

---

---

LIBYA, “HOSTILITIES,” THE OFFICE OF LEGAL  
COUNSEL, AND THE PROCESS OF EXECUTIVE BRANCH  
LEGAL INTERPRETATION

*Trevor W. Morrison* \*

The Obama Administration has faced severe criticism for its conclusion that U.S. involvement in the Libya military campaign does not constitute “hostilities” for purposes of the War Powers Resolution<sup>1</sup> (WPR). Under the WPR, the U.S. military may not remain engaged in “hostilities” for more than sixty days without congressional authorization. The Libya operation appeared to cross that point on May 20, but Congress has not provided authorization. The Administration’s theory, which it has now robustly defended in congressional testimony,<sup>2</sup> is that the operation complies with the WPR because the U.S. military’s involvement has remained below the “hostilities” level since early April, when NATO assumed leadership of the operation. But the theory faces real challenges, especially given recent reports that “American warplanes have struck at Libyan air defenses about 60 times, and remotely operated drones have fired missiles at Libyan forces about 30 times” since NATO took charge of the overall operation.<sup>3</sup>

Yet whatever one makes of the merits of the issue, there may be a separate ground for concern. According to press reports, the Obama Administration followed a highly unusual process to arrive at its decision on the “hostilities” question.<sup>4</sup> I am not yet prepared to accept that these reports (presumably based on leaks from officials with their own self-serving agendas) provide a complete and accurate picture of what happened. But the process issue is very important, and here I want to explore some of its dimensions.

In discussing the process issue, I will also address a few points in my ongoing exchange with Professor Bruce Ackerman over legal in-

---

\* Professor of Law, Columbia Law School.

<sup>1</sup> Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (2006)).

<sup>2</sup> See *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. (2011) (statement of Harold H. Koh, Legal Adviser, U.S. Department of State) (providing a detailed account of the basis for the Obama Administration’s conclusion that U.S. involvement in the Libya operation is consistent with both the Constitution and the War Powers Resolution), available at [http://foreign.senate.gov/imo/media/doc/Koh\\_Testimony.pdf](http://foreign.senate.gov/imo/media/doc/Koh_Testimony.pdf).

<sup>3</sup> Charlie Savage & Thom Shanker, *Scores of U.S. Strikes in Libya Followed Handoff to NATO*, N.Y. TIMES, June 21, 2011, at A8.

<sup>4</sup> See Charlie Savage, 2 Top Lawyers Lose Argument on War Power, N.Y. Times, June 17, 2011, at A1; Michael Isikoff, On Libya, President Obama Evaded Rules on Legal Disputes, Scholars Say, msnbc.com (June 21, 2011), [http://www.msnbc.msn.com/id/43474045/ns/politics-white\\_house/t/libya-president-obama-evaded-rules-legal-disputes-scholars-say/](http://www.msnbc.msn.com/id/43474045/ns/politics-white_house/t/libya-president-obama-evaded-rules-legal-disputes-scholars-say/).

terpretation in the executive branch. After devoting much of his book, *The Decline and Fall of the American Republic*,<sup>5</sup> to an attack on the existing structures and processes of executive branch legal interpretation, Ackerman has more recently rallied to the defense of one of the key players in that structure, the Justice Department’s Office of Legal Counsel (OLC). That is a welcome development, though it is unclear how it fits with Ackerman’s broader indictment of the current institutional arrangement. In any event, I will show here that although the Administration’s reported decisionmaking process on the “hostilities” question might seem to support Ackerman’s broader argument, the fallout from the decision underscores the costs to any presidential administration of departing from the traditional processes of executive branch legal interpretation.

## I

Deeply rooted traditions treat the Justice Department’s Office of Legal Counsel (OLC) as the most important source of legal advice within the executive branch. A number of important norms guide the provision and handling of that advice. OLC bases its answers on its best view of the law, not merely its sense of what is plausible or arguable.<sup>6</sup> To ensure that it takes adequate account of competing perspectives within the executive branch, it typically requests and fully considers the views of other affected agencies before answering the questions put to it. Critically, once OLC arrives at an answer, it is treated as binding within the executive branch unless overruled by the Attorney General or the President. That power to overrule, moreover, is wielded extremely rarely — virtually never. As a result of these and related norms, and in spite of episodes like the notorious “torture memos,” OLC has earned a well-deserved reputation for providing credible, authoritative, thorough and objective legal analysis.

The White House is one of the main beneficiaries of that reputation. When OLC concludes that a government action is lawful, its conclusion carries a legitimacy that other executive offices cannot so readily provide. That legitimacy is a function of OLC’s deep traditions and unique place within the executive branch. Other executive offices — be they agency general counsels or the White House Counsel’s Office — do

---

<sup>5</sup> BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010) [hereinafter *DECLINE AND FALL*].

<sup>6</sup> Importantly, “its” best view of the law reflects the fact that, as an executive branch legal office, OLC accords particular weight to its own past legal opinions as well as other executive branch precedents and, more broadly, that it may be more protective of executive prerogatives than are non-executive actors. See Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1502 (2010) (discussing consistency between OLC’s obligation to seek its best view of the law and the “generally pro-executive tenor in OLC’s opinions”).

not have decades-long traditions of providing legal advice based on their best view of the law after fully considering the competing positions; they have not generated bodies of authoritative precedents to inform and constrain their work; and they do not issue legal opinions that, *whether or not they favor the President*, are treated as presumptively binding within the executive branch. (Nor should those other offices mimic OLC; that is not their job.) Because the value of a favorable legal opinion from OLC is tied inextricably to these aspects of its work, each successive presidential administration has a strong incentive to respect and preserve them.

In a recent book, Professors Eric Posner and Adrian Vermeule call this sort of thing “*executive self-binding*, whereby executives commit themselves to a course of action that would impose higher costs on ill-motivated actors.”<sup>7</sup> Admittedly, Posner and Vermeule do not appear to recognize that treating OLC’s advice as presumptively binding is a form of executive self-binding. Indeed, as described below, they do not think OLC advice warrants any such treatment. Yet signaling and maintaining a willingness to treat OLC’s legal advice as presumptively binding enhances the credibility of a president’s claims of good faith and respect for the law, which in turn can help generate public support for his actions. That is precisely the point of executive self-binding: to foster credibility in circumstances where, “[f]or presidents, credibility is power.”<sup>8</sup>

## II

In *Decline and Fall* and related writings, Ackerman attacks the current state of legal interpretation within the executive branch, especially the roles played by OLC and the White House Counsel’s Office. Ignoring the incentives in favor of executive self-binding, Ackerman argues that excesses like the “torture memos” are not abusive anomalies but are instead the inevitable (and sure to be repeated) products of an institutional setup that cannot be trusted to produce serious, good faith legal analysis, especially on issues of presidential power.

In a review of *Decline and Fall*,<sup>9</sup> I argue that Ackerman greatly overstates things. Although I acknowledge that the current institutional arrangement is not perfect and that some reforms are worth contemplating, I maintain that the evidence does not support the claim that the current setup cannot be relied upon to provide credible, good-faith legal

---

<sup>7</sup> ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 137 (2011).

<sup>8</sup> *Id.* at 153.

<sup>9</sup> Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688 (2011) (reviewing ACKERMAN, *DECLINE AND FALL*).

analysis as a general matter. In fact, the existing arrangement has proved itself remarkably reliable over the years. OLC's traditional role — and the commitment of successive administrations to retaining that role — is the key to that reliability.

In a June 21 op-ed harshly criticizing the decision-making process on the "hostilities" question, Ackerman appears to shift ground. He lambasts the process in this case precisely because he says it did not treat OLC's legal analysis as presumptively binding and thus drastically departed from "traditional legal process the executive branch has developed to sustain the rule of law over the past 75 years."<sup>10</sup> The problem, in other words, is not the traditional institutional arrangement for the provision of legal advice within the executive branch, but the apparent departure from that arrangement in this case. To the extent Ackerman now sees OLC's traditional role as something worth preserving, not abolishing,<sup>11</sup> he and I are very much in agreement.

### III

But what actually happened in this case? Was there a significant departure from tradition? If so, what was it? The press reports certainly depict an anomalous process:

OLC — backed by [Attorney General Eric] Holder — concluded that sustained U.S. support for the NATO campaign against Libya, as well as some of its elements — including U.S. drone strikes — amounted to "hostilities" as defined by the Vietnam-era War Powers Act. . . .

Rather than permit OLC to vet the issue, the White House adopted an unusual and far more informal procedure: It instructed lawyers for key government agencies, including the State and Defense Departments, to submit their views directly to White House Counsel Bob Bauer rather than the Justice Department office, administration officials said.

Bauer . . . then passed along the views directly to the president.

Obama, who was once a constitutional law professor at the University of Chicago, concluded he did not need congressional approval for continuing the Libya campaign. . . .

In doing so, Obama not only rejected the views of Holder and OLC's acting chief, Caroline D. Krass, he also overruled Jeh C. Johnson, the Defense Department's chief legal counsel. He sided instead with a more favorable analysis provided by Harold Koh, the State Department's chief legal adviser.<sup>12</sup>

---

<sup>10</sup> Bruce Ackerman, *Legal Acrobatics, Illegal War*, N.Y. TIMES, June 21, 2011, at A27.

<sup>11</sup> Compare *id.*, with Bruce Ackerman, *Abolish the White House Counsel: And the Office of Legal Counsel, Too, While We're At It*, SLATE (Apr. 22, 2009), <http://www.slate.com/id/2216710/>.

<sup>12</sup> Isikoff, *supra* note 4.

One striking thing about this account is that OLC apparently played the precise role that Ackerman claims in his book it cannot be relied upon to play: it said “no” on an issue of presidential power that was deeply important to the White House. As I show in my review of *Decline and Fall*, OLC has done this many times in the past.<sup>13</sup>

The reported treatment of OLC’s analysis by those who received it, in contrast, is both anomalous and concerning. Most worryingly, the press reports claim that OLC’s opinion was presented to the President as just one perspective on the “hostilities” issue. On this account, the various legal opinions were treated like competing policy recommendations, each one deserving roughly comparable weight, with no strong initial presumption in favor of any of them.

To be clear, a decisionmaking process of that sort would be perfectly constitutional. The Constitution does not require that there be an OLC at all, much less one whose legal opinions are treated as authoritative throughout the executive branch. Some would prefer that OLC’s opinions not be accorded such weight. In contrast to their account of executive self-binding discussed above, for example, Posner and Vermeule have recently suggested that OLC’s proper role is “Keeper of the Presidential Fig Leaf,” and that its core function is to “supply the legal justification,” however strained, for the President’s “important” policy aims.<sup>14</sup> Like Ackerman, they contend that OLC virtually always plays this role; unlike Ackerman, they celebrate it. And if OLC were ever to depart from that role, Posner and Vermeule argue it should be treated as “just another adviser,” with no special presumption in favor of its legal conclusions.<sup>15</sup>

To concretize things, this would mean that one of the most dramatic assertions of legal principle during the George W. Bush Administration was both unimaginable and entirely wrongheaded. I refer to the refusal by former OLC head Jack Goldsmith, former Deputy Attorney General James Comey, and former Attorney General John Ashcroft to certify the legality of a warrantless surveillance program that was deeply important to the White House but that those officials thought was illegal.<sup>16</sup> When the White House threatened to proceed with the program despite the Justice Department’s refusal to certify it, virtually the entire leadership of the Department was apparently prepared to resign.

---

<sup>13</sup> See Morrison, *Constitutional Alarmism*, *supra* note 9, at 1717–19. As I also explain in the review, the frequency with which OLC produces written opinions saying “no” to the White House does not provide a complete picture of its constraining role.

<sup>14</sup> Eric Posner & Adrian Vermeule, *Libyan Legal Limbo: Why There’s Nothing Wrong with Obama Ignoring Some of His Own Legal Advisers on Libya*, SLATE (June 28, 2011), <http://www.slate.com/id/2297793/>.

<sup>15</sup> *Id.*

<sup>16</sup> See Morrison, *Constitutional Alarmism*, *supra* note 9, at 1718 (noting the episode).

Only then did the White House back down and accede to the changes the Department officials thought were needed to bring the program within legal bounds. On the deterministic account advanced by Posner and Vermeule, it is unthinkable that Justice Department lawyers would have behaved this way. And it is equally indefensible. Rather than standing on their best view of the law in the expectation it would be honored by the White House, the officials at Justice should simply have provided the legal "fig leaf" the White House desired. And when they did not, no one should have had any qualms about the White House getting the leaf from some other executive branch lawyer.

Although not obviously unconstitutional, the role of nonbinding "Keeper of the Presidential Fig Leaf" would be a dramatic departure from OLC's traditional function and from successive administrations' self-binding to that function. OLC's value to the executive branch depends heavily on the maintenance of its traditional role, including the twin norms of expecting it to render legal advice based on its best view of the law and treating its advice as presumptively binding.

According to the press, the process leading to the President's decision on the "hostilities" question did not honor the second of those norms. I am not yet confident, however, in the complete accuracy of the reports. From my own time in public service I know all too well that the reality of government decisionmaking is often much more complicated than appears in the press. Although I rather doubt that any still-unknown facts about this process could provide a complete justification for what happened, they could significantly change our assessment of the *nature* of the problem. Thus, at this point I do not think we are in a position to provide a reliably accurate diagnosis.

#### IV

We can, though, identify what an appropriate process would have been. There are a number of steps here.

To start, it bears emphasizing that the "hostilities" question was clearly one that OLC should address. To be sure, OLC does not address every legal question arising within the executive branch, nor could it. Modern government is vast and diverse. Agencies and the White House have their own general counsel's offices capable of answering many of the issues that arise in the daily course of business. So which legal issues should go to OLC? I address this point in my review of Ackerman's book:

Abstract definitions are difficult here, but in general I think th[e] questions [that should ordinarily go to OLC] cover (1) legal issues that OLC has a history of addressing and on which it therefore has an accumulated jurispru-

---

---

dence and expertise; (2) significant issues of executive power; and (3) programs or policies likely to trigger substantial public attention and/or controversy.<sup>17</sup>

The “hostilities” question is all of the above.

Moreover, at the outset of the Libya operation, the Administration appropriately placed great reliance on OLC’s conclusion that the President had the authority to commit U.S. military forces to the operation without prior congressional authorization.<sup>18</sup> Given that, it would have been especially inappropriate not to consult OLC on the related, follow-on “hostilities” question. Indeed, ideally OLC would have been analyzing and providing at least preliminary advice on the contours of that issue from the very beginning of the operation. (For all I know, that is exactly what happened.) Sixty days pass quickly; OLC’s legal advice is most useful when conveyed in sufficient time for policymakers to plan accordingly.

Next, in analyzing the issue, OLC should have sought and given full consideration to the views of other affected agencies, especially the State and Defense Departments. The press accounts claim that the views of the Defense Department’s General Counsel and the State Department’s Legal Adviser were routed through the White House Counsel’s Office to the President, for consideration along with OLC’s views. It is possible OLC also had the benefit of those views earlier in the process, as it worked on the issue. But if it did not, it should have. The traditions that require OLC to provide answers based on its best view of the law and that then treat those answers as binding presume and require that OLC has the benefit of the best thinking of all substantially affected agencies and that it adequately weighs their interests in its analysis.

Once OLC arrived at its conclusion, it should have been clearly conveyed to the relevant parties, ideally in writing. Reducing an opinion to writing is not always possible when time is short, but where it is feasible it helps clarify the precise terms and bounds of OLC’s position.

The recipients of OLC’s opinion (whether written or oral) should have regarded it as the presumptively final word on the “hostilities” question. The President certainly retains the authority to overrule OLC, but the traditions of executive branch legal interpretation do not contemplate routine relitigation before the President. Still, on matters of grave consequence where affected agencies strongly disagree with OLC’s analysis, there is nothing categorically inappropriate in their seeking presidential review. Importantly, any such presidential review

---

<sup>17</sup> *Id.* at 1732–33.

<sup>18</sup> 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://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf>.

---

---

should proceed on the understanding that OLC's analysis should be adhered to in all but the most extreme circumstances.

Presidential overruling should be rare because it can carry serious costs. To start, it can undermine OLC's ability to produce legal opinions consistent with its best view of the law. Agency general counsels and the White House Counsel's Office may approach legal questions not with the goal of seeking the best view of the law, but with the aim of finding the best, professionally responsible legal defense of their client's preferred policy position. There is nothing wrong with that. But if the President routinely favors legal views of that sort over OLC's conclusions, the traditional rationale for having an OLC at all will be undermined. OLC's work product is significant today in large part because of the time-honored understanding that its conclusions are presumptively binding within the executive branch. Routine presidential overruling would weaken the presumption, which in turn would diminish the significance of OLC's work and reduce its clients' incentive to seek its views. To remain relevant, OLC would likely start intentionally tilting its analysis in favor of its clients' (here, the President's) preferred policies. Put another way, the strong presumption in favor of the authoritativeness of OLC's analysis provides OLC with the institutional space and cover to provide answers based on its best view of the law. If the former is weakened, the latter is jeopardized.

Just as the White House benefits greatly from OLC's reputation for providing authoritative opinions based on its best view of the law, undermining that reputation can do real harm to the long-run institutional interests of the White House. If the presumption in favor of OLC's authoritativeness is undermined, then in cases when the White House relies on an OLC opinion to establish the legality of a policy or program, outside observers will suspect it is mere opportunism — that the White House is invoking OLC merely because OLC said "yes." At that point, the benefit of being able to point to OLC as a source of authoritative, credible legal analysis will be lost. To put it in Posner and Vermeule's terms, the executive self-binding mechanism will unravel, and with it the presidential power-enhancing credibility it can provide.<sup>19</sup>

Moreover, as I explain in the next section, in the short run any departure from OLC's analysis is sure to raise serious questions. If OLC is set up to provide presumptively authoritative legal answers based on its best view of the law and if the competing views of other agencies are liable to be functions of their policy preferences and not simply their best legal views, how does the President justify departing from OLC's views? What legal rationale can he provide? Is it credible?

---

<sup>19</sup> See POSNER & VERMEULE, *THE EXECUTIVE UNBOUND*, *supra* note 7, at 137.



---

---

If not, what does that say about his administration's commitment to legal principle? I am not saying a President can never adequately answer these questions. In rare situations, especially where OLC itself agrees the issue is extremely close, it could be possible to provide a principled justification for departing from OLC's position. But any such departure is bound to trigger these questions. The inevitability of such questions, plus the longer-run costs noted above, need to be part of the President's calculus when deciding whether to reject OLC's views.

It is worth thinking about measures that could help ensure the decisionmaking process takes all these costs into account. Here I will note two. First, before favoring another agency's views over OLC's, the President should require them to be reduced to writing whenever possible. Great care must be taken to ensure that agency views opposing OLC are sufficiently well-grounded and defensible to withstand the public skepticism that will inevitably follow when the President favors them over OLC. Putting those views in writing can help in that regard. Second, whenever there might be a risk of presidential overruling, OLC should secure the active support of the Attorney General before conveying its position to the White House. And if the President then seriously contemplates overruling OLC's position, the Attorney General should weigh in with the President directly. In doing so he should not only defend OLC's analysis (and make clear that he agrees with it) but also underscore to the President the short- and long-run costs of overruling OLC. That is a message appropriately conveyed by the Attorney General.

Again, none of this would deny that the President has the authority to overrule OLC. But the President will not be well served unless he is given a full appreciation of the short- and long-run institutional costs involved.

## V

In his book, Ackerman laments that the White House Counsel's Office has "often" ousted OLC from its privileged position as the source of authoritative legal advice within the executive branch, instead generating its own legal opinions blessing particular programs if it appears OLC would say no.<sup>20</sup> This repeated end-running of OLC has happened, Ackerman argues, "without anybody considering it improper."<sup>21</sup> In my review of his book, I show that Ackerman is wrong in this charge.<sup>22</sup> To be sure, there is a risk that the White House Counsel

---

<sup>20</sup> ACKERMAN, *DECLINE AND FALL*, *supra* note 5, at 100.

<sup>21</sup> *Id.*

<sup>22</sup> See Morrison, *Constitutional Alarmism*, *supra* note 9, at 1732-41. In his response to my review, Ackerman supplements the episodes of supposed end-running he cites in his book (which, I

might displace OLC, and isolated episodes of that sort are not literally unprecedented. But the idea that it has happened often over the years without anyone thinking it amiss is simply incorrect.<sup>23</sup>

Why hasn't it happened more often? Part of the answer, as I explain in my review, is that powerful incentives discourage displacing OLC from its traditional role:

---

show in my review, do not in fact support his claim) with two things: a complaint by former OLC head Charles Cooper that the White House discounted OLC's views during the Reagan Administration, and a statement by Peter Wallison, President Reagan's White House Counsel, that in some cases the Counsel is able to proceed without consulting OLC. Bruce Ackerman, *Lost Inside the Beltway: A Reply to Professor Morrison*, 124 HARV. L. REV. F. 13, 30 n.76 (2011). Neither of those sources (the second of which is contradicted by the statements of other former White House Counsels) establishes that the White House has in fact repeatedly done end-runs around OLC "without anybody considering it improper." ACKERMAN, *DECLINE AND FALL*, *supra* note 5, at 100. Ackerman appears to recognize this. Instead, they suggest to him that the issue is worth investigating: "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." Ackerman, *Lost Inside the Beltway*, *supra*, at 30 n.76. One might have hoped Ackerman himself would do the necessary research before making his sweeping claim. In any event, as detailed in my review, my own research reveals no basis for his claim.

<sup>23</sup> Ackerman has other worries about the White House Counsel's Office, above and beyond the charge that it is usurping OLC's role. For example, he disapproves of the Counsel acting as a public spokesman for the White House on various issues, even when it is on the basis of legal analysis provided by OLC. See Ackerman, *Lost Inside the Beltway*, *supra* note 22, at 32-34. On that point he and I simply disagree. The head of OLC would never have been the natural public spokesman for the White House in such circumstances, and I see no particular problem with the White House Counsel playing that role.

Ackerman is also troubled by the sheer growth of the Counsel's Office in recent decades. He thinks it counts as evidence that OLC's influence must be declining, even when he turns out to be wrong about individual episodes of alleged end-running of OLC by the Counsel. See *id.* at 27-29. But as I show in my review of *Decline and Fall*, any assessment of the growth of the Counsel's Office must be placed in the context of the huge expansion of legal offices across the executive branch, many of which dwarf both OLC and the Counsel's Office by orders of magnitude. See Morrison, *Constitutional Alarmism*, *supra* note 9, at 1733 & n.176. The number of lawyers working in the executive branch and the diversity of roles they play has increased dramatically over the last several decades. That growth is fascinating and worth studying, but it does not by itself establish that OLC's influence is waning. Neither does the (comparatively modest) growth in the White House Counsel's Office.

I will also note that Ackerman's severe hostility to the White House Counsel's Office misses the important ways in which it can facilitate, not threaten, OLC's work. One important role played by the Counsel's Office is to serve as a kind of buffer between the political demands of the West Wing and OLC. Over the past several administrations, the Counsel's Office has typically regulated and supervised most contacts between the White House and the Justice Department. One purpose of doing so is to help insulate the Department from inappropriate political pressures. It does not always work, and of course people will disagree about what kind and amount of "pressure" is "inappropriate." But consider the alternatives. If the Counsel's Office were abolished as Ackerman has urged, see Ackerman, *Abolish the White House Counsel*, *supra* note 11, would the White House stop calling OLC? Of course not. Instead, the calls would come directly from the political offices in the West Wing — offices that are principally concerned with the political and policy dimensions of the issues they work on, not the legal limits. Abolishing the Counsel's Office, in other words, would likely increase, not decrease, the political pressure on OLC.

The very institutional factors that make the Counsel's Office more likely to say yes to the President also make its advice dramatically less valuable when trying to defend an action to a skeptical third party — whether Congress, the press, or perhaps ultimately a court. As long as OLC retains its reputation as a source of authoritative and credible legal analysis, relying only on the White House Counsel to answer questions that would ordinarily go to OLC is extremely risky. Were an administration to point to advice from the Counsel's Office on such a matter, it would provide a barrage of questions: Did the White House seek an opinion from OLC? If so, what did OLC say? If not, why not?<sup>24</sup>

These questions parallel the kinds of questions that are inevitable when the President overrules OLC. Indeed, the institutional incentives against too readily overruling OLC are basically the same as the incentives against ousting OLC altogether. In either case, the White House will face difficult questions from the press and will be exposed to political attack by its adversaries in Congress.<sup>25</sup>

These questions and criticisms underscore how wrong it is to suppose that OLC can be ousted from its role “without anybody considering it improper.”<sup>26</sup> Indeed, the notion that a President determined to pursue a particular policy can simply cast about for a favorable legal opinion and then rely on it with impunity ignores the reality of government today. As long as the President's decision is publicly disclosed, questions about the substance and process of the decision will be asked. Answers that depict a highly anomalous process will raise further questions. That may be the ultimate check here: the prospect of public criticism and political reprisal encourages the White House to maintain OLC's traditional role even when doing so cuts against its immediate policy preferences. And that is as it should be.

However much he now appears to admire OLC's traditional role, it seems Ackerman still would prefer to replace it with his Supreme Executive Tribunal — a statutorily created quasi-court composed of nine judges serving staggered twelve-year terms, which would answer the sorts of legal questions that now go to OLC.<sup>27</sup> I survey some of the problems with this idea in my review of Ackerman's

---

<sup>24</sup> Morrison, *Constitutional Alarmism*, *supra* note 9, at 1741–42.

<sup>25</sup> See Maryanne Borrelli et al., *The White House Counsel's Office*, in *THE WHITE HOUSE WORLD: TRANSITIONS, ORGANIZATION, AND OFFICE OPERATIONS* 193, 206 (Martha Joynt Kumar & Terry Sullivan eds., 2003) (“If the counsel does not involve the OLC — or, having received the OLC's interpretation, sets it aside — the White House is isolated and will lack support for its actions.”).

<sup>26</sup> ACKERMAN, *DECLINE AND FALL*, *supra* note 5, at 100.

<sup>27</sup> See Bruce Ackerman, *The Lawless Presidency*, *THE DAILY BEAST* (June 28, 2011), <http://www.thedailybeast.com/articles/2011/06/28/obama-s-flawed-legal-reasoning-on-libya-and-how-to-fix-it.html> (reasserting his call for a tribunal along the lines of the Supreme Executive Tribunal proposed in *Decline and Fall*).

book.<sup>28</sup> One major concern is that *Decline and Fall* says the Tribunal's answers would be "binding on the executive branch,"<sup>29</sup> yet it nowhere discusses the massive constitutional problems with empowering an executive office to impose conclusive, legally binding obligations on the President.<sup>30</sup> Ackerman has since clarified that he would not grant the Tribunal binding authority, but would instead reserve for the President the power to decide whether or not to adhere to the Tribunal's decisions.<sup>31</sup> Yet at that point, the Tribunal would have no greater authority than OLC does today.

OLC does not have the power to impose conclusive, binding legal obligations on the President, but by longstanding tradition its opinions are treated as presumptively binding and are virtually never overruled by the President or Attorney General. As re-specified by Ackerman, that is the most the Supreme Executive Tribunal could ever hope for — but without the benefit of longstanding traditions to sustain it. In either case, the key is not any external statutory guarantee of interpretive authority, but a commitment by the White House to respect the legal conclusions in question. Yet if presidents are not willing to engage in executive self-binding with respect to a time-honored institution like OLC, why should we expect they would do so for Ackerman's new Tribunal? We should not. What this reveals is that newfangled institutions are not the answer. As I say in the conclusion to my review of *Decline and Fall*, "[t]he key lies not in any transformation of the executive branch but in the 'cultural norms' of offices like OLC . . . and in a Pres-

---

<sup>28</sup> Morrison, *Constitutional Alarmism*, *supra* note 9, at 1742–48.

<sup>29</sup> ACKERMAN, *DECLINE AND FALL*, *supra* note 5, at 146.

<sup>30</sup> See Morrison, *Constitutional Alarmism*, *supra* note 9, at 1745–46 (detailing this problem).

<sup>31</sup> See Ackerman, *Lost Inside the Beltway*, *supra* note 22, at 39. Ackerman suggests that this has been his position all along, and that he has never envisioned that the Tribunal would be able to bind the President. *Id.* Readers of his book may be forgiven for thinking otherwise, given his statement in *Decline and Fall* that the Tribunal's answers would be "binding on the executive branch." ACKERMAN, *DECLINE AND FALL*, *supra* note 5, at 146. True, a few pages after that passage, Ackerman discusses the prospect that the President might "defy the tribunal." *Id.* at 150. But that discussion compares such defiance to the possibility, ultimately unrealized, that President Nixon might have "def[ie]d] the Supreme Court when it ordered him to turn over his incriminating tapes during the Watergate Affair." *Id.* at 151. Ackerman presumably concedes that the Court's decision in *United States v. Nixon*, 418 U.S. 683 (1973), imposed a legally binding obligation on Nixon. On that understanding, the risk was that Nixon might have flouted the obligation imposed by the Court, not exercised a legitimate legal power to overrule the Court. Comparing presidential defiance of the Supreme Executive Tribunal to presidential defiance of the Court thus seems an odd way to acknowledge that the President would retain the *legal* authority to overrule the Tribunal. But in any event, Ackerman's clarification that he would indeed preserve that authority for the President does remove one large constitutional problem with his Tribunal. All the other problems noted in my review remain.

ident, Congress, and public that care whether those norms are preserved.”<sup>32</sup>

\* \* \*

The fallout from the Obama Administration’s treatment of the “hostilities” question suggests quite powerfully that many in the press, the lawyerly public, and Congress *do* care about preserving the traditional structures of executive branch legal interpretation.<sup>33</sup> However this particular episode is resolved, the Obama Administration should reaffirm that it too cares about those traditions, including the strong presumption in favor of OLC’s conclusions. The long-term health of executive branch legal interpretation — not to mention the White House’s own self-interest — will be bolstered by re-embracing what Ackerman, in his pro-OLC moments, rightly calls the “traditional legal process the executive branch has developed to sustain the rule of law over the past 75 years.”<sup>34</sup>

---

<sup>32</sup> Morrison, *Constitutional Alarmism*, *supra* note 9, at 1749 (quoting JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 37 (2007)) (emphasis added).

<sup>33</sup> At the same time, it is hard to avoid the conclusion that political opportunism drives some substantial part of congressional opposition to the substance of the Administration’s position on the “hostilities” issue. As late as June 1, well after the sixty-day mark of the Libya operation, Speaker of the House John Boehner said he thought the Administration was “technically” in compliance with the WPR. Bob Cusack & Molly K. Hooper, *Boehner: Obama Not “Technically” Violating War Powers Act*, THE HILL BLOG BRIEFING ROOM (June 1, 2011, 06:47 PM), <http://thehill.com/blogs/blog-briefing-room/news/164301-boehner-obama-not-technically-violating-war-power-act>. It was not until weeks later that he began criticizing the substance of the Administration’s views and asking hard questions about the process by which it arrived at those views. This has led Senate Majority Leader Harry Reid to suggest that some House Republicans “have clearly decided to use the War Powers Resolution as a political bludgeon to pursue a partisan agenda.” Charlie Savage & Jennifer Steinhauer, *In House, Challenges Over Policy on Libya*, N.Y. TIMES, June 23, 2011, at A10. The WPR’s sixty-day clock does indeed provide Congress with an inexpensive and powerful political weapon, as it effectively requires the executive branch to absorb the full cost of congressional inaction. Whether that represents an ideal allocation of institutional responsibility is beyond the scope of this essay.

<sup>34</sup> Ackerman, *Legal Acrobatics, Illegal War*, *supra* note 10.