
BOOK REVIEW

CONSTITUTIONAL ALARMISM

THE DECLINE AND FALL OF THE AMERICAN REPUBLIC. By Bruce Ackerman. Cambridge, Mass.: The Belknap Press of Harvard University Press. 2010. Pp. 270. \$25.95.

*Reviewed by Trevor W. Morrison**

INTRODUCTION

The Decline and Fall of the American Republic is a call to action. Professor Bruce Ackerman opens the book with the claim that “something is seriously wrong — very seriously wrong — with the tradition of government that we have inherited” (p. 3). The problem, he says, is the modern American presidency, which he portrays as recently transformed into “an especially dangerous office” (p. 189 n.1) posing “a serious threat to our constitutional tradition” (p. 4). Ackerman urges us to confront this “potential for catastrophic decline — and act before it is too late” (p. 11).

Concerns of this kind are not new. Indeed, in some respects *Decline and Fall* reads as a sequel to Professor Arthur Schlesinger’s 1973 classic, *The Imperial Presidency*.¹ Ackerman writes consciously in that tradition, but with a sense of renewed urgency driven by a conviction that “the presidency has become far more dangerous today” than in Schlesinger’s time (p. 188). The sources and mechanisms of that purported danger are numerous; *Decline and Fall* sweeps across journalism, national opinion polls, the Electoral College, civilian-military relations, presidential control of the bureaucracy, and executive branch lawyering to contend that “the foundations of our own republic are eroding before our very eyes” (p. 188).

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Full disclosure: I served in two offices that are the targets of substantial criticism in the book here under review — the Office of Legal Counsel (in 2000–2001) and the White House Counsel’s Office (in 2009). The views expressed here are my own and should not be taken to reflect the views of those offices or any other part of the federal government.

¹ ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (Mariner Books 2004) (1973). Schlesinger supported a broader vision of presidential power than does Ackerman, but their work shares a concern for keeping that power, however defined, within appropriate bounds.

These linked claims are best conveyed in Ackerman's own words:

I predict that: (1) the evolving system of presidential nominations will lead to the election of an increasing number of charismatic outsider types who gain office by mobilizing activist support for extremist programs of the left or the right; (2) all presidents, whether extremist or mainstream, will rely on media consultants to design streams of sound bites aimed at narrowly segmented micropublics, generating a politics of unreason that will often dominate public debate; (3) they will increasingly govern through their White House staff of superloyalists, issuing executive orders that their staffers will impose on the federal bureaucracy even when they conflict with congressional mandates; (4) they will engage with an increasingly politicized military in ways that may greatly expand their effective power to put their executive orders into force throughout the nation; (5) they will legitimate their unilateral actions through an expansive use of emergency powers, and (6) assert "mandates from the People" to evade or ignore congressional statutes when public opinion polls support decisive action; (7) they will rely on elite lawyers in the executive branch to write up learned opinions that vindicate the constitutionality of their most blatant power grabs. These opinions will publicly rubber-stamp presidential actions months or years before the Supreme Court gets into the act — and they will generate heated debate amongst the broader legal community. With the profession divided, and the president's media machine generating a groundswell of support for his power grab, the Supreme Court may find it prudent to stage a strategic retreat, allowing the president to displace Congress and use his bureaucracy and military authority to establish a new regime of law and order. (pp. 9–10)

These are serious warnings, delivered by one of the most important constitutional scholars of the last half century.

But the book does more than sound an alarm. It also advances a series of reforms intended to salvage the constitutional order, reforms that Ackerman suggests "might sensibly reduce the risk" of constitutional disaster (p. 12). In response to the rise of a "politics of unreason," for example, Ackerman renews his call for Deliberation Day, a national holiday before each presidential election when voters would join in neighborhood meetings to discuss issues raised in the campaign (pp. 127–31).² To save the flagging journalism industry, he proposes a National Endowment for Journalism to reward reporting that advances readers' "political understanding" (p. 133). To overcome the problems of the Electoral College, he supports an already-existing idea for an interstate compact under which participating states would award their electoral votes to the presidential ticket winning the national popular vote (pp. 136–37). And to ensure accuracy, Ackerman calls for a bipartisan commission of political scientists to count the

² See BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* (2004).

votes (p. 139). Grouped by Ackerman under the rubric “Enlightening Politics” (pp. 119–40), this is an ambitious agenda.

Equally sweeping are Ackerman’s proposals for “Restoring the Rule of Law” (pp. 141–79). To counter the White House’s “tendencies toward charismatic lawlessness” (p. 152), he suggests legislation requiring Senate confirmation of all top White House staffers, in return for which the Senate would guarantee a vote on all executive appointees within sixty days of their nomination (pp. 152–59). To better regulate presidential power during crises, he repeats his call for a statute granting the President certain temporary and extraordinary powers during emergencies (p. 168).³ And to restore civilian control of the military, he proposes a new Canon of Military Ethics and argues that retired officers should be barred from certain high-ranking government positions until they have spent five years in civilian life (pp. 159–63).

The centerpiece of Ackerman’s rule-of-law argument, however, is his treatment of legal interpretation and advice within the executive branch. He is drawn to the issue in part by the controversy over legal opinions produced by the Justice Department’s Office of Legal Counsel (OLC) on various issues relating to the “war on terror.”⁴ Yet he claims to be interested not in whether the lawyers responsible “deserve[] criminal punishment for writing the justly notorious ‘torture memos,’” but in “the institutional conditions that made these memos possible” (p. 6). Ackerman sees those conditions as hopelessly biased, creating “[a] culture of lawlessness” (p. 152) in which OLC as well as the White House Counsel’s Office predictably “allow short-term presidential imperatives to overwhelm sober legal judgments” and “give their constitutional imprimatur to presidential power grabs” (p. 88). His conclusion is damning: “[N]obody can say, with a straight face,

³ See generally BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* (2006).

⁴ The most notorious of these is a 2002 OLC opinion concluding that the federal anti-torture statute only minimally constrains the government’s use of “enhanced interrogation techniques” on suspected terrorists. Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>, *withdrawn and replaced by* Memorandum from Daniel Levin, Acting Assistant Att’y Gen., Office of Legal Counsel, to James B. Comey, Deputy Att’y Gen., Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A, Op. Off. Legal Counsel (Dec. 30, 2004), available at <http://www.justice.gov/olc/18usc23402340a2.htm>. The Justice Department disavowed the opinion soon after it was leaked to the public, but in subsequent memoranda OLC continued to uphold the legality of many of the most controversial interrogation techniques in question. See OFFICE OF PROF’L RESPONSIBILITY, U.S. DEP’T OF JUSTICE, *INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS 121–23* (July 29, 2009) [hereinafter OPR REPORT], available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>.

that the current setup represents a good-faith institutional effort to provide [the President] with a *balanced* understanding of the law” (p. 148).

To remedy the problem, Ackerman calls for legislation creating a “Supreme Executive Tribunal” of nine presidentially nominated, Senate-confirmed “judges for the executive branch” (p. 143). In popular writing leading up to the publication of *Decline and Fall*, Ackerman accompanied this proposal with an argument to abolish OLC and the White House Counsel’s Office.⁵ He does not go quite that far in the book, but he does propose that the Tribunal replace OLC as the principal source of centralized legal analysis within the executive branch (p. 146). In fact, he would grant the Tribunal an even broader mandate. He would empower it to take up legal questions not only as they arise within the executive branch but also at the behest of members of Congress, and he would make its answers legally binding on everyone in the executive branch, including the President (p. 146).

Each of *Decline and Fall*’s major arguments contains much to remark upon, but I will not address them all here. Instead, I will focus on the last item noted above, which in many ways is the linchpin of the book — Ackerman’s critique of the current structures for legal advice within the executive branch, and his proposal to fix things with a Supreme Executive Tribunal. These are the core components of his claims about the supposed demise of the rule of law in the executive branch, as well as how to restore it. In making these claims, Ackerman enters an ongoing debate about executive branch legal interpretation.⁶ His contribution displays both his broad constitutional reach

⁵ See, e.g., 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>.

⁶ In the years since OLC’s various “war on terror” opinions were first released to the public, there has been an outpouring of scholarship addressing both those specific opinions and more general questions about executive branch lawyering. See generally HAROLD H. BRUFF, *BAD ADVICE: BUSH’S LAWYERS IN THE WAR ON TERROR* (2009); JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007); JOHN YOO, *CRISIS AND COMMAND: THE HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH* (2009); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007) [hereinafter Johnsen, *Faithfully Executing the Laws*]; Dawn E. Johnsen, *What’s a President to Do? Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. REV. 395 (2008); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006) [hereinafter Morrison, *Constitutional Avoidance*]; Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010) [hereinafter Morrison, *Stare Decisis*]; Julian Davis Mortenson, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. (forthcoming 2011) (reviewing *Crisis and Command* and other books by Yoo); Norman W. Spaulding, *Essay, Independence and Experimentalism in the Department of Justice*, 63 STAN. L. REV. 409 (2011); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005).

and his creativity in thinking about how to improve our public institutions. His twin claims — that the executive branch is on the verge of lawlessness, and that only something like the Supreme Executive Tribunal can save it — thus deserve serious engagement. Ultimately, however, neither claim succeeds.

Although *Decline and Fall* is billed as concerned with “institutions, not individuals” (p. 6), it is fueled by outrage at the torture memos and other lawyerly abuses during the Bush Administration. The outrage is understandable and, in my view, justified. The problem, however, lies in the broader implications Ackerman draws. He seems to concede that no institutional arrangement can completely inoculate us against future abuses. Yet he takes the torture memos as proof that the current setup contains no real constraints — that the only thing preventing a repeat of the torture memos is the absence of a President asking for another legal opinion “defending the indefensible” (p. 109). This leads him to miss key features of how law is actually practiced in the executive branch, especially in offices like OLC and the White House Counsel’s Office. His oversimplified account obscures the constraints built into the current institutional arrangement, constraints that have real, if imperfect, traction even on matters of grave importance and during times of heightened strain.

My claim is not that the current practice of executive constitutionalism contains nothing to worry about. The past century has seen a rise in the power of the executive as against the other branches, and it is important to think seriously about how — and how well — law constrains that increased power. But one cannot determine what works well and poorly in the executive branch without grasping *how* the branch works. This is part of what made *The Imperial Presidency* so important. Intimately familiar with the workings of the White House from his time in the Kennedy Administration, Schlesinger married that experience with his academic expertise to produce a work of great insight.

Another important contribution is a document called “Principles to Guide the Office of Legal Counsel,” issued in late 2004 by a group of former OLC lawyers. See 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 Johnsen, *Faithfully Executing the Laws*, *supra* at app. 2. Finally, OLC in recent years has issued two memoranda laying out best practices for the office. See Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, to Att’ys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010) [hereinafter 2010 OLC Best Practices Memorandum], available at <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf>; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, to Att’ys of the Office, Re: Best Practices for OLC Opinions (May 16, 2005) [hereinafter 2005 OLC Best Practices Memorandum], available at <http://www.justice.gov/olc/best-practices-memo.pdf>.

The same cannot be said of *Decline and Fall*. Instead, the book is an exercise in unwarranted alarmism married to radical calls for “fundamental institutional reform” (p. 178). The very extravagance of Ackerman’s reform proposals — his idea for a Supreme Executive Tribunal would utterly reconfigure our constitutional system — is part of the problem. Drastic measures presuppose drastic times, and so there is a risk of overstating the weaknesses in the status quo so that a revolutionary solution seems imperative. The result is liable to be more sensationalistic than accurate in description, more provocative than feasible in prescription. So it is with *Decline and Fall*. Its account of the current state of affairs is too often oversimplified or false, its attraction to institutional innovation too often blind to the workaday needs of government and insensitive to the costs of change. Ultimately, the book deals too little with the reality of executive constitutionalism to offer a credible appraisal of its performance or to propose serious ideas for its reform.

An overarching message of this Review, then, is that when assessing legal interpretation in the executive branch, institutional details matter. In part because the practice of executive constitutionalism is less familiar to many than the work of the courts, there is a danger that its key processes will be overlooked or misunderstood. Mistakes at that level can lead an entire argument astray, producing claims untethered to reality. In order to show how this happens in *Decline and Fall*, much of this Review necessarily flies at low altitude. But it also seeks to build on some of my own earlier writing in proposing a more institutionally sensitive approach to law and legal interpretation in the executive branch.

To start, Part I addresses some basic framing questions and suggests that Ackerman’s description of executive constitutionalism, as well as the relationship between the executive and judicial branches, misses the mark in important respects. Part II focuses on OLC, and especially on the posture it adopts when providing legal advice to the White House and other clients. The key to understanding OLC is appreciating the role of what Professor Jack Goldsmith, a former head of OLC, calls the “cultural norms” of the office⁷ — norms that prize independence and professional integrity, and that require OLC to provide legal advice based on its best view of the law. These are powerful, if somewhat informal, norms, and Ackerman gives them far too little credence. Still, I agree with him that OLC is potentially vulnerable to political pressures in its work and that those pressures can yield bad results. But as I explain, a number of broader institutional factors help explain why OLC is not and is unlikely to become simply

⁷ GOLDSMITH, *supra* note 6, at 37.

a rubber stamp for the White House. I further suggest that a full appraisal of OLC must engage closely the actual substance of its work, something *Decline and Fall* largely fails to do.

Part III moves to the other key player in Ackerman's account of executive constitutionalism, the White House Counsel's Office. Ackerman contends that this office is poised to displace OLC from its traditional legal advisory role, offering instead its own opinions defending as legal whatever the President wants to do. Indeed, he goes so far as to say that this sort of usurpation has already "happened often over recent decades, without anybody considering it improper" (p. 100). But that is false. Indeed, I show that Ackerman's own evidence cuts directly against his claim on this score. Moreover, although there can never be any guarantees, I explain why the usurpation Ackerman warns about is unlikely to happen going forward.

Part IV takes up Ackerman's Supreme Executive Tribunal. I argue that the Tribunal is extremely unlikely to find presidential or congressional support, that it would raise serious legal and practical questions if ever implemented, and that, ultimately, it simply has no place in our constitutional system.

I. EXECUTIVE CONSTITUTIONALISM AND THE COURTS

Much of Ackerman's argument proceeds from a set of assumptions about the relationship between the executive and judicial branches, as well as the circumstances in which the executive does and should articulate its constitutional views. My goal in this Part is to draw those assumptions out and to suggest where they go wrong. In particular, I argue that Ackerman is wrong to suggest that the Supreme Court has ever had any kind of monopoly on constitutional interpretation, and that his concern that the Executive will soon defy the Court or that the Court will start deferring excessively to the Executive is not borne out by recent events or longer-term trends.

A. *A Judicial Monopoly on Constitutional Interpretation?*

One of Ackerman's underlying concerns is that executive offices like OLC and the White House Counsel's Office are eroding what he sees as the traditional position of the judiciary, and especially the Supreme Court: "During previous centuries, opinions of the Court were accorded unquestioned centrality by the broader legal community; but the rise of executive constitutionalism threatens to shatter the Court's de facto monopoly . . ." (p. 89). Soon, Ackerman warns, "the Supreme Court will no longer operate as the only arbiter of constitutional legitimacy" (p. 84).

Yet the Supreme Court has never been the only arbiter of constitutional legitimacy. This is not news. The constitutional text requires members of Congress, the President, and all other executive officers to

pledge to uphold the Constitution,⁸ which has long been understood to entail more than following the Court's decisions. John Marshall, the most celebrated champion of judicial review, saw this point.⁹ Three years before writing *Marbury v. Madison*,¹⁰ while serving in the House of Representatives, he stressed that the Constitution extends "the judicial power of the United States . . . to all cases in law and equity arising under the constitution, laws and treaties of the United States," not to "all questions arising [there]under."¹¹ Marshall explained that "[i]f the judicial power extended to every question under the constitution it would involve almost every subject proper for legislative discussion and decision; if to every question under the laws and treaties of the United States it would involve almost every subject on which the executive could act."¹² In those circumstances, "[t]he [constitutional] division of power . . . could exist no longer, and the other departments would be swallowed up by the judiciary."¹³ But that is not how the Constitution allocates responsibility among the branches. Instead, "[a] variety of legal questions must present themselves in the performance of every part of executive duty, but these questions are not therefore to be decided in court."¹⁴ In particular, where the legal question is one of what Marshall called "political law," it should be "decided by the executive and not by the courts."¹⁵

The Supreme Court's nonjusticiability doctrines offer perhaps the clearest illustration of this point. Officials within the executive branch often face constitutional questions that the federal courts would treat as nonjusticiable on political question or other grounds. But that does not license them to ignore the questions, or to answer them without regard to the law. Instead, they "must make a conscious decision to obey the Constitution whether or not their acts can be challenged in a court

⁸ U.S. CONST. art. II, § 1, cl. 8 (requiring the President, before "enter[ing] on the Execution of his Office," to swear or affirm that he "will faithfully execute the Office of President of the United States, and will to the best of [his] Ability, preserve, protect and defend the Constitution of the United States"); *id.* art. VI, cl. 3 ("The Senators and Representatives . . . and all executive and judicial Officers . . . shall be bound by Oath or Affirmation, to support this Constitution . . .").

⁹ See Walter Dellinger & H. Jefferson Powell, *Marshall's Questions*, 2 GREEN BAG 2d 367, 375-76 (1999) (explaining that Marshall thought "the courts are not the only institutions whose province and duty includes the exposition and interpretation of the law").

¹⁰ 5 U.S. (1 Cranch) 137 (1803).

¹¹ John Marshall, Speech Delivered in the House of Representatives, of the United States, on the Resolutions of the Hon. Edward Livingston, Relative to Thomas Nash, Alias Jonathan Robbins (1800), in 4 THE PAPERS OF JOHN MARSHALL 95 (Charles T. Cullen ed., 1984).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 103.

¹⁵ *Id.*

of law and then must conform their actions to these principled determinations.”¹⁶

Beyond zones of literal nonjusticiability, there are areas where the judicial doctrine tends to defer to the practices and understandings of the political branches. Foreign affairs is a prime example. As Professor Louis Henkin has explained, in this area “courts are less willing than elsewhere to curb the federal political branches, are even more disposed to presume the constitutional validity of their actions and to accept their interpretations of statutes, and have even developed doctrines of special deference to them.”¹⁷ On constitutional issues, deference of this sort amounts to judicial underenforcement of the relevant constitutional provision. But like nonjusticiability, judicial underenforcement is not a license for public officials to ignore the law. Instead, it imposes on the political branches an obligation not only to comply with the Court’s precedents but to go further and confront the Constitution themselves.¹⁸

Much of the work done by offices like OLC arises in these areas of judicial non- or underenforcement. As a 1996 OLC opinion puts it,

[t]he judiciary is limited, properly, in its ability to enforce the Constitution, both by Article III’s requirements of jurisdiction and justiciability and by the obligation to defer to the political branches in cases of doubt or where Congress or the President has special constitutional responsibility. In such situations, the executive branch’s regular obligation to ensure, to the full extent of its ability, that constitutional requirements are respected is heightened by the absence or reduced presence of the courts’ ordinary guardianship of the Constitution’s requirements.¹⁹

¹⁶ *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 618 (2007) (Kennedy, J., concurring); see also Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 690 (2005) (“[A] [judicial] decision not to invalidate government action on political question grounds ‘is of course very different from a decision that specific congressional action does not violate the Constitution,’ because it leaves open the possibility that the political branches might themselves find a violation.” (quoting *U.S. Dep’t of Commerce v. Montana*, 503 U.S. 442, 458 (1992))).

¹⁷ LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 132 (2d ed. 1996).

¹⁸ See RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 40–41 (2001) (“[D]eferential standards of [judicial] review do not give conscientious officials a license to behave as they choose.”); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1227 (1978) (arguing that public officials “have a legal obligation to obey an underenforced constitutional norm which extends beyond its interpretation by the federal judiciary to the full dimensions of the concept which the norm embodies”).

¹⁹ *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. Off. Legal Counsel 124, 180 (1996) (footnote omitted). Ackerman acknowledges in other parts of the book that “the Court gets into the act only when a litigant suffers a particularized injury and asks the justices to rectify the situation in the name of the Constitution,” and thus that “the matters addressed by the White House Counsel and the Office of Legal Counsel often fail to raise judicial questions” (p. 142). It is a puzzle, given this, that he describes the Court as wielding a “de facto monopoly” (p. 89) on constitutional interpretation and legitimacy.

None of this challenges the authority of the Supreme Court, properly understood. The ongoing academic debate over the extent of the Court's power to bind the political branches notwithstanding,²⁰ the reality of our constitutional practice is that the political branches are bound by the Supreme Court's determination that a given law or action is unconstitutional. But judicial supremacy is asymmetrical: requiring the political branches to follow the Court's determinations of unconstitutionality does not entail barring them from observing constitutional constraints that go above and beyond what the Court would impose.²¹ Thus, for example, President Jackson's famous veto of the bill extending the charter of the Bank of the United States²² did not violate the Supreme Court's earlier decision upholding the Bank's constitutionality in *McCulloch v. Maryland*.²³

In sum, the image of the Supreme Court as "the only arbiter of constitutional legitimacy" (p. 84) does not describe our constitutional system. The Court surely has a privileged position, but in the vast areas of judicial non- or underenforcement, the political branches are at least as important, sometimes more. As Professor Jefferson Powell puts it, "It is, to appropriate a phrase, the province and duty of the political departments, within their respective spheres, to say what the law of the Constitution is."²⁴ Current practices of executive constitutionalism must be appraised against that reality.

B. Executive Defiance of the Court?

Ackerman's more particular claims about the executive-judiciary relationship take two forms: first, that a future President may defy direct orders of the Court; second, that a future Court may be unwilling

²⁰ This debate generally pits "departmentalists" against "judicial supremacists." For leading articulations of the two views, see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373 (1994); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CALIF. L. REV. 1045 (2004).

²¹ See David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 61, 69 ("Even if the President were to consider himself bound to obey a judicial determination that a statute is unconstitutional, . . . it would not follow that he should understand himself to be similarly bound by a judicial determination that a statute is constitutional."). This is the dominant view, but there are outliers. See, e.g., Alexander & Schauer, *supra* note 20, at 1384–85.

²² See 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 576–91 (James D. Richardson ed., 1896).

²³ 17 U.S. (4 Wheat.) 316 (1819).

²⁴ H. Jefferson Powell, *The Province and Duty of the Political Departments*, 65 U. CHI. L. REV. 365, 379 (1998).

even to confront the President. I consider these claims in turn, in this section and the next.

The more dramatic of Ackerman's two claims here is a prediction that on matters of executive power, Presidents are liable to "undermin[e] the legal establishment headed by the Supreme Court" (p. 185) by defying unfavorable Supreme Court judgments. Ackerman sees the modern presidency as increasingly likely to assert broad powers in times of purported emergency, manipulating public opinion to claim a mandate from the people to act in defense of the nation.²⁵ He thinks it virtually certain that OLC will uphold such assertions no matter how audacious, and he thinks OLC's pretensions to sober legal analysis, championed by the President from his unique soapbox, will cause the public to accord OLC's opinions legitimacy they do not deserve (pp. 68, 84, 185). From there, Ackerman contends, it is a short step to the President's defying the Court if his actions yield a justiciable controversy and the Court holds against him:

Even if the justices . . . decide to intervene, their opinion(s) will only serve as part of an institutional point-counterpoint — with the ensuing legal chatter generating confusion amongst the general public.

In the meantime, the president will be acting decisively to create facts on the ground — ordering his appointees in the bureaucracy to follow the legal opinions of the White House Counsel and Justice Department, not those of the Supreme Court — leaving the military as a potential arbiter. (pp. 84–85)

Ackerman insists this is a "very real" threat (p. 85).²⁶

Certainly, the constitutional order would be radically changed if presidents started defying the Court's judgments in this manner. There is an extensive literature examining the history of the country's acceptance of the principle of judicial supremacy (which, as I showed in the previous section, is not the same as a judicial monopoly).²⁷ However one tells that history, the principle is now deeply entrenched in practice. Presidential defiance of it would be momentous, perhaps

²⁵ Chapter Three of the book, "Three Crises," develops this point (pp. 67–85).

²⁶ Elsewhere in the book, Ackerman notes that President Nixon "did not defy the Supreme Court when it ordered him to turn over his incriminating tapes during the Watergate Affair. He handed them over, even though this gave his enemies a 'smoking gun' in their impeachment campaign" (p. 151) (footnote omitted). But Ackerman insists that "Nixon's famous retreat is hardly dispositive [of the issue today] — since it is precisely my thesis that the modern presidency is far more dangerous than it was in the 1970s" (p. 151). Evidently, Ackerman truly believes the risk of presidential defiance of the Court is a greater threat today than it was under the President who famously said "when the president does it, that means that it is not illegal" (p. 87) (quoting Interview by David Frost with Richard Nixon (May 20, 1977)) (internal quotation marks omitted).

²⁷ See generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2009); KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* (2007).

calamitous. Yet recent history does not suggest a gathering threat on this front.

Consider the Bush Administration, by any measure an enthusiastic proponent of expansive executive power. In litigation before the Supreme Court, it asserted the authority to establish military commissions by executive order,²⁸ it claimed unreviewable (or, at most, only very deferentially reviewable) power to determine who is detainable as an enemy combatant,²⁹ and it contested federal courts' jurisdiction to entertain habeas corpus petitions challenging detentions at Guantánamo Bay.³⁰ The Supreme Court ultimately rejected each of those claims.³¹ But even though the Bush Administration could point to written OLC opinions supporting its position on each issue,³² it made no effort to use them as a basis for defying the Court. Instead, it took its cues from the Court's decisions.

In *Hamdi v. Rumsfeld*,³³ for example, Justice O'Connor's plurality opinion described the contours of a U.S. citizen's due process right to challenge the determination that he was an enemy combatant.³⁴ The Defense Department responded by establishing Combatant Status Review Tribunals to determine whether the noncitizens held at Guantánamo Bay were properly detained as enemy combatants, looking to *Hamdi* for guidance in designing the tribunals.³⁵ That response is par-

²⁸ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 (2006).

²⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 527 (2004) (plurality opinion).

³⁰ *Rasul v. Bush*, 542 U.S. 466, 475, 480 (2004); *Boumediene v. Bush*, 128 S. Ct. 2229, 2244 (2008).

³¹ See *Hamdan*, 548 U.S. at 567 (holding presidentially established military commissions were contrary to statutory constraints); *Hamdi*, 542 U.S. at 535–36 (plurality opinion) (rejecting “the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme,” on behalf of a majority of the Court, see *id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment)); *Rasul*, 542 U.S. at 484 (holding basic statutory grant of habeas corpus jurisdiction extends to detentions at Guantánamo Bay); *Boumediene*, 128 S. Ct. at 2262 (holding detainees at Guantánamo Bay have constitutional privilege of writ of habeas corpus).

³² See, e.g., Memorandum from Patrick F. Philbin, Deputy Assistant Att’y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Legality of the Use of Military Commissions to Try Terrorists (Nov. 6, 2001), available at <http://www.justice.gov/olc/2001/pub-millcommfinal.pdf> (concluding the President has inherent authority under the Constitution, and the Uniform Code of Military Justice, to establish military commissions); Memorandum from Patrick F. Philbin & John C. Yoo, Deputy Assistant Att’ys Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, U.S. Dep’t of Def., Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba (Dec. 28, 2001), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 29 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (concluding “the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantánamo Bay],” though acknowledging “some litigation risk that a district court might reach the opposite result”).

³³ 542 U.S. 507.

³⁴ *Id.* at 524–39 (plurality opinion).

³⁵ See *Boumediene*, 128 S. Ct. at 2241 (noting government’s claim that tribunals were designed to comply with *Hamdi*). I am not arguing that these tribunals satisfied *Hamdi*’s due

ticularly striking because *Hamdi*'s due process analysis technically applied only to the detention of U.S. citizens;³⁶ the Administration voluntarily subjected itself to an extension of the Court's analysis.

The Bush Administration also followed the Court's lead in *Hamdan v. Rumsfeld*.³⁷ Justice Breyer's concurring opinion in that case stressed that nothing in the Court's decision invalidating the system of military commissions established by executive order "prevent[ed] the President from returning to Congress to seek the authority [for military commissions] he believes necessary."³⁸ The Administration proceeded to work with Congress to do just that, culminating in the passage of the Military Commissions Act of 2006.³⁹

Finally, on the issue of habeas corpus jurisdiction, it is true that the Bush Administration responded to the Court's identification in *Rasul v. Bush*⁴⁰ of a statutory basis for habeas jurisdiction over Guantánamo detentions by working with Congress to amend the statute and remove that jurisdiction (though even that was not really defiance).⁴¹ But when the Court later held in *Boumediene v. Bush*⁴² that Guantánamo detainees have the constitutional privilege of the writ, the Bush Administration did not transfer them to facilities outside the United States or otherwise attempt to evade the decision. Instead, it responded by defending the detentions in the ensuing habeas litigation.⁴³

My point here is not to defend the Bush Administration's responses to cases like *Hamdi*, *Hamdan*, *Rasul*, and *Boumediene*. The adequacy of those responses is debatable. Undoubtedly, at least some were calculated to minimize the consequences of the Court's decisions in order to preserve other government programs not directly addressed by the decisions.⁴⁴ But that is nothing new, and it is certainly not the open

process standards. Especially as implemented, they turned out to have serious limitations. *See id.* at 2260, 2269–70 (discussing the tribunals' limitations without concluding whether they satisfied *Hamdi*). My point here is simply that the Bush Administration looked to *Hamdi* when deciding how to craft the tribunals.

³⁶ 542 U.S. at 524 (plurality opinion).

³⁷ 548 U.S. 557 (2006).

³⁸ *Id.* at 636 (Breyer, J., concurring).

³⁹ Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of the U.S. Code).

⁴⁰ 542 U.S. 466 (2004).

⁴¹ *See Boumediene v. Bush*, 128 S. Ct. 2229, 2241–42, 2265–66 (2008) (describing passage of Detainee Treatment Act of 2005 and Military Commissions Act of 2006).

⁴² 128 S. Ct. 2229.

⁴³ Attorney General Michael Mukasey also called upon Congress to pass legislation specifying some of the contours of habeas corpus review in this context. *See* Michael B. Mukasey, Remarks at the American Enterprise Institute for Public Policy Research (July 21, 2008), available at http://www.aei.org/docLib/20080721_DOJ.pdf. Ideas for legislation of this sort continue to percolate. *See, e.g.*, Terrorist Detention Review Reform Act, S. 3707, 111th Cong. (2010).

⁴⁴ *See, e.g.*, *Al Maqaleh v. Gates*, 605 F.3d 84, 97–98 (D.C. Cir. 2010) (accepting government's argument that, *Boumediene* notwithstanding, alleged alien enemy combatants held at Bagram Airfield in Afghanistan do not have the constitutional privilege of habeas corpus).

defiance Ackerman warns about. He is concerned with literal refusals to comply with direct judicial mandates. The last several years have seen no hint of such behavior.

Things might change going forward. Because the Court has neither the power of the purse nor the power of the sword,⁴⁵ we can never say for certain that its decisions are entirely safe from defiance. But we can say that evidence from the Bush Administration does not suggest imminent danger on this front.

C. *Excessive Deference by the Court?*

A second scenario, which Ackerman may deem more likely than outright defiance, is that the Court will simply accede to the President's assertions of power. Part of the problem with executive constitutionalism, Ackerman suggests, is the Executive's ability to shape legal issues long before they reach the courts. He thinks a President seeking broad authority in a time of asserted crisis can count on lawyers at OLC and the White House to produce "sober-looking documents [that] will defend outrageous presidential power plays as entirely legal and constitutional" (p. 185). And he worries that the President will be able to curry broad public (or at least the elite legal public's) support "long before the Supreme Court gets a chance to speak" (p. 68). Then,

[w]hen the Court finally moves to center stage after many months or years have passed, it may no longer think it prudent to render a high-visibility judgment on the big issues. By that point, the president may have managed to win a great deal of support from public and professional opinion — and the Court might not be able to count on broad support for a constitutional counterattack. When placed on the defensive, the justices may find it wiser to retreat from the fray, declare the entire matter a "political question," and allow the executive branch to get away with the power play. (pp. 68–69)

The danger in this scenario is not executive defiance; it is judicial abdication.

As with the defiance risk, one cannot categorically exclude the possibility that the Court might one day accede completely to grandiose assertions of executive power. But once again, recent history gives little reason to believe that day is near. To the extent Ackerman's prediction of judicial capitulation depends on the President's ability to win broad "public and professional" (p. 68) support for his positions, the virtually universal condemnations of the Bush Administration's

⁴⁵ Cf. THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("The judiciary . . . has no influence over either the sword or the purse It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.")

“torture memos,” which I discuss in greater detail in Part II, underscore the limits of that ability. Moreover, on matters that reached the Court during the last administration, the Court consistently stood its ground when faced with aggressive assertions of executive power. Each of the war-on-terror cases mentioned above involved strenuous arguments for judicial deference to executive determinations on matters relating to national security. And each time, the Court refused to defer. In *Hamdi*, for example, the government asserted that “[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict’ ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme.”⁴⁶ The Court emphatically rejected that argument:

[T]he position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.⁴⁷

The Court followed a similar pattern in its other war-on-terror decisions. In each, assertions of unilateral executive authority fared poorly, even on matters of national security and military and foreign affairs.⁴⁸ If anything, these cases might signal a *decrease* in the Court’s willingness to defer to the executive branch on such matters.⁴⁹

⁴⁶ 542 U.S. 507, 527 (2004) (plurality opinion) (alteration in original) (quoting Brief for Respondents at 26, *Hamdi*, 542 U.S. 507 (No. 03-6696)).

⁴⁷ *Id.* at 535–36. Justices Souter and Ginsburg joined the plurality on this point, giving it a majority. *See id.* at 541–42 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

⁴⁸ It is also worth noting that the government has lost a significant number of cases in the ongoing post-*Boumediene* habeas litigation in the lower courts. *See Guantanamo Bay Habeas Decision Scorecard*, CENTER FOR CONSTITUTIONAL RIGHTS, http://www.ccrjustice.org/GTMO_scorecard (last visited Mar. 26, 2010) (reporting that of fifty-seven decisions at the district court level, habeas petitions were granted in thirty-seven cases and denied in twenty). The government has fared much better in the court of appeals than the district court, however, and in any event a pure win-loss count in this area is liable to be somewhat misleading. *See* Benjamin Wittes, *Why I Don't Like the "Scorecard,"* LAWFARE (Sept. 8, 2010, 2:06 AM), <http://www.lawfareblog.com/2010/09/why-i-dont-like-the-scorecard/>. But even with these caveats, the point is that the post-*Boumediene* litigation does not paint a picture of excessive judicial deference.

⁴⁹ *See* Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 785–86 (2011) (noting that in *Rasul*, *Hamdi*, *Hamdan*, and *Boumediene*, “the Court has swept aside vigorous arguments by the executive that it refrain from engagement on abstention or political question grounds,” and that “the Court has scarcely noted any doctrinal tradition of interpretive ‘deference’ on the meaning of the laws”).

This reluctance to endorse broad assertions of unilateral executive power is no innovation. In refusing to defer to the executive in these cases, the Court has been able to draw on a deep doctrinal well. During war and other periods of heightened threat to national security, the Court has long privileged cooperation between the political branches.⁵⁰ Instead of upholding assertions of unilateral executive power derived directly from the Constitution or categorically invalidating the government's actions on civil libertarian grounds, the Court has favored a middle path focused on "whether the executive has involved the legislature in the equation, and . . . whether the executive has remained within the bounds of the power granted it by the legislature."⁵¹

The leading judicial articulation of this approach is Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.⁵² His familiar three-tiered framework provides that the President's authority is at its "maximum" when he acts with implied or express congressional authorization, at its "lowest ebb" when he acts contrary to congressional prohibition, and in a "zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain" when Congress has neither authorized nor prohibited the action.⁵³ In short, "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."⁵⁴

This is not a doctrinal framework that invites broad assertions of unilateral executive action, especially where they conflict with statutory limits. Indeed, although the Court's cases do not categorically rule out all presidential actions at "the lowest ebb," they put the President on a steep uphill climb.⁵⁵ Consider *Hamdan*, where the Court invalidated the system of military commissions President Bush had established by executive order. The key to the Court's holding was its determination that the commissions conflicted with limits Congress had imposed in the Uniform Code of Military Justice.⁵⁶ Without answer-

⁵⁰ See Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 5 (2004); Trevor W. Morrison, *The Middle Ground in Judicial Review of Enemy Combatant Detentions*, 45 WILLAMETTE L. REV. 453, 453-54 (2009); Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 51.

⁵¹ Morrison, *supra* note 50, at 453-54.

⁵² 343 U.S. 579 (1952).

⁵³ *Id.* at 635-38 (Jackson, J., concurring). Court majorities have since endorsed Justice Jackson's basic approach. See, e.g., *Medellín v. Texas*, 128 S. Ct. 1346, 1368 (2008); *Dames & Moore v. Regan*, 453 U.S. 654, 668-69 (1981).

⁵⁴ *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

⁵⁵ *Id.* at 638 ("Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.")

⁵⁶ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 624-25 (2006).

ing whether the President has the “independent power, absent congressional authorization, to convene military commissions,” the Court noted that “he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.”⁵⁷ Precedents like this do not guarantee the Court will reject all presidential “power grabs” (p. 68) that exceed legislative limits, but they do give the Court a robust basis for resisting.

To be sure, Congress has not explicitly legislated on all matters over which the President might want to assert control in the name of national security. Some of his power grabs could therefore implicate Justice Jackson’s middle tier, the “zone of twilight.” Here the President’s prospects may be better, as “any actual test of power [in this area] is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”⁵⁸ Ackerman’s argument is essentially that the President will present the Court with a series of imperatives based on the “facts on the ground” (p. 84), and that the Court will feel compelled to defer. That is possible, but again the Court’s actual record complicates the picture.

First, even where Congress has not expressly prohibited the presidential action in question, the Court may infer congressional prohibition or disapproval and find against the President on that ground. *Youngstown* itself is an example. Justice Jackson treated the case as falling within his third tier, even though Congress had not expressly prohibited the presidentially ordered seizure of domestic steel mills there at issue.⁵⁹ For him, the key was that Congress had recently passed legislation in the general area and had specifically declined to grant the President seizure authority.⁶⁰ That, for Jackson, constituted implicit congressional prohibition.⁶¹ Moreover, in more recent cases, the Court has tended to treat Jackson’s three tiers not as “pigeonholes” but rather as “point[s] along a spectrum running from explicit congressional authorization to explicit congressional prohibition.”⁶² From that perspective, even implicit congressional disapproval of the President’s actions can provide a powerful basis for the Court to oppose the President.

⁵⁷ *Id.* at 593 n.23. Admittedly, it is not clear how much the “proper” qualifier in this passage is meant to limit Congress’s power.

⁵⁸ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

⁵⁹ *Id.* at 639–40.

⁶⁰ Justice Black’s majority opinion made this point. *See id.* at 586 (majority opinion) (“[T]he use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes.”). Justice Jackson concurred in that analysis. *Id.* at 639 & n.8 (Jackson, J., concurring).

⁶¹ *See id.* at 640 (Jackson, J., concurring).

⁶² *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981).

Second, in areas with no legislative action even implicitly addressing the issue, the Court's cases do not readily accommodate unprecedented assertions of presidential power. Returning again to *Youngstown*, the key opinion on this point is Justice Frankfurter's concurrence. In part because the constitutional text is so spare on separation of powers issues, he emphasized the importance of "[d]eeply embedded traditional ways of conducting government," especially when they have been "long pursued to the knowledge of the Congress and never before questioned."⁶³ The Court has embraced this theory of congressional acquiescence in recent years, treating certain longstanding executive practices known and not objected to by Congress as part of the "executive Power" constitutionally vested in the President.⁶⁴

Critically, this theory does not work for novel assertions of presidential power. Another recent case illustrates the point. In *Medellín v. Texas*,⁶⁵ President Bush issued a memorandum providing that the United States would discharge its obligation to comply with a decision of the International Court of Justice "by having State courts give effect to the decision."⁶⁶ A key question in the case was whether the memorandum permissibly required state courts to entertain certain claims that would otherwise be barred by state procedural rules. The Court held it did not, stressing the memorandum's novelty. The Court acknowledged that "if pervasive enough, a history of congressional acquiescence can be treated as a 'gloss on "Executive Power" vested in the President by § 1 of Art. II."⁶⁷ But the memorandum had no such precedent: "The President's Memorandum is not supported by a 'particularly longstanding practice' of congressional acquiescence . . . but rather is what the United States itself has described as 'unprecedented action.'⁶⁸ For that reason, the government's defense of the memorandum could not get off the ground.

Admittedly, given the Bush Administration's disagreement with the underlying International Court of Justice decision, *Medellín* should not be read as a loss on a matter of vital importance to the Administra-

⁶³ *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring). Justice Frankfurter built on a set of already existing ideas in this area. See, e.g., *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915) (noting that Congress's failure to object to a longstanding, well-known executive practice "raise[s] a presumption that the [action] had been [taken] in pursuance of its consent").

⁶⁴ See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) ("[T]he historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" (quoting *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring))).

⁶⁵ 128 S. Ct. 1346 (2008).

⁶⁶ *Id.* at 1355 (quoting Memorandum from President George W. Bush for the Attorney General, Compliance with the Decision of the International Court of Justice in *Avena* (Feb. 28, 2005)).

⁶⁷ *Id.* at 1371 (quoting *Dames & Moore*, 453 U.S. at 686).

⁶⁸ *Id.* at 1372.

tion.⁶⁹ The main point here, however, is that in refusing to defer to the presidential memorandum, the Court reemphasized the centrality of historical practice in its analysis. In that respect, *Medellin* is a reaffirmation of a doctrine that resists unprecedented assertions of executive power.

In sum, the Court does have a practice of deferring to certain assertions of executive power, especially in times of national security crisis. But that deference is most likely when the executive is acting with the approval of the legislature, or when its actions continue a longstanding practice in which Congress can be deemed to have acquiesced.⁷⁰ This approach can admit change over time, but it favors change that is incremental and multilateral, involving not just the President but Congress and ultimately the Court itself. And that, of course, is precisely the sort of change that Ackerman's own work tends to privilege.⁷¹

* * *

Ultimately, it is difficult to credit Ackerman's claim that we face a "very real" and present danger of either outright executive defiance of the judiciary or judicial abdication in the face of a presidential "power grab" (pp. 85, 68). Risks of this sort can never be entirely discounted, nor should they be ignored. But the Court has dealt before with assertions of presidential power in the name of national security, and has generated a set of doctrinal tools that tend to resist rapid change. Even in the aftermath of the 9/11 attacks, the Court has been prepared to resist dramatic new assertions of inherent executive power, remand-

⁶⁹ See Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 372 (2008) (noting that even after the presidential memorandum was issued, "the executive branch . . . claimed that [implementing the International Court of Justice's decision in the *Avena* case] is optional, and it continues to profess that the decision misreads the [relevant treaty]"); D.A. Jeremy Telman, *Medellin and Originalism*, 68 MD. L. REV. 377, 420 (2009) (calling the Bush Administration's actions to see to the implementation of *Avena* "half-measures").

⁷⁰ The theory of congressional acquiescence embraced in the Court's cases is itself subject to criticism, including that it lets Congress evade the responsibility associated with explicitly authorizing or prohibiting the executive action in question. See MICHAEL C. DORF WITH TREVOR W. MORRISON, *THE OXFORD INTRODUCTIONS TO U.S. LAW: CONSTITUTIONAL LAW* 115–16 (2010). But that is not Ackerman's point. He is concerned about a new and gathering threat of executive excess. My point here is that the Court's cases contain at least some safeguards against that threat.

⁷¹ I refer to Ackerman's theory of "constitutional moments." See generally 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998). In *Decline and Fall*, Ackerman stresses that constitutional moments should be understood to refer to relatively long periods of time, and thus not to invite the sort of radical and rapid shifts he now warns about. He notes that constitutional moments require endorsements by all three branches of government, and that rising movements "need at least a decade before [they] can demonstrate the broad and sustained popular support required to speak authoritatively for the People" (p. 71). The Court's treatment of executive power issues is more in tune with that standard than *Decline and Fall* suggests.

ing the President to Congress to pursue a less unilateral course. The President, in turn, has displayed no inclination to defy the Court. In justiciable controversies, then, the Court's position does not seem in special peril.

That leaves *nonjusticiable* controversies. As I have shown, the Court has never had a monopoly on constitutional interpretation. Especially in certain matters of military and foreign affairs, it has been quite reluctant to join the fray, content instead to declare the issue a political question and leave it to the other branches. For example, the judiciary has not been and is unlikely ever to be receptive to efforts to halt active military campaigns.⁷² This reluctance, of course, is nothing new, and there is no particular reason to think the domain of nonjusticiability is about to expand. But its existence does underscore the importance of the extrajudicial Constitution in these areas. To understand executive constitutionalism, then, we must look to the executive branch.

II. THE OFFICE OF LEGAL COUNSEL

The Justice Department's Office of Legal Counsel (OLC) is at the heart of Ackerman's critique of executive constitutionalism. He describes it as part of "an elite professional corps that produces legal opinions of the highest technical quality" with "the same highly polished appearance" as Supreme Court opinions (p. 68). But "[t]here is one big difference: [OLC] almost always conclude[s] that the president can do what he wants" (p. 68). OLC's opinions are "produced under conditions that allow short-term presidential imperatives to overwhelm sober legal judgments" (p. 88). Although they *look* like fair-minded works of legal analysis, in fact they constitute a "superpoliticized jurisprudence" (p. 220 n.3) of "sweeping constitutional pronouncements" (p. 96) underwriting a steadily expanding vision of presidential power.⁷³

⁷² See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 272 (2d ed. 2004) ("In recent decades, federal courts have consistently refused to reach the merits in war power cases.").

⁷³ "Pronunciamento" is illustrative of the rhetoric pervading *Decline and Fall*. Elsewhere in the book, Ackerman criticizes George Lakoff for urging progressives to counter conservatives' success at setting the terms of public policy debates (with phrases like "death tax") by putting forth better framing terminology of their own (p. 26). Ackerman sees such proposals as misguided calls to fight "right-wing demagoguery" with "left-wing demagoguery" (p. 26), which will only further contribute to a "politics of unreason" (p. 39). Some of the language in *Decline and Fall* may be subject to that same criticism. Indeed, the book is shot through with rhetoric that throws considerably more heat than light: today's "constitutional lawyers mindlessly repeat the Founding mantras without reflecting on current realities" (p. 67); academic defenders of expansive executive power are waging an "all-out assault on the rule of law," full of "[h]appy-talk [that] can lead to tragedy" (pp. 214–15 n.9). These and other caricatures mar the book.

Of even more concern to Ackerman is that others do not see the gravity of the problem. One of his chief complaints is that the controversy surrounding the torture memos and other OLC opinions relating to the war on terror has not led to “fundamental reform” of OLC (p. 95). He observes:

The prevailing sentiment seems to be that the OLC is a sound institution and that it should be preserved more or less intact. This is a mistake. The “torture memos” do not represent a momentary aberration but a symptom of deep structural pathologies that portend worse abuses in the future. (p. 95)

The next time a (real or purported) national emergency arises, Ackerman predicts that the White House will seek to expand presidential power even further and that OLC will almost certainly endorse the expansion, even if it means “defending the indefensible” (p. 109).

Although Ackerman plainly objects to the current institutional framework within which OLC operates, the precise mechanics of his argument are sometimes elusive. As just described, his overarching claim is that OLC is subject to a set of “deep structural pathologies” (p. 95). He makes this assertion in the course of advancing a broader argument that executive constitutionalism today presents a dramatic *new* threat to the rule of law, yet virtually all of the institutional factors involving OLC that he points to — the way OLC is staffed, its processes for working on opinion requests, its susceptibility to client pressure — have been in place for decades. What *is* relatively new, of course, is that we are now in the aftermath of the torture memos. Ackerman claims that the memos “transform[ed] [OLC] into a legal apologist for presidential power” (p. 106), and that OLC cannot go back. But because the relevant structural features have been relatively stable for years, it is not clear why the torture memos should be seen as transformative as opposed to aberrational.

That uncertainty notwithstanding, I take up in this Part Ackerman’s basic claim that OLC suffers from such deep structural defects that it cannot possibly be a reliable source of credible legal advice. In doing so, I will weave together four points. First, Ackerman too readily presumes that because it does not occupy the position of a politically neutral court, OLC cannot reliably produce independent, credible legal advice. OLC has long espoused a commitment to acting on its best understanding of the law, and the institutional culture of the office reflects that deeply rooted commitment. Second, Ackerman provides a too simplistic and superficial account of OLC’s actual record. OLC’s advice can and does impose meaningful legal constraints on its clients, and both OLC and its clients have powerful incentives to maintain OLC’s reputation for doing so. Third, the best way to evaluate the efficacy of those incentives is not to leap to conclusions from the mere fact of OLC’s location within the executive branch, but to engage its work on the merits. Yet Ackerman devotes remarkably little attention

to the substance of OLC's work, other than the torture memos. Fourth, although the torture memos confirm that OLC can go terribly astray, and although there can be no guarantees going forward, greater public disclosure of OLC's work can help protect against such episodes. Ackerman's dissatisfaction with the Justice Department's response to the torture memos causes him to vastly underestimate the checking power of such disclosure as a general matter.

A. Background⁷⁴

OLC's core function is to provide formal legal advice through written opinions. It is the most important centralized source of such advice in the executive branch.⁷⁵ Its clients range across the branch, though the White House and the Attorney General are the most frequent.⁷⁶ OLC's legal advisory authority is delegated from the Attorney General,⁷⁷ who has had the statutory responsibility for providing such advice since 1789.⁷⁸ Attorneys General themselves regularly issued legal opinions under their own names for over 150 years; the separate office that is now OLC was not created until 1950.⁷⁹

⁷⁴ Parts of this background discussion are drawn from my own recent writing on OLC. See Morrison, *Stare Decisis*, *supra* note 6, at 1458–60.

⁷⁵ Pillard, *supra* note 16, at 710 (“[T]he head of the Office of Legal Counsel is the executive branch’s chief legal advisor.”).

⁷⁶ *Id.* at 710–11. OLC is authorized to provide legal advice only to the executive branch and “[do]es not advise Congress, the Judiciary, foreign governments, private parties, or any other person or entity outside the Executive Branch.” 2005 OLC Best Practices Memorandum, *supra* note 6, at 1. However, OLC lawyers do sometimes testify before congressional committees to explain legal positions or practices of the office. At the behest of legislative affairs staffers in the Justice Department or White House, they also occasionally communicate with congressional staffers to discuss constitutional or other legal issues raised by proposed legislation. See Morrison, *Stare Decisis*, *supra* note 6, at 1458–59 n.38.

⁷⁷ 28 C.F.R. § 0.25(a) (2009) (assigning to the Assistant Attorney General for OLC the task of “[p]reparing the formal opinions of the Attorney General; rendering informal opinions and legal advice to the various agencies of the Government; and assisting the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet”); *id.* § 0.25(c) (tasking the Assistant Attorney General for OLC with “[r]endering opinions to the Attorney General and to the heads of the various organizational units of the Department on questions of law arising in the administration of the Department”).

⁷⁸ Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 (providing that the Attorney General shall “give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments”). Today, the relevant statutory provisions are found in Title 28. See 28 U.S.C. § 511 (2006) (“The Attorney General shall give his advice and opinion on questions of law when required by the President.”); *id.* § 512 (“The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department.”); *id.* § 513 (“When a question of law arises in the administration of [one of the military departments], the cognizance of which is not given by statute to some other officer . . . , the Secretary of the military department shall send it to the Attorney General for disposition.”).

⁷⁹ Reorganization Plan No. 2 of 1950, § 4, 64 Stat. 1261, 1261 (1950).

Today, OLC is an office of about two dozen lawyers led by a presidentially nominated and Senate-confirmed Assistant Attorney General, several Attorney General-appointed Deputies, and one Deputy who is not politically appointed. Almost all the rest of the lawyers in the office are “career” civil servants. Most attorneys have the title of Attorney-Advisor, while a few who are members of the Senior Executive Service have the title Senior Counsel.⁸⁰ Although many Attorney-Advisors work in the office for just a few years, some stay longer.⁸¹

Without purporting to provide a comprehensive account of OLC, I would note several features of its work:

First, OLC does not provide legal advice except when asked by a client, and with rare exceptions⁸² there is no formal requirement that anyone in the executive branch take any particular questions to OLC. Instead, OLC’s involvement in an issue is largely “a function of client choice,”⁸³ informed by historical practice that has come to treat certain issues as especially appropriate for resolution by OLC.⁸⁴

Second, before agreeing to produce a written opinion, OLC generally requires its clients to submit their requests in writing and to provide their own views on the issue as part of their requests.⁸⁵ But there are exceptions. Most notably, the Attorney General and the White House need not specify their requests in writing,⁸⁶ and they are often afforded greater informal access to OLC while it is considering their requests.⁸⁷

Third, not all of OLC’s legal advice is memorialized in formal written opinions; some of it is oral, and some is communicated by email.⁸⁸

⁸⁰ Morrison, *Stare Decisis*, *supra* note 6, at 1460.

⁸¹ *Id.*

⁸² See 28 U.S.C. § 513 (“When a question of law arises in the administration of [one of the military departments], the cognizance of which is not given by statute to some other officer . . . , the Secretary of the military department shall send it to the Attorney General for disposition.”); Management of Federal Legal Resources, 28 U.S.C. § 509 (2006) (providing that “[w]henver two or more Executive agencies are unable to resolve a legal dispute between them, . . . each agency is encouraged to submit the dispute to the Attorney General,” and that “[w]henver two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere”).

⁸³ Morrison, *Stare Decisis*, *supra* note 6, at 1461.

⁸⁴ I discuss the kinds of issues that are typically appropriate for OLC resolution at p. 1733.

⁸⁵ See OLC Guidelines, *supra* note 6, at 1608; Pillard, *supra* note 16, at 711.

⁸⁶ See 2005 OLC Best Practices Memorandum, *supra* note 6, at 2.

⁸⁷ 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” (p. 231 n.43).

⁸⁸ See 2010 OLC Best Practices Memorandum, *supra* note 6, at 2 (“[T]he Office frequently conveys its controlling legal advice in less formal ways, including through oral presentations and by email . . .”).

The requirement that the client submit a written request to OLC does not necessarily apply when OLC's answer is provided in these more informal ways.

Fourth, OLC provides legal advice based on its best view of the law, not its sense of the best legal defense of an already determined policy position.⁸⁹

Fifth, OLC's legal opinions are treated as authoritative and binding within the executive branch unless "overruled" by the Attorney General or the President.⁹⁰ OLC generally will not provide legal advice if there is doubt about whether it will be followed.⁹¹

Sixth, if OLC determines that a client's proposed course of action is unlawful, it frequently works with the client to try to find a lawful way to pursue the client's desired end.⁹²

Seventh, OLC maintains a comprehensive internal database of its legal advice and also releases some, but not all, of its written opinions to the public. Among those opinions that are made public, some are released roughly when they are signed, while for others there is a delay of many months or even years.

⁸⁹ *Id.* at 1 ("OLC must provide advice based on its best understanding of what the law requires . . ."); 2005 OLC Best Practices Memorandum, *supra* note 6, at 3 ("OLC's interest is simply to provide the correct answer on the law . . ."); OLC Guidelines, *supra* note 6, at 1604 ("OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies."); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1324 (2000) (OLC's advice "does not come from the individual lawyer, but from the office that he or she holds," and must reflect "the office's best view of the law").

⁹⁰ See 2010 OLC Best Practices Memorandum, *supra* note 6, at 1 (OLC "provide[s] controlling advice to Executive Branch officials on questions of law"); 2005 OLC Best Practices Memorandum, *supra* note 6, at 1 ("[S]ubject to the President's authority under the Constitution, OLC opinions are controlling on questions of law within the Executive Branch."); OLC Guidelines, *supra* note 6, at 1603 ("OLC's legal determinations are considered binding on the executive branch, subject to the supervision of the Attorney General and the ultimate authority of the President."). True, there has long been some uncertainty about the technical legal bindingness of Attorney General and OLC legal advice. See Morrison, *Stare Decisis*, *supra* note 6, at 1464 & nn. 59–60. Ackerman treats this theoretical uncertainty as a point of vulnerability (p. 98). But as explained by Randolph Moss, head of OLC at the end of the Clinton Administration, "we have been able to go for over two hundred years without conclusively determining whether the law demands adherence to Attorney General Opinions because agencies have in practice treated these opinions as binding." Moss, *supra* note 89, at 1320. This longstanding consensus has real power within the executive branch.

⁹¹ See Pillard, *supra* note 16, at 711; Peter L. Strauss, *Overseer, or "The Decider"?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 742–43 (2007).

⁹² See OLC Guidelines, *supra* note 6, at 1609 ("[W]hen OLC concludes that an administration proposal is impermissible, it is appropriate for OLC to go on to suggest modifications that would cure the defect, and OLC should stand ready to work with the administration to craft lawful alternatives."); Moss, *supra* note 89, at 1329 ("On almost a daily basis, the Office of Legal Counsel works with its clients to refine and reconceptualize proposed executive branch initiatives in the face of legal constraints.").

Ackerman's basic claim about OLC is that the above factors combine to form an institutional structure that exposes OLC to excessive client pressure, as a result of which it cannot reliably produce independent, good-faith, and credible legal advice — especially on matters of presidential power. I address those concerns in the balance of this Part first by discussing both the role OLC seeks to play and the value of that role, and then by considering mechanisms to encourage it to live up to the role.⁹³

⁹³ Ackerman makes one stand-alone argument about OLC that I do not address in the main text. It concerns signing statements — statements issued by the President when signing bills into law, construing them to avoid constitutional problems or announcing that particular provisions will not be enforced on constitutional grounds. Ackerman joins others who have criticized this practice, especially as undertaken by the Bush Administration (pp. 89–95). Yet he advances a novel argument targeting not particular uses of signing statements but rather the institution of signing statements generally. The argument focuses on timing. Ackerman depicts signing statements as the product of work done during the ten days a President has to sign or veto an enrolled bill (p. 90). That interval, he insists, is too short to produce a fully considered analysis of a bill's constitutionality. Instead, it yields “slipshod” work not meriting the definitive authority that he thinks signing statements are accorded (p. 90).

There are a number of problems with this argument. First, the ten days the President has to sign or veto a bill is not the only time his lawyers have to analyze it. As part of its “bill comment” practice, OLC reviews bills introduced in Congress for potential constitutional problems. See Pillard, *supra* note 16, at 711–12 (describing the bill comment process). When OLC sees a constitutional problem, it writes a bill comment identifying the problem and sometimes proposing a solution. The Office of Management and Budget bundles OLC's constitutional analysis together with policy views from other offices across the executive branch, and those combined reactions are then typically conveyed to Congress in some form. *Id.* OLC's part in all this typically comes long before the President's ten-day clock begins to run. True, new text is sometimes introduced just prior to a bill's passage, potentially raising new constitutional issues at the eleventh hour. But that is not the norm, and even when it does happen the new issue is liable to be one that OLC has faced before and upon which, as described below, OLC already has a well-established position.

Ackerman acknowledges the bill comment process, but he continues to treat the ten-day window as the key time for constitutional analysis. That is because he sees bill comments not as “sober assessment[s]” of the constitutional issues but as part of “a larger executive lobbying campaign aimed at eliminating the offensive provision from the bill” (pp. 91–92), so that they cannot be relied upon when it comes time to draft a signing statement. This too is mistaken. It is true that, if an administration opposes a bill as a policy matter, White House or other legislative affairs staffers might invoke a bill comment when *they* lobby Congress against the bill. But it is not true that OLC typically generates bill comments with an eye to an administration's legislative lobbying efforts. OLC works quite apart from those efforts. Indeed, its bill comments often identify constitutional problems in bills the administration *supports*. When that happens, the difficult question is how to tell Congress about OLC's concerns without derailing the legislation altogether. But in any event, cases of this sort underscore the fact that the bill comment practice stands substantially apart from an administration's political legislative agenda. Given this, the onus is on Ackerman to show how bill comments are nevertheless so “intellectual[ly] and emotional[ly]” intertwined with legislative politicking as to be incapable of providing “sober” constitutional analysis (p. 92). He makes no such showing. Indeed, it is not clear that Ackerman has reviewed any actual OLC bill comments.

Second, Ackerman's complaint that signing statements are too cursory, with only “a few conclusory paragraphs [and no] pretense at sustained legal analysis” (p. 91), misjudges the role of such statements. Signing statements typically do not purport to provide a complete analysis of

B. OLC's Role and Value

As described above, OLC is supposed to provide legal advice based on its best view of the law. No statute or regulation commands OLC to approach its job this way. Other models, including that of an advocate seeking the best legal defense of a client's already-determined position, are conceivable and potentially defensible.⁹⁴ But that is not how OLC or its clients have come to understand OLC's role. As explained in a recent memorandum outlining best practices for the office (the "2010 OLC Best Practices Memorandum"), OLC has a "unique mission, and a long-established tradition . . . as to how its work should

the issues they raise. President Obama, for example, has pledged that any signing statements he issues will "identify my constitutional concerns about a statutory provision with sufficient specificity to make clear the nature and basis of the constitutional objection." Memorandum from President Barack Obama for the Heads of Executive Departments and Agencies, Presidential Signing Statements, 74 Fed. Reg. 10,669 (Mar. 11, 2009), available at http://www.whitehouse.gov/the_press_office/Memorandum-on-Presidential-Signing-Statements. But such notice need not lay out the entire analysis, nor is it necessarily "the final word from the executive branch" (p. 146).

In fact, a fuller account of the administration's thinking is frequently available elsewhere. Often, it will have been provided to Congress earlier in the legislative process, by White House or other legislative affairs staffers passing along OLC's concerns. See, e.g., Statement on Signing the Fraud Enforcement and Recovery Act of 2009, 2009 DAILY COMPILATION OF PRESIDENTIAL DOCUMENTS No. 387 (May 20, 2009) ("As my Administration communicated to the Congress during the legislative process, the executive branch will construe this subsection of the bill not to abrogate any constitutional privilege." (emphasis added)). In many cases the explanation will be relatively straightforward because the bill raises a frequently occurring issue upon which the position of the executive branch, right or wrong, remains fairly consistent from one administration to the next. These include provisions restricting the President's appointment power, legislative veto provisions, and provisions mandating certain positions in diplomatic negotiations. See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 317-18 (2006) (listing these and other commonly arising issues). On most such issues, OLC has already published legal opinions explaining its basic views. See, e.g., The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124 (1996) (surveying a broad range of commonly arising constitutional issues of this sort). These, too, are generally known to congressional staffers working on the issues. And in some cases, the very bill comment that OLC wrote on the legislation in question will be published as a formal opinion, roughly contemporaneously with the signing statement. See, e.g., Constitutionality of the Ronald Reagan Centennial Commission Act of 2009, 33 Op. Off. Legal Counsel (Apr. 21, 2009), available at <http://www.justice.gov/olc/2009/reagancentennialcommission.pdf> (providing full analysis of Appointments Clause, Ineligibility Clause, and other separation of powers issues raised by the bill, including available statutory constructions to avoid the issues); Statement on Signing the Ronald Reagan Centennial Commission Act, 2009 DAILY COMPILATION OF PRESIDENTIAL DOCUMENTS No. 424 (June 2, 2009) (signing statement tracking analysis in April 21, 2009 OLC opinion).

Thus, signing statements are best viewed not as complete accounts of an administration's views, but as devices for alerting Congress and the interested public to the existence of certain specified concerns. Thus alerted, those audiences can seek out a fuller treatment of the issue in OLC's opinions or elsewhere. True, not many members of the general public are likely to bother. But those in Congress and elsewhere who follow these issues know there is no reason to treat signing statements as complete and exclusive elaborations of an administration's views. Ackerman, however, misses all of this.

⁹⁴ See Morrison, *Stare Decisis*, *supra* note 6, at 1456 & nn. 32-33.

be carried out.”⁹⁵ That tradition includes a commitment — embedded in what Jack Goldsmith calls the “cultural norms” of the office⁹⁶ — to follow its best view of the law.

These norms and traditions do not treat OLC just like a court, however. As Goldsmith puts it, especially when OLC advises the President, its work “is neither like advice from a private attorney nor like a politically neutral ruling from a court. It is something inevitably, and uncomfortably, in between.”⁹⁷ Ackerman is skeptical of this account. “If the OLC isn’t aspiring to provide ‘a politically neutral ruling,’” he asks, “what is it aspiring to?” (p. 103).

That is a fair question. To answer, one could begin by emphasizing that OLC’s commitment is to *its* best view of the law — not *the* best view of the law in any decontextualized sense.⁹⁸ “Its” reflects OLC’s institutional location within the executive branch, which has a number of important consequences for OLC’s work. First, it means OLC may have access to information on a particular question that a court would not, which could lead OLC to answer the question differently. Second, it may mean that certain judicially developed interpretive techniques are not suitable for OLC, or at least that their suitability needs to be separately considered.⁹⁹ Third, it means that OLC inherits a distinctive body of executive precedents to guide its work,¹⁰⁰ and that at any

⁹⁵ 2010 OLC Best Practices Memorandum, *supra* note 6, at 6; *see also id.* at 1 (stressing that “OLC must provide advice based on its best understanding of what the law requires — not simply an advocate’s defense of the contemplated action or position proposed by an agency or the Administration”).

⁹⁶ GOLDSMITH, *supra* note 6, at 37.

⁹⁷ *Id.* at 35. This in-between status is reflected in the language used to describe OLC’s work. Its written products are commonly called “opinions,” which arguably carries a quasi-judicial connotation. But OLC is also often described as providing “advice” to “clients,” which sounds more like a standard attorney-client context. I do not take these linguistic discrepancies to undermine any of the core features of OLC’s work — its conclusions are treated as binding within the executive branch (unless overruled by the Attorney General or the President) whether or not they are called “opinions” or “advice” — but the imperfect fit of these familiar labels does, I think, underscore the unusualness of OLC’s position.

⁹⁸ *See Morrison, Stare Decisis*, *supra* note 6, at 1502–03. I am tracking OLC’s own description of its role here, which consistently speaks in terms of *its* best view, not *the* best view. Yet, while many of the factors that I next describe as appropriately informing OLC’s best view of the law are points about which most former OLC lawyers and scholars are likely to agree, I concede that the precise nature of the difference between OLC’s best view and the best view is subject to some degree of reasonable disagreement.

⁹⁹ For example, even assuming it is appropriate for courts to employ the canon of constitutional avoidance in statutory interpretation, it is a separate question whether OLC should use the canon. Answering that question requires examining the purposes underlying the canon and also considering other sources of statutory meaning that might be available to OLC but not to the courts. *See generally Morrison, Constitutional Avoidance*, *supra* note 6.

¹⁰⁰ OLC has recently confirmed that its precedents play an important role in its work. *See* 2010 OLC Best Practices Memorandum, *supra* note 6, at 2 (“OLC opinions should consider and ordinarily give great weight to any relevant past opinions of Attorneys General and the Office. The Office should not lightly depart from such past decisions, particularly where they directly

given point in time, its leaders are part of a particular presidential administration. As described in a set of best practice guidelines drafted by former OLC lawyers in the aftermath of the torture memos (“the OLC Guidelines”), OLC “serves both the institution of the presidency and a particular incumbent, democratically elected President in whom the Constitution vests the executive power.”¹⁰¹ Accordingly, its work should “reflect the institutional traditions and competencies of the executive branch as well as the views of the President who currently holds office.”¹⁰²

A fourth and final feature of OLC’s institutional location is its regular practice, noted above, of helping its clients find lawful ways to pursue their objectives. As explained in the 2010 OLC Best Practices Memorandum,

OLC’s analyses may appropriately reflect the fact that its responsibilities also include facilitating the work of the Executive Branch and the objectives of the President, consistent with the law. As a result, unlike a court, OLC will, where possible and appropriate, seek to recommend lawful alternatives to Executive Branch proposals that it decides would be unlawful.¹⁰³

This is a delicate undertaking. There is a danger that OLC will over-identify with its clients in this process, compromising its legal advice to accommodate them. As I discuss below, there are ways to manage this risk. But in any event, what Ackerman disapprovingly calls the “facilitative approach” (p. 99) is an important and distinctive part of the way OLC operates.

If the above description captures at least some of what it means for OLC to operate between the roles of politically neutral judge and avowedly partial advocate, the next question is whether that position is stable. Ackerman thinks not. Especially when White House officials are the clients, Ackerman thinks OLC “has an overwhelming incentive to tell them that the law allows them to do whatever they want to do” (p. 176), and he claims its opinions “almost always” do just that (p. 68). There are really two claims here — one about incentives, and one about outcomes. I will take them in reverse order.

1. *Outcomes.* — It is true that, in aggregate, OLC’s written opinions tend to be protective of executive power. But this need not be taken as proof of lawlessness or the abandonment of principle. As I

address and decide a point in question . . .”). But it has not specified precisely what weight it gives to its past opinions or in what circumstances it will depart from them. See Morrison, *Stare Decisis*, *supra* note 6, at 1453–54.

¹⁰¹ OLC Guidelines, *supra* note 6, at 1606.

¹⁰² *Id.*

¹⁰³ 2010 OLC Best Practices Memorandum, *supra* note 6, at 2.

have argued in earlier work,¹⁰⁴ the pro-executive tenor in OLC's work may simply reflect the fact that it is part of the executive branch. OLC is a participant in the separation of powers scheme envisioned by James Madison, wherein each branch defends its prerogatives against the other two.¹⁰⁵ We see this in the judiciary, where the Supreme Court implements various rules to resist or cabin legislation purporting to limit its jurisdiction.¹⁰⁶ And we see it in Congress, which often pursues a broad view of its authority to oversee executive action by, for example, passing legislative veto provisions even after the Supreme Court proscribed them in *INS v. Chadha*.¹⁰⁷ So we should be unsurprised to see a measure of institutional self-protection in the executive branch as well.¹⁰⁸

My point here is not that OLC does, or should, simply seek the most executive-friendly position available on all separation of powers questions. To be sure, it is possible to understand the Madisonian view as calling for each branch to assert its prerogatives to the maximum, constrained only by the countervailing assertions of the other two branches. It is also possible that some in the executive branch might be inclined to act this way in some contexts. But that is not

¹⁰⁴ See Morrison, *Stare Decisis*, *supra* note 6, at 1501–03.

¹⁰⁵ See THE FEDERALIST NO. 51 (James Madison), *supra* note 45, at 322; see also *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) (stating that separation of powers is designed to “ensure the ability of each branch to be vigorous in asserting its proper authority”).

¹⁰⁶ See Morrison, *Constitutional Avoidance*, *supra* note 6, at 1233–34 (discussing the Court's “self-protective” use of the canon of constitutional avoidance).

¹⁰⁷ 462 U.S. 919 (1983). See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, LAW & CONTEMP. PROBS., Autumn 1993, at 273, 273 (“More than two hundred new legislative vetoes have been enacted since *Chadha*.”).

¹⁰⁸ Representatives of the political branches are not always vigorous in defending their institutions' interests. See generally Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005) (claiming that government officials are more likely to pursue personal and political ambitions). Congress's repeated passage of legislative vetoes notwithstanding, in the modern era executive officials have arguably acted more in the Madisonian model than have legislative actors. *Id.* at 957 (describing “somewhat imperial modern presidents and stubbornly passive Congresses”). But this point should not be oversold. Congress in recent years has shown itself quite prepared (sometimes excessively so) to resist or punish exercises of presidential power it opposes. See, e.g., Department of Defense Appropriations Act, Pub. L. No. 111-118, § 9011(a)–(c), 123 Stat. 3409, 3466–67 (2009) (barring use of funds “made available in this or any other Act” to transfer Guantánamo detainees into the United States); Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1003, 119 Stat. 2680, 2739–40 (codified at 42 U.S.C. § 2000dd (2006)) [hereinafter McCain Amendment] (responding to reports of abuse of enemy combatant detainees by prohibiting cruel, inhumane, or degrading treatment of anyone in U.S. custody). Politics undoubtedly provides at least part of the explanation for this resistance: members of Congress who are not in the President's party are more likely to oppose him than are those in his party. See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006). But measures like the bans on transferring Guantánamo detainees into the United States and the McCain Amendment illustrate the possibility of vigorous legislative constraints even in times of unified government.

how OLC describes or performs its role. As discussed above, by longstanding tradition OLC provides legal advice based on its best view of the law, not its sense of the best arguments in favor of maximally pro-executive positions. Yet “[b]ecause OLC is part of the Executive Branch, its analyses may also reflect the institutional traditions and competencies of that branch of the Government.”¹⁰⁹ Those traditions and competencies are liable to tilt somewhat in the executive’s favor, and it is consistent with OLC’s role for it to respect and preserve them. As a 1996 OLC opinion puts it, “[e]xecutive branch lawyers . . . have a constitutional obligation . . . to assert and maintain the legitimate powers and privileges of the President against inadvertent or intentional congressional intrusion.”¹¹⁰ OLC’s best view of the law, in short, reflects the fact that it is located within the executive branch and that it accords special weight to certain executive sources of legal meaning. That, in turn, means that at least on close questions, OLC’s views may legitimately tilt in a more pro-executive direction than those of a court or a legislative lawyer. (This perspective puts a premium on disclosing OLC’s work to Congress, a point I address in the next section.)

The real question is whether OLC goes too far in upholding executive power, to the point of invariably “defending the indefensible” (p. 109). That question can be answered a few different ways, each cutting against Ackerman’s claims. First, one could look to the raw numbers. Ackerman offers no support for his statement that OLC “almost always conclude[s] that the president can do what he wants” (p. 68). However, an examination of written, publicly available OLC opinions issued between the beginning of the Carter Administration and the end of the first year of the Obama Administration reveals 265 opinions issued to some component of the White House, 245 of which addressed issues upon which the White House had a readily discernible position.¹¹¹ Of those 245, 193 opinions (79%) found in favor of the White House’s position without significant limitation, twenty (8%) provided a more mixed answer (upholding some aspects of the White House’s position and finding against others, or upholding its position but with substantial express limitations), and thirty-two (13%) went

¹⁰⁹ 2010 OLC Best Practices Memorandum, *supra* note 6, at 2.

¹¹⁰ The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124, 126 (1996).

¹¹¹ These numbers are derived from a dataset I generated in earlier work. See Morrison, *Stare Decisis*, *supra* note 6, at 1476–79. The coding was done by several students working independently, with discrepancies resolved by me. As I note in the earlier work, the dataset includes only written, publicly available opinions (as of June 1, 2010). That is a significant limitation, and one cannot assume that OLC’s published opinions are perfectly representative of all of its work. See *id.*

predominantly against the White House.¹¹² These numbers do tilt in favor of the White House, but they are not as stark as Ackerman's language would suggest.

A second answer would note that the instances where OLC has gone against the White House do not involve merely minor matters. Even within the relatively small fraction of all OLC advice that results in a written, publicly disclosed opinion, OLC has said no to the White House on numerous highly significant issues. Examples include OLC's conclusion during the Nixon Administration that the President lacks the inherent authority to impound funds appropriated by Congress;¹¹³ its determination during the Reagan Administration that the President lacks inherent line-item veto authority;¹¹⁴ its conclusion near the end of the Clinton Administration that a former President may be prosecuted for the same conduct that had been the focus of an unsuccessful impeachment proceeding while he was in office;¹¹⁵ and its decision, under Jack Goldsmith during the second Bush Administration, to withdraw certain of the torture memos on the ground that they were legally indefensible.¹¹⁶ Perhaps most dramatically (and outside the realm of publicly disclosed, written OLC opinions), Goldsmith and other Justice Department leaders (including then-Attorney General John Ashcroft and then-Deputy Attorney General James Comey) steadfastly refused to certify the legality of a highly classified electronic surveillance program that was extremely important to the White House, unless certain changes to the program were made. These officials were apparently prepared to resign rather than capitulate to pressure from the White House.¹¹⁷

¹¹² Not all of these opinions involve questions of presidential power, strictly speaking. Many are on issues regarding the legality of a policy or program of significance to the White House, where the power in question is not exercised by the President but instead by some executive department or agency. But, of course, the majority of any President's most ambitious programs will be implemented by executive officials other than the President himself.

¹¹³ Memorandum from William H. Rehnquist, Assistant Att'y Gen., Office of Legal Counsel, Re Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools (Dec. 1, 1969), reprinted in *Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92d Cong. 279-84 (1971).

¹¹⁴ Memorandum from Charles J. Cooper, Assistant Att'y Gen., Office of Legal Counsel, to the Att'y Gen., The President's Veto Power, 12 Op. Off. Legal Counsel 128 (1988). I return to this opinion in Part III. See *infra* pp. 1736-37.

¹¹⁵ Memorandum from Randolph D. Moss, Assistant Att'y Gen., Office of Legal Counsel, to the Att'y Gen., Whether a Former President May Be Indicted and Tried for the Same Offences for Which He Was Impeached by the House and Acquitted by the Senate (Aug. 18, 2000), available at <http://www.justice.gov/olc/expresident.htm>.

¹¹⁶ See GOLDSMITH, *supra* note 6, at 10, 141-61.

¹¹⁷ This episode, including a confrontation between White House and Justice Department officials at Ashcroft's hospital bedside, was recounted in subsequent congressional testimony by Comey. See *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the*

Admittedly, there are also notable opinions going the other way, upholding presidential actions of, at best, highly questionable legality. Famous early examples from before OLC had even been created (and thus when the Attorney General still exercised his legal advisory function himself) include Edward Bates's 1861 opinion upholding President Lincoln's unilateral suspension of habeas corpus¹¹⁸ and Robert Jackson's 1940 opinion upholding President Roosevelt's plan to give Great Britain dozens of naval warships in exchange for certain military bases.¹¹⁹ In short, the record is mixed. But that alone undermines any notion that OLC invariably says yes to the White House on significant issues.

A third, more nuanced and ultimately more important answer would stress that OLC's "facilitative approach" means that the rate at which its written opinions say yes to the President can be highly misleading. This is because many of OLC's no's never result in written opinions. If the White House comes to OLC for advice on the legality of a proposed policy or program, OLC might first respond orally. If its answer is no, and if it cannot identify another way for the White House to pursue its goals lawfully, the matter may well end there.¹²⁰ The White House will likely abandon the policy or program, but OLC will issue no written opinion. Interactions of this sort are extremely common. If, on the other hand, OLC's initial answer is no but it then finds some other way for the White House lawfully to achieve its goals, any opinion OLC writes is likely to focus on that alternative, not on the initial proposal. Thus, although OLC will have determined that the initial proposal is unlawful, and although the White House will have abided by that determination, it will not be reflected in any written opinion. Ackerman misses all of this. Yet the point is significant because it reveals that the raw yes rate in OLC's written opinions does not necessarily reflect the extent to which OLC constrains the White House or any of its other clients. Executive constitutionalism is subtler than that.

That said, I do want to acknowledge a risk that the facilitative approach could tend to push OLC's written precedents further in the pro-executive direction than OLC intends. As just described, one consequence of this approach is that OLC's written opinions may tend to memorialize more of its yes's than its no's. Put another way, in aggregate its written opinions are likely to appear more favorable to the

Hiring and Firing of U.S. Attorneys? Hearing Before the S. Comm. on the Judiciary, 110th Cong. 23 (2007) (statement of James B. Comey, former Deputy Attorney General of the United States).

¹¹⁸ Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74 (1861).

¹¹⁹ Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att'y Gen. 484 (1940).

¹²⁰ See Morrison, *Stare Decisis*, *supra* note 6, at 1469.

President than the sum of all its advice, oral and written. And because OLC's written opinions are more readily searchable than its oral answers, new OLC lawyers might overread certain written opinions to support the legality of policies or actions OLC had earlier deemed unlawful in oral advice. This could yield a jurisprudence that is more one-sided than OLC itself has intended. I am not aware of evidence proving that this has happened in any systematic way, but the danger does seem plausible.

There are ways to guard against the danger, however. Most basically, OLC could write an opinion that not only upholds an alternative means of pursuing the client's objective, but also notes its determination that the client's initial proposal is unlawful. In many cases, however, the client will be justifiably reluctant to have its initial proposal publicized in that manner. In those circumstances, OLC could still take care to confine its analysis as much as possible to the specifics of the alternative it deems lawful, noting caveats and limitations to minimize the danger that later readers will draw overbroad inferences. Finally, a consistent practice of memorializing oral advice in memoranda to the files could leave an internal record for later OLC lawyers to follow, even if such memoranda are rarely made public.¹²¹ In all these ways, the risk that OLC's facilitative efforts might make its work unduly one-sided is a manageable problem.

Where does this leave us? OLC's precedents do tend to be protective of executive power. But that by itself is not obviously problematic, especially since much of what is most important about OLC's work is not captured in the frequency with which its written opinions say yes. Ultimately, any claim that OLC goes too far in defending executive power must rely not just on the raw yes rate in its written opinions, but also on a close evaluation of the *substance* of those opinions. Put another way, if Ackerman wants to argue that OLC too readily "defend[s] the indefensible" (p. 109), he should focus on the indefensibility of specific reasoning and conclusions in OLC's work. Yet he makes no systematic attempt at that sort of analysis. The torture memos receive some attention (pp. 106–08), but beyond that Ackerman devotes strikingly little space to the actual substance of OLC's opinions.¹²² Instead, he relies on summary claims about the likelihood that

¹²¹ OLC maintains a comprehensive, searchable internal database of its unclassified written opinions and memoranda to the files. See 2010 OLC Best Practices Memorandum, *supra* note 6, at 4–5.

¹²² For example, to support his claim that the principles currently governing OLC's work "encourage[] the development of a one-sided jurisprudence over time" (pp. 104–05), Ackerman includes a footnote discussing a series of five OLC opinions addressing the scope of the President's power to use military force without congressional authorization (pp. 232–33 n.54). The opinions he cites stretch from the Carter Administration to the George W. Bush Administration and culminate in a September 25, 2001 opinion by John Yoo asserting that the President has the "unilater-

OLC will say yes — claims that miss the nuances I have described here.

2. *Incentives.* — Ackerman's main claim, however, is predictive. He forecasts a repeat of the torture memos the next time comparable circumstances arise. This prediction prompts a key question: Should the torture memos be deemed an extreme case whose risk of recurrence is not specially tied to the current institutional framework in which OLC operates? Or should they be seen as the predictable result of specific and distinctive problems with the current framework? Ackerman favors the latter explanation. The current framework, he says, is "an open door" to abuses like the torture memos (p. 106), and provides no reason for OLC to behave otherwise in similar circumstances. That is a claim about incentives.

OLC does face some incentives to depart from its best view of the law in order to endorse what its clients want. Some have suggested that the general absence of a formal requirement to seek OLC's advice might encourage it to say yes so its clients will return with more business in the future.¹²³ Additionally, the tolerance of telephone calls and other importuning from the White House while OLC works on matters of special interest to the White House can create extra pressure. Finally, as Ackerman points out, the fact that OLC's leaders are politically appointed means that they are likely to want the President and his administration to succeed (p. 97). Those appointees are likely to say that they best help the President succeed by making sure his administration stays within legal bounds. But in hard cases where saying no might stop an important policy initiative dead in its tracks, OLC's leaders undoubtedly feel pressure to say yes.

These incentives are not new. As noted above,¹²⁴ a core component of Ackerman's thesis is that OLC today faces powerful new pressures threatening to undermine its fidelity to law. But there is nothing novel in OLC or the Attorney General facing even "enormous pressure" to endorse certain presidential actions, especially in times of crisis.¹²⁵

al' power to use 'military force preemptively against terrorist organizations or the States that harbor or support them, whether or not they can be linked to the specific terrorist attacks of September 11.'" (p. 233 n.54) (quoting Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to the Deputy Counsel to the President, The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), available at <http://www.justice.gov/olc/warpowers925.htm>). Yoo's opinion is indeed quite sweeping, and Ackerman evidently disagrees with it. Yet he says nothing about precisely where, in the series of five opinions he cites, he thinks OLC went wrong. Does Ackerman disagree with all of them? Only the Yoo opinion? He does not say.

¹²³ See Pillard, *supra* note 16, at 716–17 ("[T]he more critically OLC examines executive conduct, the more cautious its clients are likely to be in some cases about seeking its advice." *Id.* at 717.).

¹²⁴ See *supra* p. 1698.

¹²⁵ GOLDSMITH, *supra* note 6, at 168. On a more general level, "[c]onstitutional scholars have long noted the historic tendency of the Executive to accrue power in times of security concern."

The previously noted opinions from the Civil War and the eve of World War II are just two examples.¹²⁶ As they illustrate, the ability of the Attorney General to resist presidential power in extreme circumstances has always been imperfect. But that imperfection has not undermined the general commitment of the Attorney General or OLC to legal principle, and Ackerman does not identify any structural change at OLC that should lead us to suspect things will be dramatically different going forward. He just seems to take the torture memos as proof of an enduring “transform[ation]” at OLC (p. 106) — despite the fact that the anomalous process by which those memos were produced has been repudiated by OLC lawyers from across the political spectrum.¹²⁷

Moreover, the torture memos notwithstanding, OLC faces significant incentives cutting in favor of independence, credibility, and principle. Put simply, if OLC says yes too readily to its clients, it will no longer be useful to them. OLC maintains its position as the most important centralized source of legal advice within the executive branch not because any provision of positive law makes it so, but because its legal advice is uniquely valuable to its clients. That value comes from OLC’s reputation for scrupulously honoring “norms of detachment and professional integrity” in its work.¹²⁸ Those norms — or, more precisely, the general belief that OLC honors those norms — give credibility to OLC’s legal analysis, which makes the analysis worth obtaining. When the White House or any other executive entity embarks upon a new and legally controversial course of action, it has a great interest in being able to answer the questions that inevitably arise (from congressional committees, journalists, advocacy groups, and so on) by pointing to an OLC opinion upholding the action — *and for the opinion to be taken seriously as a sober work of legal analysis by officials not pre-committed to the outcome*.¹²⁹ By and large, OLC is valuable only to the extent its work continues to be viewed that way.

Deborah N. Pearlstein, *Ratcheting Back: International Law as a Constraint on Executive Power*, 26 CONST. COMMENT. 523, 523 (2010).

¹²⁶ See *supra* p. 1719.

¹²⁷ The OLC Guidelines, *supra* note 6, were drafted in 2004 in response to what the signatories deemed to be the deeply problematic process by which OLC produced the torture memos. See Johnsen, *Faithfully Executing the Laws*, *supra* note 6, at 1578. All nineteen of the signatories to the Guidelines had extensive OLC experience: all of them served during the Clinton Administration, some continued in their positions into the Bush Administration, and some had served in earlier Republican administrations. Some later served in high-ranking positions in the Obama Administration, including at OLC. See Morrison, *Stare Decisis*, *supra* note 6, at 1452 n.12. Numerous high-ranking lawyers in the Bush Administration, including two OLC heads, have expressed basic agreement with the OLC Guidelines. *Id.* at 1453 n.15.

¹²⁸ GOLDSMITH, *supra* note 6, at 37.

¹²⁹ See Moss, *supra* note 89, at 1311 (“[T]he legal opinions of the Attorney General and the Office of Legal Counsel will likely be valued only to the extent they are viewed by others in the ex-

Ultimately, then, both OLC and its clients have a long-run interest in the maintenance of its reputation for integrity and fair-minded legal analysis. But that does not mean OLC's clients all perfectly internalize the costs of taxing its integrity in particular cases. They likely do not.¹³⁰ Thus, OLC must be the principal custodian of the reputation its clients want it to maintain. The question is how to do it.

Part of the answer lies in OLC's general adherence to precedent.¹³¹ Although those precedents often tilt in favor of the executive branch, they do contain principled limits¹³² — far more than Ackerman's fairly superficial and limited perusal would suggest. Thus, to the extent OLC tends to adhere to its precedents, it will generally resist dramatic expansions of presidential power. Ackerman says he is interested in finding ways to “resist sudden presidential efforts to break free of [legal] restraints” (p. 144), yet he overlooks the capacity of OLC precedent to do just that.

In addition to the role of precedent, the presence in OLC of a small number of long-serving attorneys (typically titled Senior Counsels) undermines Ackerman's related claim that OLC is “short on institutional memory” (p. 97). Although it is true that those lawyers are outnumbered by those with much shorter tenures, there is a recognition throughout the office that Senior Counsels play a vital role in OLC precisely because they are such rich repositories of institutional memory. Especially when compared to most other government legal offices, OLC is in fact *long* on institutional memory. That memory helps OLC resist the importuning of its clients.

A final factor circles back to OLC's “cultural norms” of “detachment and professional integrity.”¹³³ These are deeply ingrained norms, and OLC's professed commitment to them helps it attract lawyers motivated to uphold them. That said, if so much depends on the professional ethic of OLC's attorneys, mechanisms for motivating them on that dimension deserve special attention. Hence the importance of public disclosure.

ecutive branch, the courts, the Congress, and the public as fair, neutral, and well-reasoned.”). Ackerman acknowledges this point (p. 98), but downplays it when OLC's client is the White House. Yet it is precisely in that potentially more politicized context that the point weighs most heavily.

¹³⁰ See Morrison, *Stare Decisis*, *supra* note 6, at 1462–63 (noting that because a particular client is probably heavily invested in the policy at issue, while reputational costs are shared by all OLC clients, any single client is unlikely to properly “internalize the long-run costs of taxing OLC's integrity,” *id.* at 1462).

¹³¹ Among the almost 1200 publicly available OLC opinions issued between the beginning of the Carter Administration and the end of the first year of the Obama Administration, fewer than six percent explicitly overrule or modify OLC precedent. *Id.* at 1481.

¹³² See *id.* at 1502–03.

¹³³ GOLDSMITH, *supra* note 6, at 37.

C. *The Value of Publicly Disclosing OLC's Work*

There have been numerous calls in recent years for greater public disclosure of OLC's work,¹³⁴ as well as proposed legislation that would mandate it.¹³⁵ Although there are a variety of arguments that can be mounted in favor of such disclosure, here I want to stress two.

The first relates to the fact that OLC's jurisprudence does tend to be protective of executive power. To the extent this protectiveness is a permissible expression of the Madisonian expectation that each branch will defend its institutional prerogatives, its legitimacy depends upon disclosure — especially to Congress. The Madisonian model requires “giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”¹³⁶ As I have explained elsewhere, exercises of executive power that are not disclosed to Congress evade this checking mechanism and thus cannot claim legitimacy on Madisonian terms.¹³⁷ More concretely, the disclosure of OLC opinions upholding assertions of executive power at least gives Congress a chance to resist when it thinks the executive has gone too far.¹³⁸ There are, of course, reasons to doubt Congress's capacity to be an effective check in every case, especially if doing so requires new legislation.¹³⁹ But lesser responses like oversight hearings may be practicable. And in any event, no meaningful legislative checking is possible without disclosure.

The second argument for disclosure is reputational and connects to the discussion of incentives in the previous section. If OLC's independence and credibility depend in substantial part on the integrity of its

¹³⁴ See, e.g., Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 517 (1993) (identifying “the pressing need to publish OLC opinions promptly and to make them widely available”); Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn't Let the Terrorists Win*, 57 U. KAN. L. REV. 579, 580 (2009) (“[I]t is feasible, desirable, and realistic to expect the timely disclosure of most Office of Legal Counsel opinions.”). I have joined in these calls. See Morrison, *Stare Decisis*, *supra* note 6, at 1518–20.

¹³⁵ See OLC Reporting Act of 2008, S. 3501, 110th Cong. § 2 (as reported by S. Comm. on the Judiciary, Sept. 25, 2008). I am among a group of former OLC lawyers (two of whom went on to serve again in OLC during the first eighteen months of the Obama Administration) who have expressed support for the bill. See *Restoring the Rule of Law: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 186 (2008) (joint statement of David J. Barron, Walter E. Dellinger, Dawn E. Johnsen, Neil J. Kinkopf, Martin S. Lederman, Trevor W. Morrison, and Christopher H. Schroeder).

¹³⁶ THE FEDERALIST NO. 51 (James Madison), *supra* note 45, at 319.

¹³⁷ See Morrison, *Stare Decisis*, *supra* note 6, at 1499–1500.

¹³⁸ Cf. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — A Constitutional History*, 121 HARV. L. REV. 941, 1112 (2008) (stressing that “it is incumbent upon legislators to challenge efforts [within the executive branch] to bring about . . . change[s]” that “dramatic[ally] deviat[e]” from the traditional contours of the executive-legislative balance of power).

¹³⁹ See *supra* note 108.

lawyers, public disclosure of their work may be the best way to motivate them to uphold those values. Disclosing OLC's work implicates its lawyers' professional reputations, which in turn encourages them to avoid behavior that would cast them in a bad light. Although the general public is unlikely to pay attention, the key drivers of many OLC lawyers' reputations — Washington lawyers, legal academics, the legal press — are more likely to take notice. If being implicated in an OLC opinion “defending the indefensible” (p. 109) would harm an OLC lawyer's professional standing among those opinionmakers, the best way to discourage such defenses may be publication.¹⁴⁰

OLC does not currently publish all its written opinions, and the need to protect classified information makes full and prompt publication difficult at best. But much of what the office does is not classified. Moreover, its classified work might sometimes be publicly disclosable with redactions, or at least disclosable to the small number of members of Congress who receive briefings on covert government programs. So although there will be areas of OLC's work in which routine disclosure to the general public is infeasible, some greater disclosure than past practice is certainly possible. On that front, recent developments are heartening: unlike its 2005 predecessor, OLC's 2010 Best Practices Memorandum adopts a general presumption in favor of publishing its opinions.¹⁴¹ There is reason to hope, then, that the prospect of disclosure might become an increasingly effective disciplining tool at OLC.

Moreover, even with the obstacles to routine public disclosure of its classified work, OLC's “cultural norms”¹⁴² of independence and professional integrity themselves reflect a general presumption that the office's work will one day be made public. There are not two sets of norms at OLC, one for its unclassified work likely to be made public relatively soon, the other for its classified work likely to remain secret.¹⁴³ Instead, the prospect of disclosure of at least a substantial

¹⁴⁰ Cf. Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 15 (1993) (describing reputation “with the legal professional at large” as a “potentially significant element in the judicial utility function”); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 628–29 (2000) (suggesting Supreme Court Justices, “like the rest of us, . . . seek to conform their behavior to the demands of the relevant esteem-granting (or withholding) or reputation-creating (or damaging) groups,” *id.* at 629).

¹⁴¹ Compare 2010 OLC Best Practices Memorandum, *supra* note 6, at 5 (“[T]he Office operates from the presumption that it should make its significant opinions fully and promptly available to the public.”), with 2005 OLC Best Practices Memorandum, *supra* note 6, at 4 (acknowledging no comparable presumption and stressing instead the importance of “[m]aintaining the confidentiality of OLC opinions”).

¹⁴² GOLDSMITH, *supra* note 6, at 37.

¹⁴³ The *procedures* for OLC's classified and unclassified work do vary, especially in terms of limits on how broadly OLC may solicit views from others within the executive branch on classi-

proportion of OLC's opinions helps instill values that inform all of its work.

D. The Consequences of Disclosure

Ackerman does not think the prospect of disclosure is enough to keep OLC within bounds. Here again, his argument derives substantially from his reaction to the torture memos. His specific target on this point is the Justice Department's investigation into whether the attorneys principally responsible for the memos — Jay Bybee, then the head of OLC (now a federal judge, having been confirmed to his post before the torture memos were made public), and John Yoo, then a deputy at OLC (now returned to the law faculty from which he had been on leave at the time) — had committed professional misconduct. But as I show in this section, Ackerman misreads the results of that investigation and ignores the broader criticisms to which Bybee and Yoo have been subjected.

Ackerman portrays the Justice Department's investigation of the torture memos as “completely exonerat[ing] Bybee and Yoo of all charges of unprofessional conduct” (p. 108). Although he clearly dislikes this outcome, he calls his complaint

institutional, not personal. The department's decision dramatically increases the likelihood of more legal excesses during the next crisis. . . . The next time around, top lawyers at the OLC will look around them to find Jay Bybee sitting as a judge on the federal court of appeals, and John Yoo brazenly insisting, on countless talk shows, that he was right all along. And they will be perfectly aware that [Jack] Goldsmith's resignation¹⁴⁴ did not fundamentally change the path taken by his successors at the Bush OLC.

Given all this, why should they be tempted to resist — let alone resign — in response to some future White House demand for more legal memos defending the indefensible? (p. 109)

There are a number of problems with this account. First, Ackerman's description of the Justice Department's actions is incomplete.

fied matters. But that does not entail any variation in OLC's professional norms of integrity and independence.

¹⁴⁴ Goldsmith succeeded Bybee as the head of OLC. As noted above, *see supra* p. 1718, shortly after taking office in late 2003, Goldsmith reviewed the August 1, 2002 torture memo and a follow-on opinion and concluded they were so badly flawed that they had to be withdrawn. GOLDSMITH, *supra* note 6, at 10, 141–62. He took steps to withdraw them, and he ultimately resigned after less than a year in office in part to ensure that the withdrawal was secure. *Id.* at 161 (explaining that his resignation would make it difficult for the Justice Department or the White House to reverse his decision “without making it seem like I had resigned in protest”). Although the August 2002 memo was indeed withdrawn and replaced with a more modestly phrased opinion in late 2004, during that period and later in the Bush Administration OLC maintained its basic position on the legality of various enhanced interrogation techniques, including “waterboarding.”

After a five-year formal investigation, the Department's Office of Professional Responsibility (OPR) concluded that Bybee and Yoo had each committed "professional misconduct" (Bybee recklessly, Yoo intentionally) in connection with their work on the torture memos.¹⁴⁵ OPR went on to announce that "[p]ursuant to Department policy, we will notify bar counsel in the states in which Yoo and Bybee are licensed."¹⁴⁶ In response to objections lodged by Bybee and Yoo, Associate Deputy Attorney General David Margolis reviewed OPR's report and advised the Attorney General that he did not adopt the professional misconduct findings and would not authorize OPR to refer its findings to state bar authorities.¹⁴⁷ Thus, the Department made no referral.¹⁴⁸

It is overstatement, however, to say that Margolis issued a "final judgment" that "completely exonerated Bybee and Yoo of all charges of unprofessional conduct" (p. 108). As Margolis explained, with the public release of both his and OPR's reports, "the number of flaws [in the opinions] and the significance of them can be debated. The bar associations in the District of Columbia or Pennsylvania can choose to take up this matter, [even though] the Department will make no referral."¹⁴⁹ In other words, Margolis did not purport to provide any final, preclusive resolution of the misconduct question.

More broadly, Margolis was hardly complimentary of Bybee and Yoo's work on these opinions. While calling the misconduct issue "a close question"¹⁵⁰ that just tilted in their favor, he nevertheless concluded that the opinions reflected "poor judgment,"¹⁵¹ contained "significant flaws," and represented "an unfortunate chapter in the history of the Office of Legal Counsel."¹⁵² He singled Yoo out for specific criticism, suggesting that "Yoo's loyalty to his own ideology and convictions clouded his view of his obligation to his client and led him to author opinions that reflected his own extreme, albeit sincerely held, views of executive power while speaking for an institutional client."¹⁵³

¹⁴⁵ OPR REPORT, *supra* note 4, at 11.

¹⁴⁶ *Id.* at 11 n.10.

¹⁴⁷ 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) [hereinafter Margolis Memorandum], available at <http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf>.

¹⁴⁸ *See id.* at 67.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 68.

¹⁵² *Id.* at 67.

¹⁵³ *Id.*

Given these flaws, Margolis emphasized that his decision “should not be viewed as an endorsement of the legal work that underlies those memoranda.”¹⁵⁴ In fact, he found that Bybee and Yoo had acted “[i]n contradiction of th[e] high standard” that the Justice Department “reasonably expects of its attorneys.”¹⁵⁵

Second, beyond the OPR and Margolis reports, Ackerman appears to believe Bybee and Yoo have suffered no real adverse consequences for their work on the torture memos. That is the key to his argument that future OLC lawyers will not even be “tempted to resist . . . in response to some future White House demand for more legal memos defending the indefensible” (p. 109). It is a difficult argument to credit. Long before OPR and Margolis had issued their reports, the torture memos and their authors had been the targets of widespread condemnation. As Professor Bradley Wendel observed, by 2005 “[t]he overwhelming response by experts in criminal, international, constitutional, and military law was that the legal analysis in the [torture memos] was so faulty that the lawyers’ advice was incompetent.”¹⁵⁶ Leading lawyers within the Bush Administration publicly derided the memos as “sophomoric,”¹⁵⁷ “deeply flawed,” “sloppily reasoned, overbroad, and incautious,”¹⁵⁸ and a “slovenly mistake.”¹⁵⁹ Commentators outside the government were even more critical.¹⁶⁰ Today, Yoo in particular is “a virtual pariah in legal academia.”¹⁶¹

These condemnations have been accompanied by a range of actual and threatened proceedings in this country and abroad. Yoo has been sued by Jose Padilla for providing legal advice leading to Padilla’s al-

¹⁵⁴ *Id.* at 2.

¹⁵⁵ *Id.* at 68 (“OPR’s analysis in this case depends on an analytical standard that reflects the Department’s high expectation of its OLC attorneys rather than the somewhat lower standards imposed by applicable Rules of Professional Conduct.”). It is a separate question whether Margolis was right about the extent of the difference between the Department’s expectations as a matter of best practice and the profession’s standards of misconduct. Some have argued he overstated the appropriate distance between those standards. See, e.g., Spaulding, *supra* note 6, at 444.

¹⁵⁶ Wendel, *supra* note 6, at 68.

¹⁵⁷ Eric Lichtblau, *Justice Nominee Is Questioned on Department Torture Policy*, N.Y. TIMES, July 27, 2005, at A18 (quoting Timothy E. Flanigan, who had been Deputy White House Counsel when these memos were issued, in a hearing before the Senate Judiciary Committee).

¹⁵⁸ GOLDSMITH, *supra* note 6, at 10.

¹⁵⁹ OPR Report, *supra* note 4, at 9 (quoting then–Attorney General Michael Mukasey).

¹⁶⁰ See *Confirmation Hearing on the Nomination of Alberto R. Gonzales to Be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 158 (2005) (statement of Harold Hongju Koh) (“[I]n my professional opinion . . . the [torture] memorandum is perhaps the most clearly legally erroneous opinion I have ever heard.”); Adam Liptak, *Legal Scholars Criticize Memos on Torture*, N.Y. TIMES, June 25, 2004, at A14 (quoting Cass Sunstein as remarking that the memo was “egregiously bad” and “very low level . . . very weak, embarrassingly weak, just short of reckless”).

¹⁶¹ 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>.

leged unlawful detention and mistreatment.¹⁶² Yoo and Bybee are the targets of a criminal action in Spain.¹⁶³ Leading members of Congress have called at various points for a commission of inquiry.¹⁶⁴ The National Lawyers Guild and others have mounted a public campaign to get Yoo fired from his law faculty position.¹⁶⁵ And of course Ackerman and others have called for Bybee's impeachment.¹⁶⁶

There may turn out to be no final judgments against Yoo and Bybee in any of these domains. If so, Ackerman and others will undoubtedly feel there has been an inadequate accounting. But my point is not to argue about what Yoo and Bybee deserve. Instead, it is to say that when assessing the deterrent value of their experience for future OLC lawyers, one must look far beyond the Margolis report. Surveying the full sweep of the fallout from the torture memos, one might well conclude that their most lasting legacy is a dramatic increase in the level of congressional, journalistic, scholarly, and even general public interest in and attention to the work of OLC. The office is now exposed to a level of scrutiny not seen before 9/11, which by itself surely has a constraining effect.

Suppose, then, that a future OLC lawyer were feeling pressure from the White House to issue an opinion "defending the indefensible" (p. 109). What message should she take from the experience of the torture memo authors? Rationally, she should anticipate that the opinion could one day be made public even if it is classified when first issued; that it will be almost universally condemned by leaders in the legal community, including her own colleagues in the Justice Department and White House; that she will be treated as a pariah by the profession; that she could be the subject of a multiyear professional misconduct investigation endangering her bar license; that she could face civil suits, congressional subpoenas, and calls for her firing or impeachment; and that she might face criminal prosecution. Would none of this provide any reason even to "resist" (p. 109) the White House's demands?

Of course, there remains the possibility that OLC could issue an opinion that Ackerman or others deem "indefensible" (p. 109) but that

¹⁶² See *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1039 (N.D. Cal. 2009) (granting in part and denying in part Yoo's motion to dismiss).

¹⁶³ See Julian Borger & Dale Fuchs, *Spanish Judge Accuses Six Top Bush Officials of Torture*, THE OBSERVER (London), Mar. 29, 2009, at 39.

¹⁶⁴ See, e.g., Mark Mazzetti & Scott Shane, *Memos Spell Out Brutal C.I.A. Mode of Interrogation*, N.Y. TIMES, Apr. 17, 2009, at A1 (noting call by Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, for an "independent commission of inquiry").

¹⁶⁵ See Christopher Edley, Jr., *The Torture Memos and Academic Freedom*, UC BERKELEY SCH. OF L. (Apr. 10, 2008), <http://www.law.berkeley.edu/news/2008/edley041008.html> (resisting such calls).

¹⁶⁶ See Bruce Ackerman, *Impeach Jay Bybee*, SLATE (Jan. 13, 2009, 4:30 PM), <http://slate.com/id/2208517/>.

the author of the opinion thinks is entirely correct. That would not be a case of institutional pressures overcoming OLC's best view of the law; it would be a case of substantive disagreement about the best view of the law. In John Yoo's case, for example, the conclusions reached in the torture memos appear broadly consistent with positions he has staked out in his own academic writing.¹⁶⁷ Thus, I see little basis for concluding that those memos were simply a result of institutional pressure. To be sure, the fact that a particular position is consistent with an OLC lawyer's personal views does not justify adopting that position in an OLC opinion. As I have argued elsewhere,

[w]hen a legal scholar or anyone else takes up an official position within OLC, he assumes the responsibility of providing legal advice consistent with the norms and standards of that office. It is a non sequitur to defend that advice on the ground that it is consistent with views expressed by the official in his personal capacity.¹⁶⁸

Thus, any agreement between Yoo's own scholarship and the torture memos is not sufficient to justify the memos as OLC work product. Yet it does underscore the possibility that OLC can issue extreme opinions not as a result of institutional pressure or bad faith, but simply because of the views of the attorneys there at the time. That, however, is a risk faced by any institutional arrangement dependent on human judgment, including Ackerman's proposal for a Supreme Executive Tribunal (discussed below in Part IV). If the Tribunal had been established ten years ago, John Yoo might be sitting on it today.

* * *

Ultimately, much of Ackerman's critique of OLC seems bound up in anger at the torture memos and frustration that the lawyers responsible have not faced greater punishment. Those reactions are understandable, and it is not my purpose to question them. But as a basis for broader institutional analysis, they have led Ackerman astray.

As I have described, OLC's well-established institutional culture prizes the independence and professional integrity of its work. OLC also has real, practical incentives to honor those norms, and the evidence shows it is capable of doing so. Yet OLC is not perfect. In extreme cases it can succumb to the pressure to support high-priority White House or other administration programs. This risk may be especially acute with classified matters where those involved truly do believe (whether or not correctly) that neither the program nor OLC's advice will ever be made public. The prospect of abuses (or at least

¹⁶⁷ See generally Mortenson, *supra* note 6 (discussing Yoo's recent academic work as well as some of the opinions he wrote in OLC).

¹⁶⁸ Morrison, *Stare Decisis*, *supra* note 6, at 1505 n.220.

excesses) underscores the importance of greater disclosure of OLC's work, either to the full public or at least to a limited congressional audience on classified matters. Other oversight mechanisms may also be worth contemplating. Instead of exploring these possibilities, however, Ackerman simply translates the potential for abuse at OLC into a routine inevitability. OLC's long-term record does not justify that leap.

III. THE WHITE HOUSE COUNSEL'S OFFICE

After discussing OLC, Ackerman moves to the other major player in his account of executive branch constitutionalism — the Office of Counsel to the President, otherwise known as the White House Counsel's Office. There, things are much worse: "If only by comparison, the OLC is an oasis of legalism" (p. 101). Ackerman depicts White House lawyers as "superloyalists" (p. 12) and contends that even the most honorable of them face "an overwhelming incentive to tell [the President] that the law allows [him] to do whatever [he] want[s] to do" (p. 176). Ackerman is surely right that politics suffuses much of the work of this office. But as I show in this Part, his account is both dramatically incorrect in its factual claims and incomplete in its consideration of institutional incentives.

A. Background

The White House Counsel's Office owes its roots to President Franklin Delano Roosevelt's designation of Sam Rosenman to be Special Counsel to the President.¹⁶⁹ Rosenman operated largely as a political advisor to Roosevelt, and had no real staff of his own. Later Counsels added legal staffs, but as Ackerman notes, the office remained a relatively small operation even through the Carter administration (p. 112). Ackerman plausibly asserts that it was Carter's last Counsel, Lloyd Cutler, who helped "g[i]ve the office a new prominence" and "established [it] as an elite operation at the center of power" (p. 112). Over the course of subsequent administrations, the office also increased in size. Its precise numbers have fluctuated considerably over the last two decades, typically swelling during periods of divided government when congressional investigations of the White House are most likely. During the Clinton and second Bush Administrations the office grew to between thirty and forty lawyers (pp. 112, 236–37 n.76). Today that number is about twenty-five (p. 99).

In recent administrations the Counsel's Office has had a broad range of responsibilities, with some variation from administration to administration and even Counsel to Counsel. In general terms, the of-

¹⁶⁹ See generally SAMUEL I. ROSENMAN, WORKING WITH ROOSEVELT (1952).

office's principal "mandate is to be watchful for and attentive to legal issues that may arise in policy and political contexts involving the president."¹⁷⁰ More specifically, its responsibilities typically include overseeing the process for various executive and judicial nominations; advising White House staffers on conflicts of interest and other ethical issues; handling routine legal issues relating to the operation of White House facilities; managing White House contacts with the Justice Department; monitoring interagency decisionmaking processes on issues of special significance to the White House; participating in negotiations with Congress to advance the administration's legislative agenda; and advising the President on the exercise of his authorities and prerogatives.¹⁷¹ This last task could include advice relating to the signing of executive orders, the assertion of executive privilege, or potentially the basic legality of some presidentially favored course of action. The Counsel's Office typically is not the only legal office working on such matters; OLC and other offices will also often be involved.

B. End-Running OLC: The (Lack of) Evidence

Ackerman's main concern is with the White House Counsel's involvement in matters of presidential power. I have already discussed his worry that the White House is liable to inflict undue pressure on OLC in its work.¹⁷² Here I address his distinct claim that the Counsel's Office threatens to *displace* OLC as the source of authoritative legal advice within the executive branch, inserting itself as a more congenial (to power-hungry Presidents) source of advice. Call it end-running OLC.

In order to assess claims of end-running, we need some sense of the kinds of matters that should go to OLC. Ackerman in places seems to suggest (though he never quite says explicitly) that all legal questions arising within the White House should be submitted to the Justice Department (p. 110). But that is unworkable. Like every general counsel's office, the White House Counsel's Office faces far more legal questions every day than can practicably be referred to OLC specifically or to the Justice Department in general. Many of those questions are routine, needing no outside input. The key question for the end-run claim, then, is not whether the White House relies exclusively on the Counsel's Office to answer *any* legal questions, but whether it does so on *the kinds of questions that should ordinarily go to OLC*. Abstract definitions are difficult here, but in general I think those ques-

¹⁷⁰ Maryanne Borrelli et al., *The White House Counsel's Office*, in *THE WHITE HOUSE WORLD: TRANSITIONS, ORGANIZATION, AND OFFICE OPERATIONS* 193, 193 (Martha Joynt Kumar & Terry Sullivan eds., 2003).

¹⁷¹ *Id.* at 195–207.

¹⁷² See Part II, pp. 1701–31.

tions cover (1) legal issues that OLC has a history of addressing and on which it therefore has an accumulated jurisprudence and expertise; (2) significant issues of executive power; and (3) programs or policies likely to trigger substantial public attention and/or controversy.¹⁷³ On these issues, any attempt by the White House to proceed only on the advice of the Counsel's Office would invite serious questions. In fact, that principle may be the most succinct definition of the matters that should be put to OLC: the White House should seek OLC's advice on an issue if it would face serious criticism (from Congress, the press, or the interested public) for failing to do so.

With that standard in mind, we can address Ackerman's end-run claims. He relies in part on the sheer size of the Counsel's Office today. "[W]ith twenty-five [attorneys] serving as full-time legal advisors," Ackerman suggests, the Counsel's Office "doesn't need to rely on the OLC for an opinion on high-priority issues. It can write one in the White House" (p. 99).¹⁷⁴ This mistakes the office's capacity. As noted above, the Counsel's Office has a broad range of responsibilities, many of which have nothing to do with the sort of legal advice OLC provides. The lawyers who attend to those responsibilities — including judicial nominations, ethics advising, congressional negotiations, and day-to-day White House operations — are not displacing OLC from its legal advisory function.¹⁷⁵ It is simply not the case that all or even most of the attorneys in the White House Counsel's Office are regularly engaged in the sort of work that is appropriate for OLC. Indeed, given the press of all that other business, the office's actual capacity to provide OLC-style written opinions is exceedingly limited.¹⁷⁶

¹⁷³ This categorization accords with the position taken by the OLC Guidelines, which state that OLC should be consulted "on all major executive branch initiatives and activities that raise significant legal questions." OLC Guidelines, *supra* note 6, at 1610.

¹⁷⁴ In places, Ackerman says the Counsel's Office under President Obama has contained as many as forty lawyers (p. 99). But as he correctly acknowledges in a footnote, this number is misleading because it includes lawyers hired for the specific, time-limited purpose of vetting candidates for the many executive offices that need to be filled at the beginning of an administration (p. 230 n.40).

¹⁷⁵ OLC does not play a central role in judicial nominations today, though it has in the past. See CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR 213–24 (2007) (describing the role of Michael Luttig, then head of OLC, on Justice Thomas's confirmation team). But even when OLC did handle such matters, its work in that area stood apart from its legal advisory work. Today, the Justice Department office most likely to be involved in judicial nominations is the distinct Office of Legal Policy (OLP). See DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, *About the Office*, <http://www.justice.gov/olp/about-us.html> (last updated Dec. 2010) (noting OLP "oversees the Department's process for vetting, interviewing, evaluating and seeking confirmation of the nation's judiciary, in close consultation with the White House Counsel").

¹⁷⁶ Moreover, if the number of lawyers employed by OLC's clients were a measure of the clients' propensity to usurp OLC's interpretive authority, the White House Counsel's Office would rank far down the list. For example, the Department of Health and Human Services' Office of General Counsel (OGC) contains "over 400 attorneys." U.S. DEP'T OF HEALTH &

But Ackerman's point is not principally about the numbers. To the extent the Counsel's Office has *any* capacity to provide OLC-style advice (and it surely has some), Ackerman contends it is liable to use that capacity to undermine OLC's role. He is not the first to forecast a shift of this sort,¹⁷⁷ but he provocatively claims it is already happening — and has been for years:

If its informal conversations with the OLC suggest a serious disagreement, the White House Counsel can simply refuse to ask the OLC for a formal opinion on the matter. After cutting the Justice Department out of the loop, the White House Counsel can provide the president with his own staff's legal opinion as the basis for moving forward. . . . An OLC opinion helps legitimate the president's [policy] — but only, of course, if it approves it. And if the WHC has reason to expect a no, it's better for the White House lawyers to write up their own legal memo telling the president yes. This has happened often over recent decades, without anybody considering it improper. (pp. 99–100)

The result, Ackerman says, is that OLC's "claim to legal authority is already visibly declining" (p. 114).

This is a massive claim. Were Ackerman right about it, there would indeed be real cause for concern that the established patterns of

HUMAN SERVS., *Office of the Gen. Counsel (OGC)*, <http://www.hhs.gov/ogc/> (last visited Mar. 26, 2011). The Interior Department's Office of the Solicitor contains "more than three hundred attorneys." U.S. DEP'T OF THE INTERIOR, OFFICE OF THE SOLICITOR, *About the Office of the Solicitor*, <http://www.doi.gov/solicitor/about.html> (last updated Nov. 2, 2006). The Treasury Department's OGC contains about thirty principal attorneys and a number of other staff-level lawyers, and "[t]he General Counsel also is the head of the Treasury Legal Division, a separate bureau within the Department that is composed of . . . approximately 2,000 attorneys and 1,500 support staff . . ." U.S. DEP'T OF THE TREASURY, *About*, <http://www.treasury.gov/about/organizational-structure/offices/Pages/General-Counsel.aspx> (last updated Dec. 10, 2010). And the Defense Department's OGC directly employs about 100 attorneys, but the Department "as a whole has over 10,000 full-time and part-time civilian and military attorneys." U.S. DEP'T OF DEF., OFFICE OF THE GEN. COUNSEL, *Office of the Sec'y of Def. Honors Legal Internship Program*, <http://www.dod.gov/dodgc/contact.html> (last visited Mar. 26, 2011). Similarly, if one were principally concerned with an office's growth in recent decades, the White House Counsel's Office would not be the first place to look. The State Department's Office of Legal Adviser contained around sixty attorneys in the early 1960s. Richard Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633, 636 (1962). Today it has about 175 attorneys. U.S. DEP'T OF STATE, OFFICE OF THE LEGAL ADVISER, *Practicing Law in the Office of the Legal Adviser*, <http://www.state.gov/s/l/3190.htm> (last updated July 30, 2010). And the CIA went from a single General Counsel and two Assistant General Counsels in the late 1940s to an OGC of about 100 attorneys today. CENT. INTELLIGENCE AGENCY, GEN. COUNSEL, *History of the Office*, <https://www.cia.gov/offices-of-cia/general-counsel/agency.page.2007-03-26.1987163356.html> (last updated June 16, 2010). All of which is to say that many of OLC's clients are large operations with substantial legal staffs. That fact tells us something about the complexity of the modern executive branch, but virtually nothing about OLC's exposure to end-running.

¹⁷⁷ See Borrelli et al., *supra* note 170, at 205 (quoting President Reagan's Counsel, Peter Wallison, as stating that "eventually [the White House Counsel's Office will] freeze out completely the Office of Legal Counsel").

executive branch legal interpretation are unraveling. But he is not right. In fact, his own evidence shows the claim to be patently false.

1. *Past Administrations.* — Ackerman cites four episodes from past presidential administrations to support his claim. The first is from the Carter Administration: “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 mission” (p. 230 n.41). That assertion appears to be literally true: President Carter himself apparently went only to Cutler for legal advice on this issue. But here is how Cutler describes the episode:

I got called in four days before the rescue mission, to give an opinion as to whether the rescue mission was covered by the War Powers Resolution, and obliged us to consult Congress. . . . We knew if [we] went and told [House Speaker] Tip O’Neill, he would have told somebody else before the day was out, and we needed the advantage of surprise. I was told I couldn’t even talk to the Attorney General about it; I had to do it by myself. But I persuaded President Carter that I needed to talk to the Attorney General. He couldn’t do it without involving the Attorney General. And we gave the opinion and the rescue mission was launched.¹⁷⁸

This was not a case of the White House “cutting the Justice Department out of the loop” (p. 99). To the contrary, it reflects the Counsel’s view that, even on a matter of grave importance and sensitivity, it was imperative to involve the Justice Department and not simply rely on his own legal analysis. True, Cutler went to the Attorney General and not OLC, but that is not necessarily inappropriate. As noted above, OLC’s legal advisory function is vested by statute in the Attorney General and then delegated to OLC by regulation.¹⁷⁹ It is not a complete delegation however, and the Attorney General retains (though only rarely exercises) the authority to issue legal opinions under his own name.¹⁸⁰ Were he to begin regularly issuing opinions on questions that would ordinarily go to OLC, it could tend to undermine OLC’s standing within the executive branch. But that has not happened as a general matter, and there is no reason to read this particular episode that way.¹⁸¹ Instead, Cutler’s insistence on involving the

¹⁷⁸ Interview by Martha Kumar and Nancy Kassop with Lloyd Cutler 7 (July 8, 1999) [hereinafter Cutler Interview] (alterations in original), available at <http://www.archives.gov/presidential-libraries/research/transition-interviews/pdf/cutler.pdf> (conducted for the White House Interview Program). This interview is the only source Ackerman cites to support his description of the episode (p. 230 n.41), but he does not acknowledge what Cutler actually says in the interview.

¹⁷⁹ See *supra* p. 1709.

¹⁸⁰ See H. JEFFERSON POWELL, *THE CONSTITUTION AND THE ATTORNEYS GENERAL*, at xv & n.2 (1999).

¹⁸¹ In fact, two months before the rescue attempt, OLC issued an opinion to the Attorney General addressing various aspects of the President’s power to use military force without statutory authorization, including in the context of “a military expedition to rescue the hostages or to retal-

Attorney General underscores that on serious matters of this sort, the President needs the Justice Department.¹⁸²

Ackerman's second example is no better for him. During the George H.W. Bush Administration, Ackerman states, the Counsel's Office "refused to ask the OLC for an opinion concerning the line-item veto of appropriations measures because it disagreed with the likely result" (p. 230 n.41). Once again, this statement is at least partly true: the White House during that administration did not seek OLC's opinion on the line-item veto question. Yet once again, the full story cuts directly against Ackerman's argument. He omits, for example, that OLC had already opined on the line-item veto issue during the Reagan Administration, concluding the President does not have the authority to veto portions of a bill while signing the rest into law.¹⁸³ To be sure, that opinion did not quell the clamor for line-item veto authority during the Bush Administration.¹⁸⁴ But OLC and other lawyers in the Justice Department stood their ground. Indeed, in late 1991, President Bush's nominee for Attorney General, William Barr (who had earlier been head of OLC), testified to the Senate Judiciary Committee that he deemed the line-item veto to be beyond the President's powers.¹⁸⁵ Thus, it was clear what OLC's — and, more broadly, the Justice Department's — position was on the issue. That explains why the White

iate against Iran if the hostages are harmed." Memorandum from Theodore B. Olson, Assistant Att'y Gen., Office of Legal Counsel, to the Att'y Gen., Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. Off. Legal Counsel 185, 185 (Feb. 12, 1980). The opinion contains a lengthy section on the War Powers Resolution, including the scope of its congressional consultation and reporting requirements. *See id.* at 190–96. When Cutler and the Attorney General consulted shortly before the rescue mission was launched, it appears they addressed a question not resolved in the OLC opinion — namely, whether it was necessary to consult with Congress *before* that particular mission was launched. Still, the fact that OLC's legal advice had been sought on some general questions in this area (and that its conclusions were not later rejected by Cutler and the Attorney General) confirms the importance of its role even in this episode.

¹⁸² Moreover, in that same interview Cutler went out of his way to say that OLC, not the Counsel's Office, is "where the president has to go or the president's counsel has to go to get an opinion on whether something may properly be done or not." Cutler Interview, *supra* note 178, at 3.

¹⁸³ Memorandum from Charles J. Cooper, Assistant Att'y Gen., Office of Legal Counsel, to the Att'y Gen., The President's Veto Power, 12 Op. Off. Legal Counsel 128 (July 8, 1988).

¹⁸⁴ *See* J. Gregory Sidak & Thomas A. Smith, *Why Did President Bush Repudiate the "Inherent" Line-Item Veto?*, 9 J.L. & POL. 39, 40–47 (1992) (recounting the chronology of the debate over the line-item veto between 1987 and 1992).

¹⁸⁵ Barr testified:

I think the President should have a line-item veto. But I looked at that issue and I looked at it hard and spent a lot of time having people research it. In fact, we went back to ancient English and Scottish constitutions and precedents and so forth. I found no basis for an inherent line-item veto in the Constitution.

Confirmation Hearings on Federal Appointments — William P. Barr: Hearings Before the S. Comm. on the Judiciary (pt. 2), 102d Cong. 144 (1991).

House did not request another opinion from OLC: it already had OLC's answer.¹⁸⁶

Critically, the Bush White House did not respond to OLC's negative answer by obtaining a favorable opinion from the Counsel's Office and pressing forward on that basis. Instead, it adhered to OLC's position. Indeed, in March 1992 President Bush publicly conceded that he lacked line-item veto authority:

Some argue that the President already has . . . the line-item veto authority, but our able Attorney General, in whom I have full confidence, and my trusted White House Counsel, backed up by legal opinions from most of the legal scholars, feel that I do not have that line-item veto authority. And this opinion was shared by the Attorney General in the previous administration.¹⁸⁷

Far from an example of the White House's "cutting the Justice Department out of the loop" (p. 99), this was precisely the opposite: OLC and the Attorney General said no, and the White House complied.

Ackerman cites an episode from the last administration that also turns out to undermine his argument. Immediately after asserting that OLC's "claim to legal authority is already visibly declining," he states: "For all the notoriety of the 'torture' memos, it was White House Counsel Alberto Gonzales — not Jay Bybee or John Yoo at the OLC — who advised the president that the Geneva Conventions were 'quaint' remnants of the past that did not apply to the war on terror" (p. 114). Ackerman misunderstands this episode. It is true that, in a memorandum to the President on the question of the Third Geneva Convention's applicability to the armed conflict with al Qaeda and the Taliban, Gonzales expressed the view that the nature of that armed conflict "renders quaint some of [the Geneva Convention's] provisions."¹⁸⁸ But whatever one thinks about the merits of that issue, the memorandum did not in fact entail any kind of end-run around OLC.

As Gonzales explained in his memorandum, OLC had recently issued a formal written opinion concluding that the Third Geneva Con-

¹⁸⁶ Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, LAW & CONTEMP. PROBS., Autumn 1993, at 63, 88 (explaining that "the Bush Administration did not seek guidance from OLC on whether . . . the White House could assert a line-item veto" because "[l]awyers in the White House Counsel's Office had already determined that the chances of a favorable ruling from OLC were too unlikely").

¹⁸⁷ Address to the Republican Members of Congress and Presidential Appointees, 28 WEEKLY COMP. PRES. DOC. 510, 512 (Mar. 20, 1992); see Sidak & Smith, *supra* note 184, at 46 (discussing President Bush's concession).

¹⁸⁸ Memorandum from Alberto R. Gonzales, Counsel to the President, to the President, Re: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002) [hereinafter Gonzales Memo], in THE TORTURE PAPERS, *supra* note 32, at 118.

vention did not protect members of al Qaeda or the Taliban.¹⁸⁹ On the basis of that opinion, the President “decided that [the Third Geneva Convention] does not apply and, accordingly, that al Qaeda and Taliban detainees are not prisoners of war under the [Convention].”¹⁹⁰ The Secretary of State subsequently asked the President to reconsider that determination, and that request was the occasion for Gonzales’s memorandum.¹⁹¹ In it, Gonzales went out of his way to stress that “OLC’s interpretation of this legal issue is definitive.”¹⁹² Of course, OLC’s power to issue binding, definitive legal opinions has always been subject to the proviso that OLC may be overruled by the President.¹⁹³ Thus, the State Department’s request for presidential reconsideration was not itself an attack on OLC’s authority. Neither was the Gonzales memorandum. The memorandum did not purport to make any authoritative determinations itself. Instead, it advised the President of the state of play on the issue, weighed the costs and benefits of extending Geneva Convention protections to al Qaeda and the Taliban, and recommended that the President adhere to his initial position, which was consistent with the earlier OLC opinion. It was, in short, a briefing memorandum, not an attempt to assert any interpretive power of its own. Indeed, on the question of authority, Gonzales expressly

¹⁸⁹ *Id.* The OLC opinion in question is Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep’t of Def., Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), in *THE TORTURE PAPERS*, *supra* note 32, at 81. Interestingly, Gonzales states in his memorandum that he advised the President of OLC’s conclusions on January 18, four days before this opinion was signed. It appears Gonzales was basing his earlier advice to the President upon a January 9, 2002, draft OLC memorandum captioned as coming from Yoo and another OLC lawyer. See Memorandum from John Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep’t of Def., Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), in *THE TORTURE PAPERS*, *supra* note 32, at 38. This point perhaps reveals Gonzales’s view about who was functionally in charge at OLC during this period, but it does not undermine the point that Gonzales was relying here on legal conclusions reached by OLC, not proffering his own.

¹⁹⁰ Gonzales Memo, *supra* note 188, at 118.

¹⁹¹ *Id.*

¹⁹² *Id.* at 119. In saying this, Gonzales’s purpose was apparently to establish OLC as more authoritative on the issue than the Legal Adviser to the State Department, who took a different view. See *id.* Whatever the merits of that contention, the point here is simply that Gonzales’s memo does not undermine, but rather reinforces, OLC’s legal interpretive authority. Cf. Memorandum from Colin L. Powell, Sec’y of State, to Counsel to the President, Re: Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan, in *THE TORTURE PAPERS*, *supra* note 32, at 122, 124 (commenting on draft of Gonzales Memo and recommending that it “note that the OLC interpretation does not preclude the President from reaching a different conclusion,” and that “OLC views are not definitive on the factual questions which are central to its legal conclusions”).

¹⁹³ See *supra* p. 1711.

reaffirmed that OLC is the source of definitive legal analysis within the executive branch.

Ackerman's only other example from past administrations comes from the first months of the Clinton Administration: "White House Counsel Bernard Nussbaum did not consult OLC when he advised the president that Hillary Clinton could participate in secret strategy sessions on health care legislation without violating the Federal Advisory Committee Act" (p. 230 n.41). Relatedly, at about the same time the Counsel's Office also determined — without consulting OLC — that then-First Lady Clinton was not subject to conflict-of-interest rules applicable to government officials.¹⁹⁴ On these matters the Counsel does appear to have asserted legal interpretive authority that one might ordinarily expect to be exercised by OLC.¹⁹⁵

Granting that these are examples of the phenomenon Ackerman is worried about, they appear to say more about the state of the White House and the Justice Department at that particular point in time than about any general trend across administrations. When the issues relating to the First Lady's legal status first arose, the Clinton Administration "did not have its own appointees in place at OLC (or even in the Attorney General's Office)."¹⁹⁶ Thus, officials in the White House may have felt a need (whether or not justified as a matter of principle) to keep a closer hold on the issues. Moreover, the Counsel's Office in the first year of the Clinton Administration was a troubled place, marked most tragically by the suicide of Deputy Counsel Vincent Foster. By August of that year the *New York Times* was calling for Nussbaum's resignation.¹⁹⁷ Such controversy is not typical of the Office, so generalizing from this period is problematic.¹⁹⁸ And in any event, this one example cannot possibly establish that the White House Counsel has "often" (p. 100) usurped OLC's role in the manner Ackerman suggests.

2. *The Obama Administration.* — Having made his claim about past administrations, Ackerman then asserts that a more thorough power shift is now afoot: "During the early Obama years, the White House Counsel's pretensions expanded further. He not only provided

¹⁹⁴ Rabkin, *supra* note 186, at 94; see also William Safire, *Weighing on Foster's Mind*, N.Y. TIMES, Aug. 16, 1993, at A17 (quoting Nussbaum as saying that "[t]he [conflict-of-interest] matter was not discussed with the Office of Legal Counsel").

¹⁹⁵ See Rabkin, *supra* note 186, at 93 (noting that Nussbaum "issued a legal memorandum, under his own name, arguing that Mrs. Rodham Clinton was the equivalent of a government official and her meetings with other government officials in the [health care] task force could remain closed to the public under the FACA exemption for meetings limited to government officials and employees").

¹⁹⁶ *Id.* at 94.

¹⁹⁷ *Id.* at 63 (citing *The Clues Left by Vincent Foster*, N.Y. TIMES, Aug. 12, 1993, at A24).

¹⁹⁸ See *id.* at 94 ("The Clinton White House may have been irregular in this respect.").

the president with confidential advice. He also began to defend the president in public, challenging the OLC's traditional role as the leading legal spokesman for the president" (p. 114). Ackerman cites only one piece of evidence for this — an October 2009 letter from White House Counsel Gregory Craig to Senator Russell Feingold, responding to a letter from Senator Feingold raising questions about the number of policy "czars" in the White House (p. 238 n.89).¹⁹⁹ As with Ackerman's examples from prior administrations, there are serious flaws in his claims about this letter.

To start, there is nothing novel or untoward about the White House Counsel "defend[ing] the president in public" (p. 114). Communication between the Counsel's Office and Congress has long been "a daily fact of life."²⁰⁰ Members of Congress regularly write to the Counsel to discuss various legal or policy issues, and the Counsel frequently responds.²⁰¹ Precisely the opposite is true of OLC, which provides legal advice within the executive branch but rarely corresponds directly with Congress. There has never been a time when the head of OLC would have been the natural signatory to a letter like the one Craig wrote to Feingold. So the mere existence of the Craig letter is entirely unremarkable and unproblematic.

Then there is the content of the letter. Far from advancing its own comprehensive analysis of the core legal issue — whether various White House czar positions require Senate confirmation under the Appointments Clause — it explicitly relies on a 2007 OLC opinion entitled "Officers of the United States Within the Meaning of the

¹⁹⁹ See Letter from Gregory B. Craig, Counsel to the President, to U.S. Sen. Russell D. Feingold (Oct. 5, 2009), available at <http://theplumline.whorun.gov/wp-content/uploads/2009/10/feingoldletter.pdf> [hereinafter Craig Letter]. I should reiterate that I served in the White House Counsel's Office when this letter was written. I did not, however, have any involvement in the matter.

²⁰⁰ See Borrelli et al., *supra* note 170, at 200.

²⁰¹ See, e.g., Letter from Darrell Issa, Ranking Member, House Comm. on Oversight & Gov't Reform, to Robert Bauer, Counsel to the President (Mar. 10, 2010), available at <http://republicans.oversight.house.gov/images/stories/Letters/3-10-10%20dei%20letter%20to%20owh%20counsel.pdf> (raising questions about reports that the White House had offered Representative Joe Sestak a job in exchange for withdrawing from the Pennsylvania Democratic primary for U.S. Senate); Memorandum from Robert F. Bauer, Counsel to the President, Re: Review of Discussions Relating to Congressman Sestak (May 28, 2010), available at <http://www.whitehouse.gov/the-press-office/memorandum-white-house-counsel-regarding-review-discussions-relating-congressman-se> ("We have concluded that allegations of improper conduct [relating to Representative Sestak] rest on factual errors and lack a basis in the law."); Letter from Patrick Leahy, Chairman, Senate Comm. on the Judiciary, and Arlen Specter, Ranking Member, Senate Comm. on the Judiciary, to Fred F. Fielding, Counsel to the President (Mar. 13, 2007) (on file with the Harvard Law School Library) (requesting "documents and materials from the White House that are relevant to the recent decisions to dismiss several Senate-confirmed United States Attorneys"); Letter from Fred F. Fielding, Counsel to the President, to Patrick Leahy, Chairman, Senate Comm. on the Judiciary, et al. (Mar. 20, 2007) (on file with the Harvard Law School Library) (responding to the congressional document request regarding the dismissal of several United States Attorneys).

Appointments Clause.”²⁰² The Craig letter treats that opinion as articulating the governing legal rule, which the letter simply repeats. Moreover, it appears that lawyers from the Counsel’s Office checked with OLC before sending the letter, to make sure they understood and were correctly applying the opinion.²⁰³ This is not a story of OLC’s role being undermined.

C. *Disincentives to End-Running OLC*

The evidence aside, one might still think Ackerman has identified a substantial risk, even if not yet a reality, that the White House Counsel will displace OLC in its legal advisory role. His basic argument on this point is straightforward: although OLC’s legal approval can be valuable to the White House, in cases where OLC appears likely to say no it is better not to ask, and to rely instead on the Counsel’s Office “to write up [its] own legal memo telling the president yes” (p. 100). Here I want to consider certain incentives tending toward and against this practice.

Undoubtedly, the very existence of a Counsel’s Office presents *some* risk of this sort. Unlike OLC, the Counsel’s Office does not have a decades-long practice (inherited from an even longer tradition among Attorneys General) of providing formal legal advice based on its best view of the law. Nor has it generated a body of authoritative precedents to inform and constrain its work. It operates within, not outside, the politically charged atmosphere of the White House. And unlike with OLC, there is no professional consensus against the Counsel’s Office’s operating in more of an advocacy mode, seeking not its best view of the law but the best legal arguments in favor of the White House’s preferred policy positions. Thus, there is reason to believe that, left to its own devices, the Counsel’s Office might be willing to say yes in circumstances where OLC would say no. That, in turn, creates a risk of the end-run Ackerman fears.

But there are powerful incentives cutting the other way. 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 anal-

²⁰² Craig Letter, *supra* note 199, at 3 (quoting Memorandum from Steven G. Bradbury, Acting Assistant Att’y Gen., Office of Legal Counsel, to the Gen. Counsels of the Executive Branch, Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. Off. Legal Counsel (Apr. 16, 2007), available at www.justice.gov/olc/2007/appointmentsclausev10.pdf).

²⁰³ See Email from Gregory Craig, Former Counsel to the President, to author (Sept. 23, 2010, 14:37 EST) (on file with the Harvard Law School Library) (“I have absolutely no doubt that this letter was written with OLC’s knowledge and blessing.”).

ysis, 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 provoke a barrage of questions: Did the White House seek an opinion from OLC? If so, what did OLC say? If not, why not? Why did the White House exclude "the executive branch's chief legal advisor" from the issue?²⁰⁴ As one study of the Counsel's Office puts it, "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."²⁰⁵ It is for this reason that C. Boyden Gray, Counsel to the first President Bush, apparently "never [took] a position on a major issue without consulting OLC and never . . . advised the President in opposition to OLC's findings."²⁰⁶ Whether or not every Counsel follows this practice in every instance, the incentive is sufficiently strong to explain why the practice is "the norm."²⁰⁷

* * *

Going forward, it is possible the White House might someday start end-running OLC. One can never categorically exclude the risk, although the incentives I have described strongly discourage such behavior. In the meantime, Ackerman's own evidence defeats his claim that these end-runs have already "happened often over recent decades, without anybody considering it improper" (p. 100). This evidentiary failing is troubling. It is no small thing to charge that the White House has long been evading the most significant source of legal advice in the executive branch, without anyone thinking it amiss. An accusation like that requires supporting evidence, not a series of episodes that even the most cursory review would have revealed point in the opposite direction.

IV. THE SUPREME EXECUTIVE TRIBUNAL

I turn now to Ackerman's proposal to "[r]estor[e] the [r]ule of [l]aw" (pp. 141–79) in executive constitutionalism: the Supreme Executive Tribunal. Ackerman envisions this Tribunal as a statutorily created panel of nine presidentially nominated, Senate-confirmed "judges for the executive branch" (p. 143). The members of the Tribunal would

²⁰⁴ Pillard, *supra* note 16, at 710.

²⁰⁵ Borrelli et al., *supra* note 170, at 206; *see id.* at 194 ("Disaster can . . . strike when counsels do not make good use of the Justice Department's Office of Legal Counsel (OLC) for guidance on prevailing legal interpretations and opinions on the scope of presidential authority.").

²⁰⁶ Rabkin, *supra* note 186, at 94 (citing a personal interview with Gray and reporting that "top aides to Gray confirm Gray's recollection on this point," *id.* at 94 n.141).

²⁰⁷ *Id.*

serve for staggered twelve-year terms, so that each President would be able to nominate at least three judges during a four-year term. The Tribunal's job would be to take up the sort of legal questions that currently go to OLC and to provide final answers that are "binding on the executive branch" (p. 146). Ackerman does not specify all the ways such questions might come to the Tribunal, nor does he say whether particular questions must be put to it for resolution. He does, however, identify one important source of business for the Tribunal — members of Congress: "When senators and representatives can't reasonably expect ordinary courts to consider their complaints [against presidential action because of the political question doctrine], the tribunal will open its doors to hear their arguments" (p. 146). The Tribunal, in other words, would conclusively settle constitutional and other legal disagreements that members of Congress have with the executive branch. There are a number of problems with this idea.

As Ackerman acknowledges, adopting the Supreme Executive Tribunal would entail massive institutional change (p. 176). Such disruptions should not be pursued in the absence of demonstrated need, yet Ackerman has made no such demonstration. As I have shown in Parts I through III, his attack on executive constitutionalism as currently practiced is overstated rhetorically and undersupported factually. This is not to say there are no areas of concern, nor that all reforms are pointless. In particular, greater public disclosure of OLC's work would encourage the kinds of internal discipline upon which that office's traditions are built.²⁰⁸ But the status quo is not nearly as compromised as Ackerman suggests. He has not established that the current institutional arrangement is incapable of providing the President and others in the executive branch with reliable, good-faith legal advice. Nor has he established that exceptional abuses like the torture memos reflect defects unique to the current system, as opposed to a combination of political, ideological, and psychological factors to which no structure could ever be entirely immune. Finally, by omitting any real consideration of less dramatic reforms, Ackerman has not even approached proving that realistically implementable safeguards against a repeat of the torture memos "can *only* be provided by an institution that looks a lot like the Supreme Executive Tribunal" (p. 149).²⁰⁹

Yet even if we were in need of drastic change, Ackerman's proposal would face serious obstacles. One is practical. To put the point bluntly, it is nearly impossible to imagine a Congress and President working together to pass legislation creating a Supreme Executive Tribunal.

²⁰⁸ See *supra* pp. 1714–15.

²⁰⁹ Emphasis added.

Ackerman knows this. Of all the ideas he puts forward in *Decline and Fall*, he acknowledges that “[t]he big battle will come over the new executive tribunal” (p. 176). Ackerman takes this as evidence of the current system’s problems: “Most presidents will fiercely resist all efforts to downgrade the Office of Legal Counsel and the White House Counsel. They fully recognize that their current legal staff has an overwhelming incentive to tell them that the law allows them to do whatever they want to do” (p. 176). From there he all but dares future Presidents to resist his proposal, lest they reveal their contempt for the rule of law itself: “The more seriously the president takes the constitutional command that he ‘take care that *the laws* be faithfully executed,’ the more likely he will favor the tribunal” (p. 177).

But a President need not be hostile to the rule of law to have ample reason to resist the Tribunal. Perhaps most glaringly, there is real potential for mischief in empowering any member of Congress to require the Tribunal to address a point of asserted constitutional disagreement between the political branches. Legislation almost never enjoys unanimous support in Congress, which means there will always be members of Congress motivated to stop a bill from becoming law and to obstruct its execution once it is law. Granting members of Congress standing before the Tribunal would thus invite a “suit” against virtually every bill that has any prospect of passage. If the Tribunal concludes the bill is unconstitutional before it has finally been voted upon by the House and Senate, that judgment could affect the vote. And if it does not defeat the bill at that stage, the fact that the Tribunal’s decision is binding on the executive branch would presumably oblige the President to veto the bill.

True, a decision by the Tribunal upholding the bill’s constitutionality might help immunize the bill from later attack in the courts (although Ackerman’s own worries about undue judicial deference to executive decisions might lead him to prefer no deference), and congressional opponents would have to take that possibility into account. Still, merely filing suit in the Tribunal could have a significant effect. For bills still being debated in Congress, the pendency of such a suit could delay the bill for months.²¹⁰ Legislative minorities already have ample tools at their disposal to obstruct the legislative process; the Tribunal would add to that arsenal. A President could be fully committed to the rule of law and still see no reason to provide his congressional opponents with such a weapon.

²¹⁰ As noted above, *see supra* note 93, one of Ackerman’s arguments against signing statements is that the ten days a President has to sign or veto an enrolled bill is not enough time to produce a complete analysis of its constitutionality (pp. 90–93). Presumably, Ackerman would expect the Tribunal to spend much longer considering a congressional challenge to a bill.

A second obstacle is constitutional. Ackerman addresses one constitutional issue raised by the Tribunal, namely whether Congress could insulate the members of the Tribunal from at-will removal by the President. In concluding it could, he enters the familiar debate over whether and how the executive branch is properly deemed a unitary institution presided over by a President with the power to direct all actions within the branch. Relying heavily on the Supreme Court's decision in *Morrison v. Olson*,²¹¹ Ackerman suggests that the test in this context should be whether restricting the President's removal power would "impede the President's ability to perform his constitutional duty" to "take care that the laws be faithfully executed" (pp. 147–48).²¹² He argues that removal restrictions would not impede but would instead "greatly enhance [the President's] capacity . . . 'to take care that *the laws* be faithfully executed,'" by ensuring that the President acts on the basis of good-faith legal analysis (p. 148). "Before a president can even begin executing the law," Ackerman reasons, "he must first figure out what the law requires him to do" (p. 148). "He has an obligation to exercise this 'interpretive power in good faith'" (p. 148).²¹³ Yet that is impossible, Ackerman maintains, if the President is left to rely on advice from OLC and the White House Counsel (p. 148). Ackerman sees something like the Tribunal as the only way to generate the legal analysis the President needs to discharge his "take care" responsibility (p. 149). From that point of view, the imposition of removal restrictions to ensure the integrity of the Tribunal's work is perfectly constitutional under *Morrison*.

Ackerman may or may not be right that the removal restrictions satisfy *Morrison*.²¹⁴ But assuming they do, his proposal also raises a separate, more profound constitutional question: whether Congress may empower the Tribunal to impose legally binding obligations on the President himself. That question stands apart from the removal issue, yet Ackerman does not acknowledge it. Unlike removal, which implicates the President's power to control the way other officers use their statutory authority, here the question is whether an unremovable executive official may control the President's actions by subjecting him to legally binding obligations.

²¹¹ 487 U.S. 654 (1988).

²¹² Ackerman quotes *Morrison*, 487 U.S. at 691, 725.

²¹³ Ackerman quotes Paulsen, *supra* note 20, at 321.

²¹⁴ As I have shown throughout this Review, Ackerman has not come close to establishing that the current institutional arrangement cannot be relied upon to give the President sound legal advice. Yet while Ackerman stresses that claim as part of his *Morrison* analysis, the claim might not need to be correct for *Morrison* to be satisfied. Thus, Ackerman might be right that the Tribunal passes muster under *Morrison* even though he is wrong about the unreliability of the current institutional arrangement.

Suppose the President directs that a suspected enemy combatant be detained under law-of-war authorities, including the Authorization for Use of Military Force²¹⁵ passed by Congress in September 2001. Suppose further that a member of Congress who opposes such uses of military force initiates a proceeding before the Tribunal, and that the Tribunal finds the detention illegal and orders the individual's release. Ackerman appears to contemplate that this decision would be literally binding on the President and the rest of the executive branch (p. 146). Leaving aside (as Ackerman himself does) practical questions of enforceability, what precedent is there for the proposition that subordinate members of the executive branch can not only take legally consequential actions on their own authority, but also impose upon the President a conclusive, binding duty to act? Certainly neither the Attorney General nor OLC asserts such authority. Their legal advice is treated as binding across the executive branch, *unless overruled by the President*.²¹⁶ Ackerman nowhere considers the constitutional questions his proposal would raise on this score.

A final problem has to do with the connection between politics and law in the executive branch. Ackerman's argument about the Tribunal's relationship to the President's "take care" responsibility assumes that the President does not discharge that responsibility unless he acts on the basis of a good faith judgment about the best view of the law. That is not obviously correct. Although the President's oath of office obliges him to uphold the Constitution, and although the Constitution provides that "he shall take Care that the Laws be faithfully executed,"²¹⁷ he would not necessarily violate these duties by pursuing policies he thinks are constitutionally *defensible*, even if he has not determined they are consistent with his best view of the law.²¹⁸ The tra-

²¹⁵ Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 note).

²¹⁶ See Morrison, *Stare Decisis*, *supra* note 6, at 1466-68 (discussing this caveat). Professor Akhil Amar has suggested that questions like this are crucially informed by the Opinions Clause, which provides that the President "may[, not shall,] require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." U.S. CONST. art. II, § 2, cl. 1; see also AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: BETWEEN THE LINES AND BEYOND THE TEXT 140-41 (forthcoming 2011) (arguing that "the big idea behind the opinions clause [of Article II] was] that a president could never claim that his hands were tied because he had been outvoted or overridden by his advisors in a secret conference," and that even his cabinet members' "collective judgment would not . . . trump [the President's] own").

²¹⁷ U.S. CONST. art. II, § 3, cl. 4; see also *id.* art. II, § 1, cl. 8.

²¹⁸ A full consideration of this complex point lies beyond the scope of this Review, but I will offer two examples to illustrate what I have in mind. First, in areas where conventional sources of legal meaning suggest a number of plausible answers to a particular question but do not readily identify any one answer as clearly best, and where the area is one in which the practice of the executive branch may give some content to the law over time, the President may be able to select among the plausible answers without having to say it represents his best view of the law. Second, the President is surely able to privilege certain interpretive approaches to the Constitution over

ditions of the executive branch reflect a judgment that there is value in having at least one office — OLC — devoted to providing legal advice based on its best view of the law. But that does not make such advice constitutionally mandatory, and it certainly does not mean the President must adhere to OLC's or the Supreme Executive Tribunal's best view of the law in order to fulfill his constitutional responsibilities.

Of course, under the current institutional arrangement, a President who goes against OLC would invite substantial criticism, which helps explain why it virtually never happens. But in proposing the Tribunal, Ackerman appears to want to take the law even more thoroughly out of the President's hands — imposing upon him a binding legal obligation to adhere to the Tribunal's judgments, and denouncing as lawless any contrary action (p. 151). This proposal seems premised on the notion that the law has a single meaning, and that following the law simply entails identifying and then respecting that meaning. That is too simplistic. Legal interpretation and legal meaning are in part a function of institutional location. Especially when the institutional location is the White House, politics has a legitimate place in the law.²¹⁹ To the extent he wants to excise those politics, Ackerman is embarked on a project not to “[r]estor[e] the [r]ule of [l]aw” (pp. 141–79) but to disempower the Executive itself.

To put the same point somewhat differently, Ackerman is quite candid that he thinks the best way to keep the executive branch within legal bounds would be for the Supreme Court to “radically expan[d] its understanding of the meaning of ‘case [or] controversy,’” hearing cases now barred on standing, political question, or other grounds (p. 143). It is only because he sees “zero chance of this happening any time soon” that Ackerman resorts to the Tribunal (p. 143). The Tribunal, in other words, is an attempt to bring the judiciary within the executive branch. It is driven by hostility not to particular facets of the Court's nonjusticiability doctrines but to the very idea of nonjusticiable law. Law, Ackerman seems to suggest, requires an institution that “act[s] like a court” (p. 144).

Our constitutional traditions say otherwise. Yes, the courts play a vital role in our constitutional system, but recall John Marshall's observation that some legal questions are “questions of *political* law,” meet for resolution not by the courts but by the political branches.²²⁰ Two hundred years of constitutional practice — including much judicial doctrine — proceed from this premise. Whether Ackerman or

others, as a result of which certain policies will be deemed constitutional that would not be according to other interpretive approaches.

²¹⁹ See Powell, *supra* note 24, at 385 (“[P]olicy and principle, politics and law, are not rigid, mutually exclusive categories.”).

²²⁰ Marshall, *supra* note 11, at 103.

anyone else deems it an ideal constitutional arrangement, it is the arrangement we have. Serious appraisals of executive constitutionalism must come to grips with this reality, not subvert it.

V. CONCLUSION

Decline and Fall's account of executive constitutionalism largely fails. Whatever the merits of the book's other claims,²²¹ its treatment of law and legal interpretation in the executive branch is too heavy on alarmist rhetoric, too light on evidence. At critical points it is prone to oversimplification or pure error. If the reality of executive constitu-

²²¹ As described in the Introduction to this Review, *Decline and Fall* is about more than just executive constitutionalism. That is a key piece of the book, and one to which constitutional lawyers should be especially attentive. But the book's shortcomings on that score do not by themselves defeat its claims about the presidential primary system, the bureaucracy, civilian-military relations, the mass media, and so on. Fully evaluating those claims might require a separate essay on each, but in the spirit of encouraging further conversation I will make two points about Ackerman's arguments on the military.

First, Ackerman does not do enough to justify his idea for a five-year waiting period before retiring military officers may serve in certain civilian national security posts. He is right that top civilian positions should not be held by people who see the world through an exclusively military "professional prism" (p. 59), but his five-year ban is likely to be both under- and over-protective of that concern. For retiring officers with such narrow viewpoints, a five-year wait (possibly spent at a military contractor with close Pentagon ties) would not necessarily change things. Meanwhile, other officers may be more broad-minded even at the moment of retirement. In those cases, a five-year ban could be not only unnecessary, but also harmful. Independent-thinking advisors with recent military experience may be uniquely able to evaluate the military's claims on various issues, thus helping the President make better national security decisions. *See, e.g.*, BOB WOODWARD, *OBAMA'S WARS* 218, 252–53 (2010) (portraying two retired generals, Ambassador Karl Eikenberry and National Security Advisor James Jones, as sharp critics of the military's arguments during President Obama's consideration of Afghanistan policy options); *see also* Dennis Jacobs, *The Military and the Law Elite*, 19 CORNELL J.L. & PUB. POL'Y 205, 211 (2009) ("In order to maintain civilian control, we need civilians who understand the military . . ."). Ultimately, just as recent military service should not be a prerequisite for a job like National Security Advisor, neither should it be disqualifying. If the best candidates' active military careers ended less than five years ago, it is not clear why the President should be deprived of their expertise.

Second, there is an inconsistency between Ackerman's concern for the loss of civilian control over the military and his approach to other parts of the executive branch. In the military context, Ackerman stresses the need for civilian "supervisors who are . . . closely attuned to the values emerging from democratic politics" (p. 59). Thus, although he likely does not agree with former Defense Secretary Donald Rumsfeld's approach to the Iraq War, he seems to think Rumsfeld was correct in asserting control over dissidents in uniform who criticized Rumsfeld's approach (pp. 52–53). Outside the military context, however, Ackerman sees things in precisely opposite terms. He worries that in the course of "giv[ing] the bureaucracy marching orders to implement [the President's] charismatic visions," politically appointed leaders "refuse to defer to expert assessments of the facts . . . provided by the agencies" (p. 38). So outside the military, the problem is the corrupting influence of politics on technical expertise; within it, the problem is the threat to politics posed by experts in uniform. To be sure, the need to balance political accountability and technical expertise is a familiar challenge in government, and it may be that the balance should be struck differently in different contexts. But Ackerman does not even acknowledge the inconsistency in his approach, let alone justify it.

tionalism were as Ackerman depicts it, there would indeed be cause for deep concern. But it is not.

Still, it would be a mistake simply to ignore Ackerman's warnings about the possible trajectory of an executive constitutionalism gone awry. Though flawed, the book does highlight the importance and occasional fragility of constitutional law within the executive branch. These are points worth attending to.

As Schlesinger observed almost forty years ago, a strong President is kept constitutional by both "checks and balances incorporated within his own breast" and "the vigilance of the nation."²²² So too with the lawyers who serve him. While far from perfect, entities like OLC have a history of providing meaningful checks on the presidency. A powerful combination of professional values and institutional incentives encourages them to continue doing so. More can and should be done, especially to enhance the disciplining effects of public disclosure and congressional oversight. But it is at this level — the level of institutional refinement, not radical overhaul — that the evidence suggests we should be operating. The key lies not in any transformation of the executive branch but in the "cultural norms"²²³ of offices like OLC — norms that prize professional integrity and independence — and in a President, Congress, and public that care whether those norms are preserved.

²²² SCHLESINGER, *supra* note 1, at 418.

²²³ GOLDSMITH, *supra* note 6, at 37.