
LOST INSIDE THE BELTWAY: A REPLY TO PROFESSOR
MORRISON

*Bruce Ackerman**

Watergate. Iran-Contra. The Torture Memos. Three outbreaks of illegality in forty years. But the last time around, President George W. Bush was not required to indulge in Nixonesque claims that “when the president does it, that means it is not illegal.”¹ He could personally approve waterboarding without conceding its blatant illegality. As he explains in *Decision Points*, the “Department of Justice and CIA lawyers conducted a careful legal review,” concluding that it “complied with the Constitution and all applicable laws, including those that ban torture.”² This is much worse than Nixon’s brazen assertion of power. *Decline and Fall* predicts there will be more rubber-stamping in the future, unless the presidency reforms the way it goes about interpreting “the laws” that it must “faithfully execute.”

Professor Trevor Morrison agrees that the torture memos mark a low point for the Office of Legal Counsel. But he views them as deeply regrettable accidents — the result of a “combination of political, ideological, and psychological factors to which no structure could ever be entirely immune.”³ He is right that structural reform can’t provide a fool-proof guarantee against future failure; but he is wrong to insist that the existing system is basically sound.

We may be lucky: perhaps future presidents will be wise enough to populate the Office of Legal Counsel and the White House Counsel with a steady stream of Trevor Morrisons — serious professionals with moderate sensibilities. But as Madison taught us long ago, “[e]nlightened statesmen may not always be at the helm.”⁴

The presidency’s recent, sorry track- record reinforces this Madisonian maxim. *Decline and Fall* points to a series of institutional developments that increase the likelihood of further outbreaks of illegality. I explore how, over the past forty years, the modern primary system has opened the path to extremist candidacies on the left and the right, and

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¹ Interview by David Frost with Richard Nixon (May 20, 1977), *quoted in* BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 219 n.1 (2010) [hereinafter *DECLINE*].

² GEORGE W. BUSH, *DECISION POINTS* 169 (2010).

³ Trevor Morrison, *Constitutional Alarmism*, 124 *HARV. L. REV.* 1688, 1743 (2011) [hereinafter *Alarmism*] (reviewing *DECLINE*, *supra* note 1).

⁴ *THE FEDERALIST* NO. 10, at 75 (James Madison) (Clinton Rossiter ed., 2003).

how this extremist danger is enhanced by the rise of media manipulators in the White House. I point to a host of factors that have given the President new tools for decisive unilateral action — including the politicization of the commanding heights of the bureaucracy and military, the normalization of war-talk and the use of Gallup Polls to legitimate the President’s plebiscitarian pretensions.

Morrison doesn’t confront this multi-dimensional argument. His sixty-two page review focuses exclusively on one trouble -spot: executive-branch lawyering. But he implicitly adopts a dismissive view of the broader range of institutional pathologies that occupy the bulk of my book. At points, his complacency becomes explicit, as when he shakes his head incredulously when reporting that “Ackerman truly believes the risk of presidential defiance of the Court is a greater threat today than it was under [President Richard Nixon].”⁵

Despite Morrison’s incredulity, this is *precisely* my book’s thesis. If he rejects my multidimensional argument about the presidency’s growing danger, it would be nice to tell me why.⁶ Even without fundamental analysis, it verges on the Panglossian to suppose that the next generation will somehow evade the outbreaks of White House illegality that have erupted three times within the short space of forty years.

Once again, Morrison is over-generalizing from his experience in the Clinton and Obama Administrations. Both of his presidents were deeply socialized into the constitutional tradition, even teaching the subject in law school. They were also deal-makers by disposition and centrists by political persuasion. Given their backgrounds, there was little chance that *they* would seek to defy or intimidate the Supreme Court. But it is perilous to suppose that our future will be dominated by constitutionalists. This hasn’t been true in the past, and if my broader arguments are right, it will be even less true in the future.

This is why the present moment is important. Precisely because President Barack Obama is a constitutionalist, there is a chance — if only a small chance — that he might come to see fundamental reform of the Office of Legal Counsel and the White House Counsel as part of his enduring legacy. But this chance reduces to zero if the constitutional complacency expressed by Morrison carries the day.

Complacency is already well-entrenched inside the Beltway. But it is precisely the role of the academy to expose the Washington Consensus to critical scrutiny — which is why I’ve rejoined the debate.

⁵ *Alarmism*, *supra* note 3, at 1698 n.26.

⁶ Morrison devotes a single footnote to my larger thesis, but makes it clear that a serious critique is beyond the scope of his review. *See id.* at 1748 n.221.

I. THE POLITICIZATION OF THE OFFICE OF LEGAL COUNSEL

Morrison's narrow focus leads him to miss the point of my argument. Since he is exclusively concerned with executive-branch lawyering, he wonders why I haven't attempted a comprehensive assessment of the OLC's performance — faulting *Decline and Fall* for failing to attempt a systematic review of OLC precedents, and the like.⁷ But such a show of erudition would have diverted attention from my book's basic question: to what extent can we expect the Office of Legal Counsel and the White House Counsel to defend the rule of law when other institutional dynamics are propelling the presidency down a path toward illegality?

Any serious answer requires selective attention to episodes that reveal how executive-branch lawyers responded to past exercises in presidential unilateralism. Consider the torture memos: Morrison suggests that my intensive analysis of this tragic tale is motivated by “anger” at Jay Bybee and John Yoo.⁸ I plead not guilty. My focus is motivated by my interest in institutional reform: the only way to propose sensible change is to understand how the existing system has broken down in previous crises of legality.

My approach is similar to the Federal Reserve's in the aftermath of the recent economic crisis. When it conducts “stress tests” of the banking system, the Fed isn't interested in a comprehensive analysis of all the good and bad things that banks do for us in normal times; it looks at the past only to determine how to reduce the risk of future crises. So too here: I treat Jay Bybee and John Yoo in the same way the Fed might treat Lloyd Blankfein: if civil sanctions on particular individuals will reduce the risk of future institutional breakdowns, they should be seriously considered; if not, their punishment should be left to the retributivists amongst us. I am looking forward, not backward, — to the best way to reduce the risk of more outbursts of presidential illegality, not the best way to persecute/prosecute past wrongdoers.⁹

But, of course, Morrison's long review does much more than question my motives; it is largely devoted to contesting the accuracy of some of my factual and legal claims. As a consequence, much of his essay develops these disagreements. This is entirely understandable, but it should not conceal our agreement on many matters. I begin by searching for common ground — and try to persuade you that, without enter-

⁷ See *id.* at 1708–09.

⁸ *Id.* at 1730.

⁹ For a similarly forward-looking approach to an analogous problem, see BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 69–98 (1992), which opposes the use of the criminal law by the post-1989 regimes of Eastern Europe when dealing with Communist collaborators during the Soviet era).

ing into contested territory, there is more than enough material to make out my case for fundamental reform.

A. *Common Ground*

There was a time, not so long ago, when the OLC resembled today's Solicitor General's office in its personnel. Until President Jimmy Carter changed the practice, only the Assistant Attorney General and one Deputy were political appointees at both the OLC and the SG. The other OLC -staffers were long-time government lawyers.¹⁰ These seasoned veterans had seen lots of political appointees come and go, and were skilled in the art of deflecting short-term presidential imperatives that challenged deep-rooted constitutional traditions.

This continues to be true in the SG's office, but not in the OLC. In recent administrations, political appointees have generally occupied all leading positions.¹¹ The rest of the staff is dominated by youngish "attorney-advisors" with fancy clerkships, and the like. Most stay for no more than two or three years before moving onward and upward.¹² As Morrison recognizes, this leaves room only for a "few . . . members of the Senior Executive Service [who] have the title Senior Counsel"¹³ — two or three in recent administrations.¹⁴

¹⁰ See DECLINE, *supra* note 1, at 114; John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 425 n.186 (1993).

¹¹ See Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 716 (2005) ("[A]ll of the OLC deputies are politically appointed."). There are exceptions, often involving cases in which senior government lawyers rotate into vacant jobs as deputies until they are filled by new political appointees. Caroline Krass is a problematic exception to this rule. She served for nine years at the OLC and is now a Deputy Assistant Attorney General. The problem arises because her OLC career was interrupted by a two-year stint at Obama's WHC — as a consequence, she has obtained her present position only by passing muster at the White House. See *Meet the Principal Deputy Assistant Attorney General*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/olc/meet-olc.html> (last visited May 25, 2011). Her appointment does not suggest the emergence of a regular practice reserving one or more deputy slots for career lawyers.

¹² As John O. McGinnis explains, attorney-advisors move on quickly because OLC's specialized work doesn't provide them with "readily transferrable skill[s]" that allow them to get highly paid jobs in the private sector if they stay in the office for more than two or three years. McGinnis, *supra* note 10, at 424, 425 & n.186. Writing more recently than McGinnis, Bradley Lipton describes the same dynamic: "Since most OLC attorney-advisor positions turn over within each administration, the political appointees at the top can easily staff the rest of the office with like-minded lawyers." Bradley Lipton, Essay, *A Call for Institutional Reform of the Office of Legal Counsel*, 4 HARV. L. & POL'Y REV. 249, 255 (2010). Morrison agrees that many attorney-advisors "work in the office for just a few years . . ." *Alarmism*, *supra* note 3, at 1710.

¹³ *Id.*

¹⁴ See generally, CONGRESSIONAL DIRECTORY: Search, GPO ACCESS, <http://www.gpo.access.gov/cdirectory/search.html> (last visited May 25, 2011) (containing data from the Clinton Administration to the present).

Which leads to a fundamental question. Morrison relies heavily on the “norms” and “longstanding traditions” of the OLC to serve as a bulwark against presidential overreaching. But given the composition of the Office, precisely *who* is supposed to be safeguarding this tradition?

If we credit Madison’s maxim, we can’t count on the Administration’s appointees to do the job — “enlightened statesmen” will only sometimes manipulate the political networks required to get these plum jobs. And surely youngish up-and-comers are unlikely repositories of the very complex “tradition” Morrison describes — by definition, it takes a good deal of time to master the practice of providing opinions that, in the words of Jack Goldsmith, are “neither like advice from a private attorney nor like a politically neutral ruling from a court. It is something inevitably, and uncomfortably, in between.”¹⁵ As his memoirs suggest, even Goldsmith had trouble enacting this “awkward” role during the nine months he served as head of the OLC before he quit under pressure from the Bush White House.¹⁶ It’s a bit much to ask young attorney-advisers to serve as the principal guardians of these “cultural norms.” This puts an enormous burden on the (very) small number of senior counsel.

Morrison assures us “that Senior Counsels play a vital role in OLC precisely because they are such rich repositories of institutional memory.”¹⁷ While they surely help the transient- lawyers “resist the importuning of . . . clients”¹⁸ in garden variety cases, it is unrealistic to expect them effectively to defend entrenched constitutional principles against high-priority presidential initiatives — especially when political appointees, aided by able attorney-advisers, think up all sorts of clever legal arguments to evade and undercut these principles.

The senior counsel’s position is particularly problematic at present. Granting their role as keepers of institutional memory, precisely what are they supposed to be remembering about the operation of the Office during the Bush years?

To be sure, Goldsmith’s legalistic scruples, and the Abu Ghraib scandal, forced the White House to accept the repudiation of a couple of “torture memos.”¹⁹ But as Morrison recognizes, the OLC replaced Yoo’s memos “with a more modestly phrased opinion in late 2004 . . .

¹⁵ *Alarmism*, *supra* note 3, at 1714 (quoting Jack Goldsmith, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 35 (2007)).

¹⁶ Goldsmith resigned when “important people inside the administration had come to question my fortitude for the job, and *my reliability*” GOLDSMITH, *supra* note 15, at 161 (2007) (emphasis added), *quoted in* *DECLINE*, *supra* note 1, at 107.

¹⁷ *Alarmism*, *supra* note 3, at 1723.

¹⁸ *Id.*

¹⁹ *DECLINE*, *supra* note 1, at 107.

[which] maintained its basic position on the legality of . . . ‘waterboarding’²⁰ throughout the rest of the Bush Administration. So if the old-timers act as memory-keepers, are they supposed to tell the transients that *the OLC continued to give the Bush White House what it wanted to the bitter end, merely toning down John Yoo’s extravagant legal arguments?*²

Morrison ignores this question as he repeatedly emphasizes the staying power of the Office’s traditions. But perhaps we might find the source of better norms in some other place — not in the OLC’s institutional memory, but in its ongoing practice of opinion-writing. Day in and day out, the staff supplies the executive departments with advice on countless legal problems. When preliminary efforts at resolution don’t work out, the Office requests brief-like submissions before it works out its own position. This briefing requirement can help support the distinctive OLC norms that Morrison applauds: as the OLC legal team sits down to work, it often confronts rigorous briefs representing two (or more) departmental views of the applicable law. This practice encourages a similarly disciplined response from the opinion-writers as they explain to each department where it has gone wrong.

The problem comes when the White House gets into the act. As Morrison recognizes, the President’s lawyers “need not specify their requests in writing, and they are often afforded greater informal access to OLC while it is considering their requests.”²¹ Morrison supplements this bland description in a footnote:

As Ackerman puts the last point, “White House lawyers are in constant contact with their counterparts at the OLC. For example, Elena Kagan and Walter Dellinger recalled exchanging lengthy phone calls in which Kagan, then in the White House Counsel’s office, tried to convince Dellinger, the head of the OLC, to change his mind about legal issues.”²²

But this constant *ex parte* contact raises an obvious question: if it’s OK for Kagan to get on the phone and try to convince Dellinger, why isn’t it equally OK for future David Addingtons to browbeat future OLCs to take extremist positions on presidential power?

The contrast with the Office’s departmental practice is painfully obvious: Morrison concedes that “the tolerance of telephone calls and other importuning from the White House . . . can create extra pressure.”²³ And he also recognizes that the White House is *never* obliged to put its arguments into a written submission — allowing it to continue “importuning” without ever trying to work out the serious legal implications of its telephone chatter.

²⁰ *Alarmism*, *supra* note 3, at 1726 n.144.

²¹ *Id.* at 1710 (citation omitted).

²² *Id.* at 1710 n.87 (quoting *DECLINE*, *supra* note 1, at 231 n.43).

²³ *Id.* at 1721.

But such unremitting pressures, Morrison assures us, are “not new,”²⁴ since the Attorney General’s capacity “to resist presidential power in extreme circumstances has always been imperfect.”²⁵ He points to famous episodes during the Civil War and the run-up to World War II to support this claim.²⁶ But he forgets that *a lot* has changed since 1945.²⁷ For starters, the Attorney General has now retired from the opinion-writing business,²⁸ first leaving the job to a relatively apolitical OLC until 1976, but then allowing it to become highly politicized after Jimmy Carter changed staffing policies.²⁹ What is more, intense presidential pressures for legal rubber-stamping are no longer solely the product of “extreme circumstances.” They are now an inextricable part of ordinary American politics — as *Decline and Fall* seeks to establish by pointing to the political, bureaucratic, and military transformations of the past forty years. All this is very “new” indeed.

None of these dynamics are irresistible.³⁰ Despite Morrison’s contrary suggestion, *Decline and Fall* specifically enumerates leading cases in which the modern OLC has indeed defended its “best view of the law” against the White House’s short-term political imperatives.³¹ And I very much share Morrison’s hopes that these proud moments will continue into the future. But — need I remind you? — “enlightened statesmen will not always be at the helm.”

Worse yet, even “enlightened statesmen” might hesitate before saying “no” under the present set-up. As Morrison explains, the OLC’s official policy is to try its hardest to say “yes” — in the words of its Best Practices Memo: “to recommend lawful alternatives to Executive

²⁴ *Id.*

²⁵ *Id.* at 1722.

²⁶ *Id.* at 1719.

²⁷ I say that he “forgets,” since he is perfectly aware of these changes at other points in his argument — as the following discussion indicates. Nevertheless, he does take comfort in the fact that the current politicized arrangement has “been in place for decades,” *id.* at 1708 — thirty-five years to be precise — while only experiencing one blatant breakdown during the second Bush Administration (eight years out of thirty-five). But as he also recognizes, the “pro-executive tenor” of the OLC’s decisionmaking was already well advanced before the Bush fiasco, *id.* at 1716, and it is an open question whether Obama’s early repudiation of the torture memos was merely a strategic retreat that prepares the way for further presidentialist advances, *see infra* pages 60–261.

²⁸ *Alarmism*, *supra* note 3, at 1735.

²⁹ *See supra* notes 10–14 and accompanying text.

³⁰ *See Alarmism*, *supra* note 3, at 1719, where Morrison refutes the view — supposing it to be mine — that “OLC invariably says yes to the White House on significant issues.” To the contrary, I believe that institutions are never irresistible forces that “invariably” determine outcomes — they only create dynamics that predispose decisionmakers in a particular direction.

³¹ Compare DECLINE, *supra* note 1, at 225 n.27 (enumerating some of the same cases that Morrison cites in recalling the OLC moments of resistance), with the list provided by *Alarmism*, *supra* note 3, at 1718.

Branch proposals that it decides would be unlawful.”³² Morrison agrees that “there is a danger that OLC will over-identify with its clients . . . , compromising its legal advice to accommodate them.”³³

The problem is confirmed by Morrison’s very useful data analysis, which shows that only thirteen percent of OLC opinions have provided a more- or- less clear “no” to the White House during the past generation.³⁴ Morrison’s data- set doesn’t include OLC’s unpublished opinions — which typically involve confidential matters involving national security. Since OLC is almost- certainly more deferential to the White House in these sensitive areas, the percentage of “no’s” would likely sink into the single- digits if these secret opinions could be included in Morrison’s data set.³⁵ And remember, quantitative data can’t take into account the occasions on which the White House is especially exigent in its telephonic demands.³⁶

The danger of “over-identification” is magnified further by the OLC’s dualistic understanding of its mission — in the words of its Guidelines, it “serves both the institution of the presidency *and* a particular incumbent, democratically elected President.”³⁷ This means, according to the Guidelines, that the Office should “reflect the institution-

³² *Alarmism*, *supra* note 3, at 1715 (quoting Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, to Att’y’s of the Office of Legal Counsel, Re: Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010), available at <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf>).

³³ *Id.*

³⁴ *Id.* at 1717–18.

³⁵ Morrison notes that the unpublished opinions represent a “significant limitation” of his study, *id.* at 1717 n.111, but does not consider how their focus on national security matters is likely to bias his estimates in a systematic fashion.

³⁶ Morrison is undoubtedly right in suggesting that stare decisis plays a restraining role in garden-variety cases. But he also notes that the OLC overrules (or substantially modifies) its own decisions in more than five percent of the opinions in his sample. See *Alarmism*, *supra* note 3, at 1723 n.131. This is a significant percentage, given my focus on the likely way the OLC will function in high-stress situations. It indicates that stare decisis is by no means a rigid rule, and that the OLC cannot credibly claim that its hands are tied when the White House is pressuring it to overrule existing case- law to vindicate a high-priority presidential initiative.

Similarly, Morrison is undoubtedly correct in suggesting that his data fails to reflect the fact that the OLC sometimes informally deflects the White House from a legally problematic initiative. See *Alarmism*, *supra* note 3, at 1719. But on high-priority initiatives, the White House won’t easily take an informal “no” for an answer — it will either push the OLC to write a formal opinion saying “yes” or it will withdraw the issue from its jurisdiction and rely on the WHC to uphold the legality of the President’s plan. As a consequence, I believe that Morrison’s data provides an over-estimate, not an under-estimate, of likely OLC resistance: it fails to count unreported national security opinions (on which the OLC is probably extremely deferential), and this failure is not mitigated by its additional failure to detect informal modes of OLC resistance.

³⁷ *Id.* at 1715 (emphasis added) (quoting Memorandum from Walter E. Dellinger, Assistant Att’y Gen., Office of Legal Counsel, et al., Principles to Guide the Office of Legal Counsel (Dec. 21, 2004) [hereinafter OLC Guidelines], reprinted in Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, app. 2, at 1606 (2007)).

al traditions and competencies of the executive branch *as well as the views of the President who currently holds office.*³⁸

Morrison endorses this view, but fails to reflect on its complexities. He elaborates with great subtlety on the first branch of the OLC's mission statement — the part that expresses the distinctive “traditions and competences” developed over the long haul. But he is tight-lipped when it comes to the second aspect — which seems to give the sitting President the authority to override long-standing traditions and insist that the OLC follow his short-term views. Morrison defers this “complex” question for future elaboration,³⁹ but he is “sure[]” about one thing: the President has the right “to privilege certain interpretive approaches to the Constitution over others, as a result of which certain policies will be deemed constitutional that would not be according to other interpretive approaches.”⁴⁰

Morrison's moment of certainty throws his larger argument into utter confusion. He wishes to reassure us that the “cultural norms” of the Office provides its members with robust resources to resist White House pressure; but this claim undercuts itself if the Office's cultural norms authorize wide-ranging deference to the constitutional views expressed by the “democratically elected President.”

Consider the case of John Yoo. Morrison plainly believes that Yoo's interpretation of the Founding is wrong, and I agree, but we can't pretend to speak for the academy. After all, Yoo gained his tenured professorship precisely because his Berkeley colleagues thought highly of his “interpretive approach to the Constitution.” “Surely,” President Bush could decide that what was good enough for Berkeley was good enough for him?

After all, Morrison and the Guidelines authorize the sitting President to “privilege” his approach “over others.” So when some future Addington calls up the OLC, and orders it to reinstate Yoo-style “interpretive approaches” in its opinions, he can cite Morrison, as well as the OLC Guidelines, in support. And when political appointees turn to OLC old-timers for advice, they will learn that the OLC defended waterboarding until a new President was elected who rejected his predecessor's “interpretive approach.” So why shouldn't future OLCs also defer to the sitting President's commands until the voters take a different course in the next election?

Morrison's predicament expresses a dilemma afflicting an entire generation of elite lawyers who have been moving in- and- out of the OLC in synch with the election returns. They very much want to draw

³⁸ *Id.* (emphasis added) (quoting OLC Guidelines, *supra* note 37, at 1606).

³⁹ *Id.* at 1746 n.218. He does, however, provide some further reflections in Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1515–18 (2010).

⁴⁰ *Alarmism*, *supra* note 3, at 1746 at n.218.

a clear line between Yoo and themselves; but they subscribe to Guidelines that commit them to give special weight to the “views of the President who currently holds office.”⁴¹ This makes it tough for them to resist when the White House tells them that the sitting President adopts an emphatically broad view of his powers.

All in all, Neal Katyal’s downbeat appraisal of the situation seems at least as realistic as Morrison’s upbeat view:

[T]he political pressure on OLC officials is unavoidably immense. They are, after all, political appointees themselves — the head of the office and *all* its deputies are politically appointed. They are expected to advise the President, rather than merely adjudicate disputes, and are regularly present at White House meetings. In this climate, there is simply no way that the OLC’s aspirational purpose of acting as a neutral decision-maker can play out in practice the way one would hope. Simply put, the OLC is composed of lawyers with a client to serve.⁴²

B. Professional Misconduct?

These problematic dynamics make the Justice Department’s official inquiry into Jay Bybee and John Yoo especially important. If the Department had condemned their torture memos as unprofessional, this would have imposed serious limits on the sitting President’s authority to revolutionize the Office’s “interpretive approach.” But the Department refused to sanction Bybee or Yoo — leaving the door open for future cave-ins.

The Department did not reach its decision lightly. After an intensive five-year investigation, its well-respected Office of Professional Responsibility found that Bybee and Yoo were indeed guilty of “professional misconduct.”⁴³ Typically, this finding would be transmitted to the relevant bar associations, making disbarment likely.⁴⁴ But in early 2010, Obama’s Justice Department repudiated OPR’s conclusions, in a final judgment written by David Margolis, another highly respected long-time government lawyer.⁴⁵

⁴¹ *Id.* at 1715 (quoting OLC Guidelines, *supra* note 37, at 1606).

⁴² Neal Kumar Katyal, *Toward Internal Separation of Powers*, 116 *Yale L.J. Pocket Part* 106, 109 (2006), available at <http://www.yalelawjournal.org/images/pdfs/68.pdf>.

⁴³ OFFICE OF PROF’L RESPONSIBILITY, U.S. DEP’T OF JUSTICE, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS 260 (July 29, 2009) [hereinafter OPR REPORT], available at <http://judiciary.house.gov/hearings/pdf/oprfinalreport090729.pdf>.

⁴⁴ *See id.* at 11 n.10.

⁴⁵ *See* Memorandum from David Margolis, Assoc. Deputy Att’y Gen., to Eric Holder, Att’y Gen., Re: Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility’s Report of Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists 2 (Jan. 5, 2010).

Future political appointees are now on notice: if they are tempted to follow in the footsteps of Bybee and Yoo, the Department will do its utmost to save them from charges of “professional misconduct” — even if the Office of Professional Responsibility goes on the war path, and even if political power has passed to their political opponents.⁴⁶

Res ipsa loquitur, one would have supposed. But Morrison sharply disagrees — please note that this is the first point at which we are seriously disputing the fact of the matter. He denies my contention that the Department “completely exonerated Bybee and Yoo,”⁴⁷ pointing out that Margolis criticized them for “poor judgment,” and especially condemned Yoo for allowing “his own ideology and convictions” to “cloud[] his view of his obligation to his client.”⁴⁸ But these slaps on the wrist make the precedential force of DOJ’s decision worse, not better: when the next OLC official succumbs to “ideological” conviction in defense of a presidential power- grab, you can be sure he will be citing these words from Margolis’s opinion when defending himself against charges of “professional misconduct.”

Morrison also takes me to task for calling Margolis’s decision “final,” since bar associations remain free to institute disbarment proceedings even without a referral.⁴⁹ But the judgment was as final as the Justice Department could make it, and everybody else has treated it that way.

Begin with Judge Bybee: When he appeared at his confirmation hearings, the torture memos had not yet been leaked to the public. Nevertheless, Senators did have the foresight to ask him asked about his role in national security matters. Bybee stone-walled, refusing to

[hereinafter Margolis Memorandum], available at <http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf>.

⁴⁶ For a critique of the Margolis opinion, see David Luban, *David Margolis is Wrong*, SLATE (Feb. 22, 2010), <http://www.slate.com/id/2245531/>. See generally, *What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration: Hearings Before the Subcomm. on Administrative Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 111th Cong. (2010) (statement of David Luban, Professor, Georgetown University Law Center).

⁴⁷ DECLINE, *supra* note 1, at 108.

⁴⁸ *Alarmism*, *supra* note 3, at 1727 (quoting Margolis Memorandum, *supra* note 45, at 67). As the following passage makes clear, I did not overlook Margolis’s wrist-slapping exercise:

After six years of collective pondering, [the department] completely exonerated Bybee and Yoo of all charges of unprofessional conduct.

The department recognized that the torture memos had represented “incomplete and one-sided” arguments, and that Jack Goldsmith, in withdrawing them, found that they had “no foundation in prior OLC opinions, or in judicial decisions, or in any other source of law.” But this wasn’t enough, in its judgment, to say that the opinion writers had acted unprofessionally.

DECLINE, *supra* note 1, at 108.

⁴⁹ *Alarmism* at 1727.

answer on the grounds of executive privilege.⁵⁰ By the time the torture memos came out, he was safely ensconced on the Ninth Circuit.⁵¹

After the Democratic sweep in November 2008, impeachment became a distinct possibility — with Bybee collecting a special defense fund to respond effectively to the challenges ahead.⁵² But the Margolis report stopped the movement dead in its tracks. Here is Senator Harry Reid, majority leader of the Senate, responding to its publication:

[“]Career officials at the Department of Justice made considered judgments about the content of the memos and the discipline Bybee and Yoo should face, and Senator Reid believes it is appropriate to defer to their final decisions,” spokesman Jon Summers said⁵³

Morrison notwithstanding, Senator Reid is under the impression that Margolis’s opinion was “final.” Future leaders of the OLC are on notice that, so long as the President moves them onto the federal courts before their OLC memos leak to the press, they will preside for decades in their distinguished positions. This risk-reward ratio will reinforce the larger cultural dynamics propelling the Office to “yes” — though doubtless some resolute souls will resist temptation.

But Morrison wants to emphasize the downside risks — so he understandably shifts his attention from Judge Bybee to Professor Yoo, declaring the latter “a virtual pariah in the academy.”⁵⁴ I wish he’d tell that to the *New York Times*, the *Los Angeles Times*, and the *Wall Street Journal*, which regularly treat Yoo as a leading constitutional thinker on their op-ed pages.⁵⁵ And America’s successful strike against Osama bin Laden has provided Yoo with more high-visibility opportunities to claim vindication for his torture memos.⁵⁶

⁵⁰ See Bruce Ackerman, *Impeach Jay Bybee*, SLATE (Jan. 13, 2009), <http://www.slate.com/id/2208517/>.

⁵¹ Judge Bybee was confirmed by the Senate on March 13, 2003. The torture memos were not released until June 22, 2004. See Henry Weinstein, *Conservative Confirmed as 9th Circuit Judge*, L.A. TIMES, Mar. 14, 2003, at B6; David Johnston & James Risen, *Aides Say Memo Backed Coercion Already in Use*, N.Y. TIMES, June 27, 2004, at A1.

⁵² Anticipating the Democratic victory, Bybee had actually established his fund in July, 2008. See Michael Isikoff, *Torture Memo Author Sets Up Defense Fund to Fight Possible Impeachment*, Newsweek (Nov. 19, 2009), <http://www.newsweek.com/blogs/declassified/2009/11/19/torture-memo-author-sets-up-defense-fund-to-fight-possible-impeachment.html>.

⁵³ Steve Tetrault, “*Torture Memo*” *Author Backed*, LAS VEGAS REV.-J., Feb. 26, 2010, at 4B.

⁵⁴ *Alarmism*, *supra* note 3, at 1728 (quoting Michael C. Dorf, *Why President Obama Should Consider Pardoning Those Who Designed, Authorized, and Carried Out the Bush Policy of Abusing Detainees*, FINDLAW (Apr. 22, 2009), <http://writ.news.findlaw.com/dorf/20090422.html>).

⁵⁵ Between January 1, 2006, and May 4, 2011, Yoo published six op-eds for the *New York Times*, eight for the *Los Angeles Times*, and twenty-three for the *Wall Street Journal*. He is also a regular contributor to the *Philadelphia Inquirer* and other significant journals of opinion. (A complete list of articles is on file with the Harvard Law School Library.)

⁵⁶ See, e.g., John Yoo, *From Guantanamo to Abbottabad*, WALL ST. J., May 4, 2011, at A17; see also *Symposium: Bin Laden, No More*, NAT’L REV. ONLINE (May 2, 2011), <http://www.nationalreview.com/articles/print/266271>.

Only time will tell whether John Yoo will rehabilitate himself sufficiently to get a job with the next Republican administration. Since Yoo escaped censure for professional misconduct, and since there is no realistic chance of his disbarment,⁵⁷ his prospects for future White House service don't look too bad. While life may be a bit uncomfortable at Berkeley, he will gain consolation from cheer-leaders for his latest op-ed at the American Enterprise Institute, where he is a visiting scholar.⁵⁸ More to the point, his supporters at AEI and the Federalist Society⁵⁹ will help a lot in his campaign to win a big White House job in the next Republican administration. So long as Yoo avoids vacationing in the Costa Brava, it's far too soon to count him out.

Putting Yoo's personal fate to one side, there are many other lawyers and professors with Yoo-like views who would be honored to accept an appointment at the OLC or the White House. While the torture memos have been the object of blistering critique, this has not discredited the larger scholarly movement that glorifies presidential prerogative.⁶⁰ Indeed, new super-presidentialist scholarship is appearing at Harvard and Chicago Law Schools that makes Yoo's jurisprudence

⁵⁷ Yoo argues that Pennsylvania's statute of limitations precludes any disbarment proceedings for his conduct after March 13, 2007. See MIGUEL A. ESTRADA, Response to the U.S. Department of Justice Office of Professional Responsibility Final Report Dated July 29, 2009, at 12 (Oct. 9, 2009), available at <http://judiciary.house.gov/hearings/pdf/YooResponse090729.pdf>. Whatever the validity of this particular argument, it is now 2011, and there is a significant problem by this point. In any event, the Pennsylvania Bar has rebuffed repeated requests for his disbarment filed by a coalition of activist groups, called Velvet Revolution. This group also filed a similar complaint with the D.C. bar in November 2009, see Velvet Revolution, Re: Complaint against John Choon Yoo (Nov. 20, 2009), available at http://www.velvetrevolution.us/torture_lawyers/docs/Yoo_Dc_Complaint.pdf, but it has received no response after eighteen months. See Email from Velvet Revolution Staff (May 7, 2011) (on file with author).

Morrison also mentions a case in which Jose Padilla is suing John Yoo for his role in legitimating Padilla's detention as an illegal enemy combatant. See *Alarmism*, *supra* note 3, at 1728–29. While a district court held that Padilla's allegation sufficed to allow him to proceed, *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009), the Ninth Circuit will reconsider the decision following the Supreme Court's resolution of *Al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009). See Order Vacating Submission, *Padilla*, 633 F. Supp. 2d 1005, No. 09-16478 (9th Cir. Oct. 18, 2010).

⁵⁸ Yoo is a visiting scholar at the American Enterprise Institute. *Scholars and Fellows: John Yoo*, AM. ENTERPRISE INST., <http://www.aei.org/scholar/74> (last visited May 25, 2011).

⁵⁹ In 2001, the Federalist Society awarded Yoo the Paul M. Bator Award for his "demonstrated excellence in legal scholarship." *Paul M. Bator Award*, FEDERALIST SOC'Y, <http://www.fed-soc.org/aboutus/id.77/default.asp> (last visited May 25, 2011). He has since been a speaker at at least sixteen distinct events. *Prof. John C. Yoo*, FEDERALIST SOC'Y, <http://www.fed-soc.org/publications/author/john-c-yoo> (last visited May 25, 2011).

⁶⁰ See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 263–64 (1994); Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008).

seem tame by comparison.⁶¹ Ideas matter: with a significant proportion of the rising legal elite learning its law from presidentialist professors, one or another true believer will be tempted to put these theories into practice if and when he finds himself a job at the OLC. As we have seen, Morrison leaves this option open in defending the President's authority to transform his administration's "privileged approach" to constitutional interpretation. And in considering whether a dramatic shift makes sense, future OLC lawyers will be perfectly aware that the Department protected Yoo against disbarment the last time around.

Morrison is just kidding himself when he thinks that this won't make a difference. It's one thing to suffer the bitter-sweet pleasures of Yoo-style martyrdom; it's quite another, to be barred forever from the practice of law. The Department's decision has significantly increased the looming risk of presidential rubber-stamping at the OLC.

II. THE RISE OF THE WHITE HOUSE COUNSEL

The WHC has thus far remained in the background — on the other side of the telephone, as it were, urging the political appointees at the OLC to defer to the President's "democratic mandate" when developing their legal views. But it is time to confront the dramatic rise in the counsel's prestige and influence over the past thirty years. These ongoing dynamics permit the WHC to supplant the OLC as the President's public legal voice during the next constitutional crisis.

Morrison disputes my account by focusing on four episodes from Carter to Bush II that, according to him, serve as the entire basis for my claim. He finds that only one survives his critique, and that my treatment of the others is "patently false."⁶² But Morrison has somehow missed my discussion of other important cases. As to "patent" falsities, Morrison cannot point to a single mistake of fact in my presentation —

⁶¹ See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* (2011), which seeks to throw off the last remaining bonds of "liberal legalism," and to recognize that "[t]he Madisonian framework is broken and cannot be . . . adapted to the administrative state." *Id.* at 15. Instead of following the Founders, the authors look for inspiration to the leading Nazi theorist, Carl Schmitt, "at least when demystified and rendered into suitably pragmatic and institutional terms." *Id.* at 4.

Posner and Vermeule's argument serves as a mirror-image of Morrison's analysis. He thinks I'm an alarmist, and that a soberly realistic view of the present executive legal establishment makes it clear that major reforms are unnecessary. They think my "diagnoses of decline" are entirely realistic — indeed that they "are so convincing that [my] prescriptions for revival are futile." *Id.* at 213 n.1. While Morrison and Posner/Vermeule are poles apart on the accuracy of my diagnoses, they converge on a critical point. Both agree — if for opposite reasons — that the Obama Administration should put on the backburner any serious reforms that might significantly reduce the risk of another catastrophic outbreak of presidential illegality.

⁶² *Alarmism*, *supra* note 3, at 1735.

as I will show in a series of footnotes. I reserve the text to discuss events that Morrison failed to appreciate the first time around.⁶³

But let us begin, once again, from some common ground. As Morrison recognizes, the White House staff is a modern creation.⁶⁴ During the first 150 years of American history, the number of slots for high-powered professionals in the White House was zero. On legal matters, presidents were entirely dependent on the Attorney General.

Things began to change in 1939, when Congress granted President Franklin Roosevelt the power to name six presidential assistants in the Executive Reorganization Act.⁶⁵ And in 1943, he gave his old friend, Sam Rosenman, the title of “special counsel” when appointing him to his newly established staff. Despite this title, Rosenman was not provided with a professional team of assistants that would have enabled him to do serious legal work. He served instead as a high-powered political advisor and leading speechwriter — chiming in with passing legal judgments only occasionally. This set the pattern for the next generation. Without a legal staff of their own, White House counsel were in no position to compete with the Justice Department as the authoritative legal voice for the executive branch.

Richard Nixon continued this tradition by naming a senior political advisor, John Ehrlichman, to the job — but when he shifted Ehrlichman to the newly created Domestic Policy Council, the vacancy was filled by the thirty-year-old John Dean. This up-and-comer lacked the heft required to play the traditional role of senior advisor. So he struggled to make himself useful by recruiting a small staff of five to provide low-level legal advice to White House personnel.

And thus was born the modern Counsel’s office — which in time would possess the high-powered staff that could compete with the OLC as an authoritative legal interpreter. But this wouldn’t happen overnight. Given Dean’s involvement in Watergate, the very existence of the office was very much in doubt — until Jimmy Carter named Lloyd Cutler, one of the great lawyer-statesmen of his generation, to the job in 1979.

Cutler transformed the job. Morrison to the contrary notwithstanding, Cutler made the key legal decision to send in the helicopters during the Iran hostage crisis, cutting the OLC out of the process entirely.⁶⁶

⁶³ I also provide briefer footnote treatments of other examples of White House legal leadership that Morrison fails to notice. See *infra* note 76.

⁶⁴ See *Alarmism*, *supra* note 3, at 1731, where Morrison signs on to the account presented at pages 110 to 114 of *Decline and Fall* and their accompanying endnotes. The following paragraphs provide a brief summary.

⁶⁵ Pub. L. No. 76-19, 53 Stat. 561 (codified at 5 U.S.C. § 133 (2006)).

⁶⁶ Morrison quotes my brief discussion in endnote 41 in its entirety: “During the Iran hostage crisis, . . . President Carter asked [White House Counsel] Lloyd Cutler, not the OLC, to tell him whether the War Powers Resolution required him to consult Congress about a covert rescue mis-

No less importantly, Morrison ignores my description of the way Cutler used his position “as a springboard for public interventions on major constitutional questions.”⁶⁷ Most notably, Cutler argued that Carter’s SALT Agreement with the Soviet Union could be ratified by simple majorities of both houses as a congressional-executive agreement and did not require approval by two-thirds of the Senate.⁶⁸ This episode is of enduring importance.

To see why, consider that the relationship between the WHC and the OLC is utterly mysterious to most lawyers, let alone to most Americans. So imagine the scene when some future White House Counsel issues a legal opinion, rubberstamping the President’s latest power-grab, with the peroration: “Ever since Lloyd Cutler assumed the position as White House Counsel in 1979, this office has, from to time, taken the lead in explaining the constitutional foundations for major presidential initiatives”

Given pervasive ignorance dealing with Beltway arcana, this famous precedent will go a long way toward legitimating the White House decision to cut out the OLC. Instead of conceding impropriety, our hypothetical Counsel can summon up the great spirit of Lloyd Cutler in support of his leading role. After establishing his distinguished pedigree, Counsel can reinforce his claim to authority with a host of additional arguments: After all, there’s nothing in the Constitution that requires the President to prefer the OLC to the WHC. Article II simply tells the President to “take Care that the Laws be faithfully executed”⁶⁹ — it doesn’t tell him where to get his legal advice. Moreover, as Morrison acknowledges, the OLC’s traditional role is principally based on

sion” to free the hostages. *DECLINE*, *supra* note 1, at 230 n.41 (alterations in original). Nothing he says undercuts this claim: the only person Carter directly consulted was Cutler, and at no point did anybody ask for the OLC’s opinion on the matter.

Morrison tries to extenuate this breach by pointing out that Cutler did ask Attorney General Griffin Bell to sign on. But Bell was in no position to say “no.” As Morrison recognizes, the AG and his immediate office has left serious interpretive issues to the OLC since the 1960’s. See *Alarmism*, *supra* note 3, at 1735. Moreover, Bell didn’t ask the OLC even though it had recently written an elaborate opinion on war power issues, and could have responded within hours with an informed judgment — well within the four day window for decision. Moreover, Morrison recognizes that Cutler was deciding “a question not resolved in the OLC opinion” *Id.* at 1736 n.181.

The moral of this story is not, as Morrison suggests, “that on serious matters of this sort, the President needs the Justice Department.” Sadly, it shows that the President could count on Griffin Bell, who was in fact a relatively independent Attorney General, to serve as a rubber-stamp when the going got tough.

This is one of the three cases that reveal, in Morrison’s view, that my claims are “patently false.” *Id.* at 1735. For the others, see my discussions at *infra* notes 76 and 83.

⁶⁷ *DECLINE*, *supra* note 1, at 112, 236 n.73.

⁶⁸ In the end, President Carter succumbed to Senate protests, and submitted SALT II as a treaty, before finally withdrawing it entirely after the Soviet invasion of Afghanistan. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 903 (1995).

⁶⁹ U.S. CONST. art. II, § 3, cl. 4.

executive order, not Congressional statutes.⁷⁰ If the President prefers to treat his Counsel as a modern-day Cutler, there can be no question that the bureaucracy and military will follow his lead — at least until the courts enter into the field.

Undoubtedly, the Cutler precedent won't stifle all grumbling from Beltway cognoscenti.⁷¹ But it will make it much tougher to convince the generality of lawyerdom, as well as the broader public, that they are witnessing a dreadful act of legal usurpation — even if that's precisely what is happening.⁷²

While Morrison entirely ignores my discussion of the Cutler episode, it's clear that he rejects my larger point, remarking elsewhere that “there is nothing novel or untoward about the White House Counsel ‘defend[ing] the president in public.’”⁷³

I dissent: Since the traditional role of the OLC is based on little more than practice, it is undermined whenever the WHC disrupts this practice by publicly taking the lead on a high-priority political initiative — each intervention builds up another precedent in a counter-tradition, legitimating abuse of the WHC when the presidency experiences one of its episodic eruptions of illegality.⁷⁴

⁷⁰ See *Alarmism*, *supra* note 3, at 1709 & nn.77–79, 1710 & n.82, 1711 & n.90. I describe the prevailing legal situation in *DECLINE*, *supra* note 1, at 229 n.36.

⁷¹ Within the Beltway, “the OLC has worked hard at cultivating a reputation for disciplined legal judgment that the White House Counsel can only envy. An OLC opinion helps legitimate the president’s initiative.” *DECLINE*, *supra* note 1, at 99–100. Since Morrison emphasizes this point, *Alarmism*, *supra* note 3, at 1721–22, I want to emphasize my agreement. But the OLC’s superior reputation hardly will be decisive in the White House cost-benefit analysis. If it learns, through its telephone conversations, that the OLC is going to say “no” to a high-priority presidential initiative, “it’s better for the White House lawyers to write up their own legal memo telling the president yes.” *DECLINE*, *supra* note 1, at 100. As I explain in the text, a White House decision to make an end-run around the OLC will not generate much political backlash, since very few Americans have even heard of the OLC, let alone grasp its traditional role within the higher reaches of the executive establishment.

⁷² Morrison’s constitutional views make it clear that the President is well within his authority to rely on his Counsel’s opinion. See *Alarmism*, *supra* note 3, at 1746 n.218. I take a more complex position on the President’s institutional responsibilities to determine what “the laws” require before he is entitled to “take care” that they be “executed.” See *DECLINE*, *supra* note 1, at 148; *infra* page 39–40.

⁷³ *Alarmism*, *supra* note 3, at 1740 (quoting *DECLINE*, *supra* note 1, at 114).

⁷⁴ Morrison displays a similar blindness in his critique of my treatment of presidential signing statements. My main point is to demonstrate how, “[o]ver the short space of twenty-five years, modern presidents have gone a remarkably long way in legitimating the notion that they can disobey statutes after the most casual gesture in the direction of the Constitution.” *DECLINE*, *supra* note 1, at 95. Morrison agrees that signing statements don’t “provide a complete analysis,” but says that they usefully serve as “devices for alerting Congress and the interested public” within the Beltway to search for further elaboration of the Administration’s rationales. He recognizes, however, that “not many members of the general public are likely to bother” to ask further questions. *Alarmism*, *supra* note 3, at 1712 n.93. This is precisely my main concern — John Q. Public will simply glance at the headlines, and learn that the President is refusing to heed Congressional enactments that he is simultaneously signing into law — “I didn’t know that the President could do

But one basic fact restricted Cutler's capacity to displace the OLC. Like John Dean, he only had five lawyers working for him. While they were a high-powered group, they were in no position to displace the twenty-five superlawyers at the OLC on a regular basis. But the WHC staff began to grow by fits and starts over the next two decades — increasing to fourteen during the Iran-Contra Affair, and really taking off under Bill Clinton when the staff moved into the low forties during the impeachment controversy.⁷⁵

This puts a distinctive meaning on a second episode that Morrison puts under his microscope,⁷⁶ since OLC displacement was becoming a

such a thing," he might (justifiably) wonder. But over time, these headlines will create the general impression that it's perfectly OK for the President to make high-visibility constitutional pronouncements within the ten-day period he has to put his signature on a bill — and that is a very bad thing.

⁷⁵ See DECLINE, *supra* note 1, at 236 n.76, and sources cited therein.

⁷⁶ Morrison also presents an elaborate refutation of a third episode I discuss in a single sentence: "[T]he WHC under George H.W. Bush refused to ask the OLC for an opinion concerning the line-item veto of appropriation measures because it disagreed with the likely result." DECLINE, *supra* note 1, at 230 n.41. As this description makes plain, I did *not* claim that White House Counsel Boydon Gray asserted authority to make the ultimate decision on this issue. Indeed, I specifically mention the OLC's intransigence on the line-item veto as a praiseworthy example of "independence." DECLINE, *supra* note 1, at 225 n.27. Yet, according to Morrison, this is one of the three cases in which my description is "patently false." But there is in fact no disagreement between us. To the contrary, both of us refer to the same source as the basis for our discussion, citing Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, LAW & CONTEMP. PROBS., Autumn 1993, at 63.

I used the "line-item veto" affair to illustrate another, more subtle, form of White House influence: the WHC can simply tell OLC opinion-writers to stop in their tracks if repeated phone calls reveal that they are determined to say "no." Even if the OLC remains steadfast in the short-run, this show of power will weaken the OLC over the long-run, given its strong institutional incentives to remain in the loop. See DECLINE, *supra* note 1, at 100–01 (the very passage to which my endnote is appended). My sin, if it is one, was to make the book seem user-friendly to a general audience by reducing the formidable number of endnote-citations in the text. This sometimes led me to combine distinct ideas into a single endnote to support the broader textual discussion.

For the same reason, I did not emphasize all the incidents of WHC "end-running" that I uncovered in my research. Consider, for example, this passage from the essay by Jeremy Rabkin that serves as a common source for both Morrison and me:

Charles Cooper [head of the OLC under the second Reagan Administration] complained that OLC advice was frequently discounted by the White House. In Cooper's view, the White House lawyers were more concerned with immediate political goals than with the constitutional doctrines on presidential power emphasized by OLC.

Rabkin, *supra* at 88. Cooper's complaints are to some degree corroborated by Peter Wallison, Reagan's White House Counsel during roughly the same period, who remarks that, "If there's a constitutional question about the president's power . . . [the WHC] can make that decision on their own without consulting the OLC." DECLINE, *supra* note 1, at 115. But neither Cooper nor Wallison give concrete examples, so I didn't make anything of this episode in the book. Now that Morrison has launched a broad-based challenge, I hope that some scholar finds the time to dig through the archives in search of evidence that might corroborate, or disconfirm, this testimony.

I also report that "White House lawyers took the lead" in preparing signing statements during the presidency of George H. W. Bush — in sharp contrast to the practice prevailing in the Reagan and Clinton Administrations. See DECLINE, *supra* note 1, at 91. This served as a prelude to the egregious preemption of the OLC during the George Bush Administration, when White

much more significant possibility during the Clinton years. This one involved the legality of Hillary Clinton's effort to lead secret strategy sessions on health care reform. The WHC, not the OLC, said "yes," ruling that her participation was consistent with conflict-of-interest rules and the Federal Advisory Committee Act.⁷⁷ Morrison agrees that this was a plain case of displacement: if *any* matter should have been deferred to the OLC, it was an issue affecting the President's wife.⁷⁸ But Bill thought Hillary was central to his Administration's signature initiative, and so that was that: another big precedent was added to the chain initiated by Lloyd Cutler.

Interestingly, George W. Bush initially reacted to the mushrooming size of the WHC by dramatically cutting it back — as late as 2005, there were only fourteen lawyers in his White House office⁷⁹ — though this reduction was outweighed by the addition of the redoubtable David Addington, Cheney's counsel, to the circle of White House lawyers. As *Decline and Fall* explains, Addington and Yoo were key players in an ad hoc "war council," convened by Counsel Alberto Gonzales, to hammer out key legal positions in the "war on terror."⁸⁰ Yoo actively engaged in these intensive sessions. But at the very same time, he failed to follow standard OLC consultation procedures in preparing his torture memo. Indeed, the very existence of this memo was withheld from other lawyers at the OLC, even after the Assistant Attorney General had signed it.⁸¹ If this episode doesn't support my claim that the OLC's "claim to legal authority is already visibly declining," what does?

House lawyer David Addington dominated the signing statement process, "churning out hundreds of conclusory denunciations of congressional legislation." See *id.* at 92–93.

⁷⁷ *Alarmism*, *supra* note 3, at 1739.

⁷⁸ *Id.* Morrison tries to extenuate this breach by pointing out that the Administration had not yet placed its own officials into key positions at the OLC. *Id.* But the OLC still had its small complement of senior government lawyers, together with hold-over attorney-advisers — and one would suppose that it is precisely such nonpartisan types who were best suited to take an impartial view of Ms. Clinton's legal problems. The matter became even more embarrassing when it was subsequently revealed that, at the time of her immersion into secret strategy sessions, Ms. Clinton had not yet transferred her financial assets into a blind trust, as was required by the conflict-of-interest rules generally imposed on all federal employees, with the exception of the President and Vice-President. See Rabkin, *supra* note 76, at 94.

⁷⁹ See Michael A. Fletcher, *Quiet But Ambitious White House Counsel Makes Life of Law*, WASH. POST, June 21, 2005, at A19.

⁸⁰ *DECLINE*, *supra* note 1, at 105–06.

⁸¹ As Martin Lederman reports: "I worked as an Attorney-Advisor at OLC from 1994–2002, and I was still at the Office when it issued the 2002 Torture Opinion. I did not know anything about that Opinion, however — not even of its existence — until it became the subject of public debate . . ." Lederman, *Understanding the Torture Memos (Part I)*, BALKINIZATION (Jan. 7, 2005), <http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part-i.html>. Lederman also describes the way in which the preparation of the torture memos breached standard OLC consultation procedures.

In my view, Yoo's involvement at Gonzales's crisis sessions "represent[s] an intensification, not a repudiation, of past practices of collaboration between the OLC and the White House."⁸² Since Morrison has no trouble with telephone "importunings" from Addington, why not a pressure-packed lunch or two, or a series of intensive White House "war councils"? Instead of taking this problem seriously, Morrison focuses on a different aspect of Bush's war on terror. I am unpersuaded by his critique,⁸³ but our dispute should not divert attention from the main point: the WHC did in fact preempt the OLC's standard decision-making processes during the torture memo crisis, and it should take its place alongside key precedents from the Carter and Clinton years.

Morrison also ignores Gonzales's role as public spokesman for the presidency. The White House Counsel took to the *New York Times* to defend the Administration's refusal to abide by the Geneva Conventions⁸⁴ and its use of military commissions.⁸⁵ So the WHC was not only preempting the OLC internally; it was serving as the external legal defender of the President's high-priority initiatives.

⁸² DECLINE, *supra* note 1, at 106.

⁸³ This involved the question whether al Qaeda or the Taliban were protected by the Third Geneva Convention. *Alarmism*, *supra* note 3, at 1737–39. As Lederman reports on the basis of his own experience in the office, "traditionally OLC would solicit the views of the State Department before rendering any advice on an issue [involving treaty obligations], and would reject the State Department Legal Adviser's views only after extremely careful consideration." See Lederman, *supra* note 81.

But that is not what happened here. Instead, the OLC's John Yoo and the State Department's William Howard Taft IV submitted warring memos to the White House Counsel, who sent the matter on for final decision by the President. But, of course, the President was no lawyer, and was going to rely on his old friend's legal advice. As Morrison notices, *Alarmism*, *supra* note 3, at 1738 n.189, Gonzales had already briefed the President on the basis of a draft memo, prepared by John Yoo that had argued the case for evading the Geneva Convention — even though this memo had not yet been signed by Assistant Attorney General Bybee and did not represent the formal opinion of the OLC. In taking this step, Gonzales was displacing the OLC and asserting his authority as Counsel to preempt Jay Bybee as the President's authoritative legal adviser. Morrison fails to appreciate the significance of this power-play. Instead he focuses on a later stage of the process, when the State Department sought to gain a presidential hearing for its protest at this earlier decision. By this point, Yoo's position had received the OLC's official imprimatur, and Gonzales unsurprisingly emphasized the most current OLC memo in the document that Morrison calls a "briefing memorandum." *Id.* at 1738. Morrison exaggerates the significance of this lawyerly move, asserting that Gonzales's reliance on the OLC opinion "does not undermine, but rather reinforces, OLC's legal interpretive authority." *Id.* at 1738 n.192.

I draw a different lesson: The White House Counsel called the legal shots from the beginning. Gonzales's "briefing memorandum" is better understood as part of the Counsel's continuing effort to dominate the legal process. See generally, JOHN YOO, WAR BY OTHER MEANS 39–43 (2006) (elaborating Gonzales's central role in evading Geneva). I leave it to you to decide whether my interpretation is "patently false." *Alarmism*, *supra* note 3, at 1735. For my treatment of other disputed episodes, see *supra* notes 66 and 76.

⁸⁴ Alberto Gonzales, *The Rule of Law and the Rules of War*, N.Y. TIMES, May 15, 2004, at A17.

⁸⁵ Alberto Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27.

Which brings us to Obama's WHC. As the new President took office, the egregious lapses of the Bush WHC might have prompted a fundamental re-think. Not only had the Bush WHC run amok; but it was building on similar, if less pathological, patterns from preceding administrations. Rethinking the OLC was even more important because George Bush had allowed the WHC staff to expand from fourteen in 2005 to twenty-six in 2008.⁸⁶ Was this a moment to order another cut-back, making it harder for White House lawyers to displace the Office of Legal Counsel?

Obama's answer was "no." He increased the staff size instead. Technically speaking, the office grew to thirty-seven lawyers in 2010 — but realistically, only twenty-four are in a position to provide the President serious legal advice. Nevertheless, the twenty-four WHC slots are precisely equal in number to the legal slots available in the OLC. Moreover, the heads of the WHC — first Gregory Craig, then Robert Bauer — have done a splendid job recruiting a series of distinguished practitioners and law professors to the office. Like all other members of the White House staff, they are fierce Obama loyalists, working 24-7 to make his Administration a success.⁸⁷ While the WHC has many irons in the fire, they have the institutional capacity to displace the OLC if the President asks them to provide him with their independent legal advice — as Morrison (reluctantly) concedes.⁸⁸ At the same time, Obama's WHC has followed in Cutler's footsteps in publicly defending controversial White House initiatives.⁸⁹

⁸⁶ Compare Jon Ward, *White House Beefs Up Legal Staff*, WASH. TIMES, July 21, 2009, at B1, with Fletcher, *supra* note 79 (noting that there were fourteen attorneys in the WHC in 2005).

⁸⁷ The White House staffing report indicates that there were thirty-seven lawyers on the WHC staff in 2010. See *2010 Annual Report to Congress on White House Staff*, THE WHITE HOUSE, <http://www.whitehouse.gov/briefing-room/disclosures/annual-records/2010> (last visited May 25, 2011); see also DECLINE, *supra* note 1, at 112, 230 n.40. But thirteen of those lawyers were concerned with executive appointments and other matters, leaving approximately twenty-four available for general assignments. I expect the staff to increase further, now that the Republicans have taken over the House, requiring the White House to prepare itself for a series of wide-ranging House investigations. It appears that the WHC is already beefing itself up for the coming conflicts, see *White House Hires Lawyer from DOJ*, THE BLOG OF LEGAL TIMES (Jan. 11, 2011), <http://legaltimes.typepad.com/blt/2011/01/white-house-hires-lawyer-from-doj.html>, and I expect a significant expansion in overall size over the next two years.

⁸⁸ *Alarmism*, *supra* note 3, at 1733.

⁸⁹ Morrison takes issue with my treatment of Mr. Craig's defense of White House policy "czars" in a public letter to Senator Feingold, pointing out that Craig expressly cited an OLC opinion in defense of his position. True enough, but my point, once again, involved Craig's decision to follow in Cutler's footsteps in "defend[ing] the president in public," DECLINE, *supra* note 1, at 114 — as Morrison recognizes, *Alarmism*, *supra* note 3, at 1740-41. Morrison and I simply disagree as to whether the WHC's rising public profile should be a source of concern. Craig was more sensitive to these issues when discussing his role in another high-profile initiative involving the Administration's effort to close Guantanamo. In an excellent overview of the Administration's failed efforts, the *Washington Post* reported: "It was often assumed on the Hill and elsewhere that White House counsel Gregory B. Craig was in charge, but he rejected that characterization in an interview and

No need to exaggerate: Obama's WHC has thus far put in a perfectly creditable performance, avoiding anything resembling the worst lapses of the Clinton and Bush years. But by rehabilitating the WHC after its reputation was shattered, President Obama has set the stage for future Presidents to use the office as a platform for authoritative-looking documents in support of unilateralist power-plays. This is the context that makes Morrison's review more than-unusually significant: He is emerging from a stint at Obama's WHC to tell his fellow academics that everything is under control, and there is no need to worry about the future.

But if I am right, we are simply living at a moment of relative calm between storms: Watergate, Iran-Contra, Torture Memos, and then the deluge?

Recall that each Administration sweeps out the entire WHC staff and brings in its own team of super-competent super-loyalists. At the same time, it can replace all the top officials at the OLC with more super-loyalists. The small cadre of career OLC lawyers will be in no position to resist this political juggernaut — especially now that Jay Bybee and John Yoo have escaped professional censure from the Justice Department.

Within this politicized setting, the OLC's generally facilitative approach, and its commitment to the "democratic mandate" of the sitting President, creates a powerful dynamic encouraging the OLC to develop "creative" legal arguments endorsing problematic initiatives. And if the OLC balks, the President can respond by withdrawing the matter from the OLC and asking his WHC to provide its own authoritative legal opinion and defend it aggressively in public. There have been cases in which "enlightened statesmen" have resisted these pressures, but do we really have to take our chances?

Not to worry, Morrison tells us, we can still count on the Court to hold firm, even if the OLC or the WHC rubber-stamp the next presidential power-play.⁹⁰ After all, Bush didn't defy recent Supreme Court decisions restraining his all-out war on terror, and Nixon capitulated when the Court insisted on a hand-over of his confidential tape recordings during the Watergate affair. But Bush's compliance was grudging at best;⁹¹ and Nixon backed down under threat of impeachment. These recent episodes should not deflect attention from the larger lessons of

said he was pushing the boundaries of his office to be as involved as he was." Peter Finn & Anne E. Kornblut, *How the White House Lost on Guantanamo*, WASH. POST, Apr. 23, 2011, at A13.

⁹⁰ *Alarmism*, *supra* note 3, at 1701–06.

⁹¹ Morrison concedes this point. *See id.* at 1700.

American history: where Presidents from Jefferson to Roosevelt have repeatedly forced the Court into chaotic retreat.⁹²

When the next transformative leader takes charge in the White House, he will be in a position to intimidate the Court with an unprecedented range of bureaucratic, military, and media tools. Perhaps the Justices will remain steadfast; but it is best to reform the system now, so that we don't have to rely so heavily on their fortitude.

III. REMEDIES

Here is where Morrison and I part company. Though he repeatedly concedes that the existing set-up at the OLC and the WHC generates risks of abuse,⁹³ he disdains all talk of structural reform, contenting himself with minor variations on the status quo.

His modest proposal: the OLC should take its recent Best Practices memo seriously, and dramatically increase the speed and frequency with which it publishes its opinions to the outside world.⁹⁴ This will provoke an intensified exchange with the larger profession that will generate a virtuous cycle over time. The dynamics of this cycle go something like this:⁹⁵ When faced with the prospect of sustained professional critique, the OLC will tone down extravagant claims for executive power; and if it doesn't, it will soon confront hard-hitting commentaries that will damage the professional standing of the opinion-writers — hurting their prospects for future employment. The ensuing series of critical put-downs will sober up OLC lawyers when they confront the task of writing the next high-profile opinion. Rather than repeat the cycle of extravagant-claims-followed-by-professional-humiliation, they will generate an increasingly thoughtful work-product. These displays of virtuosity will increase the Office's appeal to the best and brightest lawyers, who will take up its job-offers despite other stellar job opportunities — leading to an ever-more-disciplined and thoughtful work-product; and so forth.

⁹² Morrison's discussion of John Marshall's views fails to confront, or even cite, my very different portrayal of Marshall in *The Failure of the Founding Fathers* 111–223 (2005). While Morrison's Marshall plays the role of classical sage drawing a clear distinction between the role of the judicial and executive branches in constitutional interpretation, *Alarmism*, *supra* note 3, at 1694–95, the Marshall on display in *Failure* is in disorderly retreat in response to the Jeffersonian juggernaut, barely managing to escape impeachment and consenting to his Court's refusal, in *Stuart v. Laird*, to defend the proud declarations of principle proclaimed only one week before in *Marbury v. Madison*. *Id.* at 163–198. For reflections on the relationship between Jefferson's encounter with the Marshall Court and Roosevelt's confrontations with the New Deal Court, see *id.* at 245–66.

⁹³ Morrison peppers his prose with lawyerly caveats — “Risks of [a major crisis] can never be entirely discounted, nor should they be ignored” — while simultaneously telling us that, for all practical purposes, we can indeed ignore the risk. See, e.g., *Alarmism*, *supra* note 3, at 1706.

⁹⁴ *Id.* at 1725.

⁹⁵ *Id.* at 1724–26.

Morrison overestimates the power of his cycle of virtue. It works most effectively if an extravagant OLC opinion encounters (near) *universal* condemnation by professional commentators. But this is unlikely, given the skewed distribution of the Office's outside critics. Keep in mind that most law professors and law review editors have barely heard of the OLC, and don't give its opinions nearly the attention they lavish on the high federal and state courts. This means that a disproportionate share of "outside" commentary will be produced by former insiders at the OLC who have returned to universities or Washington think-tanks.

These "inside-outsiders" have been thoroughly socialized into "the pro-executive tenor"⁹⁶ of the Office's jurisprudence. As a consequence, the current crop of OLC "insiders" have reason to expect a good deal of applause if they push the envelope of pro-executive precedents written by their predecessors to justify more-and-more extraordinary acts of executive unilateralism. This show of support from "inside-outsiders" won't necessarily drown out the voices of other professional critics. But they will suffice to generate a mixed chorus of yeas-and-nays that will generally allow the OLC staff to preserve its professional reputation intact: "After all," they will explain to future employers, "nobody can reasonably expect *unanimous* applause when the OLC is making high-profile, and politically consequential, decisions. You shouldn't hold it against me if my work has drawn its share of professional attacks. All this controversy shows is that I can take the heat that inevitably comes with important decisions — exhibiting just the kind of staying-power you'll want from me in my next job."

OLC's recent opinion upholding President Obama's decision to bomb Libya provides a case study on the limits of Morrison's cycle of virtue. The President refused to consult Congress although the War Powers Resolution only expressly authorizes military action without congressional authorization in cases involving a "national emergency created by attack upon the United States, its territories or possessions, or its armed forces."⁹⁷ But Libya hadn't made any such attack. So the OLC would have to engage in "creative lawyering" to tell us why the President was constitutionally empowered to go beyond the Resolution and initiate his bombing campaign. Its difficulties were compounded by Obama's campaign statements that: "[t]he President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation."⁹⁸

⁹⁶ I use Morrison's term here. *Id.* at 1716.

⁹⁷ War Powers Resolution, 50 U.S.C. § 1541(c) (2006).

⁹⁸ Charlie Savage, *Barack Obama's Q&A*, BOSTON GLOBE, Dec. 20, 2007, <http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/>.

Nevertheless, this aspect of Obama's "democratic mandate" didn't give the OLC much trouble when it came to writing its opinion: it upheld the President's initiative without mentioning Obama's contrary campaign commitments.⁹⁹ It built its case instead on the strongly pro-presidential OLC opinions from past administrations, developing their principles in novel ways to ratify Obama's action.

At this point, the OLC redeemed Morrison's hopes by publishing its opinion on April 7 — less than a week after it was issued. Within hours, insider-outsider Jack Goldsmith published a brief note which accepted the opinion's basic premises and pointed to the lawyerly ways it moved beyond previous OLC precedents.¹⁰⁰ But it took Michael Glennon only one week to respond with a strong critique that challenged the opinion's roots in the constitutional tradition.¹⁰¹ Glennon, like Goldsmith, is one of the field's leading scholars, but he has never served in the OLC, gaining his practical experience as a Senate staffer.¹⁰² For present purposes, only a paragraph of Glennon's conclusion is relevant:

One would not expect OLC to make the case against the President's actions. Its opinion on Libya, like its other opinions, is an effort to put the best legal face on those actions. The President is entitled to no less. But no one should mistake OLC's advocacy as a disinterested evaluation of competing constitutional claims. It is, in truth, not an opinion at all but a brief.¹⁰³

Here is a distinguished professor at the Fletcher School of Law and Diplomacy telling the OLC, in no uncertain terms, that it has utterly failed its Morrisonian mission: it has not risen to the occasion to provide "its best view of the law," but has merely produced an advocate's brief.

⁹⁹ Memorandum from Caroline D. Krass, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, to Eric Holder, Att'y Gen., Re: Authority to Use Military Force in Libya (Apr. 1, 2011), available at <http://graphics8.nytimes.com/packages/pdf/world/20110401-authority-military-use-in-libya.pdf>.

¹⁰⁰ Jack Goldsmith, *Office of Legal Counsel Opinion on Libya*, LAWFARE (April 7, 2011), <http://www.lawfareblog.com/2011/04/office-of-legal-counsel-opinion-on-libya-intervention/>. This note supplemented the more elaborate defense of presidential unilateralism that Goldsmith published at the very beginning of the Libyan campaign. See Jack Goldsmith, *War Power: The President's Campaign Against Libya is Constitutional*, SLATE (March 21, 2011), <http://www.slate.com/id/2288869/>. I joined this early debate on the other side. See Bruce Ackerman, *Obama's Unconstitutional War*, FOREIGN POL'Y (March 24, 2011), http://www.foreignpolicy.com/articles/2011/03/24/obama_s_unconstitutional_war. But the point here isn't to relitigate the merits, but to suggest the way the evolution of the controversy undercuts Morrison's "cycle of virtue."

¹⁰¹ Michael J. Glennon, *Forum: The Cost of "Empty Words": A Comment On the Justice Department's Libya Opinion*, HARV. NAT'L SECURITY J. (April 14, 2011), http://harvardnsj.com/wp-content/uploads/2011/04/Forum_Glennon_Final-Version.pdf.

¹⁰² Glennon was an Assistant Counsel, Office of the Legislative Counsel, U.S. Senate from 1973 to 1977 and Legal Counsel to the Senate Foreign Relations Committee from 1977 to 1980. See Michael J. Glennon, *Professor of International Law*, THE FLETCHER SCH., <http://fletcher.tufts.edu/faculty/glennon/default.shtml> (last visited May 25, 2011).

¹⁰³ Glennon, *supra* note 101, at 18.

Under the “virtuous cycle” hypothesis, this severe judgment should be reverberating in the halls of the Justice Department as I write — generating an anxious round of soul-searching as the OLC struggles to reclaim its professional respectability.

But given the lawyerly endorsement coming from Harvard’s Henry L. Shattuck Professor of Law, it will be easy for the OLC to view the critique from the Fletcher School as merely an inevitable part of a hard-hitting lawyerly dispute — and surely nothing that should impair the professional standing of the OLC’s opinion-writers?

Don’t get me wrong: More frequent and rapid publication of OLC opinions is a good idea. But its disciplining potential should not be overestimated, especially in a specialist community full of “inside-outsiders” whose views are often more strongly presidentialist than Goldsmith’s. So even in the *relatively* placid Washington of today — where the centrist Obama reigns in the White House, and al Qaeda is in disarray around the world — Morrison’s remedy isn’t enough to sustain his vision of the OLC. And yet he is asking us to rely entirely on the Office’s “norms” to sustain the rule of law during the tougher times that lie ahead. I hope he is right, but he has given us little reason to join him in this pious hope.

My book calls for a structural remedy. The President needs the constant advice of the OLC and (a thinned-down) WHC, and he should continue to rely on their counsel to meet the challenges of the moment. But over the longer run, Administration lawyers should be prepared to defend their opinions before a more impartial tribunal, within the executive branch, whose judgments will normally serve as the authoritative statement of the law for the bureaucracy and military. To kick off debate, I developed a design for a Supreme Executive Tribunal which will inevitably generate controversies over particular details. But for present purposes, it’s enough to emphasize three key elements.

First, members of the tribunal should be insulated from *ex parte* influence — no more telephone calls or more blatant forms of White House pressure. The OLC should instead submit formal briefs and oral arguments to the tribunal, just like any other litigant, and then await its judgment.

Second, the tribunal should be aiming to develop a constitutional understanding that emphasizes the *enduring* role of the executive branch in the separation of powers, and should reject the notion that the current President’s “democratic mandate” authorizes him to revolutionize traditional approaches to constitutional interpretation. The tribunal should also hear arguments presented by Congress if a substantial number of representatives believe that the President’s actions are violating Congress’s statutory commands — otherwise, how can the tribunal adopt a mature view of the Executive’s proper role in the overall system?

Third, and last, the tribunal should contain a plurality of judges, who have been confirmed by the Senate. Otherwise, it will remain too dependent on the capacity of a single “enlightened statesman” to stand up to the short-term political imperatives of the sitting President.

In short, the tribunal will make decisions, after hearing a broad range of arguments, and with its judges engaging in an on-going debate as to the “best view of the law” that should govern the executive branch. Everything else is open for argument.

Morrison, however, opposes the entire idea. He suggests that I “nowhere consider”¹⁰⁴ the “profound”¹⁰⁵ constitutional question: “[W]hether Congress may empower the Tribunal to impose legally binding obligations on the President himself?”¹⁰⁶

But I do consider this precise question, and discuss at length the President’s options when confronting an adverse decision from the tribunal. Here is a brief excerpt:

In [some] cases, the president will have no choice: if he is determined to pursue his course, he must defy the tribunal.

But under very risky conditions. Once the tribunal has spoken, a wave of anxiety will ripple through the civilian and military establishment. These officials normally enjoy absolute immunity when they follow presidential orders, but they can’t take this for granted if the tribunal has handed down its adverse judgment [Given their] uncertain loyalty . . . , perhaps the president will pause at the brink, and accept the validity of the tribunal’s ruling?

Or perhaps he will respond by escalating the constitutional stakes . . .

It would be silly to try to predict the outcome. Even if the tribunal retreats before the president’s counterattack, the institutional standoff may have salutary consequences. It will alert ordinary Americans that something very troubling is taking place in Washington, making it easier for the Supreme Court to intervene effectively later on.¹⁰⁷

These passages explicitly grant the President the power to have the last say. But it situates this power within an institutional context that encourages him to take the rule of law far more seriously than he does today.

Moving from constitutional law to jurisprudence, Morrison also suggests that my proposal is “premised on the notion that the law has a single meaning.”¹⁰⁸ To the contrary:¹⁰⁹ it is precisely because there is no

¹⁰⁴ *Alarmism*, *supra* note 3, at 1746.

¹⁰⁵ *Id.* at 1745.

¹⁰⁶ *Id.*

¹⁰⁷ *DECLINE*, *supra* note 1, at 150–51.

¹⁰⁸ *Alarmism*, *supra* note 3, at 1747.

¹⁰⁹ While I admire aspects of Ronald Dworkin’s legal philosophy, I have consistently rejected his “one right answer” thesis. Compare RONALD DWORKIN, *LAW’S EMPIRE* (1986) (law as integrity)

single right answer in hard cases that the process of reaching a sound legal judgment is so important. If a lawyer fails to hear both sides of the argument, and allows one side to brow-beat him over the telephone, then his resulting “interpretation” is inherently suspect — no matter how he tries to transcend the limits of partisan advocacy. Within the Anglo-American tradition, the rule of law is better understood *as a form of culture* in which a serious commitment requires serious people to take both sides of the argument seriously before coming to judgment.

If the President is to discharge his commitment “take Care” that the “Laws” be “faithfully executed,” he has a constitutional responsibility to create a tribunal that will in fact consider both sides of the argument before advising him as to the nature of his legal obligations. After all, the present arrangements at the OLC and the WHC have evolved in a haphazard way over the twentieth century — without any systematic effort to consider whether they adequately discharge the presidency’s fundamental commitment to the rule of law. Given the recurrent episodes of illegality over the last generation, it is past time for the President and Congress to address the basic issues seriously, and pass a statute that promises better performance in the future.

This is, at any rate, my argument.¹¹⁰

But the core of Morrison’s objection is neither constitutional nor jurisprudential. Instead, his insider experience convinces him that my high-minded reforms just won’t work out in practice. To some extent, his practical objections are based on a misunderstanding of my proposal,¹¹¹ but more fundamentally, he thinks that my structural reform is far too “disrupt[ive]”¹¹² of established arrangements to warrant serious consideration.

This might seem a compelling objection inside the Beltway, where any institutional shake-up can seem like an earthquake. But in the rest of America, an elite reorganization within the executive branch is hardly an earth-shattering event. To the contrary, it would be greeted with

with BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 81–162 (1991) (interpretation as intergenerational synthesis).

¹¹⁰ For further elaboration, see *DECLINE*, *supra* note 1, at 148–50.

¹¹¹ Morrison seems to believe that I would allow individual Congressmen to go to the tribunal and obtain its opinion on the constitutionality of pending legislation. *Alarmism*, *supra* note 3, at 1744. But my proposal was addressed only to statutes that had already been passed by both houses of Congress, see *DECLINE*, *supra* note 1, at 146, and rejected any proposal to extend the tribunal’s jurisdiction to pending legislation for the reasons Morrison suggests.

Morrison is also wrong to suggest that my proposal permits a single Congressman to invoke the tribunal’s jurisdiction. My text gives this privilege to “a significant number of congressional representatives” — perhaps a relatively small number of members of a House or Senate committee with jurisdiction over the subject matter, perhaps a larger number of members of the body as a whole. See *DECLINE*, *supra* note 1, at 146. These are precisely the (important) matters of detail that I hope will be debated.

¹¹² *Alarmism*, *supra* note 3, at 1743.

enthusiasm as a sign that Washington insiders can look beyond the politics of the moment and take constructive steps to avoid the truly massive disruptions threatened by the next runaway presidency.