

¹⁹⁷ Johnsen, *supra* note 9, at 1564.

¹⁹⁸ Pozen, *supra* note 12, at 335.

friction, competition and overlap” to combat executive secrecy.¹⁹⁹ Similarly, Professor Neal Katyal recommends internal separation of powers to combat secret law, focusing on “bolster[ing] existing bureaucratic redundancy with legislation setting out inter-agency consultation requirement,” and enhancing the pay, status and employment protection of civil servants so they are not marginalized by political appointees.²⁰⁰ The Best Practices Memo recommends consulting with other members of the Department of Justice when time permits.²⁰¹ From a structural perspective, Professor Barry Sullivan suggests limiting the number of politically appointed deputies from four to one and recruiting experienced lawyers rather than politically ambitious young lawyers.²⁰² He advocates for term limits on officials in the OLC that run with the presidential administration and for-cause removal.²⁰³ One student also argues that Congress could incentivize independent judgement in the OLC by providing for for-cause removal for OLC attorneys.²⁰⁴ However, internal oversight will always implicate issues of political influence from the President, even with limitations on removal of OLC officers.

Without more expansive reform of executive norms, internal oversight of the OLC is inadequate. The executive allowed the OLC’s controversial memos from the Bush, Obama, and Trump Administrations to remain deep secrets for several years. The controversial memos did not surface until they were leaked by whistleblowers. As Rudesill notes, “leaks are no way to conduct oversight” because they are irrational, messy, and unpredictable.²⁰⁵

4. Proposed External Oversight Mechanisms for the Office of Legal Counsel

Those who are hesitant to accept the proposals for a self-regulating OLC have issued different recommendations for reform that focus on external oversight. Setty has expressed skepticism that the OLC can effectively self-regulate:

The politicization of the Office of Legal Counsel during the Bush administration, when combined with the predictable self-interest of any administration in not voluntarily disclosing its own legal policies, means that institutional steps must be taken to ensure greater transparency and adherence to the rule of law.²⁰⁶

Some scholars argue for traditional forms of congressional oversight. Goitein argues that Inspectors General (IGs) could be a possible solution to OLC secrecy.²⁰⁷ IGs could conduct continuous audits of classified OLC documents and adherence to publication standards. IGs would provide an additional level of independent oversight because IGs

¹⁹⁹ *Id.* at 334.

²⁰⁰ Katyal, *supra* note 12, at 2327, 2330–35.

²⁰¹ OLC Best Practices Memo, *supra* note 20, at 3.

²⁰² Sullivan, *supra* note 12, at 749.

²⁰³ *Id.* at 749–50; *see also* Kim, *supra* note 67, at 788 (proposing for-cause removal for appointed members of the OLC).

²⁰⁴ Kim, *supra* note 67, at 788–91.

²⁰⁵ Rudesill, *supra* note 12, at 334.

²⁰⁶ Setty, *supra* note 160, at 630.

²⁰⁷ GOITEIN, BRENNAN CTR. FOR JUST., *supra* note 36, at 67.

have a dual reporting responsibility to both the executive and Congress.²⁰⁸ Alternatively, one student argues that the Senate Judiciary Committee could provide oversight to the OLC.²⁰⁹ The Senate Judiciary Committee would be an oversight body independent from the executive, and the Committee already has the statutory and constitutional authority to regulate the DOJ.²¹⁰ Additionally, the Committee conducts oversight hearings over other areas of government and could adopt procedures from the Senate Intelligence Committee to respect national security concerns.²¹¹ However, these proposals would not bolster public transparency.

Other scholars argue for more significant restructuring of the OLC. Katyal would eliminate the OLC's adjudicatory responsibilities and create a new "Director of Adjudication" position to oversee interagency disputes to increase the adversarial nature of the OLC's role and the legitimacy of their conclusions.²¹² Ackerman would move the OLC's opinion writing practice to a "Supreme Executive Tribunal," an independent tribunal that is free to disagree with the President and develop a body of public legal doctrine.²¹³ Morrison similarly argues that OLC deference stems from a lack of adversary proceedings and could be remedied by various reform proposals, including his own proposal of a "civil liberties ombudsman" who would review draft opinions and offer comments on civil liberties issues that are implicated in OLC opinions.²¹⁴ Adopting Morrison's proposals could be a less radical means of achieving the same goals as Katyal and Ackerman.

Any of these reforms, in this Commenter's opinion, would serve as effective oversight mechanisms over the OLC because they would be independent from the executive branch and create incentives that counterbalance pressure on the OLC to defer to the President's positions. However, when faced with potential legislative reforms to government secrecy, scholars have raised serious concerns about whether legislative action will ever come to fruition. First, political representatives lack the incentive to address secret law because the voters will not reward them for reforming the OLC if they are not aware of the issues with secret law. Second, even Congressmembers that are motivated to provide oversight over the executive fail to pass legislative reforms due to the increased politicization of Congress and additional obstacles to passing legislation. Katyal notes that Congressmembers "do not even bother to check the President, knowing that a small cadre of loyalists in either House can block a bill."²¹⁵ "When the political branches are controlled by the same party, loyalty, discipline, and self-interest generally preclude interbranch checking."²¹⁶ If reforms "arrive in the form of a bill passed by Congress," they are likely to face a presidential veto.²¹⁷ As such, "Congress . . . can only do so much. If the keepers are determined to keep their secrets . . . there is not much the outsider can do."²¹⁸

²⁰⁸ *Id.*

²⁰⁹ Janover, *supra* note 8, at 1629.

²¹⁰ *Id.*

²¹¹ *Id.* at 1631–34.

²¹² Katyal, *supra* note 12, at 2337.

²¹³ ACKERMAN, *supra* note 12, at 141–46.

²¹⁴ Morrison, *Stare Decisis*, *supra* note 1, at 1523; *see also* Katyal, *supra* note 12, at 2347.

²¹⁵ Katyal, *supra* note 12, at 2320.

²¹⁶ *Id.* at 2321.

²¹⁷ Janover, *supra* note 8, at 1617.

²¹⁸ Pozen, *supra* note 12, at 337.

CONCLUSION

The erosion of publication norms and the commitment to secrecy that have occurred in the executive branch in the past fifty years are not easily overcome. In an ideal world, legal constraints and a shared commitment to government transparency would be enough to restore public trust in the government and overcome the OLC's problematic norms. The practical obstacles to reform suggest that combatting OLC secrecy and deference will not be so easy.

The DOJ OLC Transparency Act is insufficient to combat OLC secrecy and deference. The Act's definition of "final" OLC opinions is too limiting and allows documents that impact the executive's position on important civil liberties to remain secret. The Act would also not overcome the difficulty that plaintiffs already face when litigating for disclosure of those documents due to broad exemptions to FOIA that curtail the Act's reach.

The Act incorporates existing classification standards to determine what opinions or portions of opinions can be withheld from the public. Without additional classification standards and without providing for oversight and enforcement to ensure that the Attorney General is adhering to those standards, the OLC may still conceal more opinions than it discloses.

Transparency alone will not lead to adequate oversight over the OLC due to a disinterested public and a lack of incentive for the public to police the government. Even if transparency provides for public accountability as an enforcement mechanism against OLC secrecy and deference to the executive, it is not enough without additional oversight from an institutional body.

The judiciary is not able to provide adequate oversight due to prevailing norms of deference to the executive and because the Act does not require in camera review of disputed OLC opinions. Without real oversight and incentives or major reforms to the executive branch's internal functions, internal executive oversight over the OLC would also be inadequate. While external oversight mechanisms would provide the independence necessary to ensure that the OLC adheres to the DOJ OLC Transparency Act, attempts to implement external oversight will face political hurdles.

Given the present political climate, it is unlikely that Congress will be able to pass secrecy reform legislation and even less likely that Congress would be able to pass it with the supermajority necessary to overcome a presidential veto.²¹⁹ It may be that the only possible solution to reform secret law, though not supported by this Commenter, is fostering a culture of transparency within the executive itself, which would overcome some of the practical obstacles to instituting external oversight.

²²⁰ However, perhaps a future version of the DOJ OLC Transparency Act, or another legislative reform effort, will pass. While the DOJ OLC Transparency Act's provisions, as proposed in 2022, may not resolve all the outstanding issues with the OLC, achieving reform in transparency is preferable to the status quo. Future legislation could incorporate the proposals from this Comment to combat problematic norms in the Office of Legal Counsel.

²¹⁹ Janover, *supra* note 8, at 1606.

²²⁰ See Pozen, *supra* note 12, at 337.