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Peter Margulies

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

Peter Margulies*

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* 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.
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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. Because of threshold doctrines such as standing and political questions, courts often do not encounter the most difficult and important questions. Moreover, the President and Congress often develop a course of dealing over time that settles the distribution of power between them. 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). 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.

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

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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 . . . .").
adequately consider the special responsibilities they had assumed. In authorizing coercive interrogation techniques and a broad program of warrantless surveillance without securing congressional approval, these lawyers allowed the President to operate with minimal accountability and set the stage for a pushback from Congress, the courts, and global public opinion. Although more conscientious Bush Administration lawyers withdrew some of the more sweeping memos after the initial period and the Obama Administration has repudiated the rest, the question of who controls legal advice to the President continues to spur controversy. Commentators debate the appropriateness of sanctions for OLC lawyers and the design and substantive mandate of OLC.


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.


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. However, a Bivens suit that seeks damages against Yoo remains alive in federal court.

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,” would change OLC’s structure to ensure the independence of the advice received. Others seek to enhance deliberation within OLC by requiring consideration of opposing views and outlining a regime of stare decisis for OLC advice. Still others aim for substantive guidance, arguing


18. See Johnsen, supra note 4.

19. See Morrison, Stare Decisis in OLC, supra note 1.
that OLC lawyers should adhere to “mainstream” legal interpretations, but suggesting that the President has the power to disregard such advice in demonstrably exigent situations. Another cohort highlights more informal modes of accountability, such as disclosure, 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. They recite a monolithic narrative that focuses on the dangers of executive overreaching, but often exchange one species of myopia for another. Because of the tenor of Bush Administration policy, critics neglect the far more varied trajectory of executive power over time.

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. Moreover, on an issue such as coercive interrogation, Bush Administration officials used that power to reduce human rights and civil liberties here and abroad. However, prior Administrations have taken actions that interact in a more complex way with both the separation of powers and the framework of human rights. 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

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


23. See infra Part III.

24. See infra Part III.

25. See infra Part III.


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

28. See infra notes 295–314 and accompanying text.
Nazi Germany. Jackson’s interpretive style in the opinion foreshadowed John Yoo’s by straining statutes to the breaking point. However, Jackson’s advice was part of a public debate that led, within months, to the Lend Lease Act, which codified aid to Britain. Moreover, the substance of Jackson’s advice also invoked a post-war international order with greater protections against aggression and genocide. More recently, President Clinton exercised power to promote human rights, through the NATO intervention in Kosovo. 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.

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. 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. Sanctions and structural reforms can crowd out courses of dealing between the political branches that have traditionally promoted flexibility in foreign and domestic affairs. 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.

To avoid these problems, reform should center on maintaining an ethic of dialogic equipoise. All lawyers need to maintain a balance between serving a client and preserving the integrity of the legal system. Lawyers

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).
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.
39. See Margulies, True Believers, supra note 6, at 66–67.
40. See id.
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 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

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.
52. See infra Part IV.
substantive and deliberative reforms, argues that requiring a purely objective analysis unaffected by Executive Branch interests produces unduly rigid legal advice. 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.

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. However, an eagerness to impose sanctions can vitiate procedural justice. Sanctions and structural reforms can induce paralysis or even prompt polarization. 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, 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, even if the defendants knew of the abuse. 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

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.
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)).
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 Unfortunately, fair notice is often a casualty of the popular outcry for punishment of officials who have allegedly overreached.67

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))).
65. See id.
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 acquiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.” 73


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

At key junctures, officials pushed the envelope of formal legal authority and subsequently sought congressional or public ratification for their efforts. Washington’s Neutrality Proclamation is perhaps the earliest example. 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. 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. A rule that minimized overreaching but impaired this flexible course of dealing would exalt form over functionality.

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. Those out of power believe that sanctions amount to “victor’s
justice,” and lose any stake in transition’s success.\textsuperscript{80} The ancient Athenians discovered this to their chagrin, as their government moved from oligarchy to democracy four times within eight years.\textsuperscript{81} After an initial round of sanctions against the oligarchs proved counterproductive, Athenian democrats opted for a reconciliation brokered by Sparta.\textsuperscript{82} More recent transitions in Eastern Europe\textsuperscript{83} and Iraq\textsuperscript{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.\textsuperscript{85} Later, President Ford pardoned President Nixon, and presidents have pardoned others in the national security apparatus.\textsuperscript{86} Moreover, the one institutional effort to promote prosecution of American officials was a clear failure.\textsuperscript{87} According to a bipartisan consensus, the Independent Counsel statute, enacted in the wake of Watergate, criminalized political disputes and thereby

\begin{footnotesize}
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\item Id. at 21.
\item 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. Schrauf, 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).
\item 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).
\item 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, 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).
\end{enumerate}
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polarized political debate. For example, during the investigation of the Monica Lewinsky episode, political opponents cast President Clinton’s moves against al Qaeda as a “wag the dog” strategy to change the subject. 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. 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. The second Bush Administration established a “working group” to assess interrogation techniques, but then bypassed most of the group’s members. Champions


89. See Richman & Stuntz, supra note 88.


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”).


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).
of unilateral presidential power will always feel the urge to go it alone, but complicating the search for legal advice will intensify this trend.\textsuperscript{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.\textsuperscript{95} Formal sanctions would send a strong message that such lawyering diserves the national interest. However, formal sanctions may violate principles of procedural justice and chill future decisions.\textsuperscript{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 Executive Branch.\textsuperscript{97} Indeed, other attorneys were methodically cut out of the process.\textsuperscript{98} Moreover, Yoo’s legal conclusions were extraordinarily

\textsuperscript{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).


\textsuperscript{96.} See infra pp. 824–26, 829–32.

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

\textsuperscript{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
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 statutes102 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 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

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).


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


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

104. Id. at 176–77.

105. See id. at 202–04.


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”).
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

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

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).


112. See id. at 35–38.

113. Id. at 19.
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 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

\(^{116}\) 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.”).
\(^{119}\) 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).
the Bush Administration’s policy sought, 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.” However, OPR failed to articulate what additional caveats Yoo could have included. Indeed, in the course of a 260-page report, OPR did not even provide a verbatim account of Yoo’s warning. 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.” However, courts have viewed Rule 2.1 solely as a makeweight. Regulators have interpreted this rule as a generic restatement of more specific norms, such as the rules against dishonesty and conflicts of interest. Cases citing the provision involve lawyers who swindled their own clients. None involve a lawyer like Yoo, whose ideological blinders

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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 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
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.” 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. 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 prohibited; but this consensus is not complete.134 While the United Nations General Assembly favors this view,135 the pervasive politics of that body

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).
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).
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 guidelines require intentional or reckless violation of an “unambiguous” norm. \(^{139}\) Yoo’s advice did not rise to that level.


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 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
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. 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. 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. Disciplining Yoo would chill all such legal work.

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. While Washington’s move to spare the new republic this risk was essential to the United States’ development, contemporaneous critics attacked its legal justification. Interpretation along these lines 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.


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


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...
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.\textsuperscript{145} Lincoln opted for a robust interpretation of presidential power when he suspended habeas corpus and issued the Emancipation Proclamation.\textsuperscript{146} Teddy Roosevelt protected federal land and used the threat of force abroad to accomplish foreign policy goals,\textsuperscript{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.\textsuperscript{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,\textsuperscript{149} and President Clinton was even more aggressive in intervening to stop genocide in Kosovo.\textsuperscript{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

that the Neutrality Proclamation and other measures taken in the Founding Era did not reflect a plenary view of executive power).

\textsuperscript{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).

\textsuperscript{146} See Farber, supra note 85, at 156–57.

\textsuperscript{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).

\textsuperscript{148} See Spaulding, Independence and Experimentalism, supra note 17, at 423–29.

\textsuperscript{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)).

\textsuperscript{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.”).
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

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

154. Id.
155. 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)).
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
in the process leading up to and following Jackson’s opinion, which was public and ratified by Congress in the Lend Lease Act. 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. Criticizing Yoo does not imperil this prospect, 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 as a method of accountability. Plaintiffs face multiple obstacles in such lawsuits, including persuading the courts to recognize such a remedy absent congressional authorization, and dealing with official immunities that thwart relief. Each problem is formidable for plaintiffs hoping to prevail in a lawsuit against OLC lawyers.

[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.”).


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).


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.” 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.

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. Official immunities protect public servants from the unfairness of being surprised by legal developments that the officials could not have predicted. Viewed from an ex ante perspective, immunities allow officials to make difficult decisions without paralyzing worries about the effects of hindsight bias.

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

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.  
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).  
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.

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. The most sweeping change comes from Bruce Ackerman, who has proposed a “Supreme Executive Tribunal.” Others, including Neal Katyal, have offered more modest versions of this adjudicative turn. Norman Spaulding has proposed removal restrictions for supervisors at OLC, with the goal of making OLC more independent. Unfortunately, these proposals will only expand the risks of reform. In addition, some of the structural proposals undermine the separation of powers.

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. In advancing his proposal, however, Ackerman failed to specify the role of standing and other threshold issues. 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. 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 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,

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).
186. ACKERMAN, supra note 6, at 145–46.
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 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).
190. See id. at 1744.
191. See id.
the Tribunal would have to stay pending legislation for weeks or months.\footnote{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.\footnote{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.\footnote{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.\footnote{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 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.\footnote{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.\footnote{197} By relaxing standing requirements and allowing advisory opinions on pending legislation, the Tribunal might have to rewrite its own decisions.

\footnote{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”).

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).

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.  

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. 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. In regulated industries, compliance suffers when businesses view regulation as out of touch with realities “on the ground.” 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. This exit strategy would make legal advice even less independent.

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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).


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
These concerns dovetail with even more pressing constitutional cavils about restrictions on removal of the Tribunal’s members.\(^\text{204}\) To ensure the advice giver’s independence, Ackerman and others have proposed restrictions on the President’s removal power.\(^\text{205}\) 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.\(^\text{206}\) Removal restrictions, including requiring good cause, are clearly permissible only when the official has responsibility for

\section*{Notes}

\(^{203}\) 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.

\(^{205}\) 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).

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.

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.

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

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


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”).


220. See infra notes 223–26 and accompanying text.
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.\textsuperscript{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.\textsuperscript{222}

\textbf{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.\textsuperscript{223} Another commentator adopted the same view by declaring that OLC should provide advice that “fairly addresses and objectively evaluates” the law.\textsuperscript{224} Proponents of an objective standard acknowledge that law sometimes can be ambiguous.\textsuperscript{225} However, according to this view, the OLC lawyer should not consider the President’s political or institutional interest in assessing what the law allows.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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. In other words, the historians tell us, without the action proposed there might be no rule of law left to praise. 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.

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 example, argued that OLC should only provide "mainstream," not merely "remotely plausible" or "idiosyncratic" views of the law. However, they suggested that OLC’s limited role should not bind the President, who can act to safeguard the country. 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. While that may not always be the case, a commentator supporting this hedge should at

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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).


232. See BLUM & HEYMANN, supra note 8, at 54–55.  
233. Id. at 55; cf. id. at 10 (noting this standard).  

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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. 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. Neither caveat saved Yoo’s opinion from myopia, but a scholar whose approval hinges on opposing arguments should at least mention them. A scholar who fails to do so has reverted back to the absolutist posture, with all of the problems linked to that stance.

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. For Morrison, OLC should give “its” best view, which inevitably will consider the President’s interests. This view is the most honest, and also the one that best matches the long history of OLC and Attorney General opinions.

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.
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.
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 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.

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

Scholars and veterans of OLC also argue that the office should expressly consider opposing views. 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. Seeking input from government lawyers with opposing views is also a sound practice. Without that input, the government can make colossal blunders, as recent Administrations have shown. Moreover, consideration of opposing views should entail a reasoned statement of those views, including an explanation of their foundation. 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. 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.

3. Stare Decisis

Scholars with experience at OLC have also commended the office’s respect for precedent as an aid to deliberation. 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

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.
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. Stare decisis works because courts handle scores or hundreds of cases with similar facts. 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. In this sparser decisional environment, stare decisis is not as useful. As a case in point, consider Bybee’s analysis of the torture statute. Apparently, OLC had never done such an analysis before, so concrete OLC precedent was unavailable.

The common law roots of stare decisis may also be an inapposite model in other respects. Common law decision making has limitations.

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).
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 (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”).
decisio is path dependent, so that a precedent established at one point in time will govern others to follow.\textsuperscript{261} However, that puts a special onus on the variables, many of them randomly generated, contributing to the initial decision.\textsuperscript{262} While the decision maker at this juncture seeks to anticipate future implications of her ruling, her clairvoyance will of necessity be incomplete.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 military.\textsuperscript{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.\textsuperscript{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 \textit{Youngstown},\textsuperscript{268} gives the President ample wiggle room—for example, by leaving up in the air whether the President can act when

\begin{enumerate}
\item \textit{Id.} (discussing path dependence in common law).
\item See \textit{Hathaway}, supra note 262, at 629 (addressing the limitations of judges considering future cases).
\item See Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199 (1994), \textit{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).
\item See Craig Whitlock, \textit{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).
\item \textit{Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579 (1952).}
\end{enumerate}
Congress is silent.  The lines between statutory expression, implication, and silence are notoriously blurred. 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. 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. Moreover, the exception is required for reasons of policy: exigent circumstances may arise that make rigid adherence to decisional rules inadvisable. However, exceptions complicate the analysis in two ways. First, if exceptions are possible, stare decisis becomes less effective as a guide to future advice. Lawyers providing advice know ex ante, as do their clients within the executive branch, that if stare decisis becomes too confining, the President can alter the advice’s outcome. That encourages both lawyers and their clients below the chief executive level to push the envelope of precedent to avoid presidential overruling. Sometimes the lawyers may push too far. 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


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).

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.
strained arguments. 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. 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. Some have argued that these decisions were extralegal. Their legitimacy depended on subsequent ratification, and they presumably had no precedential value. Hamilton, in contrast, believed that in exigent situations the President had such power under the Constitution. 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 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. For the latter reason, presidents will seldom deem it prudent to cite these examples from history, and that is as it should be.


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 (discussing debate); Gross, supra note 21.


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. 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.

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, 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. In that way, an ideological affinity between an OLC lawyer and the President is like the siren song that distracted Ulysses from his journey home: it tempts executive officials with the promise of short-term benefits while holding long-term perils.

As the metaphor suggests, accepting OLC’s advice is a Ulysses contract, 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. 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. OLC should cultivate a sense of balance, avoiding opinions that unduly constrict or expand executive power.


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


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


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.

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.
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.

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.

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. 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. Roosevelt’s destroyer deal with Britain during World War II and Kennedy’s imposition of a blockade during the Cuban Missile Crisis 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.
Human rights-centered moves would include Lincoln’s Emancipation Proclamation, President Clinton’s participation in NATO’s intervention to stop genocide in Kosovo, and President George H.W. Bush’s participation in a United Nations humanitarian mission in Somalia. 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.” 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. 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 United States’ role in global institutions. 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. 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


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


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).


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.
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 in the Lend-Lease Act.310 The tailored nature of America’s Libya role and consultation with congressional leaders about the move311 would fulfill this criterion.

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.

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 contrast, the low likelihood of ratification would preclude advice like John Yoo’s about interrogation tactics.\footnote{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 \textit{Margulies, supra} note 10, at 61.} 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.\footnote{See \textit{Mayer, supra} note 10, at 61.} 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.\footnote{See \textit{Waldron, supra} note 131, at 20, 28–32 (discussing countervailing factors); Daniel Kanstroom, \textit{Law, Torture, and the “Task of the Good Lawyer”—Mukasey Agonistes}, 32 B.C. INT’L & COMP. L. REV. 187, 194–97 (2009) (same). \textit{See generally} Deborah L. Rhode, \textit{Ethical Perspectives on Legal Practice}, 37 STAN. L. REV. 589 (1985) (discussing the importance of lawyers’ consideration of long-term values).}

\textbf{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.\footnote{See \textit{Administration and International Law, supra} note 142; \textit{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).} 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.\footnote{See Jane Perlez, \textit{Pakistan’s Military Chief Criticizes U.S. Over a Raid}, N.Y. TIMES, Sept. 11, 2008, at A8.} 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.”\footnote{This definition comes from Secretary of State Daniel Webster’s response to the \textit{Caroline} episode, in which the British attacked a ship near Niagara Falls which had previously conducted}
This conventional view allowed terrorists to game the system. Viewed \textit{ex ante}, the imminence test does not deter terrorists, who unlike states have no “return address.” While a state’s fixed location permits retaliation by victims of aggression, transnational terrorist groups like al Qaeda can melt away and reconstitute themselves to plan subsequent attacks. As al Qaeda demonstrated when it followed up the Kenya and Tanzania Embassy bombings with the attack on the \textit{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. However, one can read measures enacted by the international community after September 11 as authorizing a broadened conception of self-defense.
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. 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 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. The drone strategy, Koh argued, was permitted under the Authorization for Use of Military Force (AUMF), 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. The Obama Administration also engaged with international law as an evolving body of jurisprudence. This engagement contrasted with the Bush Administration’s dismissal of treaties like the Geneva Convention as “quaint” and “obsolete.” Furthermore, the new Administration consulted a range of intra-branch
experts, including Legal Adviser Koh. Indeed, Koh’s distinguished pedigree as a critic of unilateral executive moves and American rejection of mainstream international law enhanced the Administration’s credibility.

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. A cap, which OLC could adopt as a best practice, 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 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

328. See Morrison, Libya Hostilities, supra note 311.
330. See Morrison, Constitutional Avoidance, supra note 106.
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)
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. While profligate exercises of power work for a time, they have serious long-term consequences. They can result over time in a 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. However, the alarming speed with which Bush Administration officials built the place contrasts with the difficulties encountered in closing it. Guantanamo has been “Humpty-Dumpty in reverse: easy to assemble, but very difficult to take apart.” 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. The cap regime

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334. See GOLDSMITH, supra note 4, at 206–07.
337. See MARGULIES, supra note 10, at 160.
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 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

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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”).


prosecutors testifies to the importance of signaling that one has a track record that merits trust. 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. Brandeis, who was not reticent about intervention, nonetheless cautioned that the Court should decide matters on the narrowest ground available. 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. 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. Some scholars have suggested that this balance has erred on the side of caution, but the Supreme Court’s goal has avowedly been to avoid the “pendular swings” that make government unmanageable. A cap would help OLC maintain this constitutional equilibrium.


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).


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).


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

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
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

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.
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.
episodes such as the destroyer deal with Britain.\textsuperscript{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.\textsuperscript{364}

To address the risks of procedural injustice, paralysis, and polarization, this Article has proposed a model of dialogic equipoise.\textsuperscript{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.\textsuperscript{366} To facilitate this balance, this Article has proposed a hybrid approach that combines a substantive standard with a deliberative approach.\textsuperscript{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.\textsuperscript{368} The substantive standard assures that opinions expanding executive power will respond to grave exigencies and will be subject to timely disclosure.\textsuperscript{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.\textsuperscript{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.\textsuperscript{371} Ackerman tells the tale just as starkly, but with the opposite trajectory, as a story of the Presidency undermining legal restraints.\textsuperscript{372} Between these competing narratives, an approach like dialogic equipoise can help OLC do its crucial work.

\textsuperscript{363} See \textit{supra} Part V.A.
\textsuperscript{364} See \textit{supra} notes 235–37 and accompanying text.
\textsuperscript{365} See \textit{supra} Part VI.
\textsuperscript{366} See \textit{supra} Part VI.C.
\textsuperscript{367} See \textit{supra} Part VI.A.
\textsuperscript{368} See \textit{supra} note 294 and accompanying text.
\textsuperscript{369} See \textit{supra} Part VI.A.
\textsuperscript{370} See \textit{supra} Part VI.C.
\textsuperscript{371} See \textit{SAVAGE, supra} note 9, at 55–57.
\textsuperscript{372} See generally \textit{ACKERMAN, supra} note 6.
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