IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN FOR ACCOUNTABILITY, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	No. 1:16-cv-1068 (KBJ)

NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiff Campaign for Accountability submits this notice of supplemental authority to call the Court's attention to a recent public statement by Attorney General William Barr describing the self-effectuating nature of formal opinions written by the Office of Legal Counsel ("OLC"). The Attorney General's statement is relevant to a key question in this case: whether formal written OLC opinions have operative effect as soon as they are issued.

On August 26, 2019, then–Inspector General of the Intelligence Community ("ICIG") Michael Atkinson forwarded a whistleblower complaint to Joseph Maguire, the Acting Director of National Intelligence. The Office of the Director of National Intelligence ("ODNI") then sought an OLC opinion on whether Mr. Maguire was required by statute to transmit the complaint to Congress—that is, whether he had a non-discretionary legal obligation under 50 U.S.C. § 3033(k)(5)(C). *See* Letter from Jason Klitenic, Gen. Counsel, ODNI, to Sen. Richard Burr, Sen. Mark Warner, Rep. Adam Schiff & Rep. Devin Nunes 2 (Sept. 13, 2019), https://perma.cc/QQ53-VDJF.

On September 3, 2019, the OLC issued a formal written opinion concluding that "the statute does not require the Director to transmit the complaint to the congressional intelligence

committees," explaining that "the appropriate action is to refer the matter to the Department of Justice, rather than to report to the intelligence committees under section 3033(k)(5)." *See "Urgent Concern" Determination by the Inspector General of the Intelligence Community*, 43 Op. O.L.C. __ (Sept. 3, 2019). Mr. Atkinson nonetheless informed members of a congressional intelligence committee of the existence of the complaint. *See* Letter from Michael K. Atkinson, ICIG, to Reps. Adam Schiff & Devin Nunes 2 (Sept. 9, 2019), https://perma.cc/S6J9-XSJ9. Mr. Atkinson was subsequently removed from his position as Inspector General.

During an April 9 television interview, Attorney General Barr discussed this incident and the dismissal of Mr. Atkinson. The Attorney General explained that Mr. Atkinson had misinterpreted his statutory obligations and "was told this in a letter from the Department of Justice," referring to the September 3, 2019 OLC opinion. Fox News, *AG Barr: We Must Stop Cartels from Taking Advantage of US During Pandemic*, YouTube (Apr. 9, 2020), https://www.youtube.com/watch?v=asLCEg4Ik7E, at 3:14–3:58. Attorney General Barr continued that "[Atkinson] is *obliged to follow the interpretation of the Department of Justice*, and he ignored it, so I think the President was correct in firing him." *Id.* (emphasis added).

Attorney General Barr's explanation confirms that formal written OLC opinions issued to establish the law prospectively have operative effect upon issuance and do not derive their force from subsequent agency action. Moreover, this opinion—which falls into Plaintiff's second category of opinions that constitute working law, those interpreting non-discretionary legal obligations—clearly "d[id] not offer advice but compel[led] conduct with the 'force and effect of law.'" Pl.'s MTD Opp., ECF No. 30, at 34 (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975)); *see also id.* ("When an agency is under a non-discretionary obligation to comply with some legal authority, and the OLC conclusively interprets that legal authority, the OLC's opinion

directly determines how an agency *must act*."). Mr. Atkinson, an Executive Branch employee, was "obliged to follow" the OLC's interpretation and, according to Attorney General Barr, was fired for failing to do so.

The Attorney General's description of the immediate operative effect of formal OLC opinions, underscored by the consequences of non-compliance in this particular instance, confirms that the OLC's formal written opinions constitute working law and must be disclosed.

Dated: May 8, 2020

Respectfully submitted,

/s/ *Anna Diakun*

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