

ONE HUNDRED ELEVENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
2157 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6143

Majority (202) 225-5051  
Minority (202) 225-5074

April 8, 2009

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Ave., NW  
Washington, DC 20530-0001

Dear General Holder:

The D.C. voting rights bill pending in Congress is unconstitutional. The Justice Department's Office of Legal Counsel (OLC) agrees and, according to last Wednesday's *Washington Post*, that office prepared a Memorandum setting forth the legal position that the bill does not pass Constitutional muster.<sup>1</sup>

Despite OLC's determination, according to the *Post*, you summarily rejected the legal conclusion that the D.C. voting rights bill is unconstitutional.<sup>2</sup> Apparently, because OLC did not support your political position on the bill, you sought a different view from lawyers in the Office of the Solicitor General. According to reports, those lawyers, while not disagreeing with OLC, concluded that **they could plausibly defend** the legislation. The *Washington Post* described your actions as follows: "Mr. Holder took the highly unusual step of seeking the views of his solicitor general's office, which is tasked with a very different mission than that of OLC."<sup>3</sup>

Your willingness to shop for the legal opinion you desire demonstrates questionable judgment and partisan political motivations. More concerning, however, is your willingness to unilaterally make Constitutional determinations that are adverse to the Justice Department lawyers charged with analyzing such questions. Your decision places partisan political motivations over the professional legal judgment of Justice Department lawyers.

The Office of Legal Counsel is not a marginal or unimportant office within the Justice Department. The *Washington Post* recently described OLC as "an elite section of the Justice

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<sup>1</sup> Carrie Johnson, *A Split At Justice On D.C. Vote Bill: Holder Overrode Ruling That Measure is Unconstitutional*, WASH. POST, Apr. 1, 2009, at A1.

<sup>2</sup> *Id.*

<sup>3</sup> Editorial, *A Constitutional Question*, WASH. POST, Apr. 5, 2009, at A18.

Department that is responsible for, among other things, reviewing pending legislation for constitutionality.”<sup>4</sup> Lawyers in this office are some of the most credentialed lawyers in America.<sup>5</sup> This office has an important function. According to the Department’s website:

[OLC] provides authoritative legal advice to the President and all the Executive Branch agencies. The Office drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the Executive Branch, and offices within the Department . . . . The Office also is responsible for providing legal advice to the Executive Branch on all constitutional questions and reviewing pending legislation for constitutionality.<sup>6</sup>

At your confirmation hearing, you criticized previous instances of the Justice Department foregoing sound legal reasoning for political gain.<sup>7</sup> Ironically, for the last several years, one of the popular rallying cries of Congressional Democrats was the so- called politicization of the Department of Justice. The OLC, under the Bush administration, drew partisan criticism for crafting its opinions “to fit the views of superiors in the White House.”<sup>8</sup> Former Attorney General Alberto Gonzales was criticized for authorizing “hundreds of Justice Department employees to speak with White House and congressional personnel about pending investigations.”<sup>9</sup> Democrats also criticized Gonzales for removing United States attorneys from office based on improper partisan political considerations.<sup>10</sup> Former OLC official John Yoo was claimed to have crafted legal opinions “that were politically or operationally useful to the Administration but which were not legally sound.”<sup>11</sup> Critics of the previous Administration argued that politicization cripples the Justice department and described the department under the Bush administration as embracing a “culture of partisanship and loyalty above all.”<sup>12</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> See generally Mary Beth Sheridan and Nikita Stewart, *D.C. Vote Backers Unfazed By Opinion: Agency Called Bill Unconstitutional*, WASH. POST, Apr. 2, 2009, at B1; Neil A. Lewis, *Storm Clouds Gather Over Obama Nominees*, N.Y. TIMES, Mar. 31, 2009; Paul Richter, *Human Rights advocated named State Department’s top lawyer*, L.A. TIMES, Mar. 25, 2009; Briefing Room – White House Office of the Press Secretary, *Obama Announces Key Additions to the Office of the White House Counsel*, [http://www.whitehouse.gov/the\\_press\\_office/ObamaAnnouncesKeyAdditionstotheOfficeoftheWhiteHouseCounsel/](http://www.whitehouse.gov/the_press_office/ObamaAnnouncesKeyAdditionstotheOfficeoftheWhiteHouseCounsel/) (last visited Apr. 2, 2009).

<sup>6</sup> United States Department of Justice, Office of Legal Counsel, <http://www.usdoj.gov/olc/> (last visited Apr. 2, 2009).

<sup>7</sup> Opening Statement before the Senate, January 15, 2009 Confirmation hearings, <http://www.npr.org/templates/story/story.php?storyId=99390658> (last visited Apr. 2, 2009) [hereinafter *Opening Statement*].

<sup>8</sup> *Id.*

<sup>9</sup> Editorial, *Justice on the Mend; The new attorney general’s first steps are encouraging*. WASH. POST, Dec. 3, 2007, at A16.

<sup>10</sup> Majority Staff Report to Chairman John Conyers, Jr., H. Comm. on the Judiciary, *Reining In The Imperial Presidency: Lessons and Recommendations Relating to the Presidency of George W. Bush 63* (2009), <http://judiciary.house.gov/hearings/printers/110th/IPres090113.pdf> [hereinafter *House Judiciary Report*].

<sup>11</sup> *House Judiciary Report*, *supra* note 10, at 276.

<sup>12</sup> David Iglesias, *Correcting An Injustice*, BALT. SUN, Oct. 6, 2008, at 17A.

At your confirmation hearing, you stated your desire to ensure “that what we have seen in the recent past is not replicated.”<sup>13</sup> In your opening statement you pledged, “I will work to restore the credibility of a department badly shaken by allegations of improper political interference.”<sup>14</sup>

It is the OLC’s opinion that the D.C. voting rights bill is unconstitutional and yet you have ignored their legal reasoning and judgment. You have taken the first step down the slippery slope of politicization.

At your confirmation hearing you signaled the need to put politics aside and the need for transparency within the Department of Justice. President Obama has consistently avowed his desire for openness and transparency.<sup>15</sup> In a Memorandum for the Heads of Executive Departments and Agencies, the President stated:

**My Administration is committed to creating an unprecedented level of openness in Government. We will** work together to ensure the public trust and **establish a system of transparency**, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government.

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**Government should be transparent. Transparency promotes accountability and provides information for citizens about what their Government is doing.** Information maintained by the Federal Government is a national asset. **My Administration will** take appropriate action, consistent with law and policy, to **disclose information rapidly** in forms that the public can readily find and use. Executive departments and agencies should harness new technologies to put information about their operations and decisions online and readily available to the public. Executive departments and agencies should also solicit public feedback to identify information of greatest use to the public.<sup>16</sup>

Several former OLC attorneys have acknowledged that “non-classified opinions should be publically disclosed as appropriate.”<sup>17</sup> The OLC website contains a “best practices memo”

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<sup>13</sup> Carrie Johnson, *Live from the Holder confirmation hearing*, WASH. POST, Jan. 15, 2009, [http://voices.washingtonpost.com/44/2009/01/15/live\\_from\\_the\\_holder\\_hearing.html](http://voices.washingtonpost.com/44/2009/01/15/live_from_the_holder_hearing.html).

<sup>14</sup> *Opening Statement*, *supra* note 7.

<sup>15</sup> Dan Froomkin, *Bush's End Days*, Wash. Post., Jan. 9, 2009, [http://www.washingtonpost.com/wp-dyn/content/blog/2009/01/09/BL2009010901844\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/blog/2009/01/09/BL2009010901844_pf.html)

<sup>16</sup> The President, Memorandum for the Heads of Executive Departments and Agencies, Subject: Transparency and Open Government, Jan. 21, 2009, [http://www.whitehouse.gov/the\\_press\\_office/Transparency\\_and\\_Open\\_Government/](http://www.whitehouse.gov/the_press_office/Transparency_and_Open_Government/) (emphasis added).

<sup>17</sup> *House Judiciary Report*, *supra* note 10, at 276.

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recommending that OLC opinions be presented for public comments.<sup>18</sup> Moreover, according to Friday's *Post*, OLC opinions are considered final when signed.<sup>19</sup> David Barron, OLC's acting chief, signed the Memorandum.<sup>20</sup>

The troubling nature of your actions was recently the subject of a Washington Post editorial which observed:

The attorney general is the ultimate decision maker at the Justice Department and as such is entitled to overrule opinions from the OLC. **But such rejections should be based on well-thought-out differences of legal opinion and not on political preferences. Unfortunately, Mr. Holder's highly unusual solicitation of the solicitor general's office raises questions about what drove his actions.** To dispel any concerns, Mr. Holder should order the release of all memos from the two offices on this subject and make his own views public as well.<sup>21</sup>

In order to better understand your decision, and the legal reasoning behind your seemingly haphazard decision to reject the Office of Legal Counsel's reasoning that the D.C. voting rights is unconstitutional, please produce any memoranda prepared by OLC and the Solicitor General regarding the constitutionality of the D.C. voting rights bill. If you refuse to provide their opinions, please provide us with a detailed explanation for your decision.

The Committee on Oversight and Government Reform is the principal oversight committee in the House of Representatives and has broad oversight jurisdiction as set forth in House Rule X.

We look forward to your response on or before April 21, 2009. Thank you for your attention to this matter.

Sincerely,



Darrell Issa  
Ranking Member

cc: Chairman Edolphus Towns

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<sup>18</sup> Steven G. Bradbury, *Memorandum for Attorneys of the Office*, at 4 (2005), <http://www.usdoj.gov/olc/best-practices-memo.pdf> ("In some cases, the President . . . may have a programmatic interest in putting . . . Congress, or the public on notice of the legal conclusion reached by OLC and the supporting reasoning").

<sup>19</sup> Carrie Johnson, *D.C. Vote Memo Called Informal*, WASH. POST, Apr. 3, 2009, at A3.

<sup>20</sup> *Id.*

<sup>21</sup> Editorial, *A Constitutional Question*, WASH. POST, Apr. 5, 2009, at A18 (emphasis added).