2012

Reforming Lawyers into Irrelevance?: Reconciling Crisis and Constraint at the Office of Legal Counsel

Peter Margulies
Roger Williams University School of Law

Recommended Citation

Peter Margulies, Reforming Lawyers into Irrelevance: Reconciling Crisis and Constraint at the Office of Legal Counsel, 39 Pepp. L. Rev. 809, 864 (2012)

Reforming Lawyers into Irrelevance?: Reconciling Crisis and Constraint at the Office of Legal Counsel

Peter Margulies*

* Professor of Law, Roger Williams University. I thank Trevor Morrison and participants at presentations at the Law and Society Association Annual Meeting in Chicago, Illinois and the Stanford International Legal Ethics Conference for comments on prior drafts.

I. INTRODUCTION

If the President makes decisions by default on national security, the President's only judges are the lawyers who provide the President with advice.[1] Because of threshold doctrines such as standing and political questions, courts often do not encounter the most difficult and important questions.[2] Moreover, the President and Congress often develop a course of dealing over time that settles the distribution of power between them.[3] By standing in for courts and interpreting both case law and the political branches' course of dealing, few lawyers practice with higher stakes than those at the Justice Department's elite Office of Legal Counsel (OLC).[4] However, because of the stilted advice of OLC staffers in the eighteen months after the September 11 attacks, few lawyers have received as much criticism.[5]

A broad consensus has developed that the lawyers who provided President Bush with legal advice in the aftermath of September 11 did not

---

1. *See* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1460–68 (2010) [hereinafter Morrison, *Stare Decisis in OLC*] (discussing particular features of OLC).

2. *See id.* at 1480 n.132 (noting threshold doctrines of standing, ripeness, and mootness, which limit adjudication on the merits).

3. *See* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President . . . .").

4. *See* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 71–98 (2007); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007); Morrison, *Stare Decisis in OLC*, *supra* note 1, at 1458–70; Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005); *see also* John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 407–19 (1993) (discussing the history of Attorney General opinions and OLC).

5. *See, e.g.*, W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 80–85 (2005) (arguing that OLC lawyers contravened a settled public understanding regarding interrogation).

adequately consider the special responsibilities they had assumed.[6] In authorizing coercive interrogation techniques[7] and a broad program of warrantless surveillance without securing congressional approval,[8] these lawyers allowed the President to operate with minimal accountability and set the stage for a pushback from Congress,[9] the courts,[10] and global public opinion.[11] Although more conscientious Bush Administration lawyers withdrew some of the more sweeping memos after the initial period[12] and the Obama Administration has repudiated the rest,[13] the question of who controls legal advice to the President continues to spur controversy.

6. For a discerning account by the lawyer and academic who withdrew a number of the opinions generated in those early days, see GOLDSMITH, *supra* note 4. For other critical commentary, see BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 95–110 (2010); HAROLD H. BRUFF, BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR (2009); DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 162, 176–80, 200–02 (2007); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SECURITY L. & POL'Y 455 (2005); Stephen Gillers, *Legal Ethics: A Debate*, *in* THE TORTURE DEBATE IN AMERICA 236, 237–38 (Karen J. Greenberg ed., 2006); Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1 (2008) [hereinafter Margulies, *True Believers*]; Wendel, *supra* note 5; Fred C. Zacharias, *Practice, Theory, and the War on Terror*, 59 EMORY L.J. 333, 338–48 (2009); *cf.* Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1975–76 (2008) [hereinafter Spaulding, *Professional Independence*] (arguing that the problems with OLC advice stemmed from ideological allegiances of lawyers, not from timidity on the lawyers' part).

7. *See* Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter Bybee Memo].

8. *See* GABRIELLA BLUM & PHILIP B. HEYMANN, LAWS, OUTLAWS AND TERRORISTS: LESSONS FROM THE WAR ON TERRORISM 54–56 (2010).

9. *See* CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 220–23 (2007) (discussing the McCain Amendment, which barred torture by the United States military).

10. *See* PETER MARGULIES, LAW'S DETOUR: JUSTICE DISPLACED IN THE BUSH ADMINISTRATION 56–57 (2010). Initial revelations about abuses at Abu Ghraib were made on the same day as oral argument in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), in which counsel for the government had assured Justices that the government did not engage in torture. MARGULIES, *supra*, at 56–57. The Court shortly thereafter required due process safeguards for detention of suspected terrorists. *Id.*

11. *See* José E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175, 215–21 (2006).

12. *See* GOLDSMITH, *supra* note 4, at 142–62.

13. *See* Memorandum from David J. Barron, Acting Assistant Att'y Gen., *Withdrawal of Office of Legal Counsel CIA Interrogation Opinions* (Apr. 15, 2009), *available at* http://www.justice.gov/olc/2009/withdrawalofficelegalcounsel.pdf.

Commentators debate the appropriateness of sanctions for OLC lawyers[14] and the design and substantive mandate of OLC.

The imposition of legal sanctions on John Yoo, the Berkeley law professor who, as an OLC lawyer, authored the most controversial opinions, remains unsettled. The Obama Administration completed an extensive review of Yoo's work by overruling a recommendation by one unit within the Justice Department, the Office of Professional Responsibility, to refer Yoo's case to state ethics regulators for disciplinary action such as suspension or disbarment.[15] However, a *Bivens* suit that seeks damages against Yoo remains alive in federal court.[16]

In addition, a substantial number of proposals have emerged for reforming OLC and Executive Branch legal advice. Some of these proposals, such as Bruce Ackerman's recent call for a "Supreme Executive Tribunal,"[17] would change OLC's structure to ensure the independence of the advice received. Others seek to enhance deliberation within OLC by

---

14. *See* David D. Cole, *The Sacrificial Yoo: Accounting for Torture in the OPR Report*, 4 J. NAT'L SECURITY L. & POL'Y 455, 463 (2010) (calling for government commission); Claire Finkelstein, *When Government Lawyers Break the Law: The Case for Prosecution*, 158 U. PA. L. REV. PENNUMBRA 196 (2010), *available at* http://www.pennumbra.com/debates/pdfs/AuthorizingTorture.pdf (arguing for criminal prosecution); *cf.* George D. Brown, *Accountability, Liability, and the War on Terror—Constitutional Tort Suits as Truth and Reconciliation Vehicles*, 63 FLA. L. REV. 193, 234–37 (2011) (warning of unintended consequences of truth commissions and tort liability); Stephen I. Vladeck, *Justice Jackson, the Memory of Internment, and the Rule of Law After the Bush Administration*, *in* WHEN GOVERNMENTS BREAK THE LAW: THE RULE OF LAW AND THE PROSECUTION OF THE BUSH ADMINISTRATION 183, 201–06 (Austin Sarat & Nasser Hussain eds., 2010) (discussing the appropriateness of formal versus informal sanctions).

15. *See* Office of Prof'l Responsibility, U.S. Dep't of Justice, Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists (July 29, 2009) [hereinafter OPR Report], *available at* http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf (recommendation referring Yoo to state regulatory authorities); David Margolis, Assoc. Deputy Att'y Gen., Memorandum for the Attorney General (Jan. 5, 2010), at 67 [hereinafter DOJ Final Report], *available at* http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf (rejecting OPR's recommendation regarding Yoo).

16. *See* Padilla v. Yoo, 633 F. Supp. 2d 1005, 1031 (N.D. Cal. 2009) (holding that Yoo's claim of qualified immunity did not require dismissal of lawsuit).

17. *See* ACKERMAN, *supra* note 6, at 143–50 (calling for the establishment of a "Supreme Executive Tribunal"); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2336–40 (2006) [hereinafter Katyal, *Internal Separation of Powers*] (proposing a quasi-adjudicative body as a replacement for OLC); Norman W. Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 STAN. L. REV. 409, 435–39 (2011) [hereinafter Spaulding, *Independence and Experimentalism*] (suggesting that Congress restrict the President's power to fire the OLC supervisor); *see also* Bruce Ackerman, *Lost Inside the Beltway: A Reply to Professor Morrison*, 124 HARV. L. REV. F. 13 (2011) (responding to Morrison's critique of proposals); *cf.* Pillard, *supra* note 4, at 748–58 (discussing other structural reforms at OLC, including a role for the Justice Department's Office of the Inspector General); Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 896–909 (2007) [hereinafter Posner & Vermeule, *The Credible Executive*] (criticizing Katyal's model as utopian, but suggesting pragmatic substitutes such as bipartisan appointments).

requiring consideration of opposing views[18] and outlining a regime of stare decisis for OLC advice.[19] Still others aim for substantive guidance, arguing that OLC lawyers should adhere to "mainstream" legal interpretations,[20] but suggesting that the President has the power to disregard such advice in demonstrably exigent situations.[21] Another cohort highlights more informal modes of accountability, such as disclosure,[22] that will allow Congress and the public to appreciate the reasoning of Executive Branch lawyers.

This Article critiques such proposals, arguing that both formal sanctions and structural reform yield unintended consequences. One problem is that commentators proposing reforms fight the last war.[23] They recite a monolithic narrative that focuses on the dangers of executive overreaching, but often exchange one species of myopia for another.[24] Because of the tenor of Bush Administration policy, critics neglect the far more varied trajectory of executive power over time.[25]

The Bush Administration presents a simple case for critics of executive power. President Bush and Vice President Cheney were confirmed unilateralists, rending the fabric of separation of powers by refusing to consult Congress.[26] Moreover, on an issue such as coercive interrogation, Bush Administration officials used that power to reduce human rights and civil liberties here and abroad.[27] However, prior Administrations have taken actions that interact in a more complex way with both the separation of

18. *See* Johnsen, *supra* note 4.

19. *See* Morrison, *Stare Decisis in OLC*, *supra* note 1.

20. *See* BLUM & HEYMANN, *supra* note 8, at 54–56 (arguing that OLC must provide opinions within the legal "mainstream").

21. *Id.* at 55 (invoking the example of Jefferson and Lincoln); Gabriella Blum, *The Role of the Client: The President's Role in Government Lawyering*, 32 B.C. INT'L & COMP. L. REV. 275, 281 (2009) (arguing that the executive must assume responsibility for doing what is right even if her lawyers disagree); *cf.* OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 123–27 (2006) (analyzing Jefferson's view as a rationale for "extra-legal" action by the President); Oren Gross, *Chaos and Rules: Should Responses to Violent Crisis Always Be Constitutional?*, 112 YALE L.J. 1011, 1099–109 (2003) (same). For further discussion of Gross's view, see Noa Ben-Asher, *Legalism and Decisionism in Crisis*, 71 OHIO ST. L.J. 699, 714–15 (2010).

22. Gross, *supra* note 21, at 1099–109; 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, 602–05 (2009).

23. *See infra* Part III.

24. *See infra* Part III.

25. *See infra* Part III.

26. *See* MARGULIES, *supra* note 10, at 8–10.

27. *See* Setty, *supra* note 22, at 589–94.

powers and the framework of human rights.[28] Prior to America's entry into World War II, for example, then-Attorney General Robert Jackson authorized the destroyer deal, which aided Britain in its lonely fight against Nazi Germany.[29] Jackson's interpretive style in the opinion foreshadowed John Yoo's by straining statutes to the breaking point.[30] However, Jackson's advice was part of a public debate that led, within months, to the Lend Lease Act, which codified aid to Britain.[31] Moreover, the substance of Jackson's advice also invoked a post-war international order with greater protections against aggression and genocide.[32] More recently, President Clinton exercised power to promote human rights, through the NATO intervention in Kosovo.[33] Clinton's unilateralism may have been as deplorable as Bush's; or it could have been commendable on its own terms, but worth curbing to protect the separation of powers. However, critics of the Bush-era OLC rarely even consider such questions.[34]

Problems await any response to the excesses of the Bush Administration OLC. As critics of the Bush Administration have noted, an absence of sanctions risks impunity for official overreaching and discourages officials from crafting more tempered alternatives.[35] However, formal legal sanctions, such as disbarment or damages, also create problems. Formal legal sanctions can trigger procedural injustices, such as a lack of notice, that a nation guided by the rule of law should prevent.[36] Sanctions and structural reforms can crowd out courses of dealing between the political branches that have traditionally promoted flexibility in foreign and domestic affairs.[37] Finally, constraining OLC can also increase polarization, as a President inclined toward unilateralism bypasses OLC altogether and seeks advice from other government lawyers without OLC's pedigree of balance and discernment.[38]

---

28. *See infra* notes 295–314 and accompanying text.

29. *See* Acquisition of Naval & Air Bases in Exch. for Over-Age Destroyers, 39 Op. Att'y Gen. 484, 486–88 (1940) [hereinafter Jackson op.]; *cf.* ROBERT H. JACKSON, THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT 93–103 (John Q. Barrett ed., 2003) (discussing the context of the destroyer deal).

30. *See* Jackson op., *supra* note 29, at 494–96 (interpreting very narrowly a statute making it unlawful for the United States to send any vessel of war to a belligerent nation).

31. *See* An Act to Promote the Defense of the United States (Lend-Lease Act), Pub. L. No. 77-11, § 3(b), 55 Stat. 31, 32 (1941).

32. *See* Jonathan A. Bush, *"The Supreme . . . Crime" and its Origins: The Lost Legislative History of the Crime of Aggressive War*, 102 COLUM. L. REV. 2324, 2365–66 (2002).

33. *See* LOUIS HENKIN ET AL., HUMAN RIGHTS 548–49 (2d ed. 2009).

34. *See infra* Part III.A.2.

35. *See infra* Part II.A.

36. *See infra* Part II.B.

37. *See infra* Part II.C.

38. *See infra* Part II.D.

To avoid these problems, reform should center on maintaining an ethic of dialogic equipoise.[39] All lawyers need to maintain a balance between serving a client and preserving the integrity of the legal system.[40] Lawyers in the Executive Branch face the same challenge.[41] If they unduly discount the interests of the President, they risk being cut out of the loop.[42] Cumbersome adjudicative models have this failing—the President can leave the structure unused, like a stately mansion which no one can afford to maintain.[43] However, a failure to situate the President in the overall constitutional fabric can render the President's initiatives unsustainable.[44] For this precarious balance to work, lawyers need to encourage dialog within the Executive Branch, among the other branches, and with the public.[45]

Dialogic equipoise entails four factors for OLC opinions that expand presidential power. First, the action authorized must have a compelling sovereignty- or human rights-centered rationale that prevents irreparable harm or exploits a fleeting opportunity.[46] Second, the action must present a reasonable likelihood of ratification by Congress.[47] Third, the action cannot violate any other constitutional norms, such as those found in the Bill of Rights or the Equal Protection Clause.[48] Fourth, and most controversially, advice authorizing an expansive view of presidential power must fit within a numerical cap that budgets OLC's institutional capital.[49]

This Article is divided into five parts. Part II, which addresses the risks and benefits of reform strategies, suggests that overly timid reforms risk a climate of impunity, while heedless or hasty reforms can upset reliance interests and yield paralysis or polarization.[50] Part III focuses on the OLC interrogation opinions and discusses the virtues and vices of formal sanctions like disbarment and damages.[51] It concludes that while OLC's opinions richly merit condemnation, formal sanctions would violate principles of notice and discount a history of aggressive interpretation that

39. *See* Margulies, *True Believers*, *supra* note 6, at 66–67.
40. *See id.*
41. *See id.* at 66.
42. *See id.*
43. *See infra* text accompanying notes 199–203.
44. *See infra* notes 189–96 and accompanying text.
45. *See* Margulies, *True Believers*, *supra* note 6, at 67.
46. *See infra* Part VI.A.
47. *See infra* pp. 853–54.
48. *See infra* note 294 and accompanying text.
49. *See infra* Part VI.C.
50. *See infra* Part II.
51. *See infra* Part III.

dates back to the Founding Era. Part IV analyzes structural fixes for OLC, including Ackerman's Supreme Executive Tribunal.[52] It pinpoints the constitutional and policy problems of structural reforms, which combine the disadvantages of courts and executive departments. Part V, which traces substantive and deliberative reforms, argues that requiring a purely objective analysis unaffected by Executive Branch interests produces unduly rigid legal advice.[53] Deliberative reforms, such as a commitment to disclosure, consultation with other government agencies, and stare decisis, are more promising. Finally, Part VI advances a model of dialogic equipoise that husbands OLC's institutional capital and elicits executive decisions that are both disciplined and effective.[54]

II. REFORM'S RISKS AND REWARDS

Any effort to move beyond institutional failures such as the OLC memos on interrogation entails several risks. The absence of sanctions can embolden future Executives to overreach.[55] However, an eagerness to impose sanctions can vitiate procedural justice.[56] Sanctions and structural reforms can induce paralysis or even prompt polarization.[57] Workable reforms must navigate through these obstacles.

A. The Hazards of Impunity

Failed or timid reform can foster a climate of impunity which attaches no cost to former officials' overreaching. This can send the unhealthy message that overreaching is regrettable but that officials need not go out of their way to avoid it. In *Ashcroft v. Iqbal*,[58] for example, the Court held that senior federal officials could not be liable for failing to properly supervise subordinates who engaged in abuse of post-9/11 immigration detainees,[59]

52. *See infra* Part IV.
53. *See infra* Part V.
54. *See infra* Part VI.
55. *See infra* Part II.A.
56. *See infra* Part II.B.
57. *See infra* Part II.C–D.
58. 129 S. Ct. 1937, 1954 (2009).
59. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS, 10–17 (2003), http://usdoj.gov/oig/special/0306/full.pdf [hereinafter OIG Sept. 11 Report]. The claims in the case arose from a roundup that targeted undocumented aliens from the Middle East and South Asia. *See id.* For a discussion of profiling and counterterrorism policy, see DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR 30–31 (2007) (discussing the post-9/11 roundup); MARGULIES, *supra* note 10, at 28–30. *Cf.* Stephen J. Ellmann, *Racial Profiling and Terrorism*, 46 N.Y.L. SCH. L. REV. 675 (2002–2003) (discussing profiling techniques).

even if the defendants knew of the abuse.[60] In his opinion for the majority, Justice Kennedy described the roundup of undocumented Muslim noncitizens after September 11 as a "legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks."[61] The government's own report portrayed the roundup as far more chaotic, characterized by wholesale arrests of undocumented aliens with no demonstrable connection to terrorism.[62] However, the tangled doctrinal basis for the Court's holding, which conflated supervisory and respondeat superior liability,[63] demonstrated that the Court was unduly eager to insulate Executive Branch officials from the foreseeable consequences of their actions.

B. Procedural Injustice and the Rule of Law

Procedural injustice is another risk of transitions. Many transitions from overreaching crystallize understandings about what constitutes illegal conduct.[64] Prior to that crystallization, however, ambiguity surrounds the relevant law.[65] Interpretations of the law that resolve ambiguity in favor of a defendant uphold the "fundamental principle" of legality: "[N]o citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed."[66]

60. *See Iqbal*, 129 S. Ct. at 1952 (finding that officials "cannot be held liable unless they themselves acted *on account of* a constitutionally protected characteristic" (emphasis added)).

61. *Id.* at 1951.

62. *See* OIG Sept. 11 Report, *supra* note 59, at 16–17 (reporting that agents received over 96,000 leads, including one asserting only that the target worked in a grocery store "'operated by numerous Middle Eastern men'").

63. *Iqbal*, 129 S. Ct. at 1949 (asserting that the case was governed by the principle that, in lawsuits seeking damages for constitutional violations, "masters [should] not answer for the torts of their servants"). However, the supervisory liability theory advanced by the *Iqbal* plaintiffs required a showing of recklessness by those in charge. *Id.* at 1952. In contrast, under respondeat superior, even non-negligent principals are liable for their agents' torts. *Id.* at 1958 (Souter, J., dissenting) (citing RESTATEMENT (THIRD) OF AGENCY § 2.04 (2005)). Appellate courts had repeatedly held that supervisory recklessness could trigger liability. *See* Int'l Action Ctr. v. United States, 365 F.3d 20, 28 (D.C. Cir. 2004) ("'The supervisor[] must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see.'" (quoting Jones v. City of Chi., 856 F.2d 985, 992 (7th Cir. 1988))).

64. *See* Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 791–800 (2004) [hereinafter Posner & Vermeule, *Transitional Justice*] (discussing retroactive justice after regime changes, and the procedural legality of punishing the old regime under the new regime's laws).

65. *See id.*

66. United States v. Santos, 553 U.S. 507, 514 (2008). International law has traditionally attached great importance to legality as a principle. *See* DAVID LUBAN, JULIE R. O'SULLIVAN &

Unfortunately, fair notice is often a casualty of the popular outcry for punishment of officials who have allegedly overreached.[67] Overreaching officials' eager embrace of procedural rights that they blithely deny others deserves a chapter all of its own in the annals of legal irony.[68] However, procedural rights do not merely benefit those who invoke them. Like other measures that we can justify on rule-utilitarian grounds, they benefit society, even when the case for exceptions seems compelling.[69] As Hamilton noted, the prospect of judicial enforcement of rights prompts emerging majorities and their representatives to "qualify their attempts" at shortcuts around the rule of law.[70] Ignoring notice undermines this salutary check, even when poetic justice identifies sanctions' targets.

C. Reform and Paralysis

Another problem is paralysis. Hindsight bias makes it easy to second-guess officials for actions that may seem hasty or shortsighted from the convenient perch of retrospect, but were in fact difficult decisions made with a sparse menu of options.[71] Officials fearful of subsequent second-guessing may become unduly risk averse, taking no action when action is needed.[72]

Because of the need to avoid paralysis in national security matters, informal courses of dealing between the branches have often been substituted for more formal sources of authority. Justice Jackson noted in *Youngstown Sheet & Tube Co. v. Sawyer* that "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter,

---

DAVID P. STEWART, INTERNATIONAL AND CRIMINAL LAW 14–15 (2010) (discussing legal principles requiring fair notice that conduct violates the law).

67. *See* Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545, 616–17 (1998) (discussing problems with notice in genocide prosecutions).

68. *See* Stephen Holmes, *The Spider's Web: How Government Lawbreakers Routinely Elude the Law*, *in* WHEN GOVERNMENTS BREAK THE LAW: THE RULE OF LAW AND THE PROSECUTION OF THE BUSH ADMINISTRATION 121, 141 (Austin Sarat & Nasser Hussain eds., 2010) (describing this tendency as "irritating").

69. *See* Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2022–23 (1997) (addressing the need for justice and fairness to establish equality under the law, even if some criminals go unpunished).

70. *See* THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

71. Conferring qualified immunity on officials helps mitigate the ill-effects of hindsight bias. *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982); Richard H. Fallon, Jr., *Some Confusion About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 338–39 (1993) (analyzing judicial efforts to balance constitutional rights and official discretion in damages actions). *See generally* Peter H. Schuck, *Suing Our Servants: The Courts, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281 (arguing that damages actions can produce undue official risk aversion).

72. *See* Schuck, *supra* note 71, at 299–301.

enable, if not invite, measures on independent presidential responsibility."[73] At key junctures, officials pushed the envelope of formal legal authority and subsequently sought congressional or public ratification for their efforts.[74] Washington's Neutrality Proclamation is perhaps the earliest example.[75] Washington interpreted a treaty with France in a narrow manner that kept America out of foreign conflicts, using presidential authority in a manner that seems prudent in retrospect but was controversial at the time.[76] Since then, presidents from Jefferson to Clinton have taken the initiative to preserve the status quo and to advance emerging norms of individual and human rights with the expectation that Congress would ratify their choices.[77] A rule that minimized overreaching but impaired this flexible course of dealing would exalt form over functionality.[78]

---

73. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 637 (1952) (Jackson, J., concurring); *see also id.* at 610–11 (Frankfurter, J., concurring) (discussing legislative acquiescence as triggering judicial deference); Dames & Moore v. Regan, 453 U.S. 654 (1981) (upholding presidential negotiation of claims settlement with Iran); United States v. Midwest Oil Co., 236 U.S. 459 (1915) (upholding the power of the President, in a case involving congressional acquiescence, to safeguard federal land for conservation and orderly development); *cf.* WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 121–29 (1994) (discussing what authors call "customary national security law"); HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 102–05 (2006) (discussing *Midwest Oil*); Morrison, *Stare Decisis in OLC*, *supra* note 1, at 1498 (arguing "that within OLC, its own body of executive power precedents is a critical piece of the broader historical practice informing its understanding of the law"); Curtis A., Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. (forthcoming 2012), *available at* http://ssrn.com/abstract=1999516 (arguing that historical patterns of acquiescence are a legitimate basis for constitutional interpretation, but that some caveats apply).

74. *See* BLUM & HEYMANN, *supra* note 8, at 20 (citing urgency as a justification for executive action before legislative approval).

75. George Washington, Proclamation of Neutrality (Apr. 22, 1793), *reprinted in* 32 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745–1799, at 430–31 (John C. Fitzpatrick ed., 1939).

76. *See* Martin S. Flaherty, *The Story of the Neutrality Controversy: Struggling Over Presidential Power Outside the Courts*, *in* PRESIDENTIAL POWER STORIES 21, 29–39 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

77. *See* BLUM & HEYMANN, *supra* note 8, at 55 (alluding to the Louisiana Purchase); *id.* at 45 (discussing Kosovo intervention).

78. *See* Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1209–10 (2007) (noting the need for the Executive to be able to enact flexible responses to rapidly changing circumstances). *But see* Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783 (2011) (arguing that a functional view leads to undue deference).

D. Polarization and Reform's Reversal

Polarization can be an additional ill-effect of attempted reforms. Undue emphasis on formal sanctions can cause this phenomenon. So can structural reforms that make legal advice too cumbersome to obtain.

The challenges faced by transitions from dictatorship abroad demonstrate that a rigid focus on formal legal sanctions can undermine the new regime.[79] Those out of power believe that sanctions amount to "victor's justice," and lose any stake in transition's success.[80] The ancient Athenians discovered this to their chagrin, as their government moved from oligarchy to democracy four times within eight years.[81] After an initial round of sanctions against the oligarchs proved counterproductive, Athenian democrats opted for a reconciliation brokered by Sparta.[82] More recent transitions in Eastern Europe[83] and Iraq[84] have exhibited the same tendency.

For this reason, pragmatism has informed approaches to criminal prosecution of overreaching officials in the United States. Lincoln declined to prosecute most officials of the Confederacy, asserting that formal sanctions such as penalties for treason would impair reconciliation.[85] Later, President Ford pardoned President Nixon, and presidents have pardoned others in the national security apparatus.[86] Moreover, the one institutional

---

79. *See* Posner & Vermeule, *Transitional Justice*, *supra* note 64, at 769 (noting the ill-effects of rigid adherence).

80. *See* Gene Bykhovsky, *An Argument Against Assertion of Universal Jurisdiction by Individual States*, 21 WIS. INT'L L.J. 161, 181 (2003) (citing the lack of credibility in "victor's justice," and the risks of pursuing criminal prosecutions in a new regime).

81. *See* JON ELSTER, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE 4–22 (2004).

82. *Id.* at 21.

83. *See* Denise V. Powers & James H. Cox, *Echoes from the Past: The Relationship Between Satisfaction with Economic Reforms and Voting Behavior in Poland*, 91 AM. POL. SCI. REV. 617, 628 (1997) (discussing popular disillusionment yielded by stress in rooting out former Communist functionaries).

84. *See* Jeremy Sarkin & Heather Sensibaugh, *How Historical Events and Relationships Shape Current Attempts at Reconciliation in Iraq*, 26 WIS. INT'L L.J. 1033, 1064–65 (2009) (noting that the initial American policy of rooting out Ba'athists from the government had ruinous results, turning many Iraqis toward armed opposition to United States efforts). *But see* MICHAEL A. NEWTON & MICHAEL P. SCHARF, ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN 181–83 (2008) (praising some post-Saddam Iraqi prosecutions, including the case of Judge Awad al-Bandar, which constituted the first conviction since the post-World War II era of a judge for violating human rights).

85. *See* DANIEL FARBER, LINCOLN'S CONSTITUTION 100–01 (2003) (discussing the clear legal basis for treason prosecutions of Confederate officials and combatants, which never occurred).

86. *See* Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033, 1040 n.21 (2007) (discussing President Reagan's pardon of Mark Felt, an FBI official who had authorized warrantless searches and had also, unbeknownst to Reagan, been "Deep Throat," Woodward and Bernstein's legendary source for stories about the Watergate scandal). In the early Cold War period, covert operatives and interrogators apparently received advance pardons for activities that might otherwise have triggered prosecution. *See also* JOHN T. PARRY,

effort to promote prosecution of American officials was a clear failure.[87] According to a bipartisan consensus, the Independent Counsel statute, enacted in the wake of Watergate, criminalized political disputes and thereby polarized political debate.[88] For example, during the investigation of the Monica Lewinsky episode,[89] political opponents cast President Clinton's moves against al Qaeda as a "wag the dog" strategy to change the subject.[90] The nation's interest in an effective approach to al Qaeda suffered.

Structural reform can also exacerbate polarization. The President need not seek OLC's advice, if doing so creates undue disruption or delay.[91] When seeking advice from OLC becomes too cumbersome, a president will seek advice from lawyers who are closer at hand, including the White House Counsel. Policy blunders have proliferated when insular power players have shut out sources of advice within the Executive Branch. During the Reagan Administration, the primary actors in the Iran-Contra affair froze out the Office of the Legal Adviser in the State Department.[92] The second Bush Administration established a "working group" to assess interrogation

---

UNDERSTANDING TORTURE 142–45 (2010) (discussing Cold War interrogation tactics, conducted with the consent of senior officials); William Ranney Levi, *Interrogation's Law*, 118 YALE L.J. 1434, 1465–67 (2009) (noting that President Truman provided a standing pardon to CIA Director Walter Bedell Smith for the CIA's use of consciousness-altering chemicals and other techniques on putative Soviet defectors and other subjects).

87. *See* Ethics in Government Act of 1978, 28 U.S.C. §§ 49, 591–599 (2006).

88. *See* CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRST HAND ACCOUNT 135 (1991) (discussing congressional Democrats' efforts to criminalize stance on access to government documents by then-OLC head Ted Olson); Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 591, 598 (2005) (discussing Independent Counsel Kenneth Starr's investigation of Bill Clinton). Mutual realization of the statute's noxious effects led Congress to allow it to sunset. *See* 28 U.S.C. § 599 (1994) (providing that the Independent Counsel Reauthorization Act of 1994 expires five years after the date of enactment).

89. *See* Richman & Stuntz, *supra* note 88.

90. *See* Todd S. Purdum, *U.S. Fury on 2 Continents: Congress; Critics of Clinton Support Attacks*, N.Y. TIMES, Aug. 21, 1998, at A1 (quoting Republican Senators Dan Coats of Indiana and Arlen Specter of Pennsylvania as expressing skepticism about the purpose and timing of attacks on a suspected al Qaeda camp in Afghanistan).

91. *See* Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 449 (1993) (noting that the President "has the authority . . . to make his own legal determinations without consulting any particular lawyer").

92. *See* Abraham D. Sofaer, *The Reagan and Bush Administrations—Abraham D. Sofaer (1985–1990), in* SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER 65, 80–81 (Michael P. Scharf & Paul R. Williams eds., 2010) (noting that the Iran-Contra affair "seriously damaged" the Administration's antiterrorism program).

techniques, but then bypassed most of the group's members.[93] Champions of unilateral presidential power will always feel the urge to go it alone, but complicating the search for legal advice will intensify this trend.[94]

III. SANCTIONING OLC LAWYERS: THE ALLURE AND UNINTENDED CONSEQUENCES OF POETIC JUSTICE

To blunt impunity, some commentators have urged formal sanctions against former OLC lawyer John Yoo.[95] Formal sanctions would send a strong message that such lawyering disserves the national interest. However, formal sanctions may violate principles of procedural justice and chill future decisions.[96]

To examine the merits of formal sanctions, a quick look at Yoo's work product is useful. Yoo's advice on coercive interrogation displayed problems of process and substance. The advice emerged from a closed process driven by Vice President Cheney and Cheney's legal alter ego, David Addington, without public disclosure or wide discussion within the

---

93. *See* STAFF OF S. COMM. ON ARMED SERVICES, 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY 131 (Comm. Print 2008), *available at* http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf. Republican Senator Lindsey Graham of South Carolina, one of the legislators who subsequently investigated the evolution of the Administration's policy on interrogation, observed that if group members did not see the work product, "I'm not so sure that's much of a working group." *Panel III of a Hearing of the Senate Armed Services Committee: Origins of Aggressive Interrogation Techniques*, 110th Cong., FED. NEWS SERVICE, June 17, 2008. *See generally* MARGULIES, *supra* note 10, at 61 (discussing how bureaucratic allies of Vice President Cheney and his counsel David Addington, including William Haynes, general counsel at the Department of Defense, froze out potential critics).

94. JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 314 (2007) ("Lawyers are not always invited into the decision-making room" because of "concerns about secrecy, delay, and 'lawyer creep' . . . whereby one legal question becomes seventeen, requiring not one lawyer but forty-three to answer."). An effort to streamline decision-making may account for the tendency in Republican Administrations to set up detours around career bureaucrats, whom senior officials regard as Democrats eager to derail Republican initiatives. *See* FRIED, *supra* note 88, at 154–55 (discussing perceived intractability of "permanent government"); MARGULIES, *supra* note 10, at 10 (arguing that for Vice President Cheney, "dissenters within the bureaucracy were either displaying a craven 'cover your behind' attitude or engaging in stealthy ideological warfare"); SAVAGE, *supra* note 9, at 281–86 (discussing efforts in the first and second Bush Administrations to control bureaucracy); *cf.* Cassandra Burke Robertson, *Beyond the Torture Memos: Perceptual Filters, Cultural Commitments, and Partisan Identity*, 42 CASE W. RES. J. INT'L L. 389 (2009) (discussing links between accountability for excesses of previous regime and partisan interactions).

95. *See* Nasser Hussain & Austin Sarat, *Introduction: Responding to Government Lawlessness: What Does the Rule of Law Require?*, *in* WHEN GOVERNMENTS BREAK THE LAW: THE RULE OF LAW AND THE PROSECUTION OF THE BUSH ADMINISTRATION 1, 19 (Austin Sarat & Nasser Hussain eds., 2010) (asserting that the diplomatic efforts by the Obama Administration may be unavailing "without some measure of accountability for crimes, particularly torture"); Finkelstein, *supra* note 14.

96. *See infra* pp. 824–26, 829–32.

Executive Branch.[97] Indeed, other attorneys were methodically cut out of the process.[98] Moreover, Yoo's legal conclusions were extraordinarily aggressive. For example, consider Yoo's interpretation of the torture statute,[99] which Congress passed to implement the United States' obligations under the United Nations Convention Against Torture (CAT).[100] Yoo interpreted the statute, which prohibits conduct "specifically intended" to inflict severe pain, as requiring proof that an interrogator had inflicted pain for its own sake, not for another purpose such as gaining information.[101] Yoo also used unrelated health care statutes[102] to define "severe pain" as pain associated with organ failure and other critical health conditions.[103] Given this backdrop, harm that fell short of being life threatening was outside the torture statute's scope.[104] Justifying these narrow constructions, Yoo invoked the canon of constitutional avoidance.[105] The torture statute would be unconstitutional, Yoo argued, if it failed to provide the President with latitude.[106] Yoo's approach clashed with interpretations that fit the remedial purpose of the statute and CAT. Yoo's strained arguments were a

97. *See* BLUM & HEYMANN, *supra* note 8, at 56–57 (noting how Addington refused to make OLC opinions available to the NSA).

98. *See id.* at 18–19; MARGULIES, *supra* note 10, at 61. As a group, military lawyers sought to push back against this dynamic; perhaps they were aware of reciprocal risks that an unduly aggressive posture could pose for United States military personnel. Civilian decision makers resented the military's scruples. *Compare* Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407 (2008) (arguing for robust dialogue between military lawyers and civilian officials on issues such as procedural safeguards in military tribunals), *and* Gregory S. McNeal, *Organizational Culture, Professional Ethics and Guantánamo*, 42 CASE W. RES. J. INT'L L. 125, 126–34 (2009) (praising a culture of resistance to political influence within the military), *with* Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1820–23 (2007) (portraying military lawyers who opposed Bush Administration policies on detention and interrogation as entrenched members of bureaucracy).

99. *See* 18 U.S.C. § 2340A (2006).

100. *See* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 2, U.N. Doc. A/RES/39/708 (Dec. 10, 1984) [hereinafter CAT].

101. *See* Bybee Memo, *supra* note 7, at 174–75.

102. *E.g.*, 8 U.S.C. § 1369 (2006) (allowing federal reimbursement only for hospital care provided to undocumented aliens with emergency medical conditions).

103. Bybee Memo, *supra* note 7, at 176.

104. *Id.* at 176–77.

105. *See id.* at 202–04.

106. *See id.*; *cf.* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1229–30 (2006) [hereinafter Morrison, *Constitutional Avoidance*] (critiquing Yoo's view as encouraging Executive Branch self-dealing).

case study in lawyering for the short term and cost the United States dearly in global good will when they came to light almost two years later.[107]

A. Ethical Sanctions as a Remedy for Overreaching

Professional discipline seemed at first blush like an appropriate and even necessary remedy for the myopia that Yoo displayed.[108] However, transforming Yoo from a resoundingly negative example into a subject of professional discipline requires more. Professional discipline, such as disbarment, could trigger the problems of paralysis and polarization discussed above.[109] Moreover, state sanctions like disbarment rest on observance of procedural rights, such as notice and a right to be heard, which Yoo did not relinquish through his blithe dismissal of the rights of others. Impatience with those rights merely takes a page from Yoo's book.[110]

---

107. *See* David Luban & Henry Shue, *Mental Torture: A Critique of Erasures in U.S. Law*, 100 GEO. L.J. (forthcoming 2012), *available at* http://ssrn.com/abstract=1797806 (arguing that the U.S. interpretation of "mental torture" is problematic under international law). *See generally* Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1412–18 (2009) (discussing institutional barriers to sound decision-making within the Executive Branch). The amount of useful information yielded by the techniques that Yoo authorized, such as waterboarding, continues to be the subject of debate. *See* Philip Zelikow, *A Dubious C.I.A. Shortcut*, N.Y. TIMES, Apr. 24, 2009, at A27 (noting that a former State Department official and director of the 9/11 Commission, Philip Zelikow, suggested that intelligence reports derived from interrogations of alleged 9/11 mastermind Khalid Shaikh Mohamed and two others, using "enhanced" techniques, "were a critical part of the intelligence flow, but rarely—if ever—affected a 'ticking bomb' situation").

108. Indeed, while the Department of Justice (DOJ) ultimately decided against a referral to state ethics regulators, the DOJ Final Report criticized Yoo in terms rarely applied to lawyers for the federal government, acknowledging that Yoo's "loyalty to his own ideology" had inspired advice embodying "extreme . . . views of executive power." DOJ Final Report, *supra* note 15, at 67. Integrating short- and long-term perspectives may be particularly important for the government lawyer, since any official seeking advice is in some sense an agent for the polity as a whole. That integration is necessary, regardless of the identity of the client the lawyer is advising. For analyses of what turns on identification of the government lawyer's client, see Keith A. Petty, *Professional Responsibility Compliance and National Security Attorneys: Adopting the Normative Framework of Ethical Legal Process* 8–13 (June 30, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1632945 (arguing that identifying the precise client is often not central because of overarching themes in national security advice). *Cf.* Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789 (2000) (arguing that government lawyers have a duty to serve the public interest); Nelson Lund, *The President as Client and the Ethics of the President's Lawyers*, 61 L. & CONTEMP. PROBS. 65, 66–67 (1998) (arguing that government lawyers lack the authority to second-guess their clients' choices on grounds of morality or policy); Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1295–97 (1987) (same); Zacharias, *supra* note 6, at 338–48 (arguing that questions about the role of public interest in legal advice occur for attorneys in both private and public employment).

109. *See supra* Part II.C–D.

110. *See* JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 152–54 (2006) (asserting that according detainees due process rights, including the right to a lawyer and a hearing, would interfere with the government's counterterrorism efforts).

DOJ's Final Report correctly noted problems with professional discipline that Yoo's accusers have ignored. First, two of the guides to professional conduct which Yoo allegedly violated were drafted after his conduct occurred;[111] fairness precluded applying these norms to Yoo's case. Second, Yoo's conclusions were more tempered and the underlying law more ambiguous than Yoo's accusers have acknowledged.[112] Third, Yoo's aggressive interpretive method echoed earlier advice in the canon of national security law, including Attorney General Jackson's opinion authorizing the destroyer deal with Britain.[113]

1. Notice, Time, and the Legality of Sanctions

Imposition of sanctions on Yoo would have dented a centerpiece of the rule of law: the proposition that individuals can only be punished for violating laws in effect at the time of their conduct.[114] In Yoo's case, understanding this problem of legality merely requires a nod at the calendar. The OPR report, recommending a referral to state ethics regulators, relied on two ethics guides for government lawyers.[115] However, neither of those guides existed when Yoo issued the principal opinions that formed the basis for the referral recommendation. The guides that did not exist included a memorandum from OLC on "best practices" from May 2005,[116] almost three years after Yoo had submitted his memo, and a similar list of principles from former OLC lawyers announced in December 2004.[117] Broadly speaking, each guide urged that lawyers for OLC disclose and discuss opposing arguments.[118] This is a sound and sensible practice, anchored in the importance of careful deliberation. However, to transform prudent practice into an enforceable norm, the guides would have had to have been available to Yoo at the time he finalized his advice.

Moreover, Yoo had expressly modified an extreme position because of opposing arguments. Yoo added a significant hedge to his conclusion that

111. DOJ Final Report, *supra* note 15, at 15–16.

112. *See id.* at 35–38.

113. *Id.* at 19.

114. *See* United States v. Santos, 128 S. Ct. 2020, 2025 (2008).

115. *See* OPR Report, *supra* note 15, at 21–24.

116. *See* Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., to Attorneys of the Office of Legal Counsel, Re: Best Practices for OLC Opinions (May 16, 2005).

117. *See* Johnsen, *supra* note 4, at 1602–10 (reprinting principles).

118. *See id.* at 1605 ("OLC's analysis should disclose, and candidly and fairly address, the relevant range of legal sources and substantial arguments on all sides of the question.").

liability hinged on proof of intent to cause severe pain *for its own sake.*[119] At the urging of Michael Chertoff, who was then head of the Justice Department's Criminal Division and would later become the Secretary of Homeland Security,[120] Yoo warned that whatever the interrogator's motive, a jury could infer intent from *any* technique that a reasonable person would view as causing severe pain.[121] An overzealous interrogator might have pondered Yoo's warning and still taken his chances. However, imposing the burden of uncertainty at trial on the interrogator is precisely what critics of the Bush Administration's policy sought,[122] and clearly does not provide the legal cover which critics rightly deplore.

Imposing formal sanctions on Yoo despite this caveat would also present significant problems of notice. The OPR Report, which recommended a referral to state ethics regulators, asserted that Yoo's caveat was "insufficient."[123] However, OPR failed to articulate what additional caveats Yoo could have included.[124] Indeed, in the course of a 260-page report, OPR did not even provide a verbatim account of Yoo's warning.[125] If fairness requires attending to facts, Yoo deserved a more methodical accounting.

The vague and untested scope of binding authority compounds this fairness problem. In recommending that Yoo be referred to state ethics regulators, OPR relied on American Bar Association Model Rule 2.1, which states that a lawyer "shall exercise independent professional judgment and render candid advice."[126] However, courts have viewed Rule 2.1 solely as a

---

119. *See* Bybee Memo, *supra* note 7, at 174–75.

120. *See* DOJ Final Report, *supra* note 15, at 66.

121. *See* Bybee Memo, *supra* note 7, at 175 (noting that "as a matter of practice in the federal criminal justice system it is highly unlikely that a jury would acquit" when a reasonable person would view a given interrogation method as causing severe pain to a detainee).

122. *See* Elaine Scarry, *Five Errors in the Reasoning of Alan Dershowitz*, *in* TORTURE: A COLLECTION 281, 282 (Sanford Levinson ed., 2004) (rejecting blanket impunity and Dershowitz's proposal for "torture warrants," and arguing that in a case where the infliction of severe pain demonstrably averted a catastrophe, the interrogator "would have to rely on convincing a jury of peers that the context for the act was exceptional"); *cf.* Michael W. Lewis, *A Dark Descent into Reality: Making the Case for an Objective Definition of Torture*, 67 WASH. & LEE L. REV. 77, 86–87 (2010) (arguing that the "ticking time bomb" scenario is too rare to provide a basis for law or policy); Kim Lane Scheppele, *Hypothetical Torture in the "War on Terrorism,"* 1 J. NAT'L SECURITY L. & POL'Y 285 (2005) (same).

123. OPR Report, *supra* note 15, at 175.

124. Yoo also added a caveat to his analogy to federal health care statutes that define "severe pain" as equivalent to the pain an individual would suffer during "death, organ failure, or the permanent impairment of a significant body function." Bybee Memo, *supra* note 7, at 176 (noting that health care statutes "address a substantially different subject").

125. *See generally* OPR Report, *supra* note 15.

126. *See* MODEL RULES OF PROF'L CONDUCT R. 2.1 (2011); *cf.* Clark, *supra* note 6 (discussing the relevance of Rule 2.1); Steven Giballa, *Saving the Law from the Office of Legal Counsel*, 22 GEO. J. LEGAL ETHICS 845, 845 (2009) (arguing that "Rule 2.1 should be interpreted to prohibit OLC lawyers from providing legal opinions . . . that advocate for unorthodox interpretations of the

makeweight. Regulators have interpreted this rule as a generic restatement of more specific norms, such as the rules against dishonesty[127] and conflicts of interest.[128] Cases citing the provision involve lawyers who swindled their own clients.[129] None involve a lawyer like Yoo, whose ideological blinders drove over-identification with client wishes. Admittedly, Rule 2.1 is a useful guideline, particularly in its encouragement of lawyer advice on "moral, economic, social and political factors."[130] However, targeting Yoo's 2002 advice with a fresh pivot from the rule's precatory pedigree to a newly robust conception would engender serious notice concerns.

The relevant substantive legal authority is also vague. Critics of Yoo rightly point out that the techniques Yoo authorized surely constitute "cruel, inhuman, or degrading treatment" under international law.[131] However, critics fail to acknowledge international law's demarcation between harsh treatment, which states may use in an emergency, and torture, which is categorically prohibited. In a case dealing with interrogation methods used by Britain to seek information about violent acts against civilians planned by the Irish Republican Army, the European Court of Human Rights held that techniques such as use of stress positions and sleep deprivation did not constitute torture.[132] Israel's High Court of Justice, while interposing strict regulation of similar methods, did not categorically rule out their use.[133] Customary international law is moving gradually toward a consensus that even cruel, inhuman, and degrading treatment should be categorically

---

law," and that they should be required "to provide what they believe to be the best, rather than a merely plausible, view of the law").

127. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2011) (defining lawyer misconduct to include "dishonesty, fraud, deceit or misrepresentation").

128. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2011) (prohibiting conflict between an interest of the client and "a personal interest of the lawyer," unless the lawyer reasonably believes she can provide competent representation and the client gives informed consent in writing).

129. *See, e.g.*, *In re* Coffey's Case, 880 A.2d 403 (N.H. 2005) (describing a series of acts in which a lawyer bilked his client out of property); *In re* Harper, 571 S.E.2d 292, 293 (S.C. 2002) (a case in which a lawyer with a substantial interest in a company in which his client had invested heavily did not inform the client of the company's financial difficulties).

130. *See* MODEL RULES OF PROF'L CONDUCT R. 2.1 (2011).

131. *See* CAT, *supra* note 100, at pmbl. (noting the parties' desire to aid "struggle against torture and other cruel, inhuman or degrading treatment"); *cf.* JEREMY WALDRON, TORTURE, TERROR, AND TRADE-OFFS: PHILOSOPHY FOR THE WHITE HOUSE 204–05 (2010) (arguing that the notice argument is not persuasive because even conduct short of torture would still entail deliberate imposition of suffering).

132. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) (1978).

133. *See* HCJ 5100/94 Pub. Comm. Against Torture in Isr. v. Israel 53(4) PD 817 [1999], *reprinted in* 38 I.L.M. 1471 (1999).

prohibited; but this consensus is not complete.[134] While the United Nations General Assembly favors this view,[135] the pervasive politics of that body limit its usefulness as a guide to the state of the law.[136] Recent case law perpetuates this uncertainty.[137]

United States courts do not further the cause of clarity, since there are no decisions on the meaning of the torture statute. Indeed, the statute has not produced a single prosecution of an American official. Therefore, courts have had no occasion to interpret its terms.[138] The Justice Department's own

---

134. Article 16 of the Convention Against Torture requires that states shall "undertake to prevent" cruel, inhuman, and degrading treatment, and imposes a number of duties on signatories to achieve this goal, including education of officials, monitoring of practices, investigation, and access to the courts. *See* CAT, *supra* note 100, at 198. However, the CAT does not bar exceptions to the rule against cruel, inhuman, and degrading treatment, although it does so expressly in the case of torture. *Id.* at 197.

135. *See, e.g.*, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 64/153, U.N. Doc. A/RES/64/153 (Dec. 18, 2009); *see also* Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535, 1535–37 (2009) (discussing General Assembly resolutions in the course of asserting that prohibition of cruel, inhuman, and degrading treatment is a *jus cogens* norm that allows no derogation or exception).

136. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, rptr. n.2 (1986) (noting only that General Assembly Resolutions "in some circumstances contribute to the process of making customary law"); *see also* STEPHEN C. MCCAFFREY, UNDERSTANDING INTERNATIONAL LAW (2006), *reprinted in* HENKIN ET AL., *supra* note 33, at 194–95 (noting that General Assembly resolutions "must be evaluated carefully" before taken as evidence of formation of customary international law); David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 256 (2005) (noting that General Assembly resolutions provide evidence regarding customary international law, but are not dispositive).

137. In *Gäfgen v. Germany*, 2010 Eur. Ct. H.R. 759, the European Court of Human Rights declared that Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which governs members of the European Union, categorically barred all forms of cruel, inhuman, and degrading treatment. *Id.* ¶ 87. However, litigants conceded that the European Convention's categorical bar differed from the more equivocal guidance in the CAT. *Id.* ¶ 86 (argument of Redress Trust). Moreover, the court declined to hold that the admission of evidence obtained through threats of harsh treatment rendered the trial unfair. *Id.* ¶ 187. To reach this result, the court resorted to one of criminal procedure's most outcome-determinative doctrines, the harmless error rule. *Id.* Overall, the *Gäfgen* court's approach was more pragmatic than categorical. Its implications for the evolution of customary international law on cruel, inhuman, and degrading treatment are mixed, at best.

138. One federal decision on interrogation of a criminal defendant within the United States used the term "torture" to describe a practice much like waterboarding. However, the court analyzed criminal procedure issues with no relevance to the torture statute. *See* United States v. Lee, 744 F.2d 1124, 1125 (5th Cir. 1984) (ruling that a sheriff's deputy who claimed that his superior had ordered him to participate in violations of defendants' civil rights was not entitled to a severance at the start of trial). In the past, the United States had prosecuted both its own troops and Japanese soldiers for wantonly forcing large quantities of water into subjects' lungs and stomachs. *Cf.* Claire Finkelstein & Michael Lewis, *Should Bush Administration Lawyers Be Prosecuted for Authorizing Torture?*, 158 U. PA. L. REV. PENNUMBRA 205, 214 (2010); Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468, 482–90 (2007). In contrast, Yoo approved only the ingestion of small amounts of water within specific time limits. *See* Memorandum from Jay S. Bybee, Assistant Att'y Gen., to John Rizzo, Acting Gen. Counsel of the

guidelines require intentional or reckless violation of an "unambiguous" norm.[139] Yoo's advice did not rise to that level.

Scholars can and should criticize Yoo's myopia. By the same token, the Obama Administration's view that waterboarding constitutes torture is a welcome advance.[140] However, neither apt condemnation of Yoo's advice nor praise for the current Administration's stance rebuts the procedural fairness arguments against formal sanctions.

2. Disciplining Yoo, Echoes of the Destroyer Deal, and the Danger of Paralysis

Another difficulty with subjecting Yoo to discipline stems from the uncomfortable similarity at the level of interpretive method between Yoo's work and previous opinions never overruled.[141] The aggressive interpretive method used by Yoo, if not the substance of his work, tracked the approach of government lawyers from the Republic's founding. Moreover, it foreshadows interpretation by Obama Administration lawyers on drone attacks.[142] Disciplining Yoo would chill all such legal work.

Cent. Intelligence Agency, Interrogation of al Qaeda Operative 4 (Aug. 1, 2002), *available at* http://www.fas.org/irp/agency/doj/olc/zubaydah.pdf. Yoo was myopic in failing to realize that interrogators under pressure to get information would force subjects to ingest substantially more water than he had authorized, and disregard the time limits he had prescribed. *See* MARGULIES, *supra* note 10, at 64–65.

139. U.S. DEP'T OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY, ANALYTICAL FRAMEWORK 3 (2005), http://www.justice.gov/opr/framework.pdf. Norman Spaulding argued recently that DOJ's Final Report incorrectly viewed OPR's guideline as tracking the "clearly established" law standard for officials' qualified immunity in tort. Spaulding, *Independence and Experimentalism*, *supra* note 17, at 442; *cf.* Pearson v. Callahan, 555 U.S. 223, 231 (2009) (stating the legal standard for qualified immunity). However, since courts have defined clearly established law as law that is free of material ambiguities, there is little difference between OPR's requirement of an "unambiguous" norm and the qualified immunity standard. To be sure, OPR could change its standard to make it more demanding. However, fairness would require that such a change be prospective in operation.

140. *See* Eric Lichtblau, *Nominee Wants Some Detainees Tried in the U.S.*, N.Y. TIMES, Jan. 16, 2009, at A1 (reporting views of then-Attorney General-designate Eric Holder).

141. *See generally* Morrison, *Stare Decisis in OLC*, *supra* note 1 (discussing the precedential status of OLC and Attorney General opinions).

142. *See* Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) [hereinafter Administration and International Law], *available at* http://www.state.gov/s/l/releases/remarks/139119.htm (defending the Administration's position); *infra* notes 315–29 and accompanying text (arguing that overall context supported legal authorization for drone attacks). *But see* Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009* (Notre Dame Law Sch., Legal Studies Research Paper No. 09-43, 2010), *available at* http://ssrn.com/abstract=1501144 (arguing that drone attacks

Aggressive interpretation started, fittingly enough, with George Washington. Washington's Neutrality Proclamation unilaterally restricted interpretation of a treaty with France to avoid America's entanglement in European wars.[143] While Washington's move to spare the new republic this risk was essential to the United States' development, contemporaneous critics attacked its legal justification.[144] Interpretation along these lines continued with Andrew Jackson's successful campaign to abolish the Bank of the United States; Jackson's lawyers interpreted presidential power in a sweeping fashion to rid the country of what Jackson perceived as a regressive tool of oligarchical wealth and privilege.[145] Lincoln opted for a robust interpretation of presidential power when he suspended habeas corpus and issued the Emancipation Proclamation.[146] Teddy Roosevelt protected federal land and used the threat of force abroad to accomplish foreign policy goals,[147] while his cousin Franklin Roosevelt dispatched his cohort of brilliant legal minds to defend the New Deal against precedents that cast doubt on its constitutionality.[148] Closer to the present day, John F. Kennedy interpreted the United Nations Charter aggressively to justify the tailored response of a naval blockade during the Cuban Missile Crisis,[149] and

---

coordinated by intelligence agents violate international law); Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Human Rights Council, U.N. Doc. A/HRC/14/24 (May 20, 2010) [hereinafter Extrajudicial Summary], *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/ 135/03/PDF/G1013503.pdf?OpenElement (same).

143. *See* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 338 (1993).

144. *See id.* at 337–40; Flaherty, *supra* note 76, at 21, 29–39; *cf.* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) (arguing that the Neutrality Proclamation and other measures taken in the Founding Era did not reflect a plenary view of executive power).

145. *See* Spaulding, *Independence and Experimentalism*, *supra* note 17, at 420–22 (suggesting that moves demanded by Jackson and implemented by his Attorney General, Roger Taney, of *Dred Scott* fame, such as unilaterally transferring federal deposits to state banks from the Bank of the United States, constituted aggrandizement of power that the Constitution assigned to Congress).

146. *See* FARBER, *supra* note 85, at 156–57.

147. *See* DOUGLAS BRINKLEY, THE WILDERNESS WARRIOR: THEODORE ROOSEVELT AND THE CRUSADE FOR AMERICA 14–20 (2009) (describing how Roosevelt declared wildlife reservations and refuges on federal property, asking only whether Congress had prohibited such action); EDMUND MORRIS, THEODORE REX 459–61 (2001) (discussing intervention in Cuba in 1906); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 89 (2004) (discussing Roosevelt's management of foreign affairs issues such as the agreement to acquire the Panama Canal). Tempering these unilateral proclivities, Roosevelt coupled his "stewardship theory" of the Presidency with outreach to hitherto excluded constituencies, such as labor. *See* Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2084 (2009).

148. *See* Spaulding, *Independence and Experimentalism*, *supra* note 17, at 423–29.

149. Louis Henkin, Comment, *in* ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW 149, 152–53 (1974) (approving of a blockade as a measured use of force appropriate to the situation, while acknowledging tensions with limits on self-defense in U.N. Charter, art. 2(4)).

President Clinton was even more aggressive in intervening to stop genocide in Kosovo.[150]

In the extensive annals of aggressive interpretation, one episode warrants special mention: Robert Jackson's authorization of the destroyer deal with Britain during World War II. In authorizing the destroyer deal, Jackson relied on the avoidance canon, citing the constitutional basis of presidential power in narrowly construing the Neutrality Act's bar on conveyance of material to other nations.[151] Jackson also grafted an artificially narrow specific intent requirement onto the 1917 Espionage Act,[152] which prohibited the intentional transfer to a belligerent power of "*any* vessel built, armed, or equipped as a vessel of war."[153] The most natural interpretation of the text is that Congress wanted to bar the intentional transfer of any vessel that matched the description. However, Jackson parsed the provision differently, to bar only the transfer of vessels originally "built, armed, or equipped" with the specific intent to effect such a transfer.[154] This strained interpretation allowed Jackson to opine that allowing Britain post hoc to borrow destroyers initially built for American use was legal.[155] Undergirding the entire opinion was Jackson's argument that the President could have proceeded if necessary on his own constitutional authority.[156]

---

150. *See* David R. Andrews, *The Clinton Administration—David R. Andrews (1997–2000)*, *in* SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER 113, 125 (Michael P. Scharf & Paul R. Williams eds., 2010) (The State Department Legal Adviser found that because of a combination of compelling humanitarian need and questionable legal authority, intervention by NATO forces was "justifiable and legitimate, but not a precedent.").

151. *See* Jackson op., *supra* note 29, at 494–96; *cf.* JACKSON, *supra* note 29, at 93–103; William R. Casto, *Attorney General Robert Jackson's Brief Encounter with the Notion of Preclusive Presidential Power*, 30 PACE L. REV. 364, 368–80 (2010) (analyzing opinion).

152. Espionage Act of 1917, ch. 30, 40 Stat. 217 (codified as amended in scattered sections of 18, 22, and 50 U.S.C.).

153. Jackson op., *supra* note 29, at 494 (emphasis added).

154. *Id.*

155. *See id.* Jackson cited a treatise which dealt with acts of a citizen or "subject" of a state, and did not address actions taken by the government itself, as in the destroyer deal. *See id.* The Attorney General acknowledged that his distinction between new and old destroyers was "hairsplitting." *Id.* (citing 2 OPPENHEIM, INTERNATIONAL LAW 574–76 (5th ed. 1935)).

156. *Id.* at 486. Jackson cited the favorite decision of executive power's champions, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936). Jackson op., *supra* note 29, at 486. Quoting Justice Sutherland's opinion in that case, he described the President as the "sole organ of the Federal Government in the field of international relations." *Id.* (quoting *Curtiss-Wright*, 299 U.S. at 320). Jackson failed to note that John Marshall, the source of the "sole organ" description, had qualified it in a fashion material to the destroyer deal, by noting that the President's authority was paramount only in the *absence* of congressional action. *See* Statement of John Marshall, 10

Jackson's opinion sported the same aggressive interpretive style as Yoo's work more than sixty years later. Jackson invoked the avoidance canon in a way that furthered executive designs.[157] He defined specific intent with a parched parsimony that conveniently excluded the President's transaction with Britain. To close the deal, he piled on a healthy helping of inherent executive power.[158] To be sure, there were significant differences in the process leading up to and following Jackson's opinion, which was public and ratified by Congress in the Lend Lease Act.[159] However, these differences coexisted with a common strand of aggressive interpretation. Given the unpredictability of events, the United States might need someone to advise a future President as Jackson advised Roosevelt.[160] Criticizing Yoo does not imperil this prospect;[161] but *sanctioning* Yoo could compromise a lawyer's willingness to assume Jackson's role.

B. Damage Actions and Hindsight Bias

Concerns about procedural justice and paralysis would also doom a *Bivens* lawsuit for damages[162] as a method of accountability. Plaintiffs face multiple obstacles in such lawsuits, including persuading the courts to recognize such a remedy absent congressional authorization,[163] and dealing

---

ANNALS OF CONG. 613–14 (1800); *cf.* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 66 (4th ed. 2006) (explaining context for Marshall's remarks); H. Jefferson Powell, *The Founders and the President's Authority Over Foreign Affairs*, 40 WM. & MARY L. REV. 1471, 1511–27 (1999) (same).

157. *See* Morrison, *Constitutional Avoidance*, *supra* note 106.

158. Others share this view of Jackson's opinion as markedly aggressive. *See* DOJ Final Report, *supra* note 15, at 18–19 (quoting Jack Goldsmith, a Harvard law professor who as head of OLC in 2003–2004 withdrew a number of Yoo's memos, as calling Jackson's analysis "extremely weak [and] unconvincing," "very bad," and downright "terrible"). However, Goldsmith's remarks, cast with a tinge of irony to juxtapose Jackson's interpretive method with Yoo's, dovetailed with a high regard for Jackson's place in the national security canon. *See id.* at 19 ("Any standard that would have landed Robert Jackson in trouble cannot be the right standard.").

159. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1047 (2008).

160. *See* SCHLESINGER, *supra* note 147, at 108 (describing the destroyer deal as "compelled by a threat to the nation surpassed only by the emergency which led Lincoln to take his actions after Sumter").

161. A consensus of elite opinion is a significant sanction for a professional like Yoo, who has become a negative example. *Cf.* Vladeck, *supra* note 14, at 201–06 (discussing informal sanctions provided by public and elite opinion).

162. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

163. *Cf.* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (precluding a lawsuit against senior officials by aliens detained and deported after the September 11 attacks); Arar v. Ashcroft, 585 F.3d 559, 580 (2d Cir. 2009) (en banc) (precluding a lawsuit by an alleged survivor of extraordinary rendition); Brown, *supra* note 14, at 234–37 (discussing tort suits against officials as legitimate vehicles for accountability, but cautioning about negative externalities of such litigation); Peter Margulies, *Judging Myopia in Hindsight:* Bivens *Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195 (2010) [hereinafter Margulies, *Judging Myopia in Hindsight*] (arguing that courts

with official immunities that thwart relief.[164] Each problem is formidable for plaintiffs hoping to prevail in a lawsuit against OLC lawyers.

In some cases involving national security, courts have declined to permit suits for damages, citing the chilling effect on officials and the risk of disclosing sensitive information as "factors counseling hesitation."[165] While there are strong arguments that precluding a lawsuit at this stage bends the law too far in the direction of impunity, courts in national security cases have often discounted this countervailing factor.[166]

In addition, official immunity interposes a significant obstacle to recovery. Officials have qualified immunity, which courts can breach only if an official acts in disregard of clearly settled law.[167] Official immunities protect public servants from the unfairness of being surprised by legal developments that the officials could not have predicted.[168] Viewed from an *ex ante* perspective, immunities allow officials to make difficult decisions without paralyzing worries about the effects of hindsight bias.[169]

The lawsuit by former detainee Jose Padilla[170] against Yoo is vulnerable on each of these counts. While categorical preclusion of *Bivens* suits can

---

should avoid categorical preclusion or intervention, and instead consider whether damages actions would further development of effective alternatives to overreaching); Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809 (2010) (arguing that damages litigation is an important safeguard for accountability).

164. *See* Ashcroft v. Al-Kidd, 131 S. Ct. 2074, 2085 (2011) (holding that official immunity protected a former Attorney General sued by an individual who had been detained as a material witness in a terrorism case); Pearson v. Callahan, 555 U.S. 223, 231 (2009) (stating the legal standard for qualified immunity); *cf.* Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117 (2009) (arguing that the current structure of adjudication for constitutional torts encourages undue deference to official decisions); Stephen I. Vladeck, *AEDPA, Saucier, and the Stronger Case for Rights-First Constitutional Adjudication*, 32 SEATTLE U. L. REV. 595, 608–12 (2009) (same).

165. *See Arar*, 585 F.3d at 573, 576–77 (asserting that risk of disclosure of sensitive national security information was a factor weighing against the availability of a damages claim).

166. *Compare id.* at 636 (Calabresi, J., dissenting) (expressing concern that the majority's conclusion would make *Bivens* actions inappropriate in every case), *with id.* at 576–77 (majority opinion) (discussing risk of disclosure of sensitive national security information without acknowledging the dissent's concerns).

167. *See Pearson*, 555 U.S. at 231.

168. *See id.* at 245.

169. On hindsight bias, see Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, *in* BEHAVIORAL LAW AND ECONOMICS 95, 95 (Cass R. Sunstein ed., 2000) (noting that maxims such as "hindsight . . . is '20/20'" stand for the proposition that "[l]earning how the story ends . . . [distorts] our perception of what could have been predicted").

170. Padilla was subsequently convicted on terrorism charges; his case is on appeal. *See* Abby Goodnough & Scott Shane, *Padilla is Guilty on All Charges in Terror Trial*, N.Y. TIMES, Aug. 17, 2007, at A1.

send an unhealthy signal to officials and encourage official overreaching, an appeals court might view the need for secrecy in the provision of legal advice as justifying such a step.[171] In any case, the *Padilla* suit will also flounder on the grounds of official immunity. A district court found that the suit could go forward.[172] However, the decision failed to adequately explain how Padilla overcame Yoo's qualified immunity, in light of the court's acknowledgement that "the legal framework relating to [Padilla's detention] . . . *was developing* at the time of the conduct alleged in the complaint."[173] The combination of questions about the availability of a cause of action and the scope of immunity dims the prospects for a lawsuit against Yoo.[174]

IV. STRUCTURAL REMEDIES: A CURE WORSE THAN THE DISEASE?

Those impatient with a quixotic reliance on formal sanctions have proposed structural changes that would make OLC more independent and judicial in character.[175] The most sweeping change comes from Bruce Ackerman, who has proposed a "Supreme Executive Tribunal."[176] Others, including Neal Katyal, have offered more modest versions of this adjudicative turn.[177] Norman Spaulding has proposed removal restrictions for supervisors at OLC, with the goal of making OLC more independent.[178] Unfortunately, these proposals will only expand the risks of reform. In addition, some of the structural proposals undermine the separation of powers.

---

171. *See* Lebron v. Rumsfeld, 764 F. Supp. 2d 787, 790–807 (D.S.C. 2011) (dismissing the lawsuit brought by Padilla and his mother against the former Secretary of Defense regarding the same treatment that forms the basis for the lawsuit against Yoo).

172. Padilla v. Yoo, 633 F. Supp. 2d 1005, 1039–40 (N.D. Cal. 2009).

173. *See id.* at 1036–37 (emphasis added). For an incisive critique of the failure of the *Yoo* court to follow the applicable legal standard or acknowledge the policy rationale for qualified immunity, see Peter H. Schuck, *Immunity, Not Impunity*, AM. LAWYER, Nov. 2009, at 51.

174. *See* Vladeck, *supra* note 14, at 204–05 (concluding that the lawsuit has a low probability of success).

175. *See* Katyal, *Internal Separation of Powers*, *supra* note 17, at 2336–40; *cf.* Pillard, *supra* note 4, at 748–58 (discussing other structural reforms in OLC, including a greater role for the Justice Department's Office of the Inspector General); Posner & Vermeule, *The Credible Executive*, *supra* note 17, at 896–909 (criticizing Katyal's proposals as promoting rigidity).

176. *See* ACKERMAN, *supra* note 6, at 143–50.

177. *See* Katyal, *Internal Separation of Powers*, *supra* note 17.

178. *See* Spaulding, *Independence and Experimentalism*, *supra* note 17, at 433–37.

A. Courting Disaster: Transforming OLC into a Judicial Entity

Ackerman's makeover of American government would create a new tribunal with nine members sitting for staggered twelve-year terms.[179] In advancing his proposal, however, Ackerman failed to specify the role of standing and other threshold issues.[180] This lack of specificity creates more questions than answers about the tribunal's role.

The confusion may have stemmed from Ackerman's unclear depiction of standing in comparative law. On the one hand, Ackerman acknowledged that a German tribunal that helped inspire his proposal had a jurisdictional mandate that would clash with Article III constraints on standing.[181] As a result, Ackerman noted, the German tribunal could not serve as a model for his Supreme Executive Tribunal.[182] However, Ackerman also stated that the French Conseil d'Etat was a more promising template for his approach.[183] Yet the Conseil d'Etat issues advisory opinions.[184] Borrowing from institutions elsewhere is often valuable, but one should first be sure what attributes those institutions possess.

The Tribunal's interaction with conceptions of standing in the federal courts is even more unclear. Ackerman would permit suits by members of Congress, whom the Supreme Court has typically held lack standing to sue.[185] The Tribunal would also hear cases that federal courts would decline to hear because they raise political questions.[186] Courts stay their hand in these matters to allow Congress and the President to work out their differences on policy matters.[187] Many of these matters may lack clear standards that facilitate judicial review or may address contexts such as foreign policy, where the nation should speak with one voice.[188] Thus, under

179. *See* ACKERMAN, *supra* note 6, at 143.

180. *Id.* at 146–47 (noting that the proposal requires "legal fine tuning"); *see also id.* at 246–47 n.6 (discussing standing).

181. *Id.* at 246–47 n.6.

182. *Id.*

183. *Id.*

184. Predictably, the decisions of the Conseil d'Etat clash with the decisions of the other two high tribunals in France. *See* David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 775 n.165 (2009).

185. *See* ACKERMAN, *supra* note 6, at 145; *cf.* Raines v. Byrd, 521 U.S. 811, 813, 830 (1997) (holding that members of Congress lacked standing to challenge provisions of a statute authorizing line-item veto).

186. ACKERMAN, *supra* note 6, at 145–46.

187. *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

188. *See id.* at 211–13 (noting that "many such questions uniquely demand a single-voiced statement of the Government's views"); *cf.* RICHARD H. FALLON, JR., IMPLEMENTING THE

Ackerman's prescription, a primary source of the Tribunal's workload would be decisions about pending statutes or regulations contested by legislators on policy grounds.

This prescription is worse than the disease.[189] Legislators would have far less reason to negotiate with either the President or their own colleagues.[190] Instead of engaging in the messy business of negotiation, they would seek the Tribunal's intervention.[191] To perform its advisory function, the Tribunal would have to stay pending legislation for weeks or months.[192] This delay would have a particularly deleterious impact on foreign policy matters, where a timely move may be necessary to avert irreparable harm or capitalize on a fleeting opportunity.[193] Moreover, such temporal shifts would inevitably alter the political dynamic, giving opponents of legislation an advantage. Leverage of this kind might be useful for groups traditionally disfavored in the political process; however, equal protection and other doctrines already protect these groups.[194] Ackerman designed his proposal not for remedying discrimination, but for recalibrating an allocation of powers among the branches that, in his view, had tilted dangerously toward the Executive.[195]

While the Executive Branch would be weaker once Ackerman's Tribunal opened for business, it is far less clear that Congress as an institution would be stronger. The most likely winner would be inertia, as small groups of legislators representing special interests would seek recourse

---

CONSTITUTION 45–55 (2001) (discussing institutional concerns such as manageable standards that influence the role of doctrine in particular cases); Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002) (recommending greater recourse to doctrine).

189. *See* Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1742–48 (2011) (book review) [hereinafter Morrison, *Constitutional Alarmism*].

190. *See id.* at 1744.

191. *See id.*

192. *See id.* Ackerman subsequently asserted that his proposal still "grant[ed] the President the power to have the last say," regardless of the Tribunal's decision. Ackerman, *supra* note 17, at 39. However, the passages from *The Decline and Fall of the American Republic* that Ackerman cited in his reply to Morrison did not make this clear, but only ventured the prediction that if the President "is determined to pursue his course, he must defy the [T]ribunal." *Id.* (citing ACKERMAN, *supra* note 6, at 150). Describing the President as "defy[ing]" the Tribunal sounds like an extra-legal action, not an exercise of lawful prerogative.

193. For example, delay could have complicated the Louisiana Purchase. *See* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 638 n.5 (1952) (Jackson, J., concurring) (citing Letter from Thomas Jefferson to John Breckinridge (Aug. 12, 1803), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 407, 411 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903)) (discussing the need for decisive action).

194. *See* Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (invalidating a provision that excluded "hippie communes" from the Food Stamp program); *cf.* FALLON, *supra* note 188, at 87–89 (discussing rationale for judicial review).

195. ACKERMAN, *supra* note 6, at 143 (noting that the point is to "create a new institutional mechanism that will put a brake on the presidential dynamic before it can gather steam").

in the Tribunal to block rules or statutes that benefited the public as a whole. The Tribunal might also overshoot the mark on presidential power. Instead of merely curbing overreaching, the Tribunal might provide timid presidents with political cover for passivity.[196]

In short order, the Tribunal might find its own institutional capital running low. For courts, standing doctrine not only observes Article III limits on judicial power, but also ensures a concreteness that sharpens issues.[197] By relaxing standing requirements and allowing advisory opinions on pending legislation, the Tribunal might have to rewrite its own decisions every few weeks as political coalitions shift. As a result, both the legal community and the public might quickly come to see the Tribunal as a pawn in the political process, rather than a source of enduring norms. These consequences of relaxed standing rules also reduce the utility of Neal Katyal's earlier, more modest suggestion for an adjudicative turn at OLC.[198]

An adjudicative model like Katyal's could also increase polarization. Katyal proposed sending some interagency disputes to a Director of Adjudication, whose mandate might also include assessing the effect of international law on presidential power.[199] However, hitching the President to the wagon of the Director of Adjudication's advice would have significant unintended consequences. If the President perceives the Tribunal's procedures as too cumbersome to fit the nation's needs, the legitimacy of the Tribunal itself may suffer.[200] In regulated industries, compliance suffers when businesses view regulation as out of touch with realities "on the

196. This is also a risk of the present system. *See* Power of the President in Executing the Laws, 9 Op. Att'y Gen. 516, 523 (1860) (opinion by President Buchanan's Attorney General, J.S. Black, finding that the President lacked power to prevent secession).

197. *See* Baker v. Carr, 369 U.S. 186, 204 (1962) (applying the standing doctrine); *cf.* Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562 (2009) (discussing interplay of constitutional and prudential rationales in threshold doctrines).

198. *See* Katyal, *Internal Separation of Powers*, *supra* note 17; *cf.* Margulies, *True Believers*, *supra* note 6, at 64 (arguing that "concretely adversarial relationships" sharpen issues and therefore improve decision makers' work products).

199. *See* Katyal, *Internal Separation of Powers*, *supra* note 17, at 2337–40. Katyal highlighted the possibility that the proposed Director of Adjudication could have issued an opinion on the applicability of the Geneva Conventions to Guantanamo detainees. *Id.* at 2340 (noting that an opinion by a "neutral adjudicator" would have strengthened the case for judicial deference to the President).

200. OLC has already adopted some procedures that insulate it from political pressure, in the manner of a court, at the price of "isolating it from its clients and the contexts in which they operate." Morrison, *Stare Decisis in OLC*, *supra* note 1, at 1509; *see also* Pillard, *supra* note 4, at 734–38 (citing a preference for written requests and an aversion to opining on hypothetical questions).

ground."[201] This sense of illegitimacy of the Tribunal can polarize the situation, spurring the President to even riskier strategies. Polarization is even more likely because the President is not locked into advice from a new tribunal. The President can always secure advice elsewhere, such as from the White House Counsel.[202] This exit strategy would make legal advice even less independent.[203]

These concerns dovetail with even more pressing constitutional cavils about restrictions on removal of the Tribunal's members.[204] To ensure the advice giver's independence, Ackerman and others have proposed

---

201. *See, e.g.*, Neil Gunningham & Darren Sinclair, *Regulation and the Role of Trust: Reflections from the Mining Industry*, 36 J.L. & SOC'Y 167, 176–83 (2009) (noting the ineffectiveness of legal sanctions); Robert A. Kagan, Dorothy Thornton & Neil Gunningham, *Explaining Corporate Environmental Performance: How Does Regulation Matter?*, 37 LAW & SOC'Y REV. 51, 73–74 (2003) (same); *cf.* Tom Tyler, Stephen Schulhofer & Aziz Z. Huq, *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC'Y REV. 365 (2010) (discussing the positive effects of perception of legitimacy on cooperation with law enforcement).

202. *See* Pillard, *supra* note 4, at 713. *But see* Morrison, *Constitutional Alarmism*, *supra* note 189 (arguing that White House Counsel also has a tradition of integrity which will minimize abuses). Katyal acknowledged this risk. *See* Katyal, *Internal Separation of Powers*, *supra* note 17, at 2339 ("The traditional case against OLC independence is that it leads to less advice rather than more."). To deal with this issue, Katyal proposed allowing agencies and whistleblowers to file cases with the new adjudicative entity. *Id.* This proliferation of intra-branch litigants might well promote greater reflection about governance issues. However, it could also produce an intra-branch version of Ackerman's tribunal, in which contending players will too readily seek relief in adjudication instead of ironing out their differences through negotiation. Katyal's inter-agency tribunal could also become a pawn in turf disputes, revising its decisions as agency parties negotiate. Of course, parties negotiate conventional court cases all the time. However, courts have threshold tests like standing rules, ripeness, and exhaustion to ensure that parties do not prematurely exit other avenues for resolving their disputes. *See, e.g.*, Morrison, *Stare Decisis in OLC*, *supra* note 1.

203. The unique prestige of OLC reduces this cost. *See* MaryAnne Borrelli et al., The White House 2001 Project: The White House Interview Program, Report No. 29, at 12 (Nov. 1, 2000), http://whitehousetransitionproject.org/files/counsel/Counsel-OD.PDF (oral history project on White House Counsel's office quoting C. Boyden Gray, White House Counsel under the first President Bush, as commenting, "[w]e [the White House] were free to ignore their advice but you knew so you did so at your peril because if you got into trouble you wouldn't have them there backing you up, you wouldn't have the institution backing you up").

204. In France, members of the political branches, including the Prime Minister and Minister of Justice, participate in the Conseil d'Etat. *See* Henry H. Perritt, Jr., *Providing Judicial Review for Decisions by Political Trustees*, 15 DUKE J. COMP. & INT'L L. 1, 44 (2005). However, scholars accept that American elected officials or cabinet members could not serve in this capacity, at least if the tribunal had any distinctive adjudicative function. *See* U.S. CONST. art. I, § 6, cl. 2 (forbidding members of Congress from holding executive office); *see also* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 119 n.38 (1995) (noting that the Constitution does not expressly forbid an executive official from holding judicial office, but that thinkers from Madison forward have believed that a prohibition is implied). The President *could*, of course, participate in a more informal intra-branch review of executive policies. However, that more informal process would lack the independence that Ackerman considered to be vital.

restrictions on the President's removal power.[205] The Supreme Court has recently indicated that the separation of powers places limits on Congress's ability to create positions within the Executive Branch, whose occupants the President cannot remove.[206] Removal restrictions, including requiring good cause, are clearly permissible only when the official has responsibility for overseeing administrative adjudication authorized by Congress, or has been appointed for a limited purpose not involving compliance with the President's instructions.[207] In those situations, restrictions on removal are necessary to ensure the integrity of the adjudicative process. However, the adjudication that Congress can protect only entails regulation of private sector dealings, such as the Securities and Exchange Commission's jurisdiction over publicly traded companies.[208] No precedent exists for creation of a tribunal within the executive branch that would exert binding power over the *President's* decisions.[209] An Article III court has such power,[210] but Ackerman's proposal was a response to perceived inadequacies with federal court review. The unanswered questions about Ackerman's proposal have taken us back to where we started.

---

205. *See* ACKERMAN, *supra* note 6, at 147–49; *cf.* Spaulding, *Independence and Experimentalism*, *supra* note 17, at 433–37. *But see* Katyal, *Internal Separation of Powers*, *supra* note 17, at 2237–38 (conceding that the Constitution could require allowing the President to overrule the Director of Adjudication).

206. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151–52 (2010) (invalidating removal restrictions on members of the Public Company Accounting Oversight Board (PCAOB) within the Securities and Exchange Commission). However, the *Free Enterprise Fund* holding is relatively narrow, and does not alter the pragmatic view of Congress's power as outlined in the case law. *See* Morrison v. Olson, 487 U.S. 654, 671 (1988) (upholding an independent counsel statute which granted courts the authority to appoint counsel and limited the President's removal power); Humphrey's Ex'r v. United States, 295 U.S. 602, 632 (1935) (upholding a statute requiring good cause for removal of the Chair of the Federal Trade Commission). For a more expansive view of presidential power, see Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

207. *See Free Enter. Fund*, 130 S. Ct. at 3152 (noting that the earlier case concerned the Federal Trade Commission, an independent agency that was "quasi-legislative and quasi-judicial," rather than "purely executive" in character (citing *Humphrey's Ex'r*, 295 U.S. at 627–29)).

208. Congress can also authorize courts to exercise its prerogatives under Article I of the Constitution. Bankruptcy courts are one example. Commentators have proposed specialized Article I courts for immigration and Social Security disability benefits. *See, e.g.*, Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1678–79 (2010) (discussing the virtues and risks of such a proposal in an immigration context). However, Congress has never created an Article I court that purported to define the President's duties, as Ackerman's Tribunal would do. *See* Morrison, *Constitutional Alarmism*, *supra* note 189, at 1745.

209. *See* Morrison, *Constitutional Alarmism*, *supra* note 189, at 1745.

210. *See* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952).

Similar problems affect Spaulding's proposal to preserve OLC's current structure, but add restrictions on removal.[211] This proposal would also give the President political cover for inertia, and therefore insulate him from voters who expect the President to deliver what he promised.[212] While Spaulding argued that the secrecy of OLC's advice on national security justified this additional freedom from presidential control, courts have typically viewed secrecy as facilitating the President's discharge of purely executive responsibilities.[213] Spaulding was surely correct that secrecy can become a serious problem in OLC's work.[214] However, the fallout from excessive secrecy will not justify otherwise unconstitutional restrictions on the removal power.

B. Doubling Down on Bureaucracy: The New Professional Misconduct Review Unit

The changes described above, particularly Ackerman's makeover, are likely to remain bases for discussion, rather than implementation. Whatever the merits of these proposals, they at least respond to a felt concern about past abuses. The one structural change actually promulgated by the new Administration—the creation of the Professional Misconduct Review Unit (PMRU)—is unlikely to stop abuses in the future.

The PMRU, established by Attorney General Eric Holder, will review OPR findings that Justice Department lawyers have engaged in misconduct.[215] However, this measure may not promote accountability. First, it will not review no-cause determinations by OPR, but only instances where OPR has recommended discipline.[216] Second, the new unit will further delay the review process by requiring more layers of bureaucracy, thereby frustrating the public interest in timely review and disclosure.[217] While the process needs fixing, the PMRU may compound problems, rather than alleviate them.

---

211. *See* Spaulding, *Independence and Experimentalism*, *supra* note 17, at 433–37.

212. *See* Myers v. United States, 272 U.S. 52, 163–64 (1926) (finding that the President has the sole power to remove purely executive officers).

213. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–20 (1936).

214. BLUM & HEYMANN, *supra* note 8, at 18–19.

215. *See* Press Release, Office of Pub. Affairs, Dep't of Justice, Attorney General Creates Professional Misconduct Review Unit, Appoints Kevin Ohlson Chief (Jan. 18, 2011) [hereinafter Press Release], *available at* http://www.justice.gov/opa/pr/2011/January/11-ag-060.html. Most complaints about DOJ lawyers involve criminal prosecutions. *See, e.g.*, United States v. Stevens, 715 F. Supp. 2d 1, 2–5 (D.D.C. 2009) (discussing allegations of abuses, including failure to disclose exculpatory evidence, in the prosecution of late Alaska senator Ted Stevens).

216. *See generally* Press Release, *supra* note 215.

217. *See* Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 16 n.75 (2009).

V. DECISIONAL REFORMS: SUBSTANTIVE STANDARDS AND DELIBERATIVE PROCESSES

Reformers have also suggested changes in the substantive standard governing OLC's work, and the role it performs. The impetus for these suggestions comes from a general consensus that Yoo wrongly approached his job as would a private lawyer advocating in court for his client's position.[218] In the advocacy context, ethics rules promote a robustly adversarial debate, by prohibiting only knowing misstatements of fact or law.[219] OLC's work requires more; however, discerning *how much* more to require has proven challenging. Some believe that utter objectivity is essential.[220] Other scholars generally accept an objective standard, but hedge their bets either by allowing more aggressive opinions when the lawyer discloses opposing arguments or by permitting a more senior official such as the President to act against the lawyer's advice.[221] Still others believe that OLC advice does not resemble a private lawyer's work or a judicial decision—instead, "[i]t is something inevitably, and uncomfortably, in between," with some, but not unlimited, room for minding the President's institutional and policy interests.[222]

A. The Perils of Absolutism

Ackerman emphatically belongs in the objectivity camp—he proposed a Supreme Executive Tribunal to replace OLC because he believed that anything less than judicial objectivity was a danger to the country.[223] Another commentator adopted the same view by declaring that OLC should provide advice that "fairly addresses and objectively evaluates" the law.[224] Proponents of an objective standard acknowledge that law sometimes can be ambiguous.[225] However, according to this view, the OLC lawyer should not

218. *See* GOLDSMITH, *supra* note 4, at 149 (quoting another government lawyer as describing Yoo's work as reading "like a bad defense counsel's brief, not an OLC opinion"); LUBAN, *supra* note 6, at 198 (describing Yoo's memos as "aggressive advocacy briefs").

219. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1)–(2) (2011).

220. *See infra* notes 223–26 and accompanying text.

221. *See infra* notes 235–37 and accompanying text.

222. *See* GOLDSMITH, *supra* note 4, at 35.

223. *See* ACKERMAN, *supra* note 6, at 143–50 (proposing Tribunal); *id.* at 104 (denouncing anything less than this standard as "twists and turns of legalese").

224. *See* John C. Dehn, *Institutional Advocacy, Constitutional Obligations, and Professional Responsibilities: Arguments for Government Lawyering Without Glasses*, 110 COLUM. L. REV. SIDEBAR 73, 79 (2010).

225. *Id.* at 78.

consider the President's political or institutional interest in assessing what the law allows.[226]

The absolutist view is compelling, until it confronts the situation on the ground. Consider the exigent circumstances that persuaded Robert Jackson to authorize World War II's destroyer deal with Britain.[227] An absolutist could question the need for the transaction, though historians have largely resolved that issue, finding that our refusal would have facilitated Germany's defeat of Britain and permitted the Axis powers to pivot toward attacking the United States.[228] A more committed absolutist could reason that the peril to the country should not figure in her calculations, either because such danger cannot outweigh contravention of positive law in any case or because exceptions will eventually cause greater harm to the legal fabric. Here, too, however, the historians would whittle down absolutist arguments, suggesting that only the Civil War surpassed the seriousness of the situation facing Jackson and his principal, Franklin Roosevelt.[229] In other words, the historians tell us, without the action proposed there might be no rule of law left to praise.[230] After the historians are done, the absolutist can only insist that even a clear and present danger to the nation will not justify a relaxed view of the lawyer's role. That stance merits a certain grudging admiration, but cannot bind a leader whose first duty is to the country's survival.[231]

Because the absolutist approach is ultimately unpalatable, some commentators have sought to couple an objective standard with a hedge that mitigates the standard's rigidity. Professors Blum and Heymann, for

---

226. *Id.* (stating that OLC lawyers should not shade advice to defend an "'institutional tradition,' prerogative, or policy decision").

227. *See* SCHLESINGER, *supra* note 147, at 105–06 (noting that the United States faced a "genuine national emergency").

228. *See id.* at 108.

229. *Id.*

230. This was Lincoln's argument to Congress about the need to suspend habeas corpus in Maryland. *See* Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (Roy P. Basler ed., 1953) (asserting that preserving habeas would have allowed "all the laws, *but one*, to go unexecuted . . . [and] go to pieces"); *cf.* SCHLESINGER, *supra* note 147, at 59 (discussing Lincoln's exercise of power); Barron & Lederman, *supra* note 159, at 998–1000 (arguing that Lincoln's actions were provisional in nature, and did not rely on a plenary view of presidential power).

231. *See* BLUM & HEYMANN, *supra* note 8, at 10; *see also* Michael Walzer, *Political Action: The Problem of Dirty Hands*, *in* TORTURE: A COLLECTION 61, 63–67 (Sanford Levinson ed., 2004) (discussing Machiavelli and Weber); Wendel, *supra* note 5, at 86–87 (discussing Walzer's view of leaders as "reluctant realists"); *cf.* Max Weber, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 127 (H.H. Gerth & C. Wright Mills eds. & trans., 1946) (discussing leaders' ultimate responsibilities). *But see* Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2004) (arguing that emergency measures create their own momentum). *See generally* Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (asserting that the Constitution is not a "suicide pact").

example, argued that OLC should only provide "mainstream," not merely "remotely plausible" or "idiosyncratic" views of the law.[232] However, they suggested that OLC's limited role should not bind the President, who can act to safeguard the country.[233] While this position offers more flexibility, it ignores the link between the lawyer's opinion and the President's ability to act. On the destroyer deal, for example, Roosevelt was unwilling to move without some guarantee of congressional acquiescence, and a major legislative ally had said that legal justification was necessary.[234] While that may not always be the case, a commentator supporting this hedge should at least consider the endogeneity of the lawyer's opinion to the President's decision.

Other scholars hedge by coupling an objective standard with a dispensation for lawyers who disclose opposing arguments.[235] However, this approach either constrains too little or simply reverts back to the absolutist standard. It constrains too little because surely some opinions are unjustifiable, even if the lawyer diligently lists opposing arguments. Consider an opinion endorsing genocide. Presumably, even a champion of the opposing argument hedge would view such an opinion as unacceptable no matter how comprehensively the genocide lawyer recited arguments in opposition. In fact, proponents of this hedge might be tempted to deny that the genocide lawyer even made opposing arguments, or find the lawyer's canvassing of genocide critiques inadequate. Yoo, as we have seen, provided caveats for his arguments about specific intent and severe pain.[236] Neither caveat saved Yoo's opinion from myopia, but a scholar whose approval hinges on opposing arguments should at least mention them.[237] A scholar who fails to do so has reverted back to the absolutist posture, with all of the problems linked to that stance.

---

232. *See* BLUM & HEYMANN, *supra* note 8, at 54–55.

233. *Id.* at 55; *cf. id.* at 10 (noting this standard).

234. *See* SCHLESINGER, *supra* note 147, at 106–07. Admittedly, this is not always the case. Jefferson completed the Louisiana Purchase despite his Attorney General's opposition. *See* John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 414–17 (1993); *cf.* Blum, *supra* note 21, at 281 (arguing that the Executive must assume responsibility for doing what is right even if his lawyers disagree). *See generally* Gross, *supra* note 21, at 1106–07.

235. *See* LUBAN, *supra* note 6, at 198; Johnsen, *supra* note 4, at 1605; Wendel, *supra* note 5, at 120.

236. *See* Bybee Memo, *supra* note 7, at 175.

237. Wendel and Luban, who highlighted the importance of opposing arguments, did not mention Yoo's caveats. *See* LUBAN, *supra* note 6; Wendel, *supra* note 5; *cf.* David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1452–57 (2005) (omitting mention of Yoo's disclaimers in a lengthy discussion).

Other scholars—those with experience at OLC—give an answer that Ackerman deplored but which is still the best start for an honest look at the "uncomfortably . . . in between" role of OLC.[238] For Morrison, OLC should give "*its*" best view, which inevitably will consider the President's interests.[239] This view is the most honest, and also the one that best matches the long history of OLC and Attorney General opinions.[240]

B. Deliberative Virtues: Of Stare Decisis, Disclosure, and Dissenting Views

Scholars who have turned their attention to a substantive standard have also considered OLC's deliberative process. After all, how one makes a decision is often as important as the underlying substantive standard. Political theorists have long asserted that deliberative habits are crucial to a polity's political development.[241] In the OLC context, efforts along these lines have focused on three areas: disclosure, the presence of dissenting views, and stare decisis.

1. Disclosure

Disclosure is an important deliberative safeguard. From an *ex ante* perspective, disclosure protects against fringe views, since the author of an opinion knows that outside audiences will "kick the tires" and quickly discover and critique views that distort the relevant law.[242] Disclosure also helps *ex post*, by allowing Congress, professional peers, and the public to see distortions as they emerge and campaign to correct them.[243] Disclosure also works hand in hand with efforts by the President to secure ratification of an unorthodox view that responds to exigent circumstances; disclosure, at least

238. *See* GOLDSMITH, *supra* note 4, at 35.

239. *See* Morrison, *Stare Decisis in OLC*, *supra* note 1, at 1502 (stating that OLC should offer "its best view of the law, which is different from the job of an advocate but also need not carry the pretense of 'true' neutrality"); *cf.* Johnsen, *supra* note 4. *But see* ACKERMAN, *supra* note 6, at 104 (critiquing OLC veterans' views as apologia for executive power).

240. *See* Moss, *supra* note 4. It may benefit from more specific content, which I offer later in this Article. *See infra* Part VI.

241. *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

242. *See* Margulies, *True Believers*, *supra* note 6, at 79–80; Morrison, *Stare Decisis in OLC*, *supra* note 1, at 1518–20; Setty, *supra* note 22 (discussing the importance of the disclosure of legal policy positions). *See generally* David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2010) (discussing the uses and dangers of government secrecy).

243. *See* Setty, *supra* note 22, at 602–05 (discussing the benefits of disclosure to generate political and public sentiments).

to Congress, is a necessary incident of ratification.[244] Certain opinions may contain sensitive information that makes immediate disclosure inappropriate.[245] However, Congress could well require as part of its oversight that OLC engage in a deliberative process, including making express findings that become part of an opinion, when such circumstances prevail.

2. Considering Opposing Views

Scholars and veterans of OLC also argue that the office should expressly consider opposing views.[246] Testing views against opposing arguments is a time-honored approach to deliberation, although it should not shield lawyers who advise a course that violates clearly established law.[247] Seeking input from government lawyers with opposing views is also a sound practice.[248] Without that input, the government can make colossal blunders, as recent Administrations have shown.[249] Moreover, consideration of opposing views should entail a reasoned statement of those views, including an explanation of their foundation.[250] Yoo's warning that a jury would consider specific intent in light of reasonable inferences about the effect of interrogation practices was a significant step in the right direction, albeit not a complete response.[251] In contrast, his more fleeting caveat about the limited relevance of Medicaid statutes to the concept of pain in the torture statute only gestured at the level of deliberation expected.[252]

244. *See* Margulies, *True Believers*, *supra* note 6, at 66–68 (noting the need for transparency, even in exigent circumstances, to facilitate dialogue between the branches of government).

245. *See* Setty, *supra* note 22, at 610 (discussing the treatment of sensitive information in balancing the President's need to act quickly and Congress's need for information).

246. *See* LUBAN, *supra* note 6, at 198; Johnsen, *supra* note 4, at 1605; Wendel, *supra* note 5, at 85.

247. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2011) (noting that it is unethical for a lawyer to knowingly advise a client to violate the law).

248. *See* Morrison, *Stare Decisis in OLC*, *supra* note 1, at 1522; Spaulding, *Independence and Experimentalism*, *supra* note 17, at 438–39.

249. *See* Sofaer, *supra* note 92, at 81–82.

250. *See* LUBAN, *supra* note 6, at 198.

251. *See* Bybee Memo, *supra* note 7, at 174–75.

252. *See id.* at 176–77.

3. Stare Decisis

Scholars with experience at OLC have also commended the office's respect for precedent as an aid to deliberation.[253] Respect for precedent encourages deliberation, since in the process of discovering and distinguishing precedent the lawyer will be obliged to grapple with different views and explore similarities and differences with her own. At its best, such an approach could also lead to the kind of habits of reflection that courts at their best display—an effort to find workable approaches that will stand the test of time. However, developing a workable approach to precedent at OLC also requires acknowledging the complexities of the task. Difficult issues include flaws in the analogy between OLC and courts, and uncertainty about the nature of precedent, its effects, and criteria for overruling prior decisions.

As the critique of Ackerman's Supreme Executive Tribunal proposal in the previous Part showed, OLC as currently constituted bears only limited resemblance to courts.[254] Stare decisis works because courts handle scores or hundreds of cases with similar facts.[255] However, OLC does not resolve a comparable volume of disputes. Compared to most courts, OLC considers more one-off questions that have high stakes, but little prospect for recurrence in exactly the same form.[256] In this sparser decisional environment, stare decisis is not as useful.[257] As a case in point, consider

253. *See* GOLDSMITH, *supra* note 4, at 145–46; Morrison, *Stare Decisis in OLC*, *supra* note 1, at 1492–1504. *See generally* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987) (discussing meanings and usage).

254. *See supra* Part IV.A.

255. *See* Lauren Vicki Stark, *The Unworkable Unworkability Test*, 80 N.Y.U. L. REV. 1665, 1668 (2005) (noting the need for precedents to reduce the workload of judges).

256. *See* Memorandum from David J. Barron, Acting Assistant Att'y Gen., to Att'ys of the Office of Legal Counsel, Re: Best Practices for OLC Legal Advice and Written Opinions 1 (July 16, 2010) [hereinafter Barron Memo], *available at* http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf (noting that OLC is "frequently asked to opine on issues of first impression"). As one ascends the appellate ladder, courts entertain a higher ratio of cases of first impression. The Supreme Court obviously hears a large percentage of such cases. In cases in which precedent exists, however, the Court generally accords it significant weight. Instances of overruling often provoke sharp disagreement among the Justices regarding the existence of narrower grounds for the decision. *Compare* Citizens United v. FEC, 130 S. Ct. 876, 917–25 (2010) (Roberts, C.J., concurring) (arguing that comprehensive overruling of precedent was necessary in a campaign finance case), *with id.* at 929–79 (Stevens, J., dissenting) (arguing that the majority, which struck down federal campaign finance provisions, should have decided the case on narrower grounds or respected precedent by upholding the statute).

257. Morrison's discussion of his data set of OLC opinions noted that the vast majority are "neutral," which he defined as either not mentioning OLC precedent or citing all such precedent favorably. *See* Morrison, *Stare Decisis in OLC*, *supra* note 1, at 1480–81 (noting that the "neutral" category included 88.16% of OLC opinions). Morrison did not break down this "neutral" category into opinions that did and did not cite precedent. He also did not attempt the admittedly difficult task of quantifying the level of generality of the OLC opinions cited, to discern if some of those cited were essentially boilerplate, like many cites to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137

Bybee's analysis of the torture statute.[258] Apparently, OLC had never done such an analysis before, so concrete OLC precedent was unavailable.[259]

The common law roots of stare decisis may also be an inapposite model in other respects. Common law decision making has limitations.[260] Stare decisis is path dependent, so that a precedent established at one point in time will govern others to follow.[261] However, that puts a special onus on the variables, many of them randomly generated, contributing to the initial decision.[262] While the decision maker at this juncture seeks to anticipate future implications of her ruling, her clairvoyance will of necessity be incomplete.[263]

As a result, the degree of actual constraint imposed by precedent on a current president becomes a hit-or-miss affair. OLC precedent will constrain a president who might wish to defy a statute he regards as unconstitutional.[264] This position, which seems unexceptionable in principle, may raise problems for future presidents regarding statutes that no longer fit evolving conceptions of human and civil rights.[265] Consider, for example, the "Don't Ask, Don't Tell" (DADT) policy that for a number of years limited the eligibility of openly gay individuals to serve in the

(1803), in judicial opinions. Without these more laborious and fine-grained calculations, it is difficult to assess exactly how precedent shapes OLC's overall work product. Of course, some issues do recur. *See* Morrison, *Stare Decisis in OLC*, *supra* note 1, at 1472–73 (noting that nineteenth century Attorneys General had followed precedent that Spanish claimants seeking damages from government arising out of conflict in Florida were not entitled to interest). *But see id.* at 1474 n.106 (noting that, in 1862, Lincoln's Attorney General, Edward Bates, declined to follow an earlier opinion concluding that free blacks were not citizens and therefore were not eligible for command of American seafaring vessels).

258. *See* Bybee Memo, *supra* note 7.

259. *See generally id.* at 200 (noting that "[t]he situation in which these issues arise is unprecedented").

260. ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON 108–09 (2009) (noting that common law systems can be "inefficient" when "the rate of environmental change is high").

261. *Id.* (discussing path dependence in common law).

262. *Cf. id.*; Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 606–22 (2001) (also discussing path dependence in common law).

263. *See* Hathaway, *supra* note 262, at 629 (addressing the limitations of judges considering future cases).

264. *See* Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199 (1994), *reprinted in* H. JEFFERSON POWELL, THE CONSTITUTION AND THE ATTORNEYS GENERAL 577, 578 (1999) (arguing that the President has the obligation to execute statutes that the Supreme Court is likely to uphold).

265. *See* Dawn E. Johnsen, *What's a President to Do? Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. REV. 395, 410–19 (2008) (addressing the President's "nonenforcement" authority).

military.[266] President Obama was right both to seek DADT's repeal and to modify enforcement of the provision in the run up to the repeal effort.[267] However, OLC's precedent on compliance with unconstitutional statutes may have deterred a president of less fortitude and ingenuity from limiting enforcement of the provision.

In other situations, available precedent from OLC on perennial issues like presidential power may not adequately constrain the President. Judicial precedent, such as *Youngstown*,[268] gives the President ample wiggle room—for example, by leaving up in the air whether the President can act when Congress is silent.[269] The lines between statutory expression, implication, and silence are notoriously blurred.[270] This uncertain boundary leaves OLC plenty of room to massage a particular situation into one that justifies the exercise of presidential discretion.

Further complications ensue because the unpredictability of situations facing the executive and the constitutional status of presidential authority require some means of overruling OLC precedent. The criteria and occasions for overruling call for great care, however, if OLC is to avoid the perception of strategic behavior.[271] As Morrison recently acknowledged, a provision for overruling based on the constitutional views of the President is required as a legal matter; as a unit within a cabinet department, OLC could not bind itself to a decisional rule in defiance of the President's instructions.[272] Moreover, the exception is required for reasons of policy: exigent circumstances may arise that make rigid adherence to decisional rules inadvisable.[273] However, exceptions complicate the analysis in two ways. First, if exceptions are possible, stare decisis becomes less effective as a guide to future advice.[274] Lawyers providing advice know *ex ante*, as do

266. 10 U.S.C. § 654 (1993) (repealed 2010).

267. *See* Craig Whitlock, *Pentagon Prepares to Relax 'Don't Ask, Don't Tell,'* WASH. POST, Mar. 25, 2010, at A4 (discussing possible changes to enforcement, including refusal to act on anonymous complaints).

268. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952).

269. *See* Patricia L. Bellia, *Executive Power in* Youngstown*'s Shadows*, 19 CONST. COMMENT. 87, 147–49 (2002) (arguing that avoiding precise delineation of the President's inherent power is unhealthy for democratic deliberation); Edward T. Swaine, *The Political Economy of* Youngstown, 83 S. CAL. L. REV. 263 (2010) (discussing uncertainty in the *Steel Seizure* test).

270. *See* Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383 (2004).

271. *See* Morrison, *Stare Decisis in OLC*, *supra* note 1, at 1504–18 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (noting the factors for overruling, including workability, hardship, and obsolescence)).

272. However, as Morrison notes, OLC cannot simply surrender its duty to provide legal advice. *See id.* at 1512 (citing 28 U.S.C. §§ 511–512 (2006), statutory authority for the Attorney General's provision of advice to the President).

273. *See supra* Part V.A.

274. *See* Stark, *supra* note 255, at 1674 (noting that, in the judicial context, overruling precedent undermines the legitimacy of the Court).

their clients within the executive branch, that if stare decisis becomes too confining, the President can alter the advice's outcome.[275] That encourages both lawyers and their clients below the chief executive level to push the envelope of precedent to avoid presidential overruling.[276] Sometimes the lawyers may push too far.[277] Of course, courts do this too. However, courts are virtually always public; they must submit their decisions for scrutiny by the public, the media, and professional elites, who will point out particularly strained arguments.[278] That acts as accountability of a sort. In contrast, while disclosure is a valued incident to OLC advice, the President can choose not to disclose.[279] So OLC as a practical matter has fewer constraints in the way that it interprets the bond imposed by stare decisis in a particular case.

Despite these caveats, the regime of stare decisis articulated above also clarifies a matter that has continued to provoke debate: the status of decisions by presidents like Jefferson, Lincoln, and Roosevelt to move beyond the textual limits of their authority.[280] Some have argued that these decisions were extralegal.[281] Their legitimacy depended on subsequent ratification, and they presumably had no precedential value.[282] Hamilton, in contrast, believed that in exigent situations the President had such power under the Constitution.[283] The truth (appropriate enough for OLC) is somewhere in between. Presidential decisions of this type *do* depend on subsequent ratification for their legitimacy; however, ratification does confer on such decisions a limited precedential value. Willingness to treat such historical examples as relevant precedent encourages analytical use of these episodes, rather than slipshod or expedient invocation. To be sure, OLC

275. *See* Morrison, *Stare Decisis in OLC*, *supra* note 1, at 1517–18.

276. *See id.*

277. *See id.* at 1517. This dynamic may be less salient because the President may view overruling as a serious step that signals legal jeopardy. *See* Borrelli et al., *supra* note 203; Morrison, *Constitutional Alarmism*, *supra* note 189.

278. *See generally* Todd E. Freed, *Is Stare Decisis Still the Lighthouse Beacon of Supreme Court Jurisprudence?: A Critical Analysis*, 57 OHIO ST. L.J. 1767 (1996) (commenting on the Court's differing treatment of stare decisis).

279. Few, if any, reformers suggest that *all* OLC advice should be disclosed immediately upon its issuance. *See* Morrison, *Stare Decisis in OLC*, *supra* note 1, at 1482–83 (acknowledging the general importance of confidentiality). *But see id.* at 1518–19 (arguing that presidential overruling should be disclosed).

280. *See* BLUM & HEYMANN, *supra* note 8, at 10–11.

281. *See id.* at 11–12 (summarizing arguments against these decisions).

282. *See id.* at 11 (discussing debate); Gross, *supra* note 21.

283. BLUM & HEYMANN, *supra* note 8, at 11; *cf.* Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257 (2004) (arguing for broad executive power).

lawyers should handle these examples with care, because they emerged from the cauldron of extraordinary events, and because their citation as precedent will also signal a comparable testing of the limits of presidential power.[284] For the latter reason, presidents will seldom deem it prudent to cite these examples from history, and that is as it should be.

VI. DIALOGIC EQUIPOISE AND OLC

Ultimately, OLC is not so much a quasi-judicial as a constitutionalist body that imposes constraints on the executive in the shorter term for the sake of longer term gains. Majorities consent to constitutional protections because they know that a protection that frustrates them today may safeguard their rights tomorrow.[285] Similarly, presidents value OLC because it gives them more room to maneuver once its concerns are satisfied, even though satisfying its concerns can be challenging in the near term. The sustainability of the institution requires a kind of dialogic equipoise.[286]

The OLC lawyer must always consider how other stakeholders, including Congress and the courts, will view executive initiatives. Just as lawyers often leverage their own reputation to build up goodwill for their clients,[287] the OLC lawyer's pedigree of deliberation gives her advice special clout. An OLC lawyer who too readily buys into the President's initiatives will cannibalize her own credibility, and eventually leave the President without the imprimatur that OLC can provide.[288] In that way, an ideological affinity between an OLC lawyer and the President is like the siren song that distracted Ulysses[289] from his journey home: it tempts executive officials with the promise of short-term benefits while holding long-term perils.[290] As the metaphor suggests, accepting OLC's advice is a Ulysses contract,

---

284. Jackson, for example, cited Jefferson in his destroyer deal opinion. *See* Jackson op., *supra* note 29, at 487–88 (asserting that the transaction with Britain "falls far short in magnitude of the acquisition by President Jefferson of the Louisiana Territory"). During the Reagan Administration, then-Assistant Attorney General Ted Olson cited Jackson's opinion in finding that aid to the Nicaraguan contras did not violate the Neutrality Act. *See* Overview of the Neutrality Act, 8 Op. O.L.C. 209, 216–17 (1984).

285. *See* Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1826–28, 1835 (2009) (discussing the premises of constitutionalism).

286. *See* Margulies, *True Believers*, *supra* note 6, at 66–71.

287. *See* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 263–67 (1984).

288. *See* Morrison, *Stare Decisis in OLC*, *supra* note 1, at 1513.

289. *See* JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY (1984); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1140 (1986).

290. OLC's memos in the year and a half after September 11 offered policymakers temporary peace of mind, while undermining their chances for subsequent buy-in from the other branches. *See* GOLDSMITH, *supra* note 4, at 206–07.

which binds the principal to the mast to ensure the journey's successful conclusion. On the other hand, if OLC becomes an unduly cumbersome institution, the costs of seeking its imprimatur outnumber the benefits.[291] The virtues of this coordinated game for the President decline. At that point, the President will deem it most efficient to exit and seek advice from another quarter, and again OLC will lose its ability to influence policy.[292] OLC should cultivate a sense of balance, avoiding opinions that unduly constrict or expand executive power.

A. Combining Substance and Deliberation

To pursue this elusive goal, a dialogic equipoise approach articulates a substantive test for acting in crises, but then uses the deliberative device of a cap to limit such expansive use of presidential power. In this way, it uses OLC's unique standing when circumstances require, but also maintains that standing through a precommitment mechanism that curbs overreaching. This hybrid strategy helps keep OLC safe from the polar extremes of undue risk aversion and risk-prone decisions.[293]

The substantive test has three requirements. First, action that pushes the envelope must have a compelling sovereignty- or human rights-centered rationale, defined respectively as the avoidance of irreparable harm to the nation or the promotion of emerging norms of liberty or equality. Second, the action taken must have a reasonable chance of ratification. Third, the action cannot violate any other constitutional norms.[294]

Sovereignty-centered actions would include measures, such as the Louisiana Purchase, which vastly increased the nation's size and resulted from fleeting circumstances abroad that made the only alternative—passage of a constitutional amendment—impracticable.[295] This category would also include Lincoln's suspension of habeas corpus in Maryland in April 1861 to prevent the separation of the nation's capital from the rest of the Union.[296]

---

291. *See* Morrison, *Stare Decisis in OLC*, *supra* note 1, at 1511–18 (highlighting the need for OLC to balance adherence to its precedent with the President's authority to abrogate that precedent).

292. *See id.*

293. *See supra* Part II.

294. These would include provisions found in the Bill of Rights or the Equal Protection Clause. The criteria in the text distill presidential decisions, often supported by legal advice, that have pushed the envelope in a fashion that history has judged kindly. *See* SCHLESINGER, *supra* note 147, at 89, 109.

295. *See* Gross, *supra* note 21, at 1106–08.

296. Demonstrating the urgency of the crisis, in April 1861, Confederate sympathizers in Maryland targeted Union troops and burned railroad bridges from Baltimore to the North. *See*

Roosevelt's destroyer deal with Britain during World War II[297] and Kennedy's imposition of a blockade during the Cuban Missile Crisis[298] also meet this high standard. In each case, substantial controversy attended the decision at the time. However, historians now generally agree that each measure served the national interest.[299]

Human rights-centered moves would include Lincoln's Emancipation Proclamation,[300] President Clinton's participation in NATO's intervention to stop genocide in Kosovo,[301] and President George H.W. Bush's participation in a United Nations humanitarian mission in Somalia.[302] Lincoln defended this aspect of presidential action most effectively, viewing emancipation not merely as a military measure, but also as "an act of justice" consistent with the "considerate judgment of mankind."[303] The United States is strongest when it acts decisively to prevent humanitarian catastrophes because the credibility thus acquired can also bolster diplomatic efforts in the future.[304] Congress's ratification or acquiescence demonstrates that the President in such contexts often acts as an agent for both political branches.

The Obama Administration's decision to help stop the loss of life in Libya qualified on both humanitarian grounds and reasons related to the

---

JAMES F. SIMON, LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT'S WAR POWERS 184–85 (2006).

297. *See* JACKSON, *supra* note 29, at 93–103.

298. Peter Margulies, *When to Push the Envelope: Legal Ethics, the Rule of Law, and National Security Strategy*, 30 FORDHAM INT'L L.J. 642, 671 (2007).

299. The largest remaining historical controversy concerns Lincoln's suspension of habeas corpus, although even with regard to that episode, historians fault the suspension's temporal and geographic expansion, not the relatively tailored measure in Maryland in the spring of 1861. *See* MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES (1991).

300. *See* Abraham Lincoln, Emancipation Proclamation (Jan. 1, 1863), *in* 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN 28 (Roy P. Basler ed., 1953) [hereinafter Emancipation Proclamation]; *cf.* Sanford Levinson, *The David C. Baum Memorial Lecture: Was the Emancipation Proclamation Constitutional? Do We/Should We Care What the Answer Is?*, 2001 U. ILL. L. REV. 1135, 1142–45 (discussing legal and historical context).

301. *See* HENKIN ET AL., *supra* note 33, at 548–49.

302. *See* Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 6 (1992); Memorandum Opinion for the Attorney General, 16 Op. O.L.C. 8, 9–12 (1992) [hereinafter Somalia Memo].

303. *See* Emancipation Proclamation, *supra* note 300; *cf.* ERIC FONER, THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY 237 (2010) (quoting Lincoln's December 1862 message, describing emancipation as the "last best . . . hope of earth").

304. JOSEPH S. NYE, JR., THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE 35 (2002) (suggesting that actions reflecting world consensus will result in "important opportunities for cooperation in the solution of global problems such as terrorism"); Christopher J. Borgen, *Hearts and Minds and Laws: Legal Compliance and Diplomatic Persuasion*, 50 S. TEX. L. REV. 769, 774–78 (2009) (noting the significance of global credibility with both governing elites and citizenry of other nations).

United States' role in global institutions.[305] Here, the slaughter of innocents would have been substantial without timely intervention. The Security Council had authorized the move, and action without the United States would have undermined America's commitment to the efficacy of international organizations.[306] The interventions in Somalia and Kosovo provide precedent, making the decision to intervene consistent with stare decisis in the Executive Branch.

The Libyan intervention also poses no violation of any other constitutional norms, which would bar any presidential action that violated provisions of the Bill of Rights or of the Equal Protection Clause. This prong would prohibit any unilateral executive effort to detain United States citizens without judicial review. Because of this restriction, no President could unilaterally implement a program like the Japanese-American internment program during World War II.[307]

The ratification requirement entails a reasonable expectation that Congress would either specifically endorse the President's decision through an affirmative act or acquiesce in the decision, or a reasonable belief that Congress has already authorized the decision. Both future legislative acts and acquiescence would require timely public disclosure, of the kind demonstrated by Lincoln regarding habeas corpus, Roosevelt in the destroyer deal, and Kennedy in the Cuban Missile Crisis.[308] Roosevelt and Jackson, for example, engaged in a process of "extensive and vigilant consultation" with internal and external stakeholders. [309] That deft and patient process eventually led to Congress's ratification of the destroyer deal

305. *See* Authority to Use Military Force in Libya, 35 Op. O.L.C. 1, 10 (2011); *see also* Charlie Savage, *Attack Renews Debate Over Congressional Consent*, N.Y. TIMES, Mar. 22, 2011, at A14 (discussing initial reactions).

306. This was also a rationale for President George H.W. Bush's decision to intervene in Somalia. *See* Somalia Memo, *supra* note 302, at 11.

307. *See* Patrick O. Gudridge, *Remember* Endo?, 116 HARV. L. REV. 1933 (2003) (discussing internment litigation). Congress also could not require broad internment of citizens, given any sensible reading of the sum total of Supreme Court precedent, which would include *Korematsu* as a negative example, much like John Yoo's lawyering. *Cf.* Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261 (2002) (discussing changes in American constitutional culture since World War II). Lincoln's initial suspension of habeas received post hoc approval from the Supreme Court in dicta in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 125 (1866) (observing that "in a great crisis . . . exigency . . . [could permit suspension when] immediate public investigation according to law may not be possible; and . . . the peril to the country may be too imminent to suffer such persons to go at large").

308. *See supra* notes 294–98 and accompanying text.

309. *See* SCHLESINGER, *supra* note 147, at 108.

in the Lend-Lease Act.[310] The tailored nature of America's Libya role and consultation with congressional leaders about the move[311] would fulfill this criterion.

In contrast, the low likelihood of ratification would preclude advice like John Yoo's about interrogation tactics.[312] Moreover, coercive questioning of suspected terrorists will rarely avoid irreparable harm, since traditional methods of interrogation such as building rapport are plausible alternatives to the tactics that Yoo authorized.[313] Even in cases where alternatives have been unavailing, the government should discount the harm that coercive questioning could conceivably prevent by the harm that such questioning inflicts on the integrity and discipline of government institutions.[314]

---

310. *See* GOLDSMITH, *supra* note 4, at 199–205.

311. *See* Savage, *supra* note 305. The legal status of the United States' role in Libya after expiration of the War Powers Resolution's sixty-day deadline for seeking congressional authorization presents more vexing questions. *See* Charlie Savage, *Libya Effort is Called Violation of War Act*, N.Y. TIMES, May 26, 2011, at A8. The Administration argued that its role after expiration of the deadline was largely confined to supplying French and English forces, which it said did not rise to the level of "hostilities" under the War Powers Resolution. *See* Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 62 (2011) [hereinafter Morrison, *Libya Hostilities*], *available at* http://www.harvardlawreview.org/ media/pdf/vol124_forum_morrison.pdf. However, United States warplanes and drones also attacked Libyan positions during this current phase of the conflict. *Id.* Although Congress did not define "hostilities," the use of lethal force would seem to qualify. Moreover, the Administration did not push hard for congressional ratification of its position, although it said it would "welcome" congressional approval. *See* Donna Cassata, *Senate Panel Votes to Back US Actions in Libya that House Rebuked*, BOS. GLOBE (June 29, 2011), http://articles.boston.com/2011-06-29/news/29718051_1_libya-senate-panel-war-powers-resolution. In addition, reports indicate that the Administration attached no special weight to OLC's opposition, but merely treated OLC's view as one of a number of competing sources of advice. Morrison, *Libya Hostilities*, *supra*, at 66. In short, the Administration's position exceeded the bounds of the dialogic equipoise model.

312. Indeed, the Bush Administration seemed to recognize that congressional approval would not be forthcoming, since senior officials kept the interrogation program secret, even from other Administration lawyers. *See* MARGULIES, *supra* note 10, at 61.

313. *See* JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 105–06 (2008) (discussing how veteran FBI interrogators used traditional, lawful interrogation techniques to get information from suspected terrorist Ibn al-Shaykh al-Libi).

314. *See* WALDRON, *supra* note 131, at 20, 28–32 (discussing countervailing factors); Daniel Kanstroom, *Law, Torture, and the "Task of the Good Lawyer"—Mukasey Agonistes*, 32 B.C. INT'L & COMP. L. REV. 187, 194–97 (2009) (same). *See generally* Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985) (discussing the importance of lawyers' consideration of long-term values).

B. A Case Study: The Obama Administration and Drone Attacks in Pakistan

To see dialogic equipoise in action, consider the Obama Administration's defense of drone attacks.[315] This use of force emerged as a response to a serious strategic problem. Al Qaeda and Taliban forces can readily move between Pakistan and Afghanistan, seeking to destabilize both countries.[316] The situation prior to the drone attacks produced an asymmetry favoring these groups: they had freedom of action, while United States forces had limited options. Along with this strategic dilemma, the Administration confronted a legal conundrum. Self-defense was the best rationale for strikes against the destabilizing al Qaeda and Taliban forces; but under conventional views, international law requires an imminent threat providing "no moment for deliberation."[317]

This conventional view allowed terrorists to game the system. Viewed *ex ante,* the imminence test does not deter terrorists, who unlike states have no "return address."[318] While a state's fixed location permits retaliation by

315. *See* Administration and International Law, *supra* note 142; *cf.* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (ruling that petitioner, the father of an American citizen in Yemen, who was allegedly targeted by the United States, lacked standing, and that the matter presented a political question).

316. *See* Jane Perlez, *Pakistan's Military Chief Criticizes U.S. Over a Raid*, N.Y. TIMES, Sept. 11, 2008, at A8.

317. This definition comes from Secretary of State Daniel Webster's response to the *Caroline* episode, in which the British attacked a ship near Niagara Falls which had previously conducted raids into Canada. *See* Letter from Daniel Webster, U.S. Secretary of State, to Henry Fox, British Minister in Washington (Apr. 24, 1841), *available at* http://avalon.law.yale.edu/19th_century/br-1842d.asp#web1. The United Nations Charter arguably codifies the *Caroline* standard. *See* U.N. Charter art. 51.

318. *See* William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 679–81 (2003) (arguing that the use of force was appropriate under international law); Robert Chesney, *Who May Be Killed? Anwar Al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT'L HUMANITARIAN L. 3 (2010); James A. Green, *Docking the* Caroline*: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense*, 14 CARDOZO J. INT'L & COMP. L. 429, 463–69 (2006) (noting the importance of flexibility in the definition of imminence); Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237 (2010) (arguing that the use of force was appropriate under international law); Oscar Schachter, *The Extraterritorial Use of Force Against Terrorist Bases*, 11 HOUS. J. INT'L L. 309 (1989) (same). In contrast, opponents of the new Administration's policy argued for a narrow reading of Webster's test and rights of self-defense. *See* Extrajudicial Summary, *supra* note 142, ¶ 45 (discussing the *Caroline* standard); O'Connell, *supra* note 142, at 15 (arguing that the use of force to disable terrorist groups planning subsequent attacks is not truly "defensive" in character, but amounts to "unlawful reprisal"); *cf.* Richard Murphy &

victims of aggression, transnational terrorist groups like al Qaeda can melt away and reconstitute themselves to plan subsequent attacks.[319] As al Qaeda demonstrated when it followed up the Kenya and Tanzania Embassy bombings with the attack on the *USS Cole* and September 11, while future attacks are not necessarily "imminent" in the conventional sense, recent history leaves little doubt of the group's capacity and intent. The United Nations has not codified a substitute to the conventional understanding.[320] However, one can read measures enacted by the international community after September 11 as authorizing a broadened conception of self-defense.[321] State Department Legal Adviser Harold Koh, in his defense of drone attacks, acknowledged limits imposed by the principles of distinction and proportionality, which require that officials refrain from targeting civilians and minimize collateral damage.[322] Interpreting international law as both dynamic in the face of new challenges and safeguarding abiding values such as the protection of civilians, Koh served in the best tradition of national security lawyering.

The Administration's drone policy is also a worthy example of dialogic equipoise because of the steps the Administration took to ensure that the

---

Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405 (2009) (arguing that due process should govern targeting killing).

319. *See* Administration and International Law, *supra* note 142 (noting that a terrorist group such as al Qaeda "does not have conventional forces, but . . . plans and executes its attacks against us and our allies while hiding among civilian populations").

320. *See* U.N. Charter art. 51.

321. For example, Security Council Resolution 1373 stipulates that member states should "combat [terrorism] by all means" and "cooperate . . . to prevent and suppress terrorist attacks and take action against perpetrators of such acts." *See* S.C. Res. 1373, pmbl., ¶ 3(c), U.N. Doc. S/RES/1373 (Sept. 28, 2001). As another example of this changing repertoire, consider the evolving consensus on Additional Protocol I to the Geneva Convention, which confers privileged combatant status on members of groups that commit violence in the course of "fighting against colonial domination and alien occupation and against racist regimes." *See* Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1, ¶ 4, June 8, 1977, 1125 U.N.T.S. 3. Before September 11, the United Nations General Assembly had repeatedly endorsed Protocol I. *See* Michael A. Newton, *Exceptional Engagement: Protocol I and a World United Against Terrorism*, 45 TEX. INT'L L.J. 323, 344–47 (2009) (discussing enactment of Protocol I). After September 11, an international consensus emerged around denial of immunity from criminal prosecution for terrorist groups, reflecting the United States' refusal to ratify Protocol I and the reservations noted by other countries in the North Atlantic Treaty Organization (NATO). *See id.* at 360–70.

322. *See also* Peter Bergen & Katherine Tiedemann, *No Secrets in the Sky*, N.Y. TIMES, Apr. 26, 2010, at A23 (citing statistics that drone attacks run by the Central Intelligence Agency in Pakistan kill five confirmed terrorists for every civilian). Presumably Koh, and not OLC, coordinated the defense of drone attacks because of the salience of international law questions. Similar legal arguments support the raid that resulted in the killing of Osama bin Laden. *See* Jeremy Pelofsky & James Vicini, *Bin Laden Killing was U.S. Self-Defense: U.S.*, REUTERS (May 4, 2011), http://www.reuters.com/article/2011/05/04/us-binladen-selfdefense-idUSTRE74353420110504 (reporting on the testimony of Attorney General Holder before the Senate Judiciary Committee); Kenneth Anderson, *Time for Secretary Clinton to Call Her Lawyer?*, OPINIO JURIS (May 6, 2011, 6:06 PM), http://opiniojuris.org/2011/05/06/time-for-secretary-clinton-to-call-her-lawyer/ (summarizing arguments).

policy was authorized by Congress and understood by the international law community. Koh spoke publicly about the rationale for the United States' approach, allowing those who disagreed to state their reasons.[323] The drone strategy, Koh argued, was permitted under the Authorization for Use of Military Force (AUMF),[324] which was passed shortly after the September 11 attacks and empowered the President to take all necessary and appropriate steps to prevent future attacks by al Qaeda.[325] The Obama Administration also engaged with international law as an evolving body of jurisprudence.[326] This engagement contrasted with the Bush Administration's dismissal of treaties like the Geneva Convention as "quaint" and "obsolete."[327] Furthermore, the new Administration consulted a range of intra-branch experts, including Legal Adviser Koh.[328] Indeed, Koh's distinguished pedigree as a critic of unilateral executive moves and American rejection of mainstream international law enhanced the Administration's credibility.[329]

C. Capping Expansive Advice on Executive Power

Capping OLC's expansive presidential power opinions would complement the substantive standard and provide a further bulwark against abuse. Abuse occurs in two forms: overt reliance on inherent presidential power and use of the avoidance doctrine to narrowly construe statutes that might otherwise trench on the President's supposed prerogatives.[330] A cap,

323. *See generally* Administration and International Law, *supra* note 142.

324. Authorization for Use of Military Force in Response to the 9/11 Attacks, Pub. L. No. 107-40, 115 Stat. 224 (2001).

325. *See* Administration and International Law, *supra* note 142; *cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 516–18 (2004) (relying on AUMF); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005) (discussing impact of AUMF).

326. *See generally* Administration and International Law, *supra* note 142.

327. *See* Memorandum from Alberto R. Gonzales, Counsel to President, to the President, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 118–19 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

328. *See* Morrison, *Libya Hostilities*, *supra* note 311.

329. *See* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 96 (1990) (describing Roosevelt's destroyer deal with Britain as "notorious"); *cf.* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 142–44 (2010) (suggesting that presidents gain credibility when they appoint advisors with contrary views).

330. *See* Morrison, *Constitutional Avoidance*, *supra* note 106.

which OLC could adopt as a best practice,[331] would limit the number of times in a given period that OLC could invoke the inherent power of the President or invoke the avoidance canon to narrowly construe a statute that limits executive discretion.

A cap on OLC opinions expanding presidential power would work in the following way: in each two-year period, OLC could issue three opinions[332] using the substantive test set out above, that either supported inherent presidential power or interpreted statutes narrowly to avoid ostensibly unconstitutional constraints on executive power. If OLC failed to stay within this cap, it could issue more opinions upholding executive power, but only if those opinions met the absolutists' test of objective interpretation. If OLC could not match the executive's preferred course with this more rigorous test, it would commit itself to not rendering a favorable opinion. This would not necessarily preclude the President from going forward. The President could overrule OLC's constitutional interpretation[333] or dismiss OLC's head and find a more pliable individual for the job. However, the cap would supply a bump in the road, and signal to observers both within and outside the Executive Branch that the President was on shaky ground. Although a President could still embrace the "go it alone" option by using White House Counsel, OLC's implicit finding that the President's position lacked support would be a marker for other officials and for the public.

A cap would further dialogic equipoise by forcing the President and OLC to carefully budget their most sweeping arguments. This would prompt insight about these arguments' unintended effects, while still granting the President flexibility to use OLC in exigent circumstances. A president like George W. Bush, who uses power in a profligate fashion, eventually finds himself without credibility with constituencies and stakeholders that matter, including Congress, the courts, and the legal community.[334] While profligate exercises of power work for a time, they have serious long-term consequences. They can result over time in a

331. *See* Barron Memo, *supra* note 256. Congress could not impose a cap, although it could perhaps ask for internal findings subject to follow-up by the House or Senate Intelligence Committee Chair or ranking member. *Cf.* Kathleen Clark, *Congress's Right to Counsel in Intelligence Oversight*, 2011 U. ILL. L. REV. 915 (arguing that the members of Congress on intelligence committees have a right to advice from staff lawyers, even though legislation limits access to sensitive information to members themselves).

332. The opinions would have to be on discrete matters to avoid omnibus opinions that would evade the cap.

333. *See* Morrison, *Stare Decisis in OLC*, *supra* note 1. Sometimes, the President may even be right. *See* Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353 (1953) (discussing President Roosevelt's position, contrary to Jackson's own, that the Lend-Lease provision allowing Congress to suspend aid to Britain through legislative veto was invalid; the Supreme Court agreed in *INS v. Chadha*, 462 U.S. 919 (1983)).

334. *See* GOLDSMITH, *supra* note 4, at 206–07.

diminution of presidential authority, as actions spark a counterreaction in a never-ending cycle. Sweeping exercises of power can also lock in future presidents to policy initiatives that have outlived their usefulness. For example, Bush's sweeping exercises of power in short order produced the detention facility of Guantanamo Bay, which became a global metaphor for presidential excess. The symbolism of the facility damaged not only the President's credibility, but that of the United States.[335] However, the alarming speed with which Bush Administration officials built the place[336] contrasts with the difficulties encountered in closing it. Guantanamo has been "Humpty-Dumpty in reverse: easy to assemble, but very difficult to take apart."[337] Caps on invocation of presidential authority by OLC would limit the damage, while still allowing invocation of authority in cases where no alternative existed.

Despite the recent outcry over proposed "cap-and-trade" legislation, caps have worked well in environmental law. With a cap in place, producers have to deliberate more carefully over their output.[338] The cap regime creates an incentive to develop new techniques that have fewer ecological consequences.[339] Moreover, because a cap in environmental law does not bar older technologies, but merely obliges producers to internalize ecological costs, it yields greater flexibility than an outright prohibition.[340] This incentive for innovation can also harmonize executive practice with constitutional norms.[341]

A cap of this kind is also merely a codification of practices that lawyers, courts, and agencies engage in with some frequency to develop and conserve institutional capital. Lawyers who are repeat players in litigation or

335. *See* Exec. Order No. 13,492, 74 Fed. Reg. 4897, § 2(b) (Jan. 22, 2009), *available at* http://www.fas.org/irp/offdocs/eo/eo-13492.pdf.

336. *See* KAREN GREENBERG, THE LEAST WORST PLACE: GUANTANAMO'S FIRST 100 DAYS 45–47 (2009) (discussing the drafting of legal opinions after September 11 advising that Guantanamo detentions would not be subject to judicial review).

337. *See* MARGULIES, *supra* note 10, at 160.

338. *Cf.* John S. Applegate, *Bridging the Data Gap: Balancing the Supply and Demand for Chemical Information*, 86 TEX. L. REV. 1365, 1398–404 (2008) (analyzing market-based strategies); Eric A. Posner & Cass R. Sunstein, *Should Greenhouse Gas Permits Be Allocated on a Per Capita Basis?*, 97 CALIF. L. REV. 51 (2009) (discussing the mix of *ex ante* and *ex post* effects in a cap-and-trade regime).

339. *See* Posner & Sunstein, *supra* note 338, at 52 (noting that a cap-and-trade system might be "the most effective and efficient method of reducing emissions").

340. *See* Robert W. Hahn, *Climate Policy: Separating Fact from Fantasy*, 33 HARV. ENVTL. L. REV. 557, 590 (2009) (arguing that a cap on emissions would promote innovation).

341. *Cf.* Margulies, *Judging Myopia in Hindsight*, *supra* note 163, at 237–44 (advocating an "innovation-eliciting" model to determine availability of *Bivens* actions in national security cases).

transactional work often consciously ration their arguments, tailoring their positions to those that will command respect from other repeat players.[342] By cultivating a reputation for reasonableness, lawyers find it easier to achieve their client's goals. Lawyers also have the authority to pick and choose among legal arguments so that they can select arguments that are most likely to persuade an appellate tribunal or reviewing court, even if other arguments are colorable and ethically defensible.[343] This capacity allows lawyers to marshal arguments for a client despite the client's short-term insistence on making every argument in the book. United States Attorneys insist on a measure of independence from Washington for related reasons: a reputation for independence helps cement the prosecutor's reputation with federal judges, who could derail prosecutions if they believe the prosecutor was politically motivated or blindly following directives from Washington.[344] Indeed, in many situations a prudent client will find a lawyer known for a reasonable approach that meshes with that of other repeat players—the dominance in white-collar criminal defense of former prosecutors testifies to the importance of signaling that one has a track record that merits trust.[345] These lawyer practices amount to informal caps—they are not expressly quantitative, as the cap here would be, but they limit the kinds of arguments that lawyers make.

Courts are also concerned with marshaling institutional capital. As Bickel observed, doctrines such as standing, mootness, ripeness, and political questions conserve judicial capital for the most pressing occasions.[346] Brandeis, who was not reticent about intervention,[347]

---

342. *See* Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994); *cf.* Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L.J. 637, 658–59 (2010) (discussing the screening of arguments that encourages trust between repeat players in the criminal justice system).

343. *See* Jones v. Barnes, 463 U.S. 745, 749–50 (1983).

344. *See* John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1697, 1716–22 (2003) (federal judge discusses how prosecutorial charging decisions signal appreciation of local conditions, including sentiments of jury pool).

345. *Cf.* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2120–21 (1998) (discussing the dynamics of plea bargaining in the federal system, which hinges on signals that inspire mutual trust); Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 89–100 (1995) (discussing the benefit to the defendant of cooperation with government, aided by a lawyer whose pedigree signals trustworthiness).

346. *See* Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); *cf.* Neal Kumar Katyal, Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 84–94 (2006) (describing how one advocate used Bickel's approach to persuade the Supreme Court to reject President Bush's unilateral establishment of military commissions as a radical step). *But see* Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1051–53 (2008) (arguing that the incremental approach emboldened the Executive Branch); Eric A. Posner & Adrian Vermeule, *Constitutional*

nonetheless cautioned that the Court should decide matters on the narrowest ground available.[348] Moreover, courts shape substantive decisions to avoid unnecessary strife with the political branches. Courts may break new ground in doctrine, and then trim back remedies.[349] In recent national security cases, for example, courts have granted detainees significant procedural rights, but declined to extend damages remedies against officials who have allegedly denied detainees those rights in the past.[350] Some scholars have suggested that this balance has erred on the side of caution,[351] but the Supreme Court's goal has avowedly been to avoid the "pendular swings" that make government unmanageable.[352] A cap would help OLC maintain this constitutional equilibrium.

VII. CONCLUSION

OLC built up institutional credibility over time, and lost much of it within a period of eighteen months after September 11.[353] During that period, neither OLC nor its government clients paid sufficient attention to OLC's long-term institutional role.[354] Since that point, commentators have been eager to fill the gap.[355]

Reform, however, is an elusive goal for an institution like OLC, whose mission resists pigeonholes and job descriptions. Moreover, reformers have to consider a range of sometimes competing concerns.[356] Most observers agree that a climate of categorical impunity would trigger a recurrence of the

---

Showdowns, 156 U. PA. L. REV. 991, 1041–43 (2008) (suggesting that Bickel's approach may be counterproductive when a showdown now will lower decision costs later).

347. *See* Whitney v. California, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring) (setting out First Amendment concerns with a prohibition of membership in political group).

348. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring).

349. *See* Goldsmith & Levinson, *supra* note 285, at 1810–16 (noting the interaction between substantive doctrine, remedies, and politics); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 884–85 (1999) (pointing out that over time courts define rights, such as those to nondiscriminatory public education or freedom from cruel and unusual punishment, to promote manageable remedial regimes); *cf.* FALLON, *supra* note 188, at 49–50 (noting the role of manageability in shaping of doctrine).

350. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

351. *See* Martinez, *supra* note 346, at 1054–61.

352. *See* Boumediene v. Bush, 553 U.S. 723, 742 (2008) (striking down the habeas-stripping provisions of the Military Commissions Act of 2006).

353. *See supra* notes 5–6 and accompanying text.

354. *See supra* notes 5–11 and accompanying text.

355. *See supra* note 14 and accompanying text.

356. *See supra* notes 17–22 and accompanying text.

problems that led to this pass.[357] But that still leaves a wide range of options.

In curbing impunity, reformers also have to consider the countervailing risks of procedural injustice, paralysis, and polarization.[358] A failure to consider each risk will derail reform efforts. Procedural rights like notice, for example, undermine the case for sanctions.[359] Treating these rights as mere annoyances to be tossed aside would surely constitute poetic justice for former officials like John Yoo who show rights similar disdain. However, it would compromise a transition back to the rule of law.[360] Grand structural overhauls like Ackerman's Supreme Executive Tribunal would undermine the separation of powers that ensures democratic accountability.[361] The result would be the worst of both worlds: the rigidity of the courts coupled with the strategic behavior that typifies the political branches.

Decisional approaches that modify the substantive standard and deliberative processes of OLC have the most promise. Disclosure is a vital safeguard for responsible deliberation, while stare decisis is often a valuable aid to stability and the rule of law.[362] However, these decisional approaches also have perils: an absolutist objective standard, for example, breaks down in practice, given the imperatives that national security lawyers confront in episodes such as the destroyer deal with Britain.[363] Mandating the analysis of counterarguments can be either an inadequate constraint, as in the case of advice to commit genocide, or a subjective factor that varies with the evaluator's opposition to an opinion's substantive conclusions.[364]

To address the risks of procedural injustice, paralysis, and polarization, this Article has proposed a model of dialogic equipoise.[365] The model recognizes that OLC is an important player in American constitutionalism, which must balance the need to conserve institutional capital with the need to spend that capital in exigent circumstances. OLC must maintain capital with two crucial audiences: the legal community, including the courts, which must believe that OLC can constrain the President, and the President, who can go elsewhere for advice if OLC mistakes risk aversion for the rule of law.[366] To facilitate this balance, this Article has proposed a hybrid approach that combines a substantive standard with a deliberative

357. *See supra* Part II.A.
358. *See supra* Part II.B–D.
359. *See supra* notes 114–22 and accompanying text.
360. *See supra* notes 114–39 and accompanying text.
361. *See supra* Part IV.A.
362. *See supra* Part V.B.
363. *See supra* Part V.A.
364. *See supra* notes 235–37 and accompanying text.
365. *See supra* Part VI.
366. *See supra* Part VI.C.

approach.[367] OLC may issue opinions that expand executive power and fulfill three criteria: the opinions must address sovereignty- or human rights-centered problems, be reasonably likely to obtain ratification, and respect independent constitutional guarantees.[368] The substantive standard assures that opinions expanding executive power will respond to grave exigencies and will be subject to timely disclosure.[369] At the same time, a cap will limit issuance of such opinions, encouraging OLC to marshal its institutional capital for those occasions when no alternatives will do the job.[370]

The dialogic equipoise approach will not please everyone. Those who see formal sanctions as a prerequisite for a successful transition will regard anything less as a failure of accountability. Champions of structural change will see the proposal here as an inadequate response to a fundamental problem. However, perhaps these critics, like the officials whose work they rightly deplore, are prisoners of an unduly parsimonious narrative. Vice President Cheney and his acolytes viewed the last quarter century as a saga of the Presidency hobbled by legal requirements.[371] Ackerman tells the tale just as starkly, but with the opposite trajectory, as a story of the Presidency undermining legal restraints.[372] Between these competing narratives, an approach like dialogic equipoise can help OLC do its crucial work.

367. *See supra* Part VI.A.
368. *See supra* note 294 and accompanying text.
369. *See supra* Part VI.A.
370. *See supra* Part VI.C.
371. *See* SAVAGE, *supra* note 9, at 55–57.
372. *See generally* ACKERMAN, *supra* note 6.

***