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DEVELOPMENTS IN THE LAW  
PRESIDENTIAL AUTHORITY

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Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic executive, it will only remain to inquire, what are the ingredients which constitute this energy? How far can they be combined with those other ingredients which constitute safety in the republican sense? And how far does this combination characterize the plan which has been reported by the convention?

— *The Federalist Papers*<sup>1</sup>

## I. INTRODUCTION

Over two hundred years after the ratification of the U.S. Constitution created the nation's first federal executive,<sup>2</sup> the precise scope of the President's authority remains contested. No one doubts that the President's power has expanded dramatically since George Washington took the first oath of office in 1789,<sup>3</sup> and nearly everyone would accept that this transformation reflects to some extent a necessary accommodation to the new challenges posed by a growing federal government and a changing world. But the appropriate extent of authority for a twenty-first century presidency is the subject of fierce debate both inside Washington, D.C., and across the nation. This Development traces four of the most significant battles from the past several decades regarding the President's authority. Together, these Parts demonstrate that, despite the internal executive branch incentives to expand the scope of its own authority, the power to define the nature of the presidency ultimately resides where it first began — in the American people.

Perhaps the most striking feature of the four Parts that follow is the consistency with which Presidents of both parties have sought to expand their authority. Yet different Presidents have taken different approaches toward broadening executive power; the battle's legal landscape often determines the President's strategy against the legislative branch. When faced with statutory enactments burdening executive Appointment Clause authority, Presidents George H.W. Bush, Bill Clinton, and George W. Bush all issued signing statements deeming the legislation unconstitutional and refusing to comply fully.<sup>4</sup> Presi-

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<sup>1</sup> THE FEDERALIST NO. 70, at 422 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>2</sup> The United States's initial national government organized under the Articles of Confederation lacked an executive branch. See 1 BRADFORD PERKINS, THE CAMBRIDGE HISTORY OF AMERICAN FOREIGN RELATIONS 55 (1993).

<sup>3</sup> See generally, e.g., ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND (2010); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973).

<sup>4</sup> See, e.g., Statement on Signing the Dayton Aviation Heritage Preservation Act of 1992, 2 PUB. PAPERS 1848 (Oct. 16, 1992); Statement on Signing the Coast Guard Authorization Act of 1996, 2 PUB. PAPERS 1869 (Oct. 19, 1996); Statement on Signing the Transportation, Treasury,

dent Barack Obama responded to the Senate's use of congressional procedure to block his recess appointments by asserting an inherent constitutional authority to make those appointments unilaterally.<sup>5</sup> Presidents have also attempted to expand their authority within the executive branch itself. These attempts have led to controversy, which has not been clearly resolved — for instance, some legal commentators condemned the exercise of presidential influence over the Office of Legal Counsel<sup>6</sup> but advocated for increased presidential authority over the Solicitor General.<sup>7</sup> Finally, Presidents have increasingly tried to influence the substance of the law as part of their responsibility to execute it. President George W. Bush aggressively used signing statements to interpret legislation in accordance with his vision,<sup>8</sup> and President Obama, in a significant change from past administrations, overruled his own Solicitor General by declining to defend the constitutionality of the Defense of Marriage Act.<sup>9</sup> Although the tactics have changed and the sites of conflict have shifted from administration to administration, one constant in each presidency over the past several decades has been an ongoing push to expand executive authority.

The debate over how *far* presidential authority should stretch has created tensions both within the executive branch and between the President and Congress. As each of the Parts below illustrates, government officials and legal commentators call for greater presidential power in one matter, only to turn and condemn increased executive authority in another. These conflicting positions suggest that executive power appropriately ebbs and flows in different areas of presidential responsibility. For instance, some argue that the Office of Legal Counsel can ensure executive compliance with the law only by maintaining its independence from the presidency,<sup>10</sup> but the principles of legal eth-

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Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006, 2 PUB. PAPERS 1795 (Nov. 30, 2005).

<sup>5</sup> See *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C., 2012 WL 168645 (2012); Press Release, White House, President Obama Announces Recess Appointments to Key Administration Posts (Jan. 4, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts>.

<sup>6</sup> See *infra* section III.C, pp. 2100–09.

<sup>7</sup> See *infra* section IV.B.2, pp. 2121–27.

<sup>8</sup> See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 318–21 (2006).

<sup>9</sup> See Press Release, Dep't of Justice, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (announcing the Obama Administration's decision not to defend against a constitutional challenge to the Defense of Marriage Act based on the President's conclusion that the statute is unconstitutional).

<sup>10</sup> See, e.g., Marisa Lopez, *Professional Responsibility: Tortured Independence in the Office of Legal Counsel*, 57 FLA. L. REV. 685, 713–16 (2005).

ics have required *greater* presidential influence over the Office of the Solicitor General.<sup>11</sup> Sometimes, the line dividing legitimate use of presidential authority from abuse of power is only a matter of degree — jurists accept the legitimacy of presidential signing statements, for example, but warn that the statements may also be abused to aggrandize the Executive.<sup>12</sup>

Unfortunately, narrow political interests of the moment sometimes dominate the debate. In the past decade, both political parties, when out of power, have blocked executive appointments as a means to stall the President's agenda; yet when in the majority, both parties have denounced members of the opposition for doing the same.<sup>13</sup> The federal government's ability to execute its laws effectively, while maintaining the Constitution's separation of powers, requires careful and good faith analysis of each area of expanded presidential authority. Whether presidential power is appropriately broad or needs to be reined in depends on the unique array of political, legal, and ethical factors that define each conflict.

Part II of this Development documents recent practice in the use of presidential signing statements. Presidents have long used signing statements — largely without objection — as a vehicle for asserting executive power.<sup>14</sup> However, during his second term in office, President George W. Bush began to face widespread criticism for his use of signing statements.<sup>15</sup> This recent controversy surrounding signing statements is, in some sense, surprising: the statements simply announce the President's interpretation of new legislation; they have no official legal effect and do not themselves alter the statutes they accompany. The interpretations announced in signing statements gain effect only through additional presidential directives to agency heads

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<sup>11</sup> See, e.g., Jube Shiver, Jr., *Justice Dept. Won't Defend 'Must-Carry' Cable Rule*, L.A. TIMES, Nov. 6, 1992, at D5.

<sup>12</sup> See, e.g., Martin Lederman et al., *Untangling the Debate on Signing Statements*, GEO. L. FAC. BLOG (July 31, 2006), [http://gulcfac.typepad.com/georgetown\\_university\\_law/2006/07/thanks\\_to\\_the\\_p.html](http://gulcfac.typepad.com/georgetown_university_law/2006/07/thanks_to_the_p.html).

<sup>13</sup> Compare Charlie Savage, *Long After Nomination, an Obama Choice Withdraws*, N.Y. TIMES, Apr. 10, 2010, at A16 (noting Senate Republicans' challenge to President Barack Obama's appointment of Dawn Johnsen to lead the Office of Legal Counsel), and Richard W. Stevenson, *Bush's Road Gets Rougher*, N.Y. TIMES, June 20, 2005, at A13 (Senate Democrats' challenge to President George W. Bush's appointment of John Bolton to be Ambassador to the United Nations), with Charles Babington & Jim VandeHei, *Democrats Block Vote on Bolton*, WASH. POST, June 21, 2005, at A1 (Republicans' condemning Senate Democrats for challenging Bolton's appointment), and Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 5, 2012, at A1 (Democrats' condemning Senate Republicans for challenging President Obama's appointment of Richard Cordray to be head of the Consumer Financial Protection Bureau).

<sup>14</sup> See Bradley & Posner, *supra* note 8, at 308.

<sup>15</sup> See, e.g., Editorial, *Veto? Who Needs a Veto?*, N.Y. TIMES, May 5, 2006, at A22.

or other executive branch officials — directives that do not actually require a signing statement in order to be effective. Thus, as Part II demonstrates, the objections to President Bush's signing statements turned not on their existence but rather on their *content* — that is, on the expansive views of presidential power that they often contained.<sup>16</sup> While previous Presidents' signing statements had frequently defended executive branch prerogatives from congressional encroachments,<sup>17</sup> the sweeping pronouncements and imprecise justifications in President Bush's statements marked a departure from prior practice.<sup>18</sup> And eventually, despite signing statements' historical pedigree, the backlash against Bush-era practice led President Obama to commit himself publicly to using signing statements more sparingly,<sup>19</sup> a promise that he largely has kept.<sup>20</sup>

Part II ultimately illustrates the dynamic nature of the contemporary American separation of powers. From the rise of signing statements under Presidents Reagan and George H.W. Bush and their “institutionalization” under President Clinton, Part II traces both the historical developments that led to President George W. Bush's expansive use of the statements and the evolving conceptions of executive power that accompanied those developments. A subtler tool than the veto (especially in the modern age of omnibus legislation), signing statements eventually became not only a means of announcing a President's interpretation of a given statute, but also vehicles for asserting expansive views of the President's powers vis-à-vis Congress. However, the public reaction to these views — expressed as opposition to signing statements themselves — both reduced the prevalence of the statements under President Obama and narrowed the conceptions of executive power they contained.<sup>21</sup> Is there a causal story uniting these parallel trends? Perhaps signing statements are not only a vehicle for expressing a strong pro-executive branch view, but are also, in a sense, a manifestation of this view — a President's clear rebuke of Congress's authority. Seen in this way, reducing the number of signing statements may itself be a kind of constraint on presidential power. But it remains to be seen whether the effects of the public backlash will last

<sup>16</sup> See *infra* section II.C, pp. 2084–89.

<sup>17</sup> See Bradley & Posner, *supra* note 8, at 313–14.

<sup>18</sup> See *infra* section II.B.4, pp. 2079–82.

<sup>19</sup> See Charlie Savage, *Barack Obama's Q&A*, BOS. GLOBE (Dec. 20, 2007), <http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/>.

<sup>20</sup> See *Presidential Signing Statements*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/signingstatements.php> (last visited May 3, 2012). The public response thus compensated for congressional powerlessness in this arena by successfully engendering what Professors Eric Posner and Adrian Vermeule call executive “self-binding.” POSNER & VERMEULE, *supra* note 3, at 138.

<sup>21</sup> See *infra* section II.B.5, pp. 2082–84.

beyond the Obama Administration; the ideas that signing statements embody may not readily be extinguished by simply reducing the use of the statements themselves.<sup>22</sup> On this view, the correlation between President Obama's decreased use of signing statements and his comparatively modest conception of presidential powers (at least vis-à-vis Congress<sup>23</sup>) may be just that: a correlation.

Part III addresses the President's relationship with the Office of Legal Counsel (OLC) — the traditionally independent source of legal advice for the executive branch. Despite the benefits that accrue to the White House from an independent OLC,<sup>24</sup> the Office's insulation from excessive White House control and political pressure has worn thin over the past decade. Part III identifies three major threats to OLC independence: the high-stakes national security risk posed by terrorism (particularly after September 11, 2001), OLC's willingness to deviate from its time-honored procedural safeguards, and the rise of the Office of White House Counsel as a competitor of OLC.<sup>25</sup> First, the fear of future attacks has created extraordinary pressure on OLC attorneys to empower the President in the realm of national security.<sup>26</sup> The task of justifying and establishing the outer limits of the President's interrogation authority has fallen to the OLC, which, in one infamous case, relied upon flawed statutory interpretation and expansive notions of executive constitutional authority in order to approve particularly severe interrogation techniques — even torture.<sup>27</sup> Second, OLC has risked undermining its ability to constrain the President by periodically departing from formal procedures. While the President enjoys the power to reject OLC guidance, ideally OLC's internal procedures would make such presidential deviation difficult, transparent, and relatively rare.<sup>28</sup> Informal opinions, however, work against these ideals because they prevent the public from fully evaluating the President's decision to ignore OLC's advice. In 2011, for instance, OLC issued an informal opinion on the question of the War Powers Resolu-

<sup>22</sup> See *infra* section II.D, p. 2089.

<sup>23</sup> In other respects, President Obama's assertions of presidential power have not been as modest. See, e.g., Eric Holder, Att'y Gen., Dep't of Justice, Address at Northwestern University School of Law (Mar. 5, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> (asserting that the President may order the targeted killing of certain U.S. citizens abroad in connection with the war against al Qaeda and associated forces).

<sup>24</sup> See *infra* p. 2098.

<sup>25</sup> See *infra* section III.C.1, pp. 2101–07.

<sup>26</sup> See Robert F. Turner, *What Went Wrong? Torture and the Office of Legal Counsel in the Bush Administration*, 32 CAMPBELL L. REV. 529, 557 (2010).

<sup>27</sup> See JACK GOLDSMITH, *THE TERROR PRESIDENCY* 97, 144 (2007); see also *infra* pp. 2102–04.

<sup>28</sup> See *infra* section III.B.1, pp. 2095–97.

tion's applicability to the Libya conflict in 2011.<sup>29</sup> Similarly, a formal OLC memo supports the controversial use of drone strikes in foreign nations, but the legal reasoning has not been made public; as a result, no one outside the government can evaluate its quality. And the rise of the Office of White House Counsel poses a final threat: as the office has grown in both size and stature, it has increasingly been able to usurp OLC's traditional role. Even if OLC is still asked for its analysis, the White House Counsel can provide its own opinion, and the President can heed its advice rather than the OLC's, as President Obama did with respect to the conflict in Libya.<sup>30</sup>

Part III explains why Presidents have eroded OLC independence in these ways, notwithstanding the benefits that an independent legal interpreter would provide them. Because executive branch interpretation increasingly serves to facilitate policy rollouts, the President may be interested not in the "best" legal interpretation, but merely in a plausible interpretation that will serve his policy goals.<sup>31</sup> Moreover, the President is increasingly capable of acting unilaterally without the legitimating function of OLC approval, due in part to the Office's concealed position within the executive branch.<sup>32</sup> Part III finds qualified hope in OLC's recent efforts to reform its procedures, as well as in its reaffirmation of its commitment to abide by its traditional safeguards.

Part IV explores an analogous evolution of the relationship between the Office of the Solicitor General and the President. In particular, Part IV demonstrates how the President's increasingly central role in deciding whether to defend the constitutionality of duly enacted statutes in court has qualified the Solicitor General's traditional duty to defend.<sup>33</sup> In contrast with the other trends discussed in this Development, the expansion of presidential influence over decisions to defend statutes has not provoked substantial resistance from or confrontation with the Solicitor General. Rather, Part IV finds, the Solicitor General has willingly ceded authority to the President, narrowing the Office's mission in an effort to resolve the ethical problems posed

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<sup>29</sup> Charlie Savage, *2 Top Lawyers Lose Argument on War Power*, N.Y. TIMES, June 18, 2011, at A1.

<sup>30</sup> See *infra* pp. 2105–06.

<sup>31</sup> See *infra* section III.C.2, pp. 2108–09.

<sup>32</sup> See Douglas W. Kmiec, *Yoo's Labour's Lost: Jack Goldsmith's Nine-Month Saga in the Office of Legal Counsel*, 31 HARV. J.L. & PUB. POL'Y 795, 795 (2008) (reviewing GOLDSMITH, *supra* note 27) (noting that OLC has not been "well known to the general public").

<sup>33</sup> See *infra* p. 2133 (describing how "there is still a presumption that the Solicitor General will defend the constitutionality of" statutes but questioning the weight of that presumption going forward).

by the Solicitor General's historic responsibility to serve multiple clients simultaneously.<sup>34</sup>

This acquiescence is particularly striking given the magnitude of the change it represents in the Solicitor General's role. Although the Solicitor General first declined to defend the constitutionality of a statute before the Supreme Court in 1926,<sup>35</sup> Solicitors General rarely did so again over the next five decades. Presidential administrations generally abstained from interfering with the Office's legal strategies, and Solicitors General expressed allegiance to a federal government clientele at once both varied and vague.<sup>36</sup> In 1976's *Buckley v. Valeo*,<sup>37</sup> for example, Solicitor General Robert Bork filed two dueling amicus briefs, one for Congress and one for the President.<sup>38</sup> Following Watergate and the development of stricter, better-defined ethical norms in the legal community, Solicitors General began to identify the President as their sole client.<sup>39</sup> Unlike the events described in other Parts of this Development, here public pressure — ethical reforms outside of Washington — served to *facilitate* rather than *constrain* expanding presidential power.

Since the 1990s, the Solicitor General's independent prerogative to conduct the defense of statutes has further deteriorated while the President's prerogative has increased. The old standard for refusing to defend a statute's constitutionality — the lack of reasonable arguments supporting its constitutionality<sup>40</sup> — has been lowered in practice, if not in rhetoric.<sup>41</sup> Moreover, recent Presidents have broken from traditional procedure by personally determining that certain statutes will not be defended, a trend most dramatically illustrated by President Obama's decision not to defend the central provision of the Defense of Marriage Act.<sup>42</sup> Although presidential refusals to defend statutes remain rare and Solicitors General retain some semblance of independence, Part IV concludes that future Presidents probably will continue to exercise greater authority over decisions whether to defend statutes. Yet the question of *how* Presidents will use their expanded influence over the

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<sup>34</sup> See generally Drew S. Days, III, *Executive Branch Advocate v. Officer of the Court: The Solicitor General's Ethical Dilemma*, 22 NOVA L. REV. 677 (1998).

<sup>35</sup> Seth P. Waxman, Essay, *Defending Congress*, 79 N.C. L. REV. 1073, 1084–85 (2001).

<sup>36</sup> See *infra* section IV.B.1, pp. 2118–21.

<sup>37</sup> 424 U.S. 1 (1976) (per curiam).

<sup>38</sup> See Waxman, *supra* note 35, at 1082–83.

<sup>39</sup> See *infra* pp. 2121–22.

<sup>40</sup> See, e.g., Letter from Eric H. Holder, Jr., Att'y Gen., Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 17, 2012), available at [www.justice.gov/ag/bohnero2-17-12.pdf](http://www.justice.gov/ag/bohnero2-17-12.pdf).

<sup>41</sup> See *infra* pp. 2131–32.

<sup>42</sup> See Charlie Savage & Sheryl Gay Stolberg, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES, Feb. 24, 2011, at A1.

Solicitor General — as a principled exercise of legitimate power or as an ad hoc tool to influence policy — remains unanswered.

Part V discusses recent developments in a “central battleground”<sup>43</sup> of the struggle over presidential power: the President’s power to appoint executive branch officials. The Constitution grants Congress the power to decide which presidential appointments are subject to the Senate’s advice and consent.<sup>44</sup> As the rise of the administrative state has led to a drastic expansion of the size of the federal government and with it the amount of power exercised by appointees,<sup>45</sup> the scope of congressional limitations on the President’s appointment power has taken on increased significance. Moreover, a slightly more recent phenomenon has accompanied the rapid growth of government: increasing ideological and political polarization in Washington.<sup>46</sup> These twin trends, both largely foreign to the world that the Framers envisioned, have fundamentally altered the context in which the President makes his various appointments. Consequently, new tools and tactics — both formal and informal — have emerged, which the President and Congress — as well as the Democratic and Republican parties — use in order to influence the makeup of the executive branch. Here, as in other Parts of this Development, the evolutionary dynamism of the struggle over presidential power is at center stage.

As Part V details, the mechanisms of influence that have emerged have done so largely without being passed upon by the judicial branch — a trend that may soon change. Scholars have long questioned the Madisonian ideal of the “ambition” of one branch “counteract[ing]” the ambition of another,<sup>47</sup> a conception that turns on the debatable assumption that members of each branch will favor institutional prerogatives over the fortunes of their political parties.<sup>48</sup> But the increase in the use of the Senate filibuster since the 1970s<sup>49</sup> has, in

<sup>43</sup> See *infra* p. 2136.

<sup>44</sup> See U.S. CONST. art. II, § 2, cl. 2 (granting the President the power to appoint officials “by and with the Advice and Consent of the Senate,” but providing that “Congress may by Law vest the Appointment of such inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments”).

<sup>45</sup> See generally, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

<sup>46</sup> See Delia Baldassarri & Andrew Gelman, *Partisans Without Constraint: Political Polarization and Trends in American Public Opinion*, 114 AM. J. SOC. 408, 410 (2008) (noting “virtually full agreement among scholars that political parties and politicians, in recent decades, have become more ideological and more likely to take extreme positions on a broad set of political issues”).

<sup>47</sup> THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 319.

<sup>48</sup> See, e.g., Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2316–18 (2006).

<sup>49</sup> See Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations 1885–1996*, 43 AM. J. POL. SCI. 1122, 1126 (1999).

fact, allowed minority parties to block controversial or ideologically unpalatable nominees, leading to interparty struggles that might be thought to mimic the interbranch struggles that Madison originally envisioned.<sup>50</sup> In response, Presidents have begun more aggressively to take advantage of the Recess Appointments Clause,<sup>51</sup> leading in turn to the emergence of another congressional innovation: the pro forma session. The escalating tit for tat came to a head recently as President Obama made intrasession recess appointments, despite the concurrent convening of periodic pro forma sessions,<sup>52</sup> to install both the director of the newly created Consumer Financial Protection Bureau and three new members of the National Labor Relations Board (NLRB).<sup>53</sup> This move, unlike the various mechanisms that precipitated it, will face legal challenges in court by plaintiffs aiming to invalidate regulations on the ground that agency leadership was improperly constituted.<sup>54</sup> Thus, the judiciary may be required to weigh in on the legitimacy of the President's new tool for appointing officials of his choosing. And regardless of the outcome, the history surveyed in Part V suggests that Congress and the President will continue to develop new mechanisms of influence to achieve a kind of dynamic equilibrium in the ongoing struggle over appointments.

Ultimately, the four Parts that follow reveal that in the face of ever-expanding presidential influence, the *people* retain substantial power to define the proper scope of the President's authority. Popular outcry and the calls for reform of the Office of Legal Counsel and of the Executive's use of signing statements led to presidential retreat in both areas.<sup>55</sup> Similarly, public servants in the Department of Justice, as well as the legal community's renewed emphasis on legal ethics, helped facilitate greater presidential influence over the Solicitor General.<sup>56</sup> And while the judiciary now has the opportunity to resolve the appointments battle between the President and the Senate, if it fails to do so, only the people will be able to demand an effective appointments process at the ballot box.<sup>57</sup>

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<sup>50</sup> See Levinson & Pildes, *supra* note 48, at 2372.

<sup>51</sup> U.S. CONST. art. II, § 2, cl. 3.

<sup>52</sup> For a discussion of the President's authority to make such appointments, see Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C., 2012 WL 168645 (2012).

<sup>53</sup> Cooper & Steinhauer, *supra* note 13.

<sup>54</sup> Indeed, challenges to NLRB rulings have already been filed on such a basis. See, e.g., Nat'l Ass'n of Mfrs. v. NLRB, No. 11-1629 (ABJ), slip op. at 1 (D.D.C. Mar. 2., 2012) (rejecting such a challenge where the NLRB's rule was "promulgated by a quorum of undisputedly duly authorized members well before the recess appointments were announced").

<sup>55</sup> See *infra* section III.D, pp. 2109-13.

<sup>56</sup> See *infra* pp. 2122-23.

<sup>57</sup> See *infra* section V.D, pp. 2155-56.

In the *Federalist Papers*, Alexander Hamilton emphasized two features of the executive branch that would ensure the safety of the republic alongside the nation's newly created presidency: "a due dependence on the people, and a due responsibility."<sup>58</sup> By "responsibility" Hamilton meant "accountability," because the people would be able to discover and discipline presidential misconduct.<sup>59</sup> But this second prescription for republican safety could also easily have referred to the "responsibility" of *the people themselves* — the popular responsibility to maintain the presidency as an effective but constrained constitutional inheritance. Successful execution of the public will requires an "energetic executive,"<sup>60</sup> but the preservation of the nation's democracy also depends on an engaged citizenry. This Development demonstrates that if responsibly tended by "the jealousy and watchfulness of the people,"<sup>61</sup> the presidency can remain, in Hamilton's words, "one of the best of the distinguishing features of our Constitution."<sup>62</sup>

## II. THE PRESIDENT'S ROLE IN THE LEGISLATIVE PROCESS

In the U.S. constitutional system, the coordinate branches of government are charged with maintaining institutional equilibrium, each checking the others to prevent undue concentration of power. One way in which the President helps to maintain that interbranch balance is through his affirmative role in the legislative process. While the constitutional text presupposes an active role for the President in originating and shaping legislation, developments in the realities of the legislative process over time have precipitated changes in the ways the President can influence that process.

Signing statements — official executive branch pronouncements made when the President signs a bill into law to assert his interpretation, raise any constitutional objections, and state his intentions regarding enforcement — are a manifestation of this phenomenon.<sup>1</sup> Although signing statements originated in the Monroe Administration,<sup>2</sup> Presidents rarely used them as a policy tool before the mid-twentieth century.<sup>3</sup> Later, in the 1980s, signing statements became a staple of

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<sup>58</sup> THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 1, at 422.

<sup>59</sup> *See id.* at 426–27.

<sup>60</sup> *Id.* at 422.

<sup>61</sup> *Id.* at 428.

<sup>62</sup> *Id.* at 429 (referring to the "unity of the executive").

<sup>1</sup> *See* T.J. HALSTEAD, CONG. RESEARCH SERV., RL33667, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 1 (2007).

<sup>2</sup> *Id.* at 2.

<sup>3</sup> *See* Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 312–13 (2006) (citing Christopher S. Kelley, *The Unitary Executive and the Presidential Signing Statement* 192 (2003) (unpublished Ph.D. dissertation, Miami University), available at [http://etd.ohiolink.edu/view.cgi?acc\\_num=miami1057716977](http://etd.ohiolink.edu/view.cgi?acc_num=miami1057716977)).

executive branch practice in the Reagan Administration and, since then, “have increasingly been utilized by Presidents to raise constitutional or interpretive objections to congressional enactments.”<sup>4</sup> This phenomenon went largely unnoticed until the George W. Bush Administration. President Bush, while not deviating dramatically from his immediate predecessors in terms of the number of signing statements issued, challenged far more provisions of law with these statements, especially on constitutional grounds. By some accounts, “the Bush Administration . . . used signing statements to claim the authority or state the intention to disregard or decline to enforce all or part of a law [the President] signed more than all of his predecessors combined.”<sup>5</sup> Many perceived this shift as an unconstitutional presidential power grab, calling the entire practice of signing statements into question. The popular press harshly criticized the Bush Administration.<sup>6</sup> The fervor prompted the formation of a bipartisan task force by the American Bar Association (ABA) to study the use of signing statements, eventually resulting in a report highly critical of signing statements in general and President Bush’s use of signing statements in particular.<sup>7</sup> The popular criticism also led to a considerable amount of congressional action, including several committee hearings and legislative proposals pushing back against presidential use of signing statements.

While President Bush’s signing statements drew considerable popular criticism, there is a general consensus among scholars and former Justice Department officials that the practice of using signing statements — both to assert that some aspect of a law is unconstitutional and to state in advance the President’s intent to disregard the invalid provision or provisions — is not itself constitutionally problematic.<sup>8</sup> To the extent critics found cause for concern in the signing statements,

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<sup>4</sup> HALSTEAD, *supra* note 1, at 30. Presidents Nixon, Ford, Carter, Reagan, Bush, and Clinton “issued between 100 and 400 signing statements during their administrations, averaging about 35 to 60 per year.” Bradley & Posner, *supra* note 3, at 312–13.

<sup>5</sup> AM. BAR ASS’N, REPORT OF THE TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE 6 (2006) (citing Charlie Savage, *Bush Challenges Hundreds of Laws*, BOS. GLOBE, Apr. 30, 2006, at A1; Kelley, *supra* note 3, at 3), available at <http://www.abavideo.org/ABA374/media/304.pdf>.

<sup>6</sup> See, e.g., Editorial, *Veto? Who Needs a Veto?*, N.Y. TIMES, May 5, 2006, at A22; Savage, *supra* note 5, at A1.

<sup>7</sup> See AM. BAR ASS’N, *supra* note 5, at 5 (characterizing constitutional signing statements as “contrary to the rule of law and our constitutional system of separation of powers” and “urg[ing] the President . . . to use his veto power if he believes that all or part of a bill is unconstitutional”).

<sup>8</sup> See David Barron et al., *Untangling the Debate on Signing Statements*, GEO. L. FAC. BLOG (July 31, 2006), [http://gulcfac.typepad.com/georgetown\\_university\\_law/2006/07/thanks\\_to\\_the\\_p.html](http://gulcfac.typepad.com/georgetown_university_law/2006/07/thanks_to_the_p.html).

it was in the statements' content, most notably the scope of executive authority they asserted, not in their existence per se.<sup>9</sup>

Nonetheless, the public outcry against President Bush's perceived abuse of signing statements caused a change in the White House's public stance toward signing statements, leading the Obama Administration to adopt voluntary restraints on this previously important tool of executive power. Although he reserved the right to issue signing statements when necessary to protect executive branch prerogatives against legislative encroachment, President Obama voluntarily disclaimed the use of signing statements for other purposes — namely, disregarding or undermining congressional enactments because of policy disagreements or dubious constitutional objections.

This Part analyzes and suggests an explanation for why the Obama Administration has pulled away from the use of the signing statement in many significant (if not all) respects, notwithstanding the inability of Congress to force such a change through traditional legislative mechanisms. Section A offers a structural explanation of the evolution away from traditional presidential bargaining tools (namely, the veto) and toward signing statements. Section B traces the rapid growth in the use of signing statements as a policy tool in the Reagan, Clinton, and both Bush Administrations, and then the precipitous decline in their use in the Obama Administration. Section C offers an explanation for this recent decline, focusing on the role of the public in resisting executive aggrandizement in the separation-of-powers scheme by inducing executive self-binding.

### *A. Rise of the Signing Statement: A Structural Explanation*

For most of U.S. history, the President's ability to formally influence the legislative process was seen as confined to his veto and recommendation authorities.<sup>10</sup> But in recent years, the signing statement has risen to prominence as a less direct, but equally important, means of exerting executive branch influence on legislation. The Congressional Research Service defines signing statements as follows:

Presidential signing statements are official pronouncements issued by the President contemporaneously to the signing of a bill into law that . . . have been used to forward the President's interpretation of the statutory lan-

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<sup>9</sup> See *id.* (characterizing “the extremely broad theories of the Commander-in-Chief Clause and the ‘unitary executive’ that underlie many of [President Bush’s] signing statements” as raising a “substantive concern”).

<sup>10</sup> See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (“The Constitution limits [the President’s] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.”); see also *INS v. Chadha*, 462 U.S. 919, 951 (1983). Other presidential powers, of course, are filtered through and have an indirect effect on the legislative process. See *infra* Part V, pp. 2135–56.

guage; to assert constitutional objections to the provisions contained therein; and, concordantly, to announce that the provisions of the law will be administered in a manner that comports with the Administration's conception of the President's constitutional prerogatives.<sup>11</sup>

Unlike a presidential veto, however, the signing statement does not change the underlying piece of legislation: "A signed law is still a law regardless of what the President says in an accompanying signing statement";<sup>12</sup> it "retains its legal effect and character . . . and remains available for interpretation and application by the courts (if the provision is justiciable) and monitoring by Congress."<sup>13</sup> Indeed, the signing statement is not even a formal part of the legislative process. Such statements have neither independent legal effect nor power to bind anyone — even the President himself. Signing statements merely enable the President to explain his understanding of the law's meaning and to state in advance how he plans to execute the law, including how he will construe or enforce certain provisions.<sup>14</sup> For the substance of a signing statement to have any practical effect, the President must take the additional step of directing executive branch officials not to enforce a statute or to enforce it in a particular manner — an outcome that he could obtain with or without the signing statement itself.<sup>15</sup>

The growth in federal legislation following the New Deal, increasingly in the form of omnibus bills riddled with nongermane riders, made signing statements a valuable alternative for Presidents who were unwilling to veto entire appropriations bills on the basis of isolated disagreements.<sup>16</sup> The sheer size of these bills, coupled with the indispensable nature of many of the provisions, rendered old bargaining tools such as the veto threat insufficient for integrating the President's policy preferences into statutes *ex ante*.<sup>17</sup> And once the possibility of

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<sup>11</sup> HALSTEAD, *supra* note 1, at 1.

<sup>12</sup> *Presidential Signing Statements*, LIBRARY OF CONG., <http://www.loc.gov/law/help/statements.php> (last visited May 3, 2012).

<sup>13</sup> HALSTEAD, *supra* note 1, at 24.

<sup>14</sup> *Presidential Signing Statements*, *supra* note 12.

<sup>15</sup> See Malinda Lee, Comment, *Reorienting the Debate on Presidential Signing Statements: The Need for Transparency in the President's Constitutional Objections, Reservations, and Assertions of Power*, 55 UCLA L. REV. 705, 724 (2008) ("The president may state his intention to pursue such a course of action in a signing statement, but such orders also may occur via internal communications within the executive branch.").

<sup>16</sup> Bradley & Posner, *supra* note 3, at 315; see also *id.* at 341 ("[I]n an age of omnibus legislation[,] presidents are often presented with dozens and even hundreds of provisions in a bill, often on multiple subjects, and as a political matter they will not be able to veto such bills simply because of constitutional concerns about a particular provision . . . [or] possible *applications* of the provision." (footnote omitted)).

<sup>17</sup> See Neil J. Kinkopf, *Signing Statements and the President's Authority to Refuse to Enforce the Law*, 1 ADVANCE 5, 6 (2007).

the President's exercise of the veto became unrealistic, the veto threat lost much of its force as a bargaining tool in the legislative process.

Moreover, the growth in federal power and related increase in comprehensive federal legislation led to a need for Presidents "to defend their constitutional prerogatives and to advance interpretations of ambiguous statutes that might otherwise be applied inconsistently with these prerogatives."<sup>18</sup> This change is correlated with the movement to reassert executive authority vis-à-vis Congress in the post-Watergate era and the concomitant rise of the unitary executive theory as an organizing principle for executive branch policy.<sup>19</sup> In order to prevent Congress from enfeebling the President,<sup>20</sup> signing statements understandably provided an attractive third alternative.<sup>21</sup>

*B. The Rise of Signing Statements:  
Presidential Practice from Reagan to Obama*

Since the 1980s, signing statements have been an integral means for the President to exert executive branch prerogatives in the legislative process. Beginning with the Reagan Administration, Presidents have increasingly employed signing statements to serve various strategic executive branch goals: (1) clarifying legislative meaning and guiding statutory interpretation, (2) providing interpretive guidance for administrative officials, (3) resisting legislative encroachment on executive branch prerogatives, and (4) communicating (and at times expanding) presidential nonenforcement authority. This upward trend in the use of signing statements continued unabated for more than twenty-five years, peaking in the George W. Bush Administration and then declining precipitously under President Obama.

*1. The Reagan Administration: Clarifying Legislative Meaning.* — President Reagan was the first to treat signing statements as an af-

<sup>18</sup> Bradley & Posner, *supra* note 3, at 315.

<sup>19</sup> See Christopher S. Kelley, *The Significance of the Presidential Signing Statement*, in EXECUTING THE CONSTITUTION 73, 86 (Christopher S. Kelley ed., 2006). The unitary executive theory posits that the President exercises complete control over the executive branch and thus possesses powers with which Congress cannot interfere, including the power to supervise and direct subordinates. See generally Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 607 (2005).

<sup>20</sup> Neutralizing the President's veto power could conceivably inflict both substantive and procedural injuries on the executive. On the substantive side, Congress might enact provisions of law that intrude on executive branch prerogatives, which the President could not practically veto because those provisions are buried in omnibus bills. Procedurally, the President loses the ability to write his preferences into the text of a bill when he is denied an effective veto and thus is effectively excluded from the enacting coalition.

<sup>21</sup> See Walter Dellinger, *A Slip of the Pen*, N.Y. TIMES, July 31, 2006, at A17.

firmative tool for asserting executive authority,<sup>22</sup> “seiz[ing] upon the device as a way to not just protect the prerogatives of the presidency, but also as a means to push its preferred policies when those initiatives were lost in the Congress.”<sup>23</sup> In his two terms in office, he issued 250 signing statements, thirty-four percent of which raised objections to one or more statutory provisions.<sup>24</sup> Signing statements were viewed as one part of the Reagan Administration’s broader strategic effort to counter the perceived weakening of the Executive in the post-Watergate era, during which Congress enacted “numerous laws intended to constrain the Executive — including the War Powers Resolution, the Foreign Intelligence Surveillance Act, and the Anti-Impoundment Act.”<sup>25</sup> In its bid to reassert presidential authority vis-à-vis Congress, the Reagan Administration sought to “improve statutory interpretation by making clear the president’s understanding of legislation at the time he signs a bill,”<sup>26</sup> thereby ensuring that executive views on the meaning of congressional enactments were “given significant weight.”<sup>27</sup> To this end, Attorney General Edwin Meese arranged, for the first time, to have the President’s signing statements published alongside traditional forms of (primarily preenactment) legislative history in the U.S. Code Congressional and Administrative News.<sup>28</sup>

This strategy reflected the Administration’s exceptionally aggressive view of the President’s role in statutory and constitutional interpretation.<sup>29</sup> As then-Deputy Assistant Attorney General Samuel Alito outlined, the Administration’s agenda would be “to ensure that Presidential signing statements assume their rightful place in the interpretation of legislation.”<sup>30</sup> He argued that because “the President’s approv-

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<sup>22</sup> AM. BAR ASS’N, *supra* note 5, at 10 (“For the first time, signing statements were viewed as a strategic weapon in a campaign to influence the way legislation was interpreted by the courts and Executive agencies . . .”).

<sup>23</sup> Christopher S. Kelley, A Comparative Look at the Constitutional Signing Statement: The Case of Bush and Clinton, Address at the Sixty-First Annual Meeting of the Midwest Political Science Association (Apr. 3, 2003).

<sup>24</sup> HALSTEAD, *supra* note 1, at 3.

<sup>25</sup> Bradley & Posner, *supra* note 3, at 316; see also Mark R. Killenbeck, *A Matter of Mere Approval? The Role of the President in the Creation of Legislative History*, 48 ARK. L. REV. 239, 271 (1995) (noting that the Reagan Administration used signing statements to put “a conservative cast . . . on measures enacted by an increasingly hostile and unresponsive Congress”).

<sup>26</sup> Edwin Meese III, Att’y Gen., Address at the National Press Club (Feb. 25, 1986), available at <http://www.justice.gov/ag/aghhistory/meese/1986/02-25-1986.pdf>.

<sup>27</sup> Bradley & Posner, *supra* note 3, at 316.

<sup>28</sup> *Id.*; Lee, *supra* note 15, at 712.

<sup>29</sup> Bradley & Posner, *supra* note 3, at 316.

<sup>30</sup> Memorandum from Samuel A. Alito, Jr., Deputy Assistant Att’y Gen., Office of Legal Counsel, to the Litig. Strategy Working Grp., Using Presidential Signing Statement to Make Fuller Use of the President’s Constitutionally Assigned Role in the Process of Enacting Law 1 (Feb. 5, 1986), available at <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acco60-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf>.

al is just as important as that of the House or Senate, it seems to follow that the President's understanding of the bill should be just as important as that of Congress."<sup>31</sup> The affirmative use of signing statements to create legislative history would be a significant departure from the hortatory "press release[s]" of the past and would thus "increase the power of the Executive to shape the law."<sup>32</sup> However, Alito emphasized that the "interpretive statements should be of moderate size and scope," addressing "[o]nly relatively important questions" and "concentrat[ing] on points of true ambiguity, rather than issuing interpretations that may seem to conflict with those of Congress."<sup>33</sup>

In line with this strategy, President Reagan issued a number of signing statements that focused on communicating his interpretation of the corresponding law, seeking to shape the meaning of the legislation in anticipation of future judicial review. Upon signing a supplemental appropriations bill in 1986, for example, President Reagan attached a signing statement making clear his understanding of the purpose and scope of the regulations contemplated by the act.<sup>34</sup> Specifically, he noted that he had been "assured that the prepayment provision is intended to be targeted carefully to assist only those . . . borrowers most in need of this form of financial assistance" and that "regulations will be issued to establish conditions and criteria that will be formulated to ensure that such prepayment benefits have no adverse effect on the Federal Financing Bank and are extended only to the most financially troubled borrowers."<sup>35</sup>

Some of President Reagan's signing statements also expressed concerns regarding the corresponding laws. Occasionally, the Reagan Administration stated that the Executive would construe statutory language as nonbinding to prevent encroachments on executive branch prerogatives.<sup>36</sup> Upon signing the Balanced Budget and Emergency Deficit Control Act of 1985<sup>37</sup> into law, for example, President Reagan attached a signing statement raising doubts regarding the constitutionality of certain provisions that placed various restrictions on the Exec-

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 2.

<sup>33</sup> *Id.* at 4.

<sup>34</sup> See Statement on Signing the Urgent Supplemental Appropriations Act, 1986, 2 PUB. PAPERS 906 (July 2, 1986).

<sup>35</sup> *Id.* at 906; see also Bradley & Posner, *supra* note 3, at 314.

<sup>36</sup> See, e.g., Statement on Signing the International Security and Development Cooperation Act of 1985, 2 PUB. PAPERS 983 (Aug. 8, 1985) (construing statutory language purporting to recognize the Palestinian Liberation Organization "as constituting only nonbinding expressions of congressional views on these issues" on the ground that the language constituted a "congressional effort to impose legislative restrictions or directions with respect to the conduct of international negotiations which, under article II of the Constitution, is a function reserved exclusively to the President," *id.* at 984); see also Bradley & Posner, *supra* note 3, at 314.

<sup>37</sup> Pub. L. No. 99-177, 99 Stat. 1038 (codified as amended at 2 U.S.C. §§ 900-907d, 922 (2006)).

utive's control over the budget process.<sup>38</sup> Specifically, he took issue with the assignment of "executive functions" relating to budget calculations to agents of Congress and "a provision in the bill authorizing the President to terminate or modify defense contracts for deficit reduction purposes, but only if the action [were] approved by the Comptroller General."<sup>39</sup> He resisted such encroachment on the ground that "an agent of Congress may not exercise such supervisory authority over the President."<sup>40</sup> President Reagan emphasized that, in signing the bill, he was "in no sense dismissing the constitutional problems or acquiescing in a violation of the system of separated powers carefully crafted by the framers of the Constitution."<sup>41</sup> But he did not claim authority to disregard the Act. To the contrary, he explicitly stated his "hope that these outstanding constitutional questions can be promptly resolved," noting that the bill specifically provided "a constitutionally valid alternative mechanism should the role of the Director of the Congressional Budget Office and the Comptroller General be struck down,"<sup>42</sup> implying that his Administration would wait for judicial resolution of the issue.<sup>43</sup>

2. *The George H.W. Bush Administration: Inserting "Authoritative Guidance."* — President George H.W. Bush accelerated the use of signing statements as a means of asserting executive power, "continu[ing] Reagan's agenda of expanding presidential constitutional interpretive authority by creating executive legislative history."<sup>44</sup> In only one term in office, he issued 228 signing statements, nearly half of which raised constitutional or legal objections.<sup>45</sup>

In many ways, President Bush took an even more aggressive approach to the strategic use of interpretive signing statements than did his predecessors. Early in the Bush Administration, the Office of Legal Counsel (OLC) raised the alarm about legislative encroachment on

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<sup>38</sup> Statement on Signing the Bill Increasing the Public Debt Limit and Enacting the Balanced Budget and Emergency Deficit Control Act of 1985, 2 PUB. PAPERS 1471 (Dec. 12, 1985).

<sup>39</sup> *Id.* at 1471.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1472.

<sup>42</sup> *Id.* at 1471.

<sup>43</sup> The Supreme Court cited President Reagan's signing statement in support of its conclusion that the law unduly encroached on executive authority. See *Bowsher v. Synar*, 478 U.S. 714, 719 n.1 (1986). Although the Court never purported to rely on the statement, the Reagan Administration viewed the citation as an endorsement of the viability of signing statements as legislative history and validation of its larger signing statements strategy. Yet subsequent courts "have rarely relied on signing statements and have ruled on neither their constitutionality (as executive interpretations that directly contradict legislative mandates) nor the amount of judicial deference they should receive." Note, *Context-Sensitive Deference to Presidential Signing Statements*, 120 HARV. L. REV. 597, 600 (2006).

<sup>44</sup> Lee, *supra* note 15, at 713–14.

<sup>45</sup> HALSTEAD, *supra* note 1, at 5.

executive branch prerogatives.<sup>46</sup> To counter this perceived threat, President Bush used signing statements to instantiate his preferred interpretation of legislation, regardless of whether it was consistent with legislative intent. On occasion, the Administration encouraged friendly legislators to comment on bills so their words could later be referenced in signing statements as the basis for the President's interpretation.<sup>47</sup> For example, Congress enacted the Civil Rights Act of 1991<sup>48</sup> to overrule the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*,<sup>49</sup> in which the Court narrowly construed disparate impact claims under Title VII.<sup>50</sup> In signing the bill, however, President Bush argued that the Act "codifie[d]" rather than "overturn[ed]" *Wards Cove*.<sup>51</sup> Noting that it was "extremely important that the statute be properly interpreted," President Bush instructed that statements inserted into the congressional record by Senator Robert Dole "will be treated as authoritative interpretive guidance by all officials in the executive branch with respect to the law of disparate impact as well as the other matters covered in the documents."<sup>52</sup>

Similarly, the 1990 Foreign Operations, Export Financing, and Related Programs Appropriations Act<sup>53</sup> contained a provision — similar to one previously vetoed by President Bush — preventing the President from providing funds to foreign countries under certain conditions.<sup>54</sup> President Bush objected to the provision as an intrusion on the President's control over foreign policy and supervision of the executive branch; he issued a signing statement pledging "to construe this section narrowly" in a manner "[c]onsistent with the expressed intent of the Congress and to avoid constitutional problems."<sup>55</sup> Purportedly "agree[ing]" with the view expressed on the House and Senate floor that this section is intended only to prohibit 'quid pro quo' transactions," President Bush referenced statements in the congressional record — most notably, an "explanatory colloquy" between Senators Robert Kasten and Warren Rudman — as the basis for his interpretation.<sup>56</sup>

<sup>46</sup> See Common Legislative Encroachments on Executive Branch Authority, 13 Op. O.L.C. 248 (1989).

<sup>47</sup> Kelley, *supra* note 3, at 8–9 (describing this practice as the creation of "alternative legislative history," *id.* at 9, through the help of congressional allies).

<sup>48</sup> Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of the U.S. Code).

<sup>49</sup> 490 U.S. 642 (1989).

<sup>50</sup> *Id.* at 657–68; see also Lee, *supra* note 15, at 714.

<sup>51</sup> Statement on Signing the Civil Rights Act of 1991, 2 PUB. PAPERS 1504, 1504 (Nov. 21, 1991).

<sup>52</sup> *Id.*

<sup>53</sup> Pub. L. No. 101-167, 103 Stat. 1195 (1989) (codified in scattered sections of the U.S. Code).

<sup>54</sup> *Id.* § 582(a), 103 Stat. at 1251.

<sup>55</sup> Statement on Signing the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, 2 PUB. PAPERS 1573, 1573 (Nov. 21, 1989).

<sup>56</sup> *Id.*

In the text of the statute, however, “Congress took care to point out that it excluded any ‘funds to governing governments in exchange for taking actions prohibited to the U.S. government,’ and not just the [sic] those with a quid pro quo agreement.”<sup>57</sup> According to some scholars, congressional allies inserted the contrary language into the legislative history at the Administration’s behest to be referenced later in a signing statement.<sup>58</sup>

The Bush Administration was aggressive in using signing statements to protect against perceived congressional encroachment on executive branch prerogatives, particularly with respect to the President’s authority to appoint executive branch officers.<sup>59</sup> President Bush also expanded signing statements into the foreign policy field.<sup>60</sup> As in other substantive policy areas, the Bush Administration was vehement in its protection of presidential prerogatives and prevention of congressional interference. To this end, President Bush often claimed the authority to treat statutory language as “precatory”<sup>61</sup> or “advisory”<sup>62</sup> rather than mandatory if it interfered with his foreign affairs power.

3. *The Clinton Administration: Institutionalizing the Signing Statement.* — Like his predecessors, President Bill Clinton “made active use of signing statements as a mechanism to assert presidential prerogatives,”<sup>63</sup> in some instances “to achieve what could not be achieved after veto bargaining had taken place.”<sup>64</sup> Indeed, he issued more signing statements than his Republican predecessors: 381 in his two terms in office.<sup>65</sup> However, a smaller proportion of President Clinton’s signing statements (less than twenty percent) raised constitutional objections to the underlying laws.<sup>66</sup>

<sup>57</sup> Kelley, *supra* note 3, at 115 (quoting CHARLES TIEFER, *THE SEMI-SOVEREIGN PRESIDENCY* 38 (1994)).

<sup>58</sup> *Id.*

<sup>59</sup> See, e.g., Statement on Signing the Dayton Aviation Heritage Preservation Act of 1992, 28 WEEKLY COMP. PRES. DOC. 1966 (Oct. 16, 1992) (objecting that requiring the President to select members of an executive branch commission based on recommendations from local officials would violate the Appointments Clause); Statement on Signing the National and Community Service Act of 1990, 2 PUB. PAPERS 1613, 1614 (Nov. 16, 1990) (noting that “the restrictions . . . on [the President’s] choice of nominees . . . are without legal force or effect” on the grounds of incompatibility with the Appointments Clause); see also AM. BAR ASS’N, *supra* note 5, at 12.

<sup>60</sup> AM. BAR ASS’N, *supra* note 5, at 11 (noting that one-third of President Bush’s constitutional challenges were in the foreign policy field).

<sup>61</sup> E.g., Statement on Signing the Department of Defense Appropriations Act, 1991, 2 PUB. PAPERS 1558, 1558 (Nov. 5, 1990).

<sup>62</sup> E.g., Statement on Signing the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1991, 2 PUB. PAPERS 1560, 1560 (Nov. 5, 1990).

<sup>63</sup> HALSTEAD, *supra* note 1, at 6.

<sup>64</sup> Kelley, *supra* note 23, at 19.

<sup>65</sup> HALSTEAD, *supra* note 1, at 6.

<sup>66</sup> *Id.*

As it had done during the two preceding Republican administrations, OLC under President Clinton provided a vigorous defense of the use of signing statements to raise constitutional objections to encroachments on executive authority and convey the President's intention not to enforce such provisions. Assistant Attorney General Walter Dellinger explained that if the President otherwise has nonenforcement authority, "a signing statement that challenges what the President determines to be an unconstitutional encroachment on his power, or that announces the President's unwillingness to enforce (or willingness to litigate) such a provision, can be a valid and reasonable exercise of Presidential authority."<sup>67</sup> The Clinton Administration did not take a position on signing statements used to create legislative history.<sup>68</sup>

President Clinton routinely used signing statements to push back against perceived congressional interference with his Recommendations Clause<sup>69</sup> and Appointments Clause<sup>70</sup> authority,<sup>71</sup> stating that he would construe such laws so as not to conflict with executive branch prerogatives. The Balanced Budget Act of 1997,<sup>72</sup> for example, included a provision requiring a cabinet-level executive branch official to develop certain legislative proposals for Congress.<sup>73</sup> Upon signing the bill, President Clinton attached a signing statement pledging to "construe this provision in light of [his] constitutional duty and authority to recommend to the Congress such legislative measures as [he] judge[d] necessary and expedient, and to supervise and guide [his] subordinates, including the review of their proposed communications to the Congress."<sup>74</sup> He lodged analogous objections with respect to the President's appointments power. In one instance, when signing a bill purporting to limit the President's unfettered ability to choose members of a commission, President Clinton attached a statement explaining that "[t]he Appointments Clause does not permit such restrictions to be imposed upon the executive branch's powers of appointment" and that he would treat any such restrictions "as advisory only."<sup>75</sup>

<sup>67</sup> Memorandum from Walter Dellinger for Bernard N. Nussbaum, Counsel to the President 2-3 (Nov. 3, 1993), available at <http://www.justice.gov/olc/signing.htm>. Dellinger went on to note that the President's nonenforcement authority, and thus power to raise constitutional objections in signing statements, is not limited to protecting executive branch prerogatives. *See id.* at 10 n.10.

<sup>68</sup> *See id.* at 4 ("We do not attempt finally to decide here whether signing statements may legitimately be used in the manner described by [the Reagan Administration].").

<sup>69</sup> U.S. CONST. art. II, § 3, cl. 1.

<sup>70</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>71</sup> *See HALSTEAD, supra note 1*, at 7.

<sup>72</sup> Pub. L. No. 105-33, 111 Stat. 251 (1997) (codified in scattered sections of the U.S. Code).

<sup>73</sup> *See id.*

<sup>74</sup> Statement on Signing the Balanced Budget Act of 1997, 33 WEEKLY COMP. PRES. DOC. 1990, 1991 (Aug. 5, 1997).

<sup>75</sup> Statement on Signing the Coast Guard Authorization Act of 1996, 32 WEEKLY COMP. PRES. DOC. 2112, 2113 (Oct. 19, 1996).

The Clinton Administration also expanded the use of constitutional signing statements in the military and foreign affairs contexts.<sup>76</sup> Although he did not pursue the strategy of the Reagan-Bush years with respect to interpretive signing statements, President Clinton did continue the practice of using signing statements to assert strong executive branch positions with respect to congressional actions, often to achieve policy outcomes that were otherwise unattainable. The National Defense Authorization Act for Fiscal Year 1996,<sup>77</sup> for example, contained a provision that had previously prompted a veto because the provision required discharge of HIV-positive service members.<sup>78</sup> Rather than veto the legislation again, President Clinton signed the appropriations bill into law, but issued a signing statement noting that the “discriminatory” provision was “unconstitutional,”<sup>79</sup> even going so far as to affirmatively instruct his Attorney General not to defend the law.<sup>80</sup>

President Clinton took an even more defiant stance with respect to the National Defense Authorization Act for Fiscal Year 2000.<sup>81</sup> The Clinton Administration took issue with the creation of a new agency within the Department of Energy outside the direct control of the Secretary. In his signing statement, President Clinton “la[id] out the specific actions that were to be taken in order to ensure the vitiation of the [objectionable] provisions,”<sup>82</sup> including instructing executive branch officials to take steps contrary to those enumerated in the statute. He went on to claim that a number of provisions “raise[d] serious constitutional concerns” and would be “treat[ed] . . . as advisory.”<sup>83</sup>

4. *The George W. Bush Administration: Expanding the Scope of Executive Power.* — President George W. Bush was popularly considered to have dramatically increased the number of signing statements. While indeed “quantitatively unusual,” President Bush’s practice was not unusual “in the simple way reported in the press.”<sup>84</sup> Indeed, President Bush issued fewer signing statements than many of his predeces-

<sup>76</sup> See AM. BAR ASS’N, *supra* note 5, at 13.

<sup>77</sup> Pub. L. No. 104-106, 110 Stat. 186 (1996) (codified in scattered sections of the U.S. Code).

<sup>78</sup> *Id.* § 567, 110 Stat. at 328; see also AM. BAR ASS’N, *supra* note 5, at 13.

<sup>79</sup> Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 32 WEEKLY COMP. PRES. DOC. 260, 261 (Feb. 10, 1996).

<sup>80</sup> *Id.* This statement reflects the consolidation of presidential control over the executive branch by the time of the Clinton Administration, here manifested in increased presidential control over the Justice Department at the expense of Congress. See *infra* p. 2130.

<sup>81</sup> Pub. L. No. 106-65, 113 Stat. 512 (1999) (codified in scattered sections of the U.S. Code); see HALSTEAD, *supra* note 1, at 7 (contrasting most signing statements, which “are usually generalized in nature,” with President Clinton’s statement accompanying the National Defense Authorization Act for Fiscal Year 2000, which included a “substantive presidential directive”).

<sup>82</sup> HALSTEAD, *supra* note 1, at 8.

<sup>83</sup> Statement on Signing the National Defense Authorization Act for Fiscal Year 2000, 35 WEEKLY COMP. PRES. DOC. 1927, 1930 (Oct. 5, 1999).

<sup>84</sup> Bradley & Posner, *supra* note 3, at 324.

sors — 152, compared with President Clinton's 381.<sup>85</sup> In those signing statements, however, he challenged far more provisions of law than President Clinton, or any other previous President for that matter — over 1000 in total.<sup>86</sup> President Bush typically challenged upwards of six provisions of law with each signing statement, while historically, Presidents had challenged only one or two.<sup>87</sup> Thus, the real number of executive branch challenges to congressional enactments at the moment of presentment increased dramatically in the Bush Administration.<sup>88</sup> Moreover, President Bush lodged far more constitutional challenges than his predecessors. Nearly eighty percent of his 152 signing statements contained constitutional objections, compared with just eighteen percent for President Clinton.<sup>89</sup> The shift “has been widely seen as being aimed at altering the conception of presidential authority not only in the internal operations of the executive branch, but with respect to Congress, the courts and the public.”<sup>90</sup>

A great deal of President Bush's signing statements lodged constitutional objections to bills on the ground that one or more provisions of law therein interfered with an executive branch prerogative. Some grounded their objections in specific constitutional provisions, such as the Recommendations Clause or the Appointments Clause. With respect to these purported encroachments on executive authority, “[t]he constitutional arguments made in President Bush's signing statements are similar indeed, often almost identical in wording to those made in Bill Clinton's statements.”<sup>91</sup> President Bush often challenged congressional authority to impose reporting requirements on the Executive.<sup>92</sup>

<sup>85</sup> HALSTEAD, *supra* note 1, at 9.

<sup>86</sup> *See id.*

<sup>87</sup> Bradley & Posner, *supra* note 3, at 324.

<sup>88</sup> *See id.* (“On average, Bush challenged 162 statutory provisions per year; by contrast Clinton challenged 18 and G.H.W. Bush challenged 42.”). As Professors Curtis Bradley and Eric Posner note, this could be explained, at least in part, by the increase in national security–related legislation following September 11, 2001. *See id.* at 331–32.

<sup>89</sup> HALSTEAD, *supra* note 1, at 9. Because most of President Bush's signing statements challenged multiple provisions of law, the raw number of signing statements containing constitutional challenges is deceptively low. In reality, upwards of five hundred constitutional challenges were lodged during the Bush Administration. *See id.*; AM. BAR ASS'N, *supra* note 5, at 15.

<sup>90</sup> HALSTEAD, *supra* note 1, at 11; *see also id.* (“[T]he Bush II signing statements are an integral part of the Administration's efforts to further its broad view of presidential prerogatives and to assert . . . control over all elements of the executive decisionmaking process.”).

<sup>91</sup> Curtis Bradley & Eric Posner, *Signing Statements: It's a President's Right*, BOS. GLOBE, Aug. 3, 2006, at A11; *see also Presidential Signing Statements: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 1 (2007) (statement of John P. Elwood, Deputy Assistant Att'y Gen.) [hereinafter Elwood Testimony], available at <http://www.justice.gov/olc/2007/presidential-signing-stmt.pdf>.

<sup>92</sup> *See, e.g.*, Statement on Signing Legislation to Provide for Improvement of Federal Education Research, Statistics, Evaluation, Information, and Dissemination, and for Other Purposes, 38 WEEKLY COMP. PRES. DOC. 1995, 1995 (Nov. 5, 2002).

He also issued a number of signing statements raising concerns over restrictions on the President's unfettered ability to appoint executive branch officers.<sup>93</sup> Like his predecessor, President Bush viewed *ex ante* restrictions (such as specified qualifications or candidate lists) upon whom the President can appoint, even to Senate-confirmable positions, to be flatly unconstitutional, and thus made clear he would construe any restriction on the President's appointments power to be merely advisory despite the laws' explicit requirements.

Most of President Bush's constitutional signing statements, however, concerned perceived congressional interference with the President's role as Commander in Chief.<sup>94</sup> These objections were often grounded in the unitary executive theory and the President's authority to supervise and direct the executive branch.<sup>95</sup> Many such statements expressed a generalized concern with congressional reporting requirements as interfering with the President's right to control executive branch officials.<sup>96</sup> Others rejected limitations on the use of the armed forces<sup>97</sup> or the treaty negotiation power.<sup>98</sup>

President Bush was certainly not the first to assert presidential primacy in the realm of international affairs or to claim authority to control access to sensitive national security information.<sup>99</sup> But President Bush's signing statements evinced an expanded notion of executive authority to disregard acts of Congress, oftentimes adopting strained interpretations of statutory language to avoid constitutional questions. Moreover, the Bush Administration linked these loose readings — often with respect to a large or indefinite number of provisions within the same bill<sup>100</sup> — to indeterminate sources of presidential power, such as the Commander-in-Chief Clause or unitary executive theory, effectively “signaling that the Administration reserves the right not to enforce numerous unspecified provisions” without clear articula-

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<sup>93</sup> See, e.g., Statement on Signing the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, 41 WEEKLY COMP. PRES. DOC. 1273, 1273 (Aug. 10, 2005).

<sup>94</sup> See Lee, *supra* note 15, at 727.

<sup>95</sup> See, e.g., Statement on Signing the Consolidated Appropriations Act, 2005, 40 WEEKLY COMP. PRES. DOC. 2924, 2924 (Dec. 8, 2004).

<sup>96</sup> See, e.g., Statement on Signing the Intelligence Authorization Act for Fiscal Year 2005, 40 WEEKLY COMP. PRES. DOC. 3012, 3012 (Dec. 23, 2004).

<sup>97</sup> See, e.g., Statement on Signing the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, 40 WEEKLY COMP. PRES. DOC. 2673, 2673 (Oct. 28, 2004).

<sup>98</sup> See, e.g., Statement on Signing the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1718, 1718 (Nov. 14, 2005).

<sup>99</sup> See Elwood Testimony, *supra* note 91, at 9–11.

<sup>100</sup> See, e.g., Statement on Signing the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, 37 WEEKLY COMP. PRES. DOC. 1723, 1724 (Nov. 28, 2001) (“[S]everal other provisions of the bill unconstitutionally constrain my authority regarding the conduct of diplomacy and my authority as Commander-in-Chief.”).

tion of the legal basis for doing so.<sup>101</sup> In one such signing statement, President Bush stated that he would construe a congressional reporting requirement mandating that the Attorney General convey executive branch constitutional objections — the legal grounding for signing statements themselves — so as not to require such reporting in the case of classified or unofficial executive nonenforcement orders.<sup>102</sup> Similarly, President Bush stated that certain provisions of the Intelligence Authorization Act for Fiscal Year 2002<sup>103</sup> would “fall short of constitutional standards” and he would construe the law “in a manner consistent with the President’s constitutional authority to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive’s constitutional duties.”<sup>104</sup>

5. *The Obama Administration: Reining in the Use of Signing Statements.* — President Barack Obama reversed the trend, issuing far fewer signing statements than his predecessor. In 2007, then-candidate Obama pledged “not [to] use signing statements to nullify or undermine congressional instructions as enacted into law.”<sup>105</sup> While reaffirming that “it is legitimate for a president to issue a signing statement to clarify his understanding of ambiguous provisions of statutes and to explain his view of how he intends to faithfully execute the law,” as well as “to protect a president’s constitutional prerogatives,” he criticized President Bush’s use of signing statements “to change the meaning of the legislation, to avoid enforcing certain provisions of the legislation that the President does not like, and to raise implausible or dubious constitutional objections to the legislation.”<sup>106</sup>

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<sup>101</sup> Barron et al., *supra* note 8; see also HALSTEAD, *supra* note 1, at 11 (explaining that “the large bulk of the signing statements the Bush II Administration has issued to date do not apply particularized constitutional rationales to specific scenarios, nor do they contain explicit, measurable refusals to enforce a law,” but rather “make broad and largely hortatory assertions of executive authority that make it effectively impossible to ascertain what factors, if any, might lead to substantive constitutional or interpretive conflict in the implementation of an act”).

<sup>102</sup> Statement on Signing the 21st Century Department of Justice Appropriations Authorization Act, 38 WEEKLY COMP. PRES. DOC. 1971, 1971 (Nov. 2, 2002) (pledging to construe provisions “purport[ing] to impose on the executive branch substantial obligations for reporting to the Congress activities of the Department of Justice involving challenges to or nonenforcement of law that conflicts with the Constitution . . . in a manner consistent with the constitutional authorities of the President to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive’s constitutional duties”).

<sup>103</sup> Pub. L. No. 107-108, 115 Stat. 1394 (2001) (codified in scattered sections of the U.S. Code).

<sup>104</sup> Statement on Signing the Intelligence Authorization Act for Fiscal Year 2002, 37 WEEKLY COMP. PRES. DOC. 1834, 1834 (Dec. 28, 2001).

<sup>105</sup> Charlie Savage, *Barack Obama’s Q&A*, BOS. GLOBE (Dec. 20, 2007), <http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/>.

<sup>106</sup> *Id.*

Almost immediately after he came into office, President Obama issued a memorandum in which he again promised to “issue signing statements to address constitutional concerns only when it is appropriate to do so as a means of discharging [his] constitutional responsibilities.”<sup>107</sup> Although recognizing that “signing statements serve a legitimate function in [the political] system, at least when based on well-founded constitutional objections,” the memo emphasized “that the practice of issuing such statements can be abused.”<sup>108</sup>

In response to these concerns, the memo outlined new guidelines for executive practice regarding signing statements. President Obama pledged that his administration would (1) “take appropriate and timely steps, whenever practicable, to inform the Congress of its constitutional concerns about pending legislation” in order to obviate the need for a signing statement; (2) “strive to avoid the conclusion that any part of an enrolled bill is unconstitutional”; (3) “identify [its] constitutional concerns about a statutory provision with sufficient specificity to make clear the nature and basis of the constitutional objection”; and (4) “construe a statutory provision in a manner that avoids a constitutional problem only if that construction is a legitimate one.”<sup>109</sup> While some took this memo as a promise to end the practice for good, President Obama made clear that he was not forswearing signing statements altogether but merely promising to use them in a more limited fashion than his predecessor.

President Obama has issued only twenty-one signing statements in his first three years in office — far fewer than his predecessors had at the same point in their presidencies.<sup>110</sup> In many ways, the substance of President Obama’s signing statements has departed from the pattern of his predecessors as well. His signing statements do not contain unqualified assertions of executive power. Consistent with his promise not to use “such statements as a license to evade laws that the president does not like or as an end-run around provisions designed to foster accountability,”<sup>111</sup> President Obama has limited the use of signing statements that treat statutory restrictions on the President’s appointment power as merely “advisory” (which were common in the Clinton and George W. Bush administrations). Consistent with prior practice, some of President Obama’s signing statements announce his understanding of the meaning of a bill or raise constitutional concerns about

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<sup>107</sup> Memorandum on Presidential Signing Statements, 2009 DAILY COMP. PRES. DOC. 1 (Mar. 9, 2009), available at <http://www.gpo.gov/fdsys/pkg/DCPD-200900138/pdf/DCPD-200900138.pdf>.

<sup>108</sup> *Id.* at 1.

<sup>109</sup> *Id.*

<sup>110</sup> See *Presidential Signing Statements: Hoover–Obama*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/signingstatements.php> (last visited May 3, 2012).

<sup>111</sup> Savage, *supra* note 105.

the legislation.<sup>112</sup> But President Obama's signing statements, unlike those of his predecessors, clearly indicate constitutionally problematic provisions with specificity and explain why they cannot be enforced (or how they will be enforced consistent with the Constitution).<sup>113</sup> Others announce an intent to construe a statutory provision in a manner that will obviate those constitutional concerns.<sup>114</sup>

Despite his criticism of President Bush on this score, however, President Obama has raised objections to perceived encroachments on executive power in many of his signing statements. In April of last year, for example, Congress enacted a continuing appropriations resolution that provided defense funding for the remainder of the fiscal year.<sup>115</sup> President Obama signed the bill but expressed concern that a provision therein barring him from using any such funds to transfer Guantánamo detainees into the United States or into the custody of a foreign country represented a "challenge to critical executive branch authority to determine when and where to prosecute Guantánamo detainees."<sup>116</sup> He also expressed concern that the bill's restriction on funding for certain executive branch advisors (so-called White House "czars") would "impede the President's ability to exercise his supervisory and coordinating authorities."<sup>117</sup> So as not to "violate the separation of powers by undermining the President's ability to exercise his constitutional responsibilities and take care that the laws be faithfully executed," the Obama Administration would "construe [the Act] not to abrogate these Presidential prerogatives."<sup>118</sup> Notably, however, President Obama neither cited his authority to supervise the unitary executive nor claimed the authority to disregard the statutory requirements, even with respect to the restrictions on prosecuting Guantánamo detainees. To the contrary, he promised to "work with the Congress to seek repeal of these restrictions" while "seek[ing] to mitigate their effects," in the meantime implicitly agreeing to comply until such goals could be met through the legislative process.<sup>119</sup>

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<sup>112</sup> See, e.g., Statement on Signing the Omnibus Appropriations Act of 2009, 2009 DAILY COMP. PRES. DOC. 1, 1-2 (Mar. 11, 2009).

<sup>113</sup> See *id.*

<sup>114</sup> See, e.g., Statement on Signing the Omnibus Public Land Management Act of 2009, 2009 DAILY COMP. PRES. DOC. 1, 1 (Mar. 30, 2009) ("Because it would be an impermissible restriction on the appointment power to condition the Secretary's appointments on the recommendations of members of the House, I will construe these provisions to require the Secretary to consider such congressional recommendations, but not to be bound by them in making appointments . . .").

<sup>115</sup> Department of Defense and Full-Year Continuing Appropriations Act, 2011, H.R. 1473, 112th Cong. (2011) (enacted).

<sup>116</sup> Statement on Signing the Department of Defense and Full-Year Continuing Appropriations Act, 2011, 2011 DAILY COMP. PRES. DOC. 1, 1 (Apr. 15, 2011).

<sup>117</sup> *Id.* at 2.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 1.

*C. The Public's Role in Reining in the Use of Signing Statements*

President Obama's break from his predecessors on signing statements provides important insights into the institutional dynamics at play in separation-of-powers disputes. As explained above, executive branch aggrandizement — in the form of the dramatic increase in the number of signing statements — makes intuitive sense in light of the changes to the legislative process in the late twentieth century: with the rise of omnibus legislation, the President, practically speaking, cannot routinely exercise the veto.<sup>120</sup> Faced with the prospect of acquiescing to congressional encroachment or vetoing hard-won bills with numerous salutary elements on the basis of its objection to one (or even several) isolated provisions, the executive branch advanced novel uses of the signing statement to reassert its institutional prerogatives and maintain its role in the legislative process. This practice expanded largely unchecked over the course of the twentieth century, across Democratic and Republican administrations alike, until the George W. Bush Administration, when a national firestorm erupted regarding perceived abuses of the practice. In response to the public outcry, President Obama voluntarily restricted use of signing statements.<sup>121</sup>

Political checks thus can work to restrain the President by prompting executive self-binding.<sup>122</sup> According to Professors Eric Posner and Adrian Vermeule, executive self-binding, “whereby executives commit themselves to a course of action that would impose higher costs on ill-motivated actors,”<sup>123</sup> can act as a substitute for legal constraints that have proved ineffective in preventing the concentration of power in the hands of the President. The Obama Administration's shift on signing statements demonstrates that when Congress fails to constrain the expansion of executive power, the public can step in as a check, prompting the President to voluntarily bind himself to a different policy position in an effort to maintain the credibility of his office.<sup>124</sup> The story here is slightly more complex than Posner and Vermeule suggest, however, for Congress played an important role in fanning the flames of public opinion against the presidential practice, the very force that ultimately induced the desired change.

Aggressive use of signing statements threatened to weaken the legislative branch vis-à-vis the Executive. Under the Madisonian concep-

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<sup>120</sup> See *supra* p. 2071.

<sup>121</sup> See *supra* p. 2082.

<sup>122</sup> See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* (2010). For a contrary account, see Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381 (2012) (reviewing POSNER & VERMEULE, *supra*).

<sup>123</sup> POSNER & VERMEULE, *supra* note 122, at 137.

<sup>124</sup> See *id.* at 133–37.

tion of checks and balances, the branches are expected to resist encroachment from the other branches. To this end, the Constitution provides each branch with tools to police its institutional boundaries. Indeed, the fact that the Constitution vests in the President a role in the legislative process is one example of this phenomenon; the veto is one means by which the President can prevent legislative encroachment on executive branch prerogatives. Congress, for its part, has numerous tools at its disposal to counter overconcentration of power in the President and to protect its institutional prerogatives against executive encroachment, including budget-stripping, oversight authority, impeachment, and the threat to exercise any of these powers.

Yet Congress failed to make effective use of its formal powers to rein in the President in this case.<sup>125</sup> Publicly, Congress was highly critical of signing statements in the final years of the George W. Bush Administration. Committees in both the House and Senate held hearings on the matter in the 109th and 110th Congresses.<sup>126</sup> In 2006, then-Republican and Senate Judiciary Committee Chairman Arlen Specter criticized President Bush's use of signing statements as "a challenge to the plain language of the Constitution."<sup>127</sup> Patrick Leahy, ranking Democratic Senator on the Committee, similarly characterized signing statements as a "diabolical device" used by President Bush "to unilaterally rewrite the laws enacted by the people's representatives in Congress."<sup>128</sup> Following these hearings, multiple bills were introduced in an attempt to rein in the use of signing statements. One purported to give the House and Senate standing to sue the President in federal court to challenge the legality of a signing statement and prohibit any judicial reliance on or deference to a presidential signing statement as a source of authority.<sup>129</sup> Another would have required executive branch publi-

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<sup>125</sup> This outcome could be a reflection of the fact that Congress is unwilling to use the tools at its disposal to push back against the President for political reasons, or that these tools are insufficient to counter the specific threat posed by signing statements, or both.

<sup>126</sup> See *Executive Power and Its Constitutional Limitations: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (2008); *Impact of the Presidential Signing Statement on the Department of Defense's Implementation of the Fiscal Year 2008 National Defense Authorization Act: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Armed Servs.*, 110th Cong. (2008); *Negative Implications of the President's Signing Statement on the Sudan Accountability and Divestment Act: Hearing Before the H. Comm. on Financial Servs.*, 110th Cong. (2008); *Presidential Signing Statements Under the Bush Administration: Hearing before the H. Comm. on the Judiciary*, 110th Cong. (2007); *Use of Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006).

<sup>127</sup> *Congress Questions Bush Ignoring Laws*, MSNBC.COM (June 27, 2006, 12:55 PM), <http://www.msnbc.msn.com/id/13566353/ns/politics/t/congress-questions-bush-ignoring-laws/>.

<sup>128</sup> *The Use of Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 224 (2006) (statement of Sen. Patrick Leahy, Ranking Member).

<sup>129</sup> Presidential Signing Statements Act of 2006, S. 3731, 109th Cong. (2006).

cation and explanation of signing statements.<sup>130</sup> Still another purported to deny funding for the purposes of issuing signing statements.<sup>131</sup> But all of this clamoring was ultimately for naught; none of the bills tying signing statements to Congress's budgetary or oversight authority was ultimately enacted into law.<sup>132</sup> And when legislation was ultimately enacted in the 110th Congress purporting to regulate the President's nonenforcement authority,<sup>133</sup> Congress was thwarted, ironically enough, by a signing statement.<sup>134</sup>

The 111th Congress took up the effort too; three bills were introduced that purported to restrain presidential use of signing statements.<sup>135</sup> They similarly failed to garner sufficient support. And despite this seemingly widespread concern that aggressive use of signing statements had diminished legislative authority vis-à-vis the President, Congress could not, practically speaking, cure the problem by abandoning omnibus bills altogether and returning to small-scale legislation, effectively daring the President to exercise his veto every time a constitutional objection arose; the demands of the modern state (especially in terms of funding) are too great and the anchoring effect of longstanding practice is too strong to allow for such a change.<sup>136</sup>

And yet, a dramatic shift did occur under President Obama: the executive branch pulled back on its use of signing statements and reduced the scope of claims to presidential power therein, despite Congress's inability (or unwillingness) to force such a change. In 2006, reporter Charlie Savage wrote an influential article criticizing President Bush's use of signing statements as "represent[ing] a concerted effort to expand his power at the expense of Congress, upsetting the balance between the branches of government."<sup>137</sup> This article prompted numerous reports in the press highly critical of President Bush's signing

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<sup>130</sup> Presidential Signing Statements Act of 2008, H.R. 5993, 110th Cong. (2008).

<sup>131</sup> See H.R. 5486, 109th Cong. (2006).

<sup>132</sup> Congress attempted to exercise its oversight authority by commissioning a Government Accountability Office report to study the degree to which President Bush was actually refusing to enforce bills he signed into law. See U.S. GOV'T ACCOUNTABILITY OFFICE, B-308603, PRESIDENTIAL SIGNING STATEMENTS ACCOMPANYING THE FISCAL YEAR 2006 APPROPRIATIONS ACTS (2007).

<sup>133</sup> A joint resolution similarly required the President to notify Congress of his intent not to enforce a law. See H.R.J. Res. 89, 109th Cong. (2006); H.R.J. Res. 87, 109th Cong. (2006).

<sup>134</sup> See *supra* note 102 and accompanying text.

<sup>135</sup> See TODD GARVEY, CONG. RESEARCH SERV., RL33667, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 28–30 (2012), available at <http://www.fas.org/sgp/crs/natsec/RL33667.pdf>.

<sup>136</sup> Moreover, there is a persuasive line of argument that eliminating signing statements in these instances would not actually cure the problem because the President could just as easily exercise his nonenforcement authority without issuing a signing statement. See Bradley & Posner, *supra* note 3, at 310.

<sup>137</sup> Savage, *supra* note 5, at A1.

statements,<sup>138</sup> setting off a national controversy surrounding the perceived Bush-era abuses and sparking a national debate on the issue in the popular press and in the scholarly community.<sup>139</sup> The people entered the fray, applying public pressure on the President to respect constitutional boundaries, thereby filling the gap left by a Congress too weak to protect its own institutional prerogatives through traditional legal mechanisms. And while Congress as a whole was unable to overcome barriers to coordinated legislative action, individual legislators aided the public push-back against executive aggrandizement by holding hearings, commissioning reports, and introducing bills, all of which drew attention to the issue.<sup>140</sup>

The clearest manifestation of the phenomenon of constitutional restraint motivated by the public is the role signing statements played in the 2008 presidential election. Both major party candidates made signing-statement reform part of their platform. At a 2008 campaign rally, then-candidate Obama criticized President Bush for using signing statements to change the meaning of congressional enactments, stating that it is “Congress’ job . . . to pass legislation” and that the President, when presented with a piece of legislation, has the choice of vetoing it or signing it.<sup>141</sup> He then vowed “not . . . to use signing statements as a way of doing an end run around Congress.”<sup>142</sup> While Obama pulled back on this absolute position on signing statements, Republican John McCain made the more sweeping pledge to forswear their use altogether.<sup>143</sup> These politicians’ responses to the popular uproar might be seen as ploys purely for political gain, but that does not diminish the extent to which such “ploys” were a response to citizen demand that worked to correct what in essence was a separation-of-powers market failure. In this context, public involvement actually presents an interesting twist on the formal constitutional mechanism for resisting executive encroachment in the legislative process: the veto override. With Presidents increasingly making use of signing statements to object to purportedly unconstitutional legislation rather than vetoing that legislation, Congress was denied the chance to assert its vision of constitutionality and perhaps override the President. The public, thus deprived of the opportunity to push back against the President through their representatives in Congress, used informal means

<sup>138</sup> See, e.g., Editorial, *supra* note 6, at A22.

<sup>139</sup> See AM. BAR ASS’N, *supra* note 5, at 3.

<sup>140</sup> See *supra* pp. 2069, 2085–87.

<sup>141</sup> Glenn Greenwald, *Obama v. Obama on Signing Statements*, SALON (Apr. 17, 2011), [http://www.salon.com/2011/04/17/signing\\_statements/](http://www.salon.com/2011/04/17/signing_statements/) (internal quotation marks omitted).

<sup>142</sup> *Id.* (internal quotation marks omitted).

<sup>143</sup> See Michael Abramowitz, *On Signing Statements, McCain Says “Never,” Obama and Clinton “Sometimes”*, WASH. POST, Feb. 25, 2008, at A13; Charlie Savage & James W. Pindell, *A Tactic of Bush’s on Bills Is Assailed*, BOS. GLOBE, Nov. 20, 2007, at A14.

to influence the relevant actor (President Obama) and induce a pledge to voluntarily relinquish a measure of executive power. And the public pressure worked: President Obama responded, not just on the campaign trail, but also once he was in office, issuing a clear directive codifying his vision of the appropriate use of signing statements and directing his subordinates to comply.<sup>144</sup>

That Congress could drum up and channel public support to effectively rein in presidential use of signing statements is significant, because it implies that legislative prerogatives can be protected against executive encroachment in the modern era. While checks and balances may not operate to constrain the President today as effectively as the Framers envisioned, that does not necessarily imply that executive power cannot be constrained by the coordinate branches of government. Rather, the signing-statement episode demonstrates that the branches must develop nontraditional mechanisms to police institutional boundaries in response to modern realities.<sup>145</sup> Congress was not able to achieve the necessary majorities in both houses to adopt legislation that could force the President to accede to its demands (such as legislation stripping executive branch appropriations), so interested and motivated members of Congress were essentially forced to rely on the public to act on the President directly. Thus, by depending on the people to achieve a substantive outcome that it could not have achieved on its own, Congress in a sense evaded the constitutional requirements of bicameralism and presentment. This result is particularly interesting in light of the fact that the very presidential power Congress was resisting — the use of signing statements — was criticized as enabling the President to make an end-run around the constitutional requirements of bicameralism and presentment to achieve policy outcomes he could not have achieved otherwise.

#### *D. Conclusion*

The recent history of signing statements demonstrates how public opinion can effectively check presidential expansions of power by inducing executive self-binding. It remains to be seen, however, if this more restrained view of signing statements can remain intact, for it relies on the promises of one branch — indeed of one person — to enforce and maintain the separation of powers. To be sure, President Obama's guidelines for the use of signing statements contain all the hallmarks of good executive branch policy: transparency, accountabil-

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<sup>144</sup> See *supra* pp. 2082–83.

<sup>145</sup> Signing statements and the use of public opinion to induce executive self-restraint are just a few examples of the unconventional weapons for mediating separation-of-powers disputes that have become increasingly important in recent years. Recess appointments and senatorial stalling techniques similarly reflect this trend. See *infra* Part V, pp. 2035–56.

ity, and fidelity to constitutional limitations. Yet, in practice, this apparent constraint (however well intentioned) may amount to little more than voluntary self-restraint.<sup>146</sup> Without a formal institutional check, it is unclear what mechanism will prevent the next President (or President Obama himself) from reverting to the allegedly abusive Bush-era practices.<sup>147</sup> Only time, and perhaps public opinion, will tell.

### III. PRESIDENTIAL POWER AND THE OFFICE OF LEGAL COUNSEL

During the last four months of 2011, the United States used unmanned drones to kill at least sixty people in Pakistan alone.<sup>1</sup> Drones have also been used in other nations, such as Yemen and Somalia.<sup>2</sup> Who decided that these strikes were legal, especially the targeted killing of U.S. citizen Anwar al-Awlaki? That duty fell to the Department of Justice's Office of Legal Counsel (OLC), which drafted the legal opinions justifying these killings.<sup>3</sup> Although extremely influential within the executive branch,<sup>4</sup> OLC has received little publicity for most of its history,<sup>5</sup> leading *Newsweek* to label it "the most important government office you've never heard of."<sup>6</sup> Its responsibilities include offering legal advice on proposed legislation and executive orders and helping to mediate legal disputes among various executive branch actors, but its most significant (as well as most controversial) function is drafting the official opinions of the Attorney General.<sup>7</sup> This role is especially important when the White House itself asks for legal analysis; yet, in such instances, OLC's mission to provide nonpartisan legal advice is in tension with both OLC's natural desire to assist the President and the President's general authority over the executive branch.

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<sup>146</sup> See Pildes, *supra* note 122, at 1400 n.59.

<sup>147</sup> Some have argued that this reversion has already happened in the Obama Administration. See Charlie Savage, *Provisions in Budget Bill Are Challenged by Obama*, N.Y. TIMES, Dec. 24, 2011, at A13; Charlie Savage, *Obama's Embrace of a Bush Tactic Riles Congress*, N.Y. TIMES, Aug. 9, 2009, at A16.

<sup>1</sup> Karen DeYoung, *U.S. Sticks to Secrecy as Drone Strikes Surge*, WASH. POST, Dec. 20, 2011, available at Factiva, Doc. No. WP0000020111220e7ck00014.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See, e.g., Frank M. Wozencraft, *OLC: The Unfamiliar Acronym*, 57 A.B.A. J. 33, 33-34 (1971).

<sup>5</sup> See Douglas W. Kmiec, *Yoo's Labour's Lost: Jack Goldsmith's Nine-Month Saga in the Office of Legal Counsel*, 31 HARV. J.L. & PUB. POL'Y 795, 795 (2008) (reviewing JACK GOLDSMITH, *THE TERROR PRESIDENCY* (2007)).

<sup>6</sup> Daniel Klaidman et al., *Palace Revolt*, NEWSWEEK, Feb. 6, 2006, at 34, 37, available at <http://www.thedailybeast.com/newsweek/2006/02/05/palace-revolt.html>.

<sup>7</sup> James Michael Strine, *The Office of Legal Counsel: Legal Professionals in a Political System* 4 (1992) (unpublished Ph.D. dissertation, Johns Hopkins University) (on file with the Harvard Law School Library).

OLC, whose opinions have considerable influence across the government,<sup>8</sup> has attempted to strike a balance between protecting presidential power and ensuring fidelity to the law by developing institutional norms designed “to protect its independence and to ensure that the Office will pursue . . . a ‘court-centered’ or ‘independent authority’ model of government lawyering instead of the ‘opportunistic’ model of a private lawyer.”<sup>9</sup> When the norms are followed, they help to ensure that OLC functions as an “independent” Attorney General, able to render impartial advice.<sup>10</sup> When OLC disregards these norms under White House pressure, however, OLC may issue flawed opinions that improperly expand presidential power. Recent examples of OLC lawyers being pressured by the White House into disregarding these safeguards include the “torture memos”<sup>11</sup> and its opinions authorizing drone strikes against suspected terrorists abroad.<sup>12</sup> In addition, OLC’s ability to constrain the President may falter where the President intentionally circumvents the office, as where President Obama rejected OLC’s interpretation of the War Powers Resolution.<sup>13</sup> Each of these occurrences

<sup>8</sup> For example, “it is understood that the opinion provided [by OLC] will become the controlling view of the executive branch.” Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1318 (2000). And while scholars debate whether this control is legally mandated or simply supported by past practice, even the Supreme Court has indicated that the opinion of the Attorney General ought to be followed by the executive branch. *Id.* at 1318–19. In addition, government employees are arguably completely shielded, under current law, from both civil and criminal liability if their actions are authorized by an OLC opinion. *See, e.g.*, Daniel L. Pines, *Are Even Torturers Immune from Suit? How Attorney General Opinions Shield Government Employees from Civil Litigation and Criminal Prosecution*, 43 WAKE FOREST L. REV. 93, 94 (2008).

<sup>9</sup> Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 514 (1993) (quoting John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 382–400 (1993)).

<sup>10</sup> Douglas W. Kmiec, *OLC’s Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337, 372–74 (1993).

<sup>11</sup> The torture memos were a series of OLC opinions regarding so-called “enhanced interrogation techniques” used to interrogate suspected terrorists. The most important (and the most notorious) was a memo drafted by John Yoo and issued by Jay Bybee, then the head of OLC, regarding general standards for such interrogations. *See* Memorandum from Jay S. Bybee, Assistant Att’y Gen., OLC, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), reprinted in THE TORTURE PAPERS 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter Torture Memo]. As head of OLC, Jack Goldsmith withdrew this memo on June 16, 2004, just before resigning, *see* GOLDSMITH, *supra* note 5, at 158–61. At the end of the same year, OLC issued a replacement memo. *See* Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A, 28 Op. O.L.C. (Dec. 30, 2004), 2004 WL 3554701 [hereinafter Replacement Memo].

<sup>12</sup> *See* DeYoung, *supra* note 1.

<sup>13</sup> *See* Authority to Use Military Force in Libya, 35 Op. O.L.C. (Apr. 1, 2011), 2011 WL 1459998 [hereinafter Libya Memo]; Charlie Savage, 2 *Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES (June 17, 2011), <http://www.nytimes.com/2011/06/18/world/africa/18powers.html>.

offers lessons for future relations between OLC and the White House. Increasingly, constraints on presidential power are coming not from other branches of government (as in the traditional Madisonian model of the separation of powers) but instead from political constraints on the President himself.<sup>14</sup> The incidents described above help shed light on the question of whether OLC legal opinions can impose a meaningful political constraint on presidential authority.

Section A introduces OLC and describes the White House's influence over OLC's legal opinions, and in particular the influential roles of the President and the White House Counsel. Section B discusses the internal norms and safeguards OLC has developed over time to maintain its independence from the White House and explains that this independence is desirable because it helps to ensure that OLC's legal opinions are accurate and unbiased. Section C illustrates the dangers of OLC's failing to adhere to its own safeguards or of the President's short-circuiting the opinion-writing process. Section D discusses reforms that have been implemented in order to preserve OLC's independence.

#### A. *White House Influence on the Office of Legal Counsel*

For most of its executive branch clients, OLC follows a standard set of procedures designed to protect its independence and ensure that its opinions provide the best possible view of the law. When the White House is the client, however, some of these safeguards do not apply, and OLC's impartiality is correspondingly more likely to wane. Section A.1 introduces the Office of Legal Counsel.

1. *An Overview of OLC.* — Some have described OLC's attorneys as "the lawyers for the White House,"<sup>15</sup> although it would probably be more accurate to call them the lawyers for the executive branch. OLC's most important function is to exercise the authority (delegated to it by the Attorney General) to issue legal opinions for the executive branch, especially on issues of constitutional law.<sup>16</sup> Attorney-advisers within OLC produce written opinions that become binding on the executive branch until and unless overruled by the President or the Attorney General. These opinions are not only followed by the entire executive branch, but arguably also confer nearly complete civil and criminal immunity for officials that act in accordance with OLC's view

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<sup>14</sup> See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* 14–15 (2010).

<sup>15</sup> Wozencraft, *supra* note 4, at 34 (internal quotation marks omitted).

<sup>16</sup> Strine, *supra* note 7, at 213; see also Interview by Martha Kumar with Peter Wallison 17 (Jan. 27, 2000), available at <http://www.archives.gov/presidential-libraries/research/transition-interviews/pdf/wallison.pdf> ("Questions of constitutionality are an area that the Office of Legal Counsel has traditionally handled for the White House.").

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of the law.<sup>17</sup> As a result, the attorneys at OLC exercise great influence over the actions of the executive branch, particularly in areas, such as national security, where secret programs carried out by the President may not be challenged in court for years, if ever.<sup>18</sup> In such areas, OLC assumes a quasi-judicial role as the only “independent” actor to review proposed policies, making the objectivity of its opinions extremely important for keeping executive power within its proper bounds.

2. *The White House as Client.* — Notwithstanding OLC’s “independent” role, the White House exerts a great deal of influence over the office in various ways. OLC is never *entirely* neutral with regard to the President’s policies.<sup>19</sup> Indeed, it is common for OLC to work to find a way to achieve the President’s objectives; if a proposed course of action is illegal or questionable, OLC may suggest alternative means to the desired end.<sup>20</sup> Such conduct is entirely appropriate, since OLC’s job, in the end, is to determine how far the President can go while remaining within the bounds of the law. However, the temptation to approve the President’s policies is strong, especially in areas such as foreign policy and national security where the President may justify the power he seeks as necessary in order to protect the public. The torture memos, for example, were written less than a year after the September 11 terrorist attacks,<sup>21</sup> when government officials were devoted to using any means possible to prevent another attack on American soil.<sup>22</sup> On vital issues like this one, OLC will feel a great deal of pressure to give the President as much authority as possible.

Further complicating this task, the White House has far more access to OLC than other executive branch actors do. OLC generally requires an executive branch department or agency requesting an opinion to first set out its own analysis in writing; the White House, in contrast, need not do so, and simply asks OLC for an opinion without

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<sup>17</sup> See Pines, *supra* note 8, at 94.

<sup>18</sup> For example, the enhanced interrogation methods authorized by the infamous torture memos were not publicly known for several years after the issuance of the memos. Had the Abu Ghraib photo scandal not captured the public consciousness and led to the leaking of the torture memos, the program might have remained secret indefinitely. See GOLDSMITH, *supra* note 5, at 156–57 (recounting the breaking of the Abu Ghraib scandal and the subsequent leaking of the Torture Memo). Had that been the case, OLC would have remained the only “independent” check on presidential authority.

<sup>19</sup> *Id.* at 34–35.

<sup>20</sup> See *id.* at 35.

<sup>21</sup> See Torture Memo, *supra* note 11, at 172.

<sup>22</sup> See GOLDSMITH, *supra* note 5, at 146–47 (describing the possibility of another attack and Goldsmith’s inability to second-guess his superiors’ judgment regarding the need for aggressive interrogations); JOHN YOO, WAR BY OTHER MEANS 17 (2006) (explaining the unique threat posed by nonstate actors like al Qaeda and the need for “aggressive action” to defeat them).

first drafting its own.<sup>23</sup> In addition, the White House Counsel's Office can (and often does) attempt to convince OLC to take the White House perspective on pending issues.<sup>24</sup> Moreover, the White House also has a unique ability to resist OLC even after OLC has reached an unfavorable conclusion, through personal and political pressure on OLC lawyers.<sup>25</sup> This degree of influence can corrode OLC's internal checks and balances in numerous ways, including reducing the influence of the Attorney General over his or her own Department of Justice.<sup>26</sup>

The final manner in which the White House can influence OLC comes from the ability of the White House Counsel's Office to provide the President with legal advice of its own, removing the need to consult OLC entirely. In fact, some former Counsels, such as Peter Wallison, believe that eventually "the White House Counsel's Office will freeze out the Office of Legal Counsel."<sup>27</sup> Even without eliminating OLC completely, the White House Counsel's Office is often capable of issuing the same types of opinions.<sup>28</sup> Competition with the White House Counsel thus puts pressure on OLC to rule in favor of the President, because too many adverse opinions could lead him to go to the White House Counsel instead.<sup>29</sup> This danger is increased by the fact that the President can communicate with OLC through and with the advice of the White House Counsel, which further colors his view of OLC opinions.<sup>30</sup> Thus, fear of being replaced may lead OLC to look more favorably on White House requests than it otherwise would.

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<sup>23</sup> See Wozencraft, *supra* note 4, at 34; see also GOLDSMITH, *supra* note 5, at 41–42 (describing a meeting with White House Counsel Alberto Gonzales and Counsel to the Vice President David Addington).

<sup>24</sup> BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 231 n.43 (2010).

<sup>25</sup> See, e.g., GOLDSMITH, *supra* note 5, at 71 (discussing a confrontation with David Addington over an issue of counterterrorism law).

<sup>26</sup> For example, while John Yoo was drafting the most infamous of the torture memos, and indeed during most of his time at OLC, he often met with White House Counsel Alberto Gonzales, taking instructions from him and sometimes giving the White House advice without first clearing it with Attorney General John Ashcroft. *Id.* at 24.

<sup>27</sup> Interview by Martha Kumar with Peter Wallison, *supra* note 16, at 18.

<sup>28</sup> See ACKERMAN, *supra* note 24, at 114 (describing how President Obama's White House Counsel has taken on parts of OLC's traditional role).

<sup>29</sup> See Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, *LAW & CONTEMP. PROBS.*, Autumn 1993, at 63, 89 ("OLC attempts to avoid generating the perception in the White House that it is a balky obstacle to White House policy aims.").

<sup>30</sup> See, e.g., GOLDSMITH, *supra* note 5, at 31–32 (relating that his first question on presidential policy came through White House Counsel Alberto Gonzales); *id.* at 71 (recounting how he delivered bad news regarding an important Bush Administration counterterrorism initiative to Gonzales rather than directly to the President).

### B. *How OLC Safeguards Its Independence*

Over time, OLC has established internal safeguards to ensure that its opinions will be both well-reasoned and relatively free from partisan influence.<sup>31</sup> For reasons just discussed, however, some of these safeguards do not apply to the White House. Furthermore, even those that do restrict the President and his staff may well be thought inappropriate; since the President is the ultimate authority in the executive branch, why should he be unable to direct OLC to reach a specific conclusion? Section 1 describes the protections that OLC has developed in order to defend its independence. Section 2 addresses the argument that these safeguards (and any similar ones that may be developed) are inappropriate when applied to the White House.

1. *OLC's Internal Safeguards.* — OLC's norms have three basic goals: ensuring that OLC's opinions are as accurate as they can be, promoting transparency where possible, and keeping OLC relatively nonpartisan. OLC ensures its opinions are accurate in several ways. First, a department or agency seeking an OLC opinion (with the exception of the White House) must first produce its own written analysis before asking for OLC's input.<sup>32</sup> This rule helps agencies to avoid the urge to "pass the buck" by relying solely on OLC,<sup>33</sup> and also ensures that OLC has the benefit of well-developed legal reasoning generated by the agency that is most concerned with the issue. The result is higher-quality OLC opinions and a better chance at reaching the "right" conclusion.

Second, OLC requires whenever possible that it be consulted *before* the government commits to taking an action.<sup>34</sup> If litigation has already begun, OLC will generally refuse to provide an opinion.<sup>35</sup> According to Professor Harold Koh, himself a former attorney-adviser at OLC, this requirement lets OLC focus on "impartially evaluat[ing] the legality of the proposed action."<sup>36</sup> As Koh argues, any failure to follow this poli-

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<sup>31</sup> In the words of Professor Douglas Kmiec, "[i]t is probably fair to describe the modern experience of the heads of OLC . . . as one of remarkable independence and latitude." Kmiec, *supra* note 10, at 373. While Kmiec was discussing the independence of OLC from the Attorney General rather than from the White House, the same policies and practices tend to keep OLC independent of both.

<sup>32</sup> Koh, *supra* note 9, at 514 ("OLC refrains from rendering opinions . . . to requesting agencies that have not themselves first provided legal opinions setting forth their own positions on contested interagency matters."); *see also* Wozencraft, *supra* note 4, at 34.

<sup>33</sup> Wozencraft, *supra* note 4, at 34 (internal quotation marks omitted).

<sup>34</sup> Koh, *supra* note 9, at 515.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

cy renders the OLC opinion “suspect precisely because we can no longer be certain that its result has not been ‘precooked.’”<sup>37</sup>

Another goal of OLC’s safeguards is transparency in the drafting process. For instance, it is standard OLC practice to share opinions with other government agencies while still in draft form.<sup>38</sup> This procedure gives executive departments affected by the decision an opportunity to comment on the draft, thereby permitting outside scrutiny of OLC’s analysis and helping to ensure accuracy. OLC must answer legal questions from a broad range of fields, and attorney-advisers within OLC itself may not have the relevant legal expertise. Even if one or more of them *does* have a background in the area, it is still helpful for another department that focuses on the particular issue to check OLC’s reasoning.<sup>39</sup>

OLC enables public scrutiny of its opinions, as well, by publishing many of them,<sup>40</sup> though these represent merely “the tip of the iceberg.”<sup>41</sup> Any decision by OLC to support a controversial government action with a secret (or at least nonpublic) opinion threatens its efforts to ensure transparency. Because OLC’s existence is not widely known among the public, it would be relatively easy for OLC to issue its opinions under a cloak of secrecy. This practice would remove from OLC opinions the potential check of public examination and testing.<sup>42</sup> As a result of the decision to publish, the legal justification for many important government decisions is available for examination, allowing interested parties outside the government to challenge OLC’s reasoning and incentivizing OLC to take extra care because of the knowledge that any mistakes may be publicly discussed in the media and within academia.

Lastly, OLC ordinarily protects its independence by insulating itself from partisan control in two ways: adhering to a form of *stare decisis* and treating its client as the institution of the presidency rather than the current holder of the office. Absent safeguards, attorneys at OLC would be tempted to overrule OLC opinions from prior admin-

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<sup>37</sup> *Id.* at 517; *see also id.* at 516 (discussing how OLC was not asked for an opinion in the Iran-Contra Affair until two years after it began, forcing OLC to defend the position the executive branch had adopted rather than reaching its own conclusions).

<sup>38</sup> GOLDSMITH, *supra* note 5, at 166.

<sup>39</sup> For example, the lack of war powers expertise in OLC immediately after September 11 left John Yoo — a Deputy Assistant Attorney General — to write the torture memos with virtually no supervision or review. *Id.* at 169. Seeking the input of the State Department could have been particularly valuable in this context. *Cf. id.* at 167 (“I always insisted that the State Department chime in on issues of international law, even if the issues were highly classified. And though the process was often painful, it always improved my work.”).

<sup>40</sup> *See* McGinnis, *supra* note 9, at 376.

<sup>41</sup> *Id.*

<sup>42</sup> *See* Koh, *supra* note 9, at 515.

istrations, particularly those of the opposite political party. Such a practice risks reducing OLC's credibility as an independent arbiter by making it appear to be a blatantly partisan actor. OLC's form of stare decisis avoids this problem by giving its opinions a certain degree of deference even when they were written during an administration with a very different perspective on any given issue.<sup>43</sup> In addition, OLC's general tendency to view its client as the institution of the presidency rather than the current occupant of the White House helps further protect it from presidential demands for increased power or authority.<sup>44</sup> As a result, OLC opinions, like those of the Supreme Court, can be counted on for a certain measure of consistency and reliability, and they are generally overruled only when circumstances have changed or when the previous opinion was manifestly wrong.<sup>45</sup>

2. *The Case for Independence from the White House.* — One might wonder whether OLC's safeguards are appropriate when applied to the President. After all, he is the one who is ultimately charged with "tak[ing] Care that the Laws be faithfully executed"<sup>46</sup> and therefore can argue that his view of the legal issue should trump OLC's. Proponents of the unitary executive theory make an exceptionally strong version of this case, arguing that the President has the inherent constitutional authority to control all officers and departments of the executive branch.<sup>47</sup> Assuming that the unitary executive is the proper conception of presidential power, any effort to reduce the President's influence over OLC might be considered an illegitimate interference with the constitutionally defined separation of powers.

However, this apparent conflict is based on a misunderstanding of OLC's role within the executive branch. When OLC acts to remain "independent," it is not attempting to avoid presidential control in the

<sup>43</sup> See *id.* at 516.

<sup>44</sup> *Id.* It may seem problematic, from an ethical perspective, for OLC to serve more than one client in this manner. Since the current President is the head of the executive branch, one might argue that OLC should treat him as its client, notwithstanding any advice it may have given in the past to presidents or executive agencies with different policy priorities or perspectives. Cf. *infra* pp. 2121–27 (discussing the trend toward the Solicitor General's treating the President as his or her sole "client" within the government). This problem is somewhat lessened here, however, because OLC's core function is to provide objective legal advice independent of client preferences. While OLC is a creature of the executive branch, it is paradigmatically less of an advocate than the White House Counsel or the Solicitor General. Cf. *infra* pp. 2122–24 (discussing how the Solicitor General's role as an advocate made attempts to treat the entire executive branch as his or her client, as opposed to the President alone, ethically troubling).

<sup>45</sup> See, e.g., GOLDSMITH, *supra* note 5, at 145–46. Indeed, Goldsmith took action to withdraw the torture memos only because they were "unusually worrisome." *Id.* at 146.

<sup>46</sup> U.S. CONST. art. II, § 3, cl. 4.

<sup>47</sup> See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 545 (1994) (characterizing unitary executives as "in favor of full presidential control of all execution of the laws").

same way that an “independent agency” does. When setting up truly independent agencies like the SEC, FCC, or Federal Reserve Board, Congress often grants them “broad rule making authority,” the power to conduct “on-the-record adjudicative hearings” and “investigations,” and immunity from presidential influence by stipulating that the President shall not have the power to remove the agency’s officers the way he can remove other members of the executive branch.<sup>48</sup> In contrast, OLC’s actions are internal to the executive branch; OLC lacks the authority to make rules or conduct hearings, it does not investigate anything, and its leadership serves at the pleasure of the President. In theory, the President could exercise a great deal of influence and control over OLC, packing it full of attorneys who are loyal to him and heavily pressuring it to write opinions that support his policy goals. The fact that this only happened rarely until recent years does not prove that the President lacks such power. Rather, it shows that presidents opted for the benefits that OLC’s independence provides.

One such benefit is that an independent OLC ensures that the President receives the best possible advice on what the law is, not what it should be. Importantly, the President retains the power to adopt or reject any opinion drafted by OLC, no matter what its subject matter might be or how certain the attorney-advisers are that their conclusion is the correct one.<sup>49</sup> OLC merely gives the President a perspective that potentially differs from the views of the White House Counsel or other advisors, a view comparatively free of political influences, which helps him make an informed decision.

OLC’s endorsement of a White House policy also increases the perceived legitimacy of that policy by coordinate branches. OLC opinions derive much of their value from the perception that OLC’s legal advice is “independent of the policy and political pressures associated with a particular question.”<sup>50</sup> The White House relies on OLC opinions to ensure that at least some of the President’s views are respected by other government actors, like Congress or the courts.<sup>51</sup> It is therefore in the White House’s long-term interest, as well as OLC’s, that OLC manage to strike a balance between the short-term desire of the White House to “win” on any given legal issue and the long-term need to maintain OLC’s reputation. If OLC were to become a rubber stamp for the White House, its reputation would be lost, eliminating both

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<sup>48</sup> Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 51 (attempting to define “traditional independent regulatory agencies”).

<sup>49</sup> GOLDSMITH, *supra* note 5, at 79 (“[T]he President st[ands] atop the executive branch and c[an] in theory reverse any OLC decision.”).

<sup>50</sup> McGinnis, *supra* note 9, at 422.

<sup>51</sup> *See id.* at 424.

OLC's ability to do its job effectively and its capacity to provide executive branch actors a credible ally in interbranch disputes.<sup>52</sup>

Finally, OLC's approval could increase the public's perception of a policy's legitimacy. Historically, the public has known little of OLC's existence or activities;<sup>53</sup> in the future, however, the White House could publicize OLC's role as an independent check on presidential authority. If OLC were able to establish a solid reputation among ordinary citizens for engaging in unbiased, accurate legal analysis, it would serve to further legitimize the President's claimed authority. The only way for OLC to acquire such a reputation is for it to be independent of the White House, resisting outside influence and ensuring that its legal opinions are based solely on the best view of the law.

Of course, not everyone agrees that failure to follow OLC's advice necessarily signals a problem with the President's reasoning. For example, Professors Eric Posner and Adrian Vermeule argue that "[t]here is no reason that the president . . . should be bound, even presumptively, by the legal views of those who are, after all, merely his servants," and claim that critics of President Obama's intervention in Libya "exaggerate the historical independence of OLC."<sup>54</sup> Furthermore, "nothing prevents [the President] from shutting down OLC and the other executive branch legal offices altogether."<sup>55</sup> Instead, Posner and Vermeule suggest that presidents can increase their credibility through "*executive self-binding*, whereby executives commit themselves to a course of action that would impose higher costs on ill-motivated actors."<sup>56</sup> For example, the President might establish independent commissions to review policy decisions, pledging to follow their recommendations.<sup>57</sup> He could also appoint members of the opposition party to important offices in order to bolster his credibility with political opponents.<sup>58</sup> Whichever strategy is used, the President's objective is to convince the public or the other branches of government that he can be trusted with greater authority.<sup>59</sup> Posner and Vermeule argue that, in contrast, OLC cannot serve as a check on presidential authority because "nothing would pre-

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<sup>52</sup> For example, OLC's independent reputation is essential to its role in resolving disputes between different executive agencies and departments. If OLC is known for reasoned, independent analysis, executive agencies are more likely to accept OLC's views as final rather than attempting to resist them. *Id.* at 423.

<sup>53</sup> *See supra* p. 2090.

<sup>54</sup> Eric Posner & Adrian Vermeule, *Libyan Legal Limbo*, SLATE (July 5, 2011, 6:17 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/06/libyan\\_legal\\_limbo.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/06/libyan_legal_limbo.html).

<sup>55</sup> *Id.*

<sup>56</sup> POSNER & VERMEULE, *supra* note 14, at 137.

<sup>57</sup> *Id.* at 141.

<sup>58</sup> *Id.* at 142–43. For example, President Obama asked Secretary of Defense Robert Gates to stay on and appointed Republican Congressman Ray LaHood as Secretary of Transportation. *Id.* at 143.

<sup>59</sup> *See id.* at 153.

vent the executive from marginalizing it” and because the White House Counsel’s Office stands ready to replace it.<sup>60</sup>

As Professor Richard Pildes points out in his critique of their book, though, “willingness to follow OLC interpretations would seem to be the quintessential kind of executive self-binding constraint that Posner and Vermeule otherwise advocate as critical to presidential credibility.”<sup>61</sup> Indeed, the President could self-interestedly announce that, because an independent OLC would provide him with a relatively unbiased view of the law, he is pledging to follow its advice in the vast majority of cases. Legally, the President would remain free to weigh OLC’s opinion against the advice provided by the White House Counsel or cabinet officials, and he would retain the power to reject any OLC opinion with which he disagreed or which he believed would harm national security or other vital interests if followed. Informally, however, he would face political and reputational costs if he decided to go back on his pledge and substitute his own judgment for that of OLC,<sup>62</sup> costs made even more substantial as a result of the White House’s reliance on OLC’s reputation to legitimate some of its key legal positions. The stigma attached to disregarding OLC’s advice<sup>63</sup> would thus constitute a meaningful limit on the President, particularly if public opinion plays a role in constraining the President,<sup>64</sup> because he would be discouraged from deviating from OLC’s view unless he were willing to spend a significant amount of political capital. Thus, if OLC’s internal safeguards work correctly, the President will have a strong incentive to follow a (relatively) impartial view of the law while nevertheless retaining the flexibility, in times of need, to determine the meaning of the law for himself.

*C. The Consequences of White House Influence:  
Lessons from the Realm of Foreign Policy*

Unfortunately, OLC has recently come under increased pressure to ignore its self-imposed safeguards. Each of these incidents highlights

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<sup>60</sup> *Id.* at 140.

<sup>61</sup> Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1390 (2012) (reviewing POSNER & VERMEULE, *supra* note 14).

<sup>62</sup> See POSNER & VERMEULE, *supra* note 14, at 138 (comparing informal self-binding to a “dessert addict” who counts on his friends’ disapproval to encourage him to stick to the no-dessert diet he has announced to them).

<sup>63</sup> One example of this stigma is the kind of outcry to which Posner and Vermeule themselves responded. See Posner & Vermeule, *supra* note 54 (arguing that the President should remain free to disregard OLC’s advice, even though his decision to do so with regard to Libya “has shocked and worried critics on the left and right”); see also Bruce Ackerman, Op-Ed., *Legal Acrobatics, Illegal War*, N.Y. TIMES, June 21, 2011, at A27 (alleging that President Obama’s decision not to follow OLC’s opinion “undermin[es] a key legal check on arbitrary presidential power”).

<sup>64</sup> See *infra* pp. 2111–12.

the need for OLC to cultivate its independence from White House coercion and to implement standards to govern future interactions. This need is especially great in the area of foreign policy, where judicial review of executive branch decisions is generally unlikely to occur: justiciability doctrines bar review where the President acts clandestinely,<sup>65</sup> the legal question involves state secrets,<sup>66</sup> or the issue is a political question.<sup>67</sup> As a result, OLC is likely to be the final arbiter of the meaning of the law in some important cases, either for the immediate future while the reasoning remains secret or potentially indefinitely if the question is nonjusticiable. It is also in precisely this area that it is easiest for the White House to pressure OLC to give in to its demands; the President claims broad authority,<sup>68</sup> national security often requires that these matters remain secret, and the fear of inaction leading to the deaths of American citizens encourages OLC to ignore its own safeguards in favor of giving the President whatever power he requests. Section C.1 discusses three types of threats that the White House poses to OLC independence. Section C.2 addresses the reasons underlying these threats and attempts to explain why they have materialized despite the benefits of independence.

1. *Threats to OLC's Independence.* — There are three major categories of threats that have arisen or intensified in recent times. One is the pressure terrorism has placed on OLC (and indeed, the entire federal government), encouraging it to protect the American people by whatever means necessary. Another is OLC's decision on some occasions to deviate from its formal procedure in favor of giving the Presi-

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<sup>65</sup> For example, no one outside of the executive branch reviewed the torture memos until they were leaked in 2004, Tung Yin, *Great Minds Think Alike: The "Torture Memo," Office of Legal Counsel, and Sharing the Boss's Mindset*, 45 WILLAMETTE L. REV. 473, 473 (2009), and the opinion authorizing the execution of Anwar al-Awlaki via drone strike is still classified, DeYoung, *supra* note 1.

<sup>66</sup> For example, the Court in *Totten v. United States*, 92 U.S. 105 (1875), dismissed an action against the government regarding a secret Civil War spy authorization because "public policy forbids the maintenance of any suit . . . the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." *Id.* at 107.

<sup>67</sup> See, e.g., *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring in the judgment) (arguing, joined by three other Justices, that the question presented, regarding the Senate's role in terminating treaties, was "nonjusticiable because it involve[d] the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President"); *Clark v. Allen*, 331 U.S. 503, 514 (1947) (classifying the determination of whether Germany was still in a position to uphold its treaty obligations as "essentially a political question" and refusing to abrogate a treaty absent a clear indication from the political branches).

<sup>68</sup> See, e.g., H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 528 (1999) ("[T]he executive branch . . . in the last half century has consistently adhered to an 'executive primacy' interpretation of the Constitution's allocation of power over foreign affairs and national security . . . [which holds that] the President has substantial independent authority to determine as well as carry out the foreign policy of the United States.").

dent an informal opinion. Finally, the rise of the White House Counsel's Office and its increased prestige and capability means that a White House actor may be capable of displacing OLC in its entirety.

(a) *Pressure on OLC.* — First, consider the danger of future terrorist attacks. The executive branch is greatly concerned with protecting American citizens, which influences the judgment of both the White House and OLC. The torture memos, for example, were written after the horror of September 11, when the White House had focused its efforts on ensuring that future attacks would be prevented at all costs.<sup>69</sup> To that end, the White House sought guidance from OLC as to the interpretation of the United States' antitorture law,<sup>70</sup> seeking to know exactly how far the President could go in authorizing interrogation techniques. John Yoo, the deputy assistant attorney general at OLC who drafted the Torture Memo, was an expert in presidential war powers who subscribed to an expansive view of executive authority<sup>71</sup> and had previously drafted many other opinions approving Bush Administration initiatives in the war on terror.<sup>72</sup>

Unfortunately, OLC ignored several of its usual safeguards. Normally, OLC would have circulated the opinion to the State Department for its advice on the international law issues raised by interrogation of captured terrorists, but in this case, despite the absence of classified material, the White House kept the opinion under tight control.<sup>73</sup> It was standard practice under White House Counsel Alberto Gonzales for controversial legal opinions to be limited to "a very small group of lawyers," and the Torture Memo was treated the same way.<sup>74</sup> Professor Jack Goldsmith "came to believe that [this] was done to control outcomes in the opinions and minimize resistance to them."<sup>75</sup>

Another problem was that Yoo apparently assumed that OLC's client was President Bush, rather than the institution of the presidency. After September 11, the President wanted as much authority as possi-

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<sup>69</sup> See GOLDSMITH, *supra* note 5, at 74–75 ("Bush was not telling Ashcroft to do his best to prevent another attack. He was telling him to stop the next attack, period — whatever it takes." *Id.* at 75.).

<sup>70</sup> 18 U.S.C. §§ 2340–2340A (2006) (implementing the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85).

<sup>71</sup> See Yin, *supra* note 65, at 473–74 (describing Yoo's "vision of a robust executive branch unfettered by the other two branches," *id.* at 474). For Yoo's perspective in his own words, see JOHN YOO, *THE POWERS OF WAR AND PEACE* (2005); John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CALIF. L. REV. 851 (2001) (book review); and John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (1996).

<sup>72</sup> GOLDSMITH, *supra* note 5, at 23.

<sup>73</sup> See *id.* at 166–67.

<sup>74</sup> *Id.* at 167.

<sup>75</sup> *Id.*

ble in order to prevent another attack, and White House staff put as much pressure on OLC as they could in order to get it, including ensuring that those who disagreed with them paid the price.<sup>76</sup> In addition, everyone in government at the time felt the overwhelming fear of further acts of terrorism and the attendant loss of life. This fear drove Yoo (and therefore OLC) to push the envelope in order to give the President what he wanted,<sup>77</sup> but in so doing he neglected OLC's duty to balance the competing concerns of aiding the President and staying true to the law.

Instead, Yoo tried to give the President as free a hand as possible to prevent future attacks. For example, Yoo's definition of torture was extremely favorable to the administration. The relevant statute defines torture as an "act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control."<sup>78</sup> To determine the meaning of "severe pain," Yoo looked for other uses of the phrase within the U.S. Code.<sup>79</sup> The only other mentions were in certain statutes relating to health care; for these statutes, the relevant question was whether a prudent layperson could expect the absence of immediate medical attention to jeopardize the health of an injured person.<sup>80</sup> It is clear from reading the health care statutes that organ failure or other impairment of bodily functions were not necessary conditions to meet the "severe pain" threshold.<sup>81</sup> Nevertheless, Yoo concluded that for "severe pain" to qualify as torture, it must reach the level that would "ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions."<sup>82</sup> This twisted analysis gave the White House a free hand to authorize enhanced interrogation techniques; in

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<sup>76</sup> See *id.* at 170–71 (describing how Patrick Philbin, who helped Goldsmith withdraw the Torture Memo, was denied a promotion).

<sup>77</sup> See *id.* at 165–72; see also Robert F. Turner, *What Went Wrong? Torture and the Office of Legal Counsel in the Bush Administration*, 32 CAMPBELL L. REV. 529, 557 (2010) ("Mistakes were clearly made by some very able and honorable individuals who, in their quest to save American lives, drew the line in the wrong place." (emphasis added)).

<sup>78</sup> 18 U.S.C. § 2340(1) (2006).

<sup>79</sup> Torture Memo, *supra* note 11, at 176 (internal quotation marks omitted).

<sup>80</sup> *Id.*

<sup>81</sup> The statute defines an "emergency medical condition" as one "manifesting itself by acute symptoms of sufficient severity (including severe pain) such that" a lack of immediate medical care is reasonably expected to result in, among other things, "serious dysfunction of any bodily organ or part." 8 U.S.C. § 1369(d) (2006). Severe pain is a *possible* symptom, but the situation is only serious enough to be an "emergency" if it is accompanied by something as bad as organ failure. The statute certainly does not require organ failure in order for "severe pain" to be present.

<sup>82</sup> Torture Memo, *supra* note 11, at 176.

fact, on the very same day, OLC also issued an opinion approving ten specific methods of enhanced interrogation, including waterboarding.<sup>83</sup>

The result of the failure to follow OLC's standard procedures was an overly broad opinion, based on flawed reasoning that called into question the legality of the entire interrogation program. When the memo was eventually leaked, public outcry was deafening,<sup>84</sup> Congress moved to ban waterboarding and other similar practices,<sup>85</sup> and some proposed that John Yoo and Assistant Attorney General Jay Bybee be prosecuted for their role in producing the flawed opinion.<sup>86</sup> Professor Bruce Ackerman went so far as to call for the abolition of OLC and the White House Counsel's Office.<sup>87</sup> Much of this criticism could have been avoided, or at least moderated, had OLC adhered to the norms it uses to protect its independence from the White House.<sup>88</sup>

The use of drone strikes against terrorist targets offers a similar lesson. Given President Obama's continuing reliance on drone strikes,<sup>89</sup> OLC was likely under enormous pressure to provide a legal justification for their use against terrorists abroad.<sup>90</sup> The impartiality of this

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<sup>83</sup> See Memorandum from Jay S. Bybee, Assistant Att'y Gen., OLC, to John Rizzo, Acting Gen. Counsel, CIA, Interrogation of al Qaeda Operative (Aug. 1, 2002), available at [http://media.luxmedia.com/aclu/olc\\_08012002\\_bybee.pdf](http://media.luxmedia.com/aclu/olc_08012002_bybee.pdf). It should be noted that future OLC attorneys also believed that these ten methods were legal even after Yoo's memo was withdrawn. See Replacement Memo, *supra* note 11, at 2 n.8. The point remains, however, that the Torture Memo justified nearly any conceivable interrogation method, and was in fact relied upon to authorize the entirety of the Bush Administration's interrogation program.

<sup>84</sup> See, e.g., Emily Bazelon et al., *What's Lost When Exceptions Become the Norm*, SLATE, <http://www.slate.com/features/whatistorture/Conclusion.html> (last visited May 3, 2012) ("These policies were deliberately designed to carve out exceptions to international rules regarding prisoners of war that the United States had once championed and led the world to embrace. . . . The effect has been to turn America from the world's leader on many issues of international human-rights law into the world's tyrant."); Editorial, *The Torturers' Manifesto*, N.Y. TIMES (Apr. 18, 2009), <http://www.nytimes.com/2009/04/19/opinion/19sun1.html> (calling for the impeachment of Judge Jay Bybee and describing the memos as an attempt "to provide legal immunity for acts that are clearly illegal, immoral and a violation of this country's most basic values").

<sup>85</sup> *Senate Votes to Ban Waterboarding*, MSNBC.COM (Feb. 13, 2008, 8:05:45 PM), [http://www.msnbc.msn.com/id/23153516/ns/us\\_news-security/t/senate-votes-ban-waterboarding](http://www.msnbc.msn.com/id/23153516/ns/us_news-security/t/senate-votes-ban-waterboarding).

<sup>86</sup> See generally Joseph Lavitt, *The Crime of Conviction of John Choon Yoo: The Actual Criminality in the OLC During the Bush Administration*, 62 ME. L. REV. 155 (2010).

<sup>87</sup> Bruce Ackerman, *Abolish the White House Counsel*, SLATE (Apr. 22, 2009, 3:47 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2009/04/abolish\\_the\\_white\\_house\\_counsel.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2009/04/abolish_the_white_house_counsel.html).

<sup>88</sup> While those who believe that waterboarding constitutes torture would probably still have regarded it as illegal even had it been authorized by an unbiased, quality opinion, at the very least OLC would have been better able to defend its original reasoning and argue that the law was not as clear-cut as torture opponents believed it to be.

<sup>89</sup> See DeYoung, *supra* note 1 (noting that 1350 to 2250 people have been killed in Pakistan alone over a three-year period and that drone strikes are used in Yemen and Somalia as well).

<sup>90</sup> OLC would be motivated by the same fear that permeated the government after September 11: the fear of not acting to prevent hundreds or thousands of American deaths. Cf. GOLDSMITH, *supra* note 5, at 165-69 (describing the effect that this fear had on attorneys within OLC).

opinion is of the utmost importance, because it may be quite a long time — if ever — before anyone outside of the executive branch assesses the legality of targeted drone strikes. Unfortunately, the opinions justifying drone strikes remain secret, even the one dealing with the targeted killing of American citizen Anwar al-Awlaki.<sup>91</sup> Recently, Attorney General Eric Holder *did* discuss, in broad terms, the legal analysis used by the administration in such situations, but he could not “discuss or confirm any particular program or operation.”<sup>92</sup> While it is understandable that certain privileged information must be kept secret in order to protect confidential sources or intelligence-gathering techniques, disclosure of specific opinions would allow the public to evaluate OLC’s reasoning and the President’s decision to follow it, permitting outside parties to determine whether the analysis is persuasive as a matter of law and, depending on what exactly is disclosed, whether OLC followed its own procedures. While Holder’s speech has satisfied some experts as to the legitimacy of the government’s authority as a general matter,<sup>93</sup> it left “some key issues . . . unaddressed,”<sup>94</sup> and the continued secrecy surrounding the individual opinions insulates both OLC and the President from criticism (since the public cannot know if the authority is being exercised properly without details). This situation potentially allows the President to assume powers he does not and should not have.

(b) *The OLC’s Deviation from Its Formal Procedures.* — The second major threat to OLC’s independence is deviation from the usual procedure for issuing opinions. The use of force in aid of the Libyan rebels offers an example of the ease with which the President can short-circuit the process. Before the United States intervened in Libya, OLC produced an opinion that concluded that the President had the authority to direct the use of force against targets within Libya without prior congressional approval.<sup>95</sup> First, OLC noted that past opinions have determined that the President, by virtue of his responsibility for foreign and military affairs and national security as Commander-in-Chief, may commit U.S. forces abroad without congressional authorization in order to protect important national interests.<sup>96</sup>

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<sup>91</sup> DeYoung, *supra* note 1 (“[The administration] has not offered the American public, uneasy allies or international authorities any specifics that would make it possible to judge how it is applying [the] laws.”).

<sup>92</sup> Robert Chesney, *Holder on Targeted Strikes: The Key Passages, With Commentary*, LAWFARE (Mar. 5, 2012, 5:05 PM), <http://www.lawfareblog.com/2012/03/holder-on-targeted-strikes-the-key-passages-with-commentary> (quoting Attorney General Holder).

<sup>93</sup> Jack Goldsmith, *Fire When Ready*, FOREIGN POL’Y (Mar. 19, 2012), [http://www.foreignpolicy.com/articles/2012/03/19/fire\\_when\\_ready?page=full](http://www.foreignpolicy.com/articles/2012/03/19/fire_when_ready?page=full).

<sup>94</sup> Chesney, *supra* note 92.

<sup>95</sup> Libya Memo, *supra* note 12, at \*1.

<sup>96</sup> *Id.* at \*6.

OLC also argued that the War Powers Resolution itself recognizes that the President has this authority.<sup>97</sup> Second, OLC concluded, based on “applicable historical precedents” such as the no-fly zone and occasional airstrikes in Bosnia and the NATO bombing campaign in Kosovo, that the Libyan operations do not “amount[] to a ‘war’ in the constitutional sense.”<sup>98</sup> Some commentators have criticized this opinion as misrepresenting the state of the law.<sup>99</sup> For example, Professor Michael Glennon noted that, as a senator, President Obama stated that “[t]he president does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation.”<sup>100</sup> In Glennon’s view, this statement is the accurate historical understanding of the constitutional text.<sup>101</sup> However, other scholars disagree, suggesting that the issue is not as clear-cut as OLC’s critics suggest.<sup>102</sup> In any event, OLC gave the President the authority that he wanted, its conclusion may be plausibly defended, and thus far there is no indication that it allowed the President to control the outcome of its analysis.

In the beginning of the Libya intervention, OLC operated as intended, by providing the President with a reasonable legal analysis of the situation. The threat posed by deviation from OLC’s usual procedures materialized when OLC opposed the President’s intention to continue operations past the sixty-day time limit set by the War Powers Resolution.<sup>103</sup> In this instance, President Obama exercised his constitutional authority to reject OLC’s analysis, and determined that the operations in Libya did not rise to the level of “hostilities” under the terms of the Resolution.<sup>104</sup> Normally this result would not be worrisome, because it is within the President’s power to overrule OLC’s conclusion and it is desirable for him to have this sort of flexibility.<sup>105</sup>

<sup>97</sup> *Id.* at \*8.

<sup>98</sup> *Id.* at \*12.

<sup>99</sup> See, e.g., Michael J. Glennon, *The Cost of “Empty Words”: A Comment on the Justice Department’s Libya Opinion*, HARV. NAT’L SECURITY J. (2011), [http://harvardnsj.org/wp-content/uploads/2011/04/Forum\\_Glennon\\_Final-Version.pdf](http://harvardnsj.org/wp-content/uploads/2011/04/Forum_Glennon_Final-Version.pdf).

<sup>100</sup> *Id.* at 2 (quoting President Obama) (internal quotation marks omitted).

<sup>101</sup> *Id.* at 3–4.

<sup>102</sup> See, e.g., Jack Goldsmith, *War Power*, SLATE (Mar. 21, 2011, 6:48 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/03/war\\_power.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/03/war_power.html) (arguing that the military intervention in Libya is constitutional and that critics misunderstand the argument based on precedent).

<sup>103</sup> Savage, *supra* note 13. The War Powers Resolution, 50 U.S.C. §§ 1541–1548 (2006), requires the President to terminate “any use of United States Armed Forces” within sixty days “unless the Congress (1) has declared war or has enacted a specific authorization for such use . . . , (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.” *Id.* § 1543(b).

<sup>104</sup> Savage, *supra* note 13.

<sup>105</sup> See *supra* section III.B.2, pp. 2097–2100.

Moreover, if OLC's opinion disagreed with the President's conclusion, then presumably its internal safeguards successfully prevented White House pressure from skewing its analysis. The problem in this case is that the President circumvented the usual process and asked OLC for its *informal* view of the law rather than a formal written opinion.<sup>106</sup> The result is that it is harder for Congress and the public to evaluate the President's reasoning in comparison with OLC's, meaning that the President does not incur the usual political costs associated with going his own way. OLC depends on the reputation it has built up over time as a reliable source of reasoned legal analysis; if the President is able to ignore it while suffering little or no harm in return, then both the White House and other executive branch actors will no longer hold OLC in such esteem. This effect, in turn, makes it more likely that they will either stop consulting OLC entirely (in which case its independence or lack thereof becomes irrelevant) or drive it to issue more favorable opinions in an attempt to recapture its clientele; either way, an important potential check on executive power would be eliminated. The Libyan intervention, then, while reassuring because it demonstrates OLC's ability to stand up to the President in the wake of the torture memos, is also troubling because it highlights the ease with which the President can nevertheless short-circuit the process to more easily achieve his own ends.

(c) *The Rise of the White House Counsel's Office.* — The final threat to OLC's independence is illustrated not by a particular legal opinion, but by the rise to prominence of the White House Counsel's Office. Since its creation for the President's personal adviser,<sup>107</sup> the Office has changed dramatically, but its exact function has not been elucidated, leaving open the possibility that it will usurp OLC's role.<sup>108</sup> The Office has no statutory duties,<sup>109</sup> and the White House Transition Project, drawing on the experience of past White House counsels, states that its (vague and extremely broad) "mandate is to be watchful for and attentive to legal issues that may arise in policy and political contexts in which the president plays a role."<sup>110</sup> A further problem is that, as the Transition Project itself points out, the White House Counsel's Office and OLC "tend to jockey for advantage within an administration."<sup>111</sup> This poses two different threats to OLC. First, the White

<sup>106</sup> Savage, *supra* note 13.

<sup>107</sup> Rabkin, *supra* note 29, at 65–66.

<sup>108</sup> See *supra* p. 2094.

<sup>109</sup> Rabkin, *supra* note 29, at 64.

<sup>110</sup> MARYANNE BORRELLI ET AL., WHITE HOUSE TRANSITION PROJECT, REP. NO. 2009-29, THE WHITE HOUSE COUNSEL'S OFFICE 1 (2008), available at <http://whitehoustransitionproject.org/resources/briefing/WHTP-2009-29-Counsel.pdf>.

<sup>111</sup> *Id.* at 28.

House Counsel's Office may use its special access to OLC to influence OLC's decisionmaking. An example is the role played by Alberto Gonzales while serving as White House Counsel during the Bush Administration. John Yoo often took his orders from Gonzales rather than from his nominal bosses, Jay Bybee and John Ashcroft, whom he failed to keep informed regarding the advice he was giving the White House.<sup>112</sup> The White House Counsel's Office had extensive access, which it used to shape the way Yoo carried out his duties relating to national security issues, impairing OLC's independence. Second, the White House Counsel's Office may be able to replace OLC entirely, or at least prevail over it, which was the case in the Libya intervention, where White House Counsel Robert Bauer, along with State Department Legal Adviser Harold Koh, advised the President that the use of military force did not rise to the level of hostilities under the War Powers Resolution.<sup>113</sup> Although OLC adhered to its principles and told the President that, in its opinion, the Resolution applied, the White House Counsel's Office ended up providing the legal basis for the President's actions, usurping OLC's traditional role. If similar usurpations continue to take place, OLC may have an incentive to produce opinions more favorable to the President's objectives in order to win back his favor.

2. *Why OLC Is Threatened Despite the Benefits of Independence.* — There are two important reasons why the White House may undermine OLC independence despite the benefits discussed earlier: the President is not always looking for the "best" view of the law, and the President may not need (or may not be able) to use OLC to bolster his credibility with Congress, the courts, or the public. To begin with, executive branch legal interpretation differs from interpretation in the traditional judicial context: OLC seeks not simply to extrapolate neutrally from judicial precedent, but also to accommodate the President's policy preferences insofar as it is able.<sup>114</sup> From the President's perspective, concern about the boundaries of the law may be subsidiary to pressing policy concerns, especially efforts to prevent further acts of terrorism against the United States. If the President suspects that the "best" interpretation of the law would prevent him from protecting American citizens, he has particularly strong incentives to either compel OLC to go against its better judgment, such as in the case of the torture memos, or simply to avoid asking OLC for a formal opinion, as in the continuation of operations in Libya. One might argue that the President should at least be concerned about the possibility of a court's

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<sup>112</sup> See *supra* note 26.

<sup>113</sup> Savage, *supra* note 13.

<sup>114</sup> See *supra* p. 2092.

declaring his actions to be unconstitutional, but the President also has two powerful reasons to discount this possibility. First, the President may calculate that he has more to gain from a short-term policy victory, even one that is eventually overturned, than he does from rigorously adhering to OLC's procedures. This incentive may be especially strong during an election year (when a prominent but temporary victory may boost the President's standing with the electorate) or when a threat materializes and the President acts quickly to counter it; in each case, it may not matter whether his decision is ultimately upheld in court. Second, the President may plausibly calculate that the vast majority of his decisions will never result in actionable litigation, either because he will have left office by the time they come to light<sup>115</sup> or because the courts are likely to hold that the issues are nonjusticiable.<sup>116</sup>

Another reason for the White House's willingness to undermine OLC's independence is that OLC opinions may no longer be needed (or may no longer be able) to provide their traditional legitimizing function. Particularly in the area of national security, the executive branch is capable of acting unilaterally in many or even most instances, reducing the need to get Congress or the courts to accept the White House's arguments.<sup>117</sup> Executive appointments have arguably become more politicized in recent times, and the difficulty of getting nominees through the Senate has led Presidents to do their best to ensure that their nominees are firm in their loyalty to the President and his agenda.<sup>118</sup> And if litigation looms on the horizon, the control exerted by the Solicitor General may compel even independent agencies to adopt a position consistent with the White House's preferences.<sup>119</sup> Given the President's increased control over the executive branch and his ability to act in secret, the marginal benefit of increased legitimacy may be outweighed by the risk of OLC's rejecting his preferred option. Even worse for OLC, its traditionally low profile outside of the government<sup>120</sup> may mean that many citizens first heard of it during the torture memo scandal, when it was subjected to severe criticism.<sup>121</sup> To the extent that the public *is* aware of OLC's existence, it is likely due to on-

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<sup>115</sup> See *supra* note 65.

<sup>116</sup> See *supra* note 67 and accompanying text.

<sup>117</sup> See Powell, *supra* note 68, at 528 (describing the President's claim to broad inherent authority to act in the realm of foreign policy).

<sup>118</sup> See *infra* pp. 2136–38 (explaining that executive appointments have become more contentious as the President and Congress each struggle to assert control); *infra* pp. 2145–55 (detailing several battles between the President and the Senate for control over agencies).

<sup>119</sup> Cf. *infra* p. 2115 (describing how the Solicitor General typically has final authority over the government's position in constitutional litigation); *infra* pp. 2121–27 (explaining how the President came to be regarded as the Solicitor General's sole client).

<sup>120</sup> See *supra* p. 2090.

<sup>121</sup> See sources cited *supra* note 84.

going calls for OLC's reform or abolition, as well as the controversy over drone strikes, neither of which is likely to inspire trust. Because the President does not need OLC's help when dealing with the coordinate branches of government, and because OLC is likely incapable of helping with public opinion at present, the President has even less reason to respect OLC's independence.

#### D. Responses to the Threats

The recent examples of the White House placing intense pressure on OLC, and the resulting failure of OLC's internal procedures, led to public calls for reform.<sup>122</sup> It became clear that OLC needed to take steps to avoid improper White House influence in the future. To this end, nineteen former OLC lawyers drafted a set of "Principles to Guide the Office of Legal Counsel,"<sup>123</sup> many of which were formally adopted as best practices by OLC.<sup>124</sup> OLC's best practices embody two main principles: a rejection of the advocacy model of representation<sup>125</sup> and a renewed commitment to respect OLC's own previously established guidelines. First, OLC has recognized that it must produce unbiased opinions that are faithful to its best understanding of the law rather than advocate a position taken by the White House.<sup>126</sup> "This practice is critically important . . . because [OLC] is frequently asked to opine on issues of first impression that are unlikely to be resolved by

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<sup>122</sup> See, e.g., Bradley Lipton, *A Call for Institutional Reform of the Office of Legal Counsel*, 4 HARV. L. & POL'Y REV. 249, 256–60 (2010) (proposing that the number of political appointees at OLC be reduced, that attorneys be encouraged to stay at OLC for longer periods, and that OLC opinions be made public); Yin, *supra* note 65, at 502–04 (calling for passage of the "OLC Reporting Act of 2008," which would "force the executive branch to disclose in a timely fashion any OLC opinions that expand executive power at the expense of Congress or the courts," *id.* at 503); Marisa Lopez, Note, *Professional Responsibility: Tortured Independence in the Office of Legal Counsel*, 57 FLA. L. REV. 685, 713–16 (2005) (calling for a truly independent OLC).

<sup>123</sup> *Guidelines for the President's Legal Advisors*, 81 IND. L.J. 1345, 1348 (2006).

<sup>124</sup> Memorandum from David J. Barron, Acting Assistant Att'y Gen., OLC, to Attorneys of the Office, OLC, Re: Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010) [hereinafter OLC Best Practices], available at <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf>.

<sup>125</sup> It should be noted that, while both the Solicitor General and the head of OLC are executive branch lawyers, they have made opposite choices in this respect; over time, the Solicitor General's office has adopted the advocacy model and focused on the President as its client. *Infra* pp. 2123–32 (chronicling the increased influence of the President over the Solicitor General and the resultant strong advocacy for the President). This difference is the result of the disparate roles played by the two offices. OLC's role is to offer independent, expert advice regarding the best interpretation of the law, whereas the Solicitor General participates in the adversarial system, arguing before the Supreme Court on behalf of the federal government. Ethics rules resulted in the Solicitor General's deferring more and more to the President because a broader conception of the client (for example, the entire executive branch) created a conflict of interest. See *infra* pp. 2120–23. OLC, on the other hand, does not argue for changes in the law, or for merely plausible interpretations of it, but rather seeks to present its best view of what the law is.

<sup>126</sup> OLC Best Practices, *supra* note 124, at 1.

the courts — a circumstance in which OLC’s advice may effectively be the final word on the controlling law.”<sup>127</sup> For example, drone strikes have been in use for years, yet the specific opinions containing their legal justification are still classified.<sup>128</sup> If the President is to faithfully execute the laws, he must know how they actually constrain his power, not merely what he can “get away with” due to lack of standing or unlikelihood of a successful legal challenge.<sup>129</sup> Adopting a practice of explicitly keeping this responsibility in mind when drafting opinions on sensitive legal issues would help to reduce the likelihood of another overreaching opinion.

This principle will also result in OLC’s having a greater respect for the coordinate branches of the federal government. The best practices memo explains that OLC “should strive to ensure that it candidly and fairly addresses the full range of relevant legal sources and significant arguments on all sides of a question.”<sup>130</sup> While this practice is a good idea in general, an additional specific benefit is that one “significant argument” in any discussion of the extent of presidential power will be the constitutional authority of one of the coordinate branches to curtail or even supplant the President’s authority in a given area. Following this principle will thus help ensure that future foreign policy opinions comparable to the opinion justifying the Libya intervention will adequately consider the *Youngstown* doctrine<sup>131</sup> and how Congress’s will in the matter affects the extent of presidential authority.<sup>132</sup>

Second, OLC has also reaffirmed its commitment to the norms it had previously developed. The best practices memo outlines the process for generating an opinion, and specifically notes that OLC will avoid issuing “broad, abstract legal opinions,” instead requiring that “[t]he legal question presented . . . be focused and concrete.”<sup>133</sup> In addition, OLC remains willing to share its preliminary analysis, when appropriate, with agencies and departments that will be affected by it,<sup>134</sup> and it will continue to publish important OLC opinions when possible.<sup>135</sup> Recommitting itself to these safeguards will help OLC to avoid issuing overreaching opinions, help it to take a broader array of views into account, and make it easier for the other branches and the

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<sup>127</sup> *Id.*

<sup>128</sup> See *supra* pp. 2104–05.

<sup>129</sup> *Guidelines for the President’s Legal Advisors*, *supra* note 123, at 1350.

<sup>130</sup> OLC Best Practices, *supra* note 124, at 2.

<sup>131</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

<sup>132</sup> Indeed, OLC specifically considered the effect of the War Powers Resolution on the President’s authority to initiate military action against Libya. *Libya Memo*, *supra* note 12, at \*8–9.

<sup>133</sup> OLC Best Practices, *supra* note 124, at 3.

<sup>134</sup> *Id.* at 4.

<sup>135</sup> *Id.* at 5–6.

public to monitor the executive branch's actions and ensure that the President is staying within his constitutional limits.

These changes in the way OLC operates may have been motivated by the beginning of a public reaction against White House encroachment. Commentators continue to publicize OLC's role in interpreting the law, and OLC has remained in the public eye during discussions of drone strikes and the intervention in Libya.<sup>136</sup> If public awareness increases sufficiently, the public itself may be able to act as a check on the White House's influence and encourage future administrations to give OLC's independence greater respect. For example, the controversial use of signing statements by President Bush to challenge individual provisions of bills that he signed into law angered many members of Congress, but their efforts to combat this practice were largely unsuccessful.<sup>137</sup> Indeed, "multiple bills were introduced in an attempt to rein in the use of signing statements,"<sup>138</sup> but when legislation was ultimately enacted, it was itself thwarted by the issuance of a signing statement.<sup>139</sup> Congress's attempt to exert its authority as a coequal branch of government failed; however, its efforts led to increased public awareness of the issue, and public opposition to President Bush's specific uses of signing statements persuaded President Obama to pledge to make much less frequent use of them.<sup>140</sup> This result accords with Posner and Vermeule's argument, discussed earlier, that "legal constraints [on the executive] have atrophied," necessitating the use of public opinion and the political process rather than of the constitutional authority of the other branches.<sup>141</sup> In a similar fashion, it is difficult to see how Congress could act to encourage the President to follow an unbiased view of the law; the Constitution entrusts the duty of executing the laws to the executive branch, and the President, as its head, has full authority to interpret the law as he sees fit.<sup>142</sup> Public opinion, however, could persuade the President that the benefits of respecting

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<sup>136</sup> See, e.g., *Obama Libya War Powers Debate: Obama's Lawyers Are Worse Than Bush's*, Glenn Greenwald Says, HUFFINGTON POST (June 19, 2011, 12:58 PM), [http://www.huffingtonpost.com/2011/06/19/obama-libya-lawyers-war-powers\\_n\\_879951.html](http://www.huffingtonpost.com/2011/06/19/obama-libya-lawyers-war-powers_n_879951.html).

<sup>137</sup> *Supra* pp. 2085–87.

<sup>138</sup> *Supra* p. 2087.

<sup>139</sup> *Supra* p. 2088.

<sup>140</sup> *Supra* pp. 2068–69 (describing the backlash against President George W. Bush); *supra* pp. 2083–85 (explaining how President Obama has used signing statements much less frequently); *supra* pp. 2087–88 (recounting how public opinion influenced President Obama's decision).

<sup>141</sup> POSNER & VERMEULE, *supra* note 14, at 14.

<sup>142</sup> See U.S. CONST. art. II, § 3, cl. 4; see also Posner & Vermeule, *supra* note 54 ("The constraints of the War Powers Resolution or any other law, whatever they may be, are an entirely independent matter, unaffected by whether the president does or does not hear anyone else's views about how the law should best be understood.").

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OLC's independence outweigh the potential costs and could in fact lead the President to pledge to follow OLC's legal opinions.<sup>143</sup>

Of course, there is an important difference between the use of signing statements and the decision to accept or reject OLC's legal advice: the President himself is in full control of whether he will issue a signing statement. When President Obama pledged to "issue signing statements to address constitutional concerns only when it is appropriate to do so as a means of discharging [his] constitutional responsibilities,"<sup>144</sup> he knew that he would be the one to decide when it was "appropriate." In the case of OLC, though, the President would pledge simply to follow its legal advice and would be unable to predict with any certainty how often OLC will decide that his preferred course of action is unlawful. While the President would still exert a certain degree of control over OLC by appointing the Assistant Attorney General who leads it, the fact remains that he would be essentially relying on an outsider to determine when and how he can exercise his authority. The President would retain the ability to fire the head of OLC, but that would likely entail even worse consequences in light of his pledge to adhere to OLC opinions. As a result, the President is less likely to make such a pledge in the first place, reducing the opportunity for public opinion to check his authority. Indeed, while public outcry seems to have resulted in the use of executive self-binding in the signing statement context,<sup>145</sup> the fact that President Obama decided to continue military operations in Libya despite OLC's opposition, and without requesting a formal OLC opinion, indicates that the public is not yet playing this role with respect to OLC. Nevertheless, the successful curbing of the use of signing statements suggests that it is at least possible.

### *E. Conclusion*

The President relies on OLC to issue written opinions that explain the bounds of his constitutional authority and help him to fulfill his duty to faithfully execute the laws. The threat to national security posed by the war on terror in the past decade has led to increased pressure on OLC to give the President the tools that he needs in order to protect the country. Each of the examples discussed in this Part reveals the need for OLC not only to adhere to its own internal guidelines but also to strengthen them in order to protect its independence and legitimacy. This approach would ensure that the White House re-

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<sup>143</sup> See *supra* pp. 2099–2100.

<sup>144</sup> Memorandum from President Barack Obama to the Heads of Executive Departments and Agencies, Presidential Signing Statements, 74 Fed. Reg. 10,669, 10,669 (Mar. 11, 2009).

<sup>145</sup> See *supra* pp. 2087–89.

ceives the best possible legal advice on controversial subjects and would give the President the option to use its opinions as a form of executive self-binding. Given the apparent atrophy of external constraints from the other branches, an internal constraint of this kind may offer the best chance of meaningfully containing executive power. Such a constraint, however, requires the influence of public opinion, as in the case of signing statements, and only time will tell whether public opinion will have a similar impact in the context of OLC.

#### IV. PRESIDENTIAL INVOLVEMENT IN DEFENDING CONGRESSIONAL STATUTES

In February 2011, U.S. Attorney General Eric Holder announced that, pursuant to President Barack Obama's order, the Department of Justice would decline to defend the constitutionality of section 3 of the Defense of Marriage Act<sup>1</sup> (DOMA) in those circuits that had not yet determined the standard of review to be applied to "classifications based on sexual orientation."<sup>2</sup> Critics decried the President and Attorney General's decision as "low cynicism,"<sup>3</sup> an "[e]xecutive [p]ower [g]rab,"<sup>4</sup> and even "dangerous."<sup>5</sup> What was perhaps most surprising about this decision, however, was that the President and Attorney General made the decision even though then-Acting Solicitor General Neal Katyal objected to such "nondefense"<sup>6</sup> — the White House has traditionally afforded some independence to the Solicitor General.<sup>7</sup> The White House's overruling of the Acting Solicitor General by refusing to defend a statute was not, however, an unforeseeable event, nor will it

<sup>1</sup> 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

<sup>2</sup> Press Release, U.S. Dep't of Justice, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

<sup>3</sup> Matthew J. Franck, *Obama, DOMA, and Constitutional Responsibility*, PUB. DISCOURSE (Mar. 1, 2011), <http://www.thepublicdiscourse.com/2011/03/2827>.

<sup>4</sup> Orin Kerr, *The Executive Power Grab in the Decision Not to Defend DOMA*, THE VOLOKH CONSPIRACY (Feb. 23, 2011, 3:49 PM), <http://volokh.com/2011/02/23/the-executive-power-grab-in-the-decision-not-to-defend-doma>.

<sup>5</sup> Theodore H. Frank, *Obama's Dangerous Divorce from DOMA: The Executive Can't Pick and Choose Which Laws to Defend*, DAILY NEWS (Feb. 24, 2011), [http://articles.nydailynews.com/2011-02-24/news/29441963\\_1\\_gay-couples-doma-gay-marriage](http://articles.nydailynews.com/2011-02-24/news/29441963_1_gay-couples-doma-gay-marriage).

<sup>6</sup> See Carrie Johnson, *Attorney General Holder Backs Paul Clement on DOMA Defense*, NPR (Apr. 26, 2011, 3:40 PM), <http://www.npr.org/blogs/itsallpolitics/2011/04/26/135744243/attorney-general-holder-backs-paul-clement-on-doma-defense>. The phrase "non-defense of statutes" originates in Chrysanthe Gussis, Note, *The Constitution, the White House, and the Military HIV Ban: A New Threshold for Presidential Non-Defense of Statutes*, 30 U. MICH. J.L. REFORM 591 (1997). Recently, commentators have made reference to the "nondefense of DOMA." See, e.g., Marcia L. McCormick, *Almeida on Non-Defense of DOMA and ENDA*, WORKPLACE PROF BLOG (Mar. 3, 2011), [http://lawprofessors.typepad.com/laborprof\\_blog/2011/03/almeida-on-non-defense-of-doma-and-enda.html](http://lawprofessors.typepad.com/laborprof_blog/2011/03/almeida-on-non-defense-of-doma-and-enda.html).

<sup>7</sup> See *infra* section IV.A.3, pp. 2116–18.

likely be anomalous. Rather, the Solicitor General's role has, since the late 1970s, slowly but surely undergone transformation from an independent force in the defense of statutes' constitutionality to a conveyor of "the President's distinctive constitutional voice."<sup>8</sup>

This Part traces the increase of the President's influence over decisions whether to defend federal statutes and the concomitant decrease in the Solicitor General's power to make these decisions. Section A examines the Solicitor General's role within the executive branch and specifically addresses two issues that have long perplexed commentators: who or what should be considered the Solicitor General's "client," and what degree of independence the Solicitor General should enjoy from the President. Section B traces the evolution of the President's involvement in decisions not to defend statutes and the decline of the Solicitor General's role in this regard. Finally, section C examines how the President's new role might impact the future of the government's Supreme Court litigation.

#### A. *The Solicitor General's Role Within the Executive Branch*

1. *Background.* — The U.S. Code provides that "[t]he President shall appoint in the Department of Justice, by and with the advice and consent of the Senate, a Solicitor General, learned in the law, to assist the Attorney General in the performance of his duties."<sup>9</sup> Congress originally created the Office of the Solicitor General in order to aid the Attorney General "in preparing opinions and arguing cases before the Supreme Court."<sup>10</sup> Today, representing the United States before the Supreme Court remains the Solicitor General's main role.<sup>11</sup> The Solicitor General usually decides whether to petition for certiorari<sup>12</sup> and whether to file an amicus brief.<sup>13</sup> The Solicitor General is also responsible for coordinating the litigation of the independent agencies.<sup>14</sup> Perhaps most importantly, she or he typically determines the United States's position on the law,<sup>15</sup> including whether a federal or state law or official action is consistent with the U.S. Constitution.<sup>16</sup> "In

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<sup>8</sup> John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 802 (1992) (reviewing CHARLES FRIED, ORDER AND LAW (1991)).

<sup>9</sup> 28 U.S.C. § 505 (2006).

<sup>10</sup> Role of the Solicitor Gen., 1 Op. O.L.C. 228, 228 (1977).

<sup>11</sup> See REBECCA MAE SALOKAR, THE SOLICITOR GENERAL 13 (1992).

<sup>12</sup> See *id.* at 12.

<sup>13</sup> See *id.* at 13.

<sup>14</sup> See Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 255–56 (1994).

<sup>15</sup> See LINCOLN CAPLAN, THE TENTH JUSTICE 18 (1987).

<sup>16</sup> See Wade H. McCree, Jr., Lecture, *The Solicitor General and His Client*, 59 WASH. U. L.Q. 337, 343–44 (1981).

short,” writes Professor Rebecca Mae Salokar, “the solicitor general is responsible for any and all actions on behalf of the United States government before the Supreme Court.”<sup>17</sup>

2. *The Solicitor General’s Client.* — Historically, it has been difficult to determine precisely who the Solicitor General’s client is.<sup>18</sup> Former Solicitor General Francis Biddle remarked that the Solicitor General’s “client is but an abstraction.”<sup>19</sup> Although commentators, including subsequent Solicitors General, routinely have criticized Solicitor General Biddle’s formulation,<sup>20</sup> few have agreed on an alternative theory of who constitutes the Solicitor General’s client.<sup>21</sup> One view holds that the Solicitor General’s sole client is the President.<sup>22</sup> Other views expand the Solicitor General’s client to the executive branch<sup>23</sup> or to the government as a whole.<sup>24</sup> Finally, some decline to identify a specific client and suggest instead that who the Solicitor General’s client is at any time depends on context.<sup>25</sup>

The fact that the Solicitor General is often understood to owe special duties to the Supreme Court further complicates this issue.<sup>26</sup> While most lawyers are expected to present the law in the light most

<sup>17</sup> SALOKAR, *supra* note 11, at 13.

<sup>18</sup> See, e.g., *Rex E. Lee Conference on the Office of the Solicitor General of the United States*, 2003 BYU L. REV. 1, 21, 29–32, 115 [hereinafter *Rex E. Lee Conference*].

<sup>19</sup> Drew S. Days III, Lecture, *In Search of the Solicitor General’s Clients: A Drama with Many Characters*, 83 KY. L.J. 485, 487 (1995) (quoting SALOKAR, *supra* note 11, at 7).

<sup>20</sup> See, e.g., Role of the Solicitor Gen., 1 Op. O.L.C. 228, 230 (1977) (“Francis Biddle may have overstated the case to some degree.”); CAPLAN, *supra* note 15, at 18 (“Biddle’s words describe an ideal that has never been entirely fulfilled.”); Days, *supra* note 19, at 487 (referring to Solicitor General Biddle’s view as “rhapsodic and inaccurate”); *Rex E. Lee Conference*, *supra* note 18, at 47 (statement of Professor Richard Wilkins calling Solicitor General Biddle’s view “nonsense”); Seth P. Waxman, Essay, *Defending Congress*, 79 N.C. L. REV. 1073, 1076 (2001) (stating that Solicitor General Biddle’s phrase “is [not] quite right”); Richard G. Wilkins, *An Officer and an Advocate: The Role of the Solicitor General*, 21 LOY. L.A. L. REV. 1167, 1172 (1988) (calling Solicitor General Biddle’s formulation “hyperbole”); James L. Cooper, Jr., *The Solicitor General and Federal Litigation: Principal-Agent Relationships and the Separation of Powers* 110 (May 1993) (unpublished Ph.D. dissertation, Indiana University) (on file with the Harvard Law School Library) (calling other descriptions of the Solicitor General’s role “less radical and perhaps more accurate”). *But see* McCree, *supra* note 16, at 344–45 (explicitly agreeing with the Biddle quotation).

<sup>21</sup> See Adam D. Chandler, Comment, *The Solicitor General of the United States: Tenth Justice or Zealous Advocate?*, 121 YALE L.J. 725, 726 n.5 (2011) (surveying the debate).

<sup>22</sup> See, e.g., McGinnis, *supra* note 8, at 802.

<sup>23</sup> See, e.g., CAPLAN, *supra* note 15, at 3.

<sup>24</sup> See, e.g., Erwin N. Griswold, *The Office of the Solicitor General — Representing the Interests of the United States Before the Supreme Court*, 34 MO. L. REV. 527, 527, 535 (1969); Waxman, *supra* note 20, at 1076 (“The goal is for the United States to speak with one voice . . . that reflects the interests of all three branches of government and of the people.”).

<sup>25</sup> See, e.g., Drew S. Days III, *Executive Branch Advocate v. Officer of the Court: The Solicitor General’s Ethical Dilemma*, 22 NOVA L. REV. 677, 681 (1998) (identifying nine entities that potentially could be the Solicitor General’s client).

<sup>26</sup> *Id.* at 686; see also Role of the Solicitor Gen., 1 Op. O.L.C. 228, 231 (1977).

favorable to their clients as long as they do not flatly distort the law,<sup>27</sup> the Supreme Court has historically expected from the Solicitor General a “balanced picture of the law and the facts.”<sup>28</sup> Additionally, the Supreme Court traditionally has given special consideration to the Solicitor General’s opinion regarding whether the Court should hear a particular case,<sup>29</sup> although this practice may be changing.<sup>30</sup>

3. *The Solicitor General’s Independence from the President.* — The Solicitor General “serve[s] at the pleasure of the president”<sup>31</sup> and, as an officer within the Department of Justice, reports directly to the Attorney General.<sup>32</sup> Although the Solicitor General is subordinate both to the President<sup>33</sup> and to the Attorney General,<sup>34</sup> the executive branch has typically afforded the Solicitor General some independence in carrying out her or his duties.<sup>35</sup> Indeed, in the past, the rarity of the President or Attorney General’s overruling a Solicitor General has been so pronounced that such overrulings have tended to generate interest.<sup>36</sup>

There is some authority to suggest that the Solicitor General is supposed to be insulated from politics.<sup>37</sup> Commentators justify this independence, regarded as an unusual arrangement for executive officers,<sup>38</sup> primarily on two grounds. First, this independence is regarded as

<sup>27</sup> See MODEL RULES OF PROF’L CONDUCT R. 3.1, 3.3(a)(1) (2009).

<sup>28</sup> CAPLAN, *supra* note 15, at 259; see also Role of the Solicitor Gen., 1 Op. O.L.C. at 231.

<sup>29</sup> See Role of the Solicitor Gen., 1 Op. O.L.C. at 231; CAPLAN, *supra* note 15, at 258–59; SALOKAR, *supra* note 11, at 96; Days, *supra* note 25, at 686–87.

<sup>30</sup> See Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General’s Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1324 (2010) (“Over the past two decades, the Solicitor General’s use of [her or his] influence has changed dramatically, moving away from the certiorari stage, where the Court sets its agenda, in favor of broader participation as amicus curiae at the merits stage.”).

<sup>31</sup> SALOKAR, *supra* note 11, at 70.

<sup>32</sup> *Id.*

<sup>33</sup> See, e.g., CAPLAN, *supra* note 15, at 33; SALOKAR, *supra* note 11, at 70; Letter from Donald B. Verrilli, Jr., Solicitor Gen., U.S. Dep’t of Justice, to Patrick Leahy, U.S. Senator, & Charles Grassley, U.S. Senator 4–5 (Apr. 11, 2011) [hereinafter Verrilli Letter], available at [http://www.judiciary.senate.gov/nominations/112thCongressExecutiveNominations/upload/Verrilli i-QFRs.pdf](http://www.judiciary.senate.gov/nominations/112thCongressExecutiveNominations/upload/Verrilli%20i-QFRs.pdf).

<sup>34</sup> E.g., Role of the Solicitor Gen., 1 Op. O.L.C. at 229; CAPLAN, *supra* note 15, at 48; FRIED, *supra* note 8, at 198.

<sup>35</sup> See, e.g., SALOKAR, *supra* note 11, at 70; Joshua I. Schwartz, *Two Perspectives on the Solicitor General’s Independence*, 21 LOY. L.A. L. REV. 1119, 1119 (1988); Verrilli Letter, *supra* note 33, at 1–5; see also Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 704 (2005) (“The Solicitor General plays a central role in executive constitutionalism, with little or no day-to-day supervision or input from the president or the Attorney General.”).

<sup>36</sup> See Days, *supra* note 19, at 489–94 (“What is notable about the history I have just recounted is not that incidents of direct presidential involvement in the work of the Solicitor General have occurred but that they have been so relatively few in number.” *Id.* at 493.).

<sup>37</sup> Role of the Solicitor Gen., 1 Op. O.L.C. at 232–33.

<sup>38</sup> SALOKAR, *supra* note 11, at 70.

promoting “the rule of law.”<sup>39</sup> Second, this independence facilitates the Solicitor General’s advocacy on behalf of the government by reinforcing the Supreme Court’s special trust in the Solicitor General’s legal analysis and candor.<sup>40</sup>

The question of just how independent the Solicitor General should be is at the heart of the President’s increased involvement in decisions whether to defend statutes’ constitutionality. The President’s assertion of greater control over the nondefense of statutes implies a view that the Solicitor General, at least in certain instances, should not have independent authority.<sup>41</sup> The next section traces the development of that view.

### *B. The Evolution of the Duty to Defend Statutes*

Since 1926, the President’s role in the defense of statutes has increased, with a few watershed moments signaling new epochs in this development. Early in this period, the Solicitor General declined to defend statutes only in very limited circumstances in which defense of the statute would pose severe problems for the executive branch. Around 1977, a new view of the Solicitor General’s role took hold that led to the Solicitor General’s taking the President’s interests more thoroughly into account. Starting in about 1989, Presidents began exercising the power to decide themselves whether to defend statutes, with the Solicitor General’s role in this process gradually diminishing.

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<sup>39</sup> Neal Devins, *The Law: Defending Congress’s Interests in Court: How Lawmakers and the President Bargain over Department of Justice Representation*, 32 *PRESIDENTIAL STUD. Q.* 157, 164 (2002) (citing CAPLAN, *supra* note 15); Michael W. McConnell, *The Rule of Law and the Role of the Solicitor General*, 21 *LOY. L.A. L. REV.* 1105, 1106 (1988).

<sup>40</sup> See SALOKAR, *supra* note 11, at 94; Cooper, *supra* note 20, at 111–13; see also CAPLAN, *supra* note 15, at 256–64 (describing how Solicitor General Charles Fried’s perceived lack of impartiality may have hindered his ability to advocate effectively for the Reagan Administration before the Supreme Court).

<sup>41</sup> This view was anticipated as early as 1977, when a Department of Justice memorandum noted that certain policy considerations may, in rare cases, require more deference to the Attorney General by the Solicitor General. Role of the Solicitor Gen., 1 *Op. O.L.C.* at 235.

1. *Phase I (1926–1977): Rare Nondefense, Little Presidential Interference.* — The early history of the executive branch’s decisions not to defend the constitutionality of congressional statutes reveals that the executive branch, through the Solicitor General, refused to defend the constitutionality of statutes in only extraordinary situations in which it was not clear *how* the Solicitor General could have feasibly defended such statutes. Cases during this phase exhibit little independent discretion on the part of the President in the decision not to defend and only the most basic deference by the Solicitor General to the President’s interests.

(a) *Early Decisions Not to Defend.* — The 1926 case of *Myers v. United States*<sup>42</sup> marked the first time in U.S. history that the executive branch took the position that an enacted congressional statute was unconstitutional.<sup>43</sup> The case involved the constitutionality of a statutory requirement that the Senate approve the President’s firing of certain postmasters.<sup>44</sup> *Myers* thus presented a rather stark conflict between the interests of the legislative branch and those of the executive branch.<sup>45</sup> Notably, the case arose after the executive branch violated the statute and fired Postmaster Frank S. Myers without Senate approval.<sup>46</sup> The executive branch argued that its action was constitutional under Article II notwithstanding the statute.<sup>47</sup> While the Solicitor General argued on behalf of the executive branch, Senator George Wharton Pepper argued as *amicus curiae* for Congress.<sup>48</sup>

The facts of *Myers* demonstrate why the Solicitor General, for the first time, did not defend a statute against constitutional attack. The executive branch, having terminated Myers and discontinued his salary,<sup>49</sup> could not defend against a suit by Myers without arguing that the statute in question was invalid.<sup>50</sup> Even though the holding of *Myers* may be rather significant in the history of presidential power,<sup>51</sup> the Solicitor General’s nondefense of the statute in that case might indicate nothing more than that the executive branch is entitled to argue for a statute’s unconstitutionality when necessary to defend itself in court for actions it has already taken.

<sup>42</sup> 272 U.S. 52 (1926).

<sup>43</sup> See *id.* at 57 (oral argument of Will R. King); Waxman, *supra* note 20, at 1084–85.

<sup>44</sup> *Myers*, 272 U.S. at 107–08 (majority opinion).

<sup>45</sup> See Waxman, *supra* note 20, at 1084–85.

<sup>46</sup> See *Myers*, 272 U.S. at 106–07.

<sup>47</sup> See *id.* at 108.

<sup>48</sup> *Id.* at 57 (oral argument of Will R. King).

<sup>49</sup> See *id.* at 106 (majority opinion).

<sup>50</sup> See *id.* at 107–08.

<sup>51</sup> See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE 267–69 (2008).

*Myers* thus does not raise the issue of the President's simultaneous enforcement and nondefense of a statute.<sup>52</sup> Prior to 1977, such executive branch decisions to enforce, but not to defend, statutes appear to be relatively rare: a 1996 document by the Department of Justice identified only two such instances.<sup>53</sup> In each, the legislative branch placed the executive branch in an extreme position that would have made defense of the statute difficult if not impossible, thereby limiting how much one can infer from these cases regarding the scope of the Solicitor General's discretion. In *United States v. Lovett*,<sup>54</sup> Congress discontinued the salaries of three agency employees over the objections of those agencies.<sup>55</sup> Because the agencies retained the three individuals as unpaid employees,<sup>56</sup> defense of both the statute and the agencies' retention would have required the Solicitor General to argue, implausibly, that the agencies' interest in retaining their employees was not impinged by Congress's refusal to pay them. Thus, the fact that the executive branch did not defend the statute does not provide much evidence of broad presidential authority to decline such defense in a typical instance. In *Simkins v. Moses H. Cone Memorial Hospital*,<sup>57</sup> Congress attempted to force the Surgeon General to fund racially discriminatory hospitals<sup>58</sup> if those hospitals adhered to a "separate but equal" regime.<sup>59</sup> Although the Surgeon General obeyed the statute,<sup>60</sup> the segregationist aspect of the statute was, in light of *Brown v. Board of Education*,<sup>61</sup> clearly problematic.<sup>62</sup> That the executive branch wanted to be relieved of a statutory obligation to engage in such obviously unconstitutional discrimination does not indicate that the President had wide discretion to refuse to defend statutes.

(b) *Defense of Statutes Against Interests of the President.* — Two cases in which the executive branch, through the Solicitor General, af-

<sup>52</sup> Letter from Andrew Fois, Assistant Attorney Gen., U.S. Dep't of Justice, to Orrin G. Hatch, U.S. Senator 3 & n.3 (Mar. 22, 1996) [hereinafter Fois Letter], available at <http://volokh.com/wp-content/uploads/2011/02/DOJ1996.pdf>.

<sup>53</sup> Gussis, *supra* note 6, at 607–08; see Fois Letter, *supra* note 52, at 3–7.

<sup>54</sup> 328 U.S. 303 (1946).

<sup>55</sup> See *id.* at 304–05.

<sup>56</sup> *Id.* at 305.

<sup>57</sup> 323 F.2d 959 (4th Cir. 1963) (en banc).

<sup>58</sup> See *id.* at 961–62; Fois Letter, *supra* note 52, at 4.

<sup>59</sup> *Simkins*, 323 F.2d at 965; Fois Letter, *supra* note 52, at 4 (internal quotation marks omitted).

<sup>60</sup> *Simkins*, 323 F.2d at 962; Fois Letter, *supra* note 52, at 4.

<sup>61</sup> 347 U.S. 483 (1954).

<sup>62</sup> See *id.* at 495; see also *Rex E. Lee Conference*, *supra* note 18, at 30 (statement of Chief Judge Easterbrook) (“[S]olicitors general have felt themselves to have an independent power [to decline to defend statutes] . . . . One category is abandoning statutes that are incompatible with recent decisions of the Supreme Court. . . . After the Supreme Court decided *Brown*, the solicitor general could have gone statute by statute trying to defend every law but did not.” (footnote omitted)). *Simkins* approvingly cited *Brown* as a “landmark” case, *Simkins*, 323 F.2d at 963, in holding the statute’s “separate but equal” provision unconstitutional, see *id.* at 969.

firmatively defended statutes reveal the President's very minor role in pre-1977 decisions whether to defend statutes. In each case, the Solicitor General's actions contradicted, at least in part, the President's will.

First, in *Oregon v. Mitchell*,<sup>63</sup> Solicitor General Erwin Griswold attempted to defend a statute's constitutionality while also presenting to the Supreme Court President Richard Nixon's view that the statute was unconstitutional.<sup>64</sup> Former Solicitor General Seth Waxman has recounted that Solicitor General Griswold "began his oral argument . . . by informing the Court of the views of the President and of the Department of Justice questioning the statute's constitutionality and urged the Court to 'give consideration to these views.'"<sup>65</sup> Perhaps one could attribute Solicitor General Griswold's ambivalence to the fact that, as a policy matter, President Nixon "strongly favored" the statute and indeed had signed it into law.<sup>66</sup> Solicitor General Griswold's approach was the reverse of President Nixon's — Solicitor General Griswold argued that the statute *was* constitutional but suggested that it might not be, whereas President Nixon stated that the statute was unconstitutional but implicitly acknowledged that it might be constitutional by signing it into law.

Second, in *Buckley v. Valeo*,<sup>67</sup> Solicitor General Robert Bork filed two briefs suggesting contrary positions.<sup>68</sup> In doing so, he made clear that he believed that the Solicitor General could not function "entirely as [an] advocate[] for the client [Congress] and without an attempt to present the issues in the round."<sup>69</sup> Notably, Solicitor General Bork's comment called Congress, not the President, the client. More importantly, his comment indicated that his *own* assessments of the law dictated the appropriate course of action. Chief Judge Easterbrook confirms this reading of Solicitor General Bork's comment in his recollection that Solicitor General Bork believed intensely that the statute at issue in *Buckley* was unconstitutional<sup>70</sup> but, due to political pressure, nevertheless partially defended it.<sup>71</sup> Chief Judge Easterbrook further believes that the simultaneous defense and nondefense in *Buckley* resulted from "an assessment of what the Ford administration, given the politics of the time, thought was tolerable,"<sup>72</sup> suggesting that Solicitor General Bork did not act wholly in accordance with the sitting President's views on the mat-

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<sup>63</sup> 400 U.S. 112 (1970).

<sup>64</sup> Waxman, *supra* note 20, at 1081–82.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1081.

<sup>67</sup> 424 U.S. 1 (1976) (per curiam).

<sup>68</sup> See Waxman, *supra* note 20, at 1082–83.

<sup>69</sup> *Id.* at 1083.

<sup>70</sup> *Rex E. Lee Conference*, *supra* note 18, at 32 (statement of Chief Judge Easterbrook).

<sup>71</sup> See *id.* at 33.

<sup>72</sup> *Id.*

ter but rather pursuant to a compromise. Especially given that Solicitor General Bork ultimately did defend the statute, the resulting picture of statutory defense is one of a relatively uninvolved President whose own interests could be contradicted, at least in part.

2. *Phase II (1977–1989): The President as the Solicitor General’s Client.* — The Solicitor General’s office had a watershed year in 1977.<sup>73</sup> In that year, the Solicitor General began moving toward a model that treated the President not merely more robustly as a client of the Solicitor General but as the *sole* client of the Solicitor General. That same year, Assistant Attorney General John Harmon composed a memorandum to the Attorney General describing the Solicitor General’s role.<sup>74</sup> Lincoln Caplan has identified this document as “the first official statement about the role of the Solicitor General in the century-old history of the office.”<sup>75</sup> While the memorandum both highlights the Solicitor General’s “independence”<sup>76</sup> and suggests that other members of the executive branch may be the Solicitor General’s “clients,”<sup>77</sup> it nonetheless establishes two important principles that helped to generate increased concern for the President’s interests. First, the memorandum unambiguously supports the Solicitor General’s traditional independence on the basis that such independence furthers fulfillment of the President’s interests: “[T]he President and the Attorney General . . . are well served by a subordinate officer who is permitted to exercise independent and expert legal judgment essentially free from extensive involvement in policy matters . . . .”<sup>78</sup> Second, the memorandum states that, although the Solicitor General serves a useful function for the Supreme Court, it is nonetheless the case that only “*within the limits of proper advocacy*” does “he provide[] the Court with an accurate and expert statement of the legal principles that bear upon the questions to be decided.”<sup>79</sup> In other words, whatever role the Solicitor General has in the interpretation of the law, she or he must execute it within a framework of advocacy for a client.<sup>80</sup>

Perhaps surprisingly, an increased awareness of ethical issues facing government lawyers may have led the Department of Justice in general, and the Solicitor General in particular, to move in this client-

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<sup>73</sup> Cf. CAPLAN, *supra* note 15, at 48 (describing the importance of Assistant Attorney General John Harmon’s 1977 memorandum to the Attorney General discussing the role of the Solicitor General).

<sup>74</sup> Role of the Solicitor Gen., 1 Op. O.L.C. 228 (1977).

<sup>75</sup> CAPLAN, *supra* note 15, at 50.

<sup>76</sup> Role of the Solicitor Gen., 1 Op. O.L.C. at 230.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 232.

<sup>79</sup> *Id.* at 231 (emphasis added).

<sup>80</sup> See MODEL RULES OF PROF’L CONDUCT pmb. para. 2 (2009) (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”).

focused direction. In 1977, the American Bar Association began “a comprehensive rethinking of the ethical premises and problems of the legal profession” that would ultimately result in the ABA Model Rules of Professional Conduct in 1983.<sup>81</sup> Commentators have identified the fallout from the Watergate scandal as an impetus for this overhaul.<sup>82</sup> Of course, that the Model Rules were in a primordial state in 1977 does not necessarily suggest that the Department of Justice was looking to the Model Rules when it was contemporaneously formulating its own policies. Nonetheless, the development of the Model Rules in the wake of Watergate highlights the cultural context in which all lawyers, especially government lawyers, were operating in the late 1970s. In such a context, it is unsurprising that the federal government would be concerned about defining roles for its lawyers, including the Solicitor General, with an eye toward ethics.

To be sure, it at first seems remarkable that, in the wake of Watergate, the executive branch would want to move toward a more single-client-focused (that is, President-focused) role for the Solicitor General; after all, Professor Richard Wasserstrom argued in 1975 that an amoral, client-centric model of lawyering enabled the attitude of President Nixon’s lawyers that led to the Watergate mess.<sup>83</sup> Furthermore, given that there was a pronounced backlash against presidential authority following President George W. Bush’s increased control over the Office of Legal Counsel<sup>84</sup> and use of signing statements as a method of constitutional interpretation,<sup>85</sup> one might have expected a similar reaction following Watergate. However, Wasserstrom’s critique of client-centered lawyering is far from the only account of how ethics issues affected Watergate; there is another plausible story that the commitment of President Nixon’s lawyers to a cause — “the office of the Presidency”<sup>86</sup> — rather than to the client, President Nixon, caused the Watergate lawyers to act as they did.<sup>87</sup> Likewise, public expectations

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<sup>81</sup> *Id.* preface.

<sup>82</sup> See, e.g., Brent R. Appel, *The Limited Impact of Nix v. Whiteside on Attorney-Client Relations*, 136 U. PA. L. REV. 1913, 1922 (1988); Debra Lyn Bassett, *Three’s a Crowd: A Proposal to Abolish Joint Representation*, 32 RUTGERS L.J. 387, 408–09 (2001); Daniel Walfish, *Making Lawyers Responsible for the Truth: The Influence of Marvin Frankel’s Proposal for Reforming the Adversary System*, 35 SETON HALL L. REV. 613, 628 (2005).

<sup>83</sup> See Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 9–15 (1975), reprinted in ANDREW L. KAUFMAN & DAVID B. WILKINS, PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION 4, 9–12 (5th ed. 2009).

<sup>84</sup> See *supra* pp. 2111–12.

<sup>85</sup> See *supra* p. 2069.

<sup>86</sup> KAUFMAN & WILKINS, *supra* note 83, at 320 (quoting James St. Clair, attorney for President Nixon) (internal quotation marks omitted).

<sup>87</sup> See *id.*; cf. Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1974–76 (2008) [hereinafter Spaulding, *Professional Independence*] (arguing that it is possible that the government lawyers who authorized torture during the

surrounding Watergate may have differed from those for President Bush because the right to vigorous, partial advocacy by one's lawyer in court is a venerable tradition in U.S. justice.<sup>88</sup> Thus, it is not as paradoxical as it may at first appear that the Solicitor General would become more President-focused *after* Watergate.

Indeed, *Mitchell* and *Buckley* demonstrated that Solicitors General Griswold and Bork were less concerned than their successors with ethics. In each case, the Solicitor General attempted to represent multiple conflicting interests simultaneously. As Waxman notes: "Griswold's approach was lauded by some as admirable candor; it was attacked by others as half-hearted advocacy."<sup>89</sup> His actions would have been clearly unacceptable under current ethical rules. A lawyer ethically both owes her or his client "zeal in advocacy"<sup>90</sup> and must be candid with the court.<sup>91</sup> However, candor is not the same as "disinterested[ness],"<sup>92</sup> and indeed the obligation of candor is accompanied by an assumption that "[a] lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with *persuasive force*."<sup>93</sup> Solicitor General Griswold thus seems to have ignored his responsibilities to Congress as a client in order to meet an unnecessarily strict view of candor. Solicitor General Bork's course of action in *Buckley* met a similar response.<sup>94</sup> From the ethical concerns caused by having an unclear client, it follows logically that the Solicitor General would ultimately settle on a role largely defined by advocacy for a single client: the President of the United States, the Solicitor General's ultimate superior.

Congress was by no means uninvolved in this development and arguably made the first move toward helping to define the President as the Solicitor General's clear client. In 1977 Congress, specifically citing conflict-of-interest concerns, formally cut most of its ties with the Solicitor General's office through the creation of the Office of Senate Legal Counsel.<sup>95</sup> As Salokar suggests, however, this act did not fully end

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George W. Bush Administration were motivated by their own moral views). Along these lines, Professor Norman Spaulding has written a series of articles challenging what he calls the "post-Watergate discourse" against client-centric lawyering. Norman W. Spaulding, Essay, *Independence and Experimentalism in the Department of Justice*, 63 STAN. L. REV. 409, 416 (2011); *see id.*; Spaulding, *Professional Independence*, *supra*; Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1 (2003). Indeed, it is quite telling that the Model Rules of Professional Conduct themselves extol, first and foremost, the virtues of loyalty to the client. *See* MODEL RULES OF PROF'L CONDUCT pmbl. paras. 2, 4 (2009).

<sup>88</sup> *See, e.g.*, U.S. CONST. amend. VI.

<sup>89</sup> Waxman, *supra* note 20, at 1082.

<sup>90</sup> MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1.

<sup>91</sup> *Id.* R. 3.3.

<sup>92</sup> *Id.* R. 3.3 cmt. 4.

<sup>93</sup> *Id.* R. 3.3 cmt. 2 (emphasis added).

<sup>94</sup> Waxman, *supra* note 20, at 1083.

<sup>95</sup> *See* SALOKAR, *supra* note 11, at 90-91.

the Solicitor General's involvement with Congress because the Solicitor General continued to defend attacks on statutes' constitutionality.<sup>96</sup> Even so, the change reduced ambiguity regarding who the Solicitor General's client was: it was certainly not Congress.

Nonetheless, Congress's self-disaffirmation as the Solicitor General's client does not quite explain why the President alone, as opposed to the executive branch in general, began to have more influence over decisions to defend statutes. Two memoranda from the Department of Justice, however, laid a foundation for this very conception of the Solicitor General. Although President Jimmy Carter initially wanted to make the Department of Justice an independent agency,<sup>97</sup> his Attorney General convinced him that the Constitution required a closer connection between the President and the Attorney General.<sup>98</sup> The Attorney General argued, in short, that the President must ultimately be held accountable for the actions of the Attorney General, which would not be possible if the Attorney General's decisionmaking were insulated from the President's.<sup>99</sup> By extension, the Solicitor General, a subordinate to the Attorney General, must maintain a similarly close connection with the President.

In 1980, Attorney General Benjamin Civiletti articulated a standard for the duty of defense that seemed in line with the pre-1977 model.<sup>100</sup> Attorney General Civiletti's view did not survive for long. A 1981 statement by his successor, Attorney General William French Smith, quickly replaced Attorney General Civiletti's position and provides "the most influential [statement] on recent Solicitors General" of the executive branch's duty to defend laws<sup>101</sup>: "[T]he Department has the duty to defend the constitutionality of an Act of Congress *whenever a reasonable argument* can be made in its support, even if the Attorney General and the lawyers examining the case conclude that the argument may ultimately be unsuccessful in the courts."<sup>102</sup> Although President Obama and Attorney General Holder declined to defend DOMA precisely because they believed that reasonable ar-

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<sup>96</sup> *Id.* at 104–05.

<sup>97</sup> See CALABRESI & YOO, *supra* note 51, at 363.

<sup>98</sup> *Id.* at 364.

<sup>99</sup> See Proposals Regarding an Indep. Attorney Gen., 1 Op. O.L.C. 75, 75–76 (1977).

<sup>100</sup> See The Attorney Gen.'s Duty to Defend and Enforce Constitutionally Objectionable Legislation, 43 Op. Att'y Gen. 275, 275 (1980).

<sup>101</sup> Dalena Marcott, Note, *The Duty to Defend: What Is in the Best Interests of the World's Most Powerful Client?*, 92 GEO. L.J. 1309, 1318 (2004).

<sup>102</sup> *Id.* (quoting The Attorney Gen.'s Duty to Defend the Constitutionality of Statutes, 43 Op. Att'y Gen. 325, 325–26 (1981) (emphasis added)).

guments were unavailable,<sup>103</sup> this standard has historically been rather toothless.<sup>104</sup>

Indeed, the ease of reaching “reasonability” itself prompted the very document in which Attorney General Smith announced the standard: Attorney General Smith overturned his predecessor’s decision not to defend a particular statute.<sup>105</sup> In 1980, Attorney General Civiletti announced that the Department of Justice would not defend the statute at issue in *League of Women Voters v. FCC*<sup>106</sup> because of the lack of reasonable arguments.<sup>107</sup> After the inauguration of a new President, however, Attorney General Smith reversed course.<sup>108</sup> Even though, in the end, *League of Women Voters* did not give the reasonability rule any bite, the potential for a meaningful reasonability requirement was finally realized in the decision not to defend DOMA.<sup>109</sup>

By contrast, the document in which Attorney General Smith articulated this rule does appear to have established two bona fide exceptions to the duty to defend federal statutes: “The Department appropriately refuses to defend an act of Congress only in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid.”<sup>110</sup> Although these standards were framed as mere exceptions to a general duty of defense, it was not clear before 1977 that there were any exceptions to the duty of defense except in the exceedingly rare situations noted previously.<sup>111</sup> Thus, Attorney General Smith’s articulation of the Department of Justice’s role in defending statutes actually opened the door for more decisions not to defend.

With an understanding of the Solicitor General’s role that deferred greatly to the ultimate authority of the President, as well as to a rather unrestrictive set of guidelines for declining to defend statutes, it was only a matter of time before the President more actively influenced and directed the Solicitor General not to defend statutes. In this light, Solicitor General Charles Fried served as an important transitional

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<sup>103</sup> See *infra* pp. 2131–32.

<sup>104</sup> See, e.g., *Defending Marriage: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 53 (2011) [hereinafter *Defending Marriage*] (statement of Edward Whelan, President, Ethics and Public Policy Center).

<sup>105</sup> See *The Attorney Gen.’s Duty to Defend the Constitutionality of Statutes*, 43 Op. Att’y Gen. at 325–26.

<sup>106</sup> 489 F. Supp. 517 (C.D. Cal. 1980).

<sup>107</sup> See Fois Letter, *supra* note 52, at 5.

<sup>108</sup> *Id.* at 5–6; see also *The Attorney Gen.’s Duty to Defend the Constitutionality of Statutes*, 43 Op. Att’y Gen. at 326.

<sup>109</sup> See *infra* pp. 2131–32.

<sup>110</sup> *The Attorney Gen.’s Duty to Defend the Constitutionality of Statutes*, 43 Op. Att’y Gen. at 325.

<sup>111</sup> See *supra* pp. 2118–21.

figure through his aggressive promotion of President Ronald Reagan's vision of the law, stirring controversy through advocacy that seemed unacceptably partisan to some observers.<sup>112</sup> Several Supreme Court Justices lamented that Solicitor General Fried took a position of strong advocacy for the executive branch instead of pursuing the traditional Solicitor General model focused on assisting the Court.<sup>113</sup> But given the post-Watergate concern with legal ethics,<sup>114</sup> it seems as though the Solicitor General's eventual strong advocacy for the executive branch was unavoidable.<sup>115</sup>

One paradigmatic aspect of Solicitor General Fried's tenure was his advocacy, as then-Acting Solicitor General, seeking the invalidation of *Roe v. Wade*.<sup>116</sup> This position seems inconsistent with Attorney General Smith's suggestion that the Department of Justice would decline to defend statutes if to do so would require advocating overturning the Court's precedents.<sup>117</sup> The fact that Solicitor General Fried departed from this principle indicates an expansion of the Solicitor General's advocacy for the President's views.<sup>118</sup>

The Fried model found support in a 1987 *University of Chicago Law Review* essay on government lawyer ethics by Professor and former Department of Justice attorney Geoffrey Miller.<sup>119</sup> Although Miller's article does not focus on the Solicitor General, his account privileges an executive branch lawyer's fidelity to the executive branch over both any extraordinary duty to the courts<sup>120</sup> and any duties to the "public in-

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<sup>112</sup> See, e.g., CAPLAN, *supra* note 15, at 275–77.

<sup>113</sup> See *id.* at 255–67.

<sup>114</sup> See *supra* pp. 2122–24.

<sup>115</sup> But see CAPLAN, *supra* note 15, at 271 (questioning whether it was "inevitable that the Solicitor General would become a partisan advocate").

<sup>116</sup> 410 U.S. 113 (1973); see CAPLAN, *supra* note 15, at 139–42.

<sup>117</sup> See The Attorney Gen.'s Duty to Defend the Constitutionality of Statutes, 43 Op. Att'y Gen. 325, 325–26 (1981).

<sup>118</sup> See FRIED, *supra* note 8, at 33 ("Abortion was a signal issue for the [Reagan] administration, joining the strong prolife sentiments of the President's religious-right, traditionalist constituency with the more professional sense . . . that *Roe v. Wade* was an extreme example of judicial overreaching — a position with which I agreed."); see also CAPLAN, *supra* note 15, at 266 (statement of an anonymous Supreme Court Justice that she or he "get[s] the impression that on abortion, affirmative action, and a whole range of other subjects, [Solicitor General Fried has] gone way out of his way to support the point of view of the Administration" (internal quotation mark omitted)).

One might argue that Solicitor General Fried's actions were not really a departure from Attorney General Smith's principle because the abortion advocacy did not occur in the context of the defense of a congressional statute. See Brief for the United States as Amicus Curiae in Support of Appellants, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (Nos. 84-495 & 84-1379), 1985 WL 669620, at \*2. However, this fact actually makes Solicitor General Fried's departure more dramatic because he asked the Court to overturn its precedent even though Congress had no direct interest in the Court's doing so.

<sup>119</sup> See Geoffrey P. Miller, Essay, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987).

<sup>120</sup> See *id.* at 1296–97.

terest” in the abstract.<sup>121</sup> For instance, Miller highlights that Attorney General Smith’s guideline was not required by legal ethics:

It would not . . . be unethical for [a government lawyer] to assist in a project that probably would be held unconstitutional under existing Supreme Court precedent so long as the project is not contrary to any binding judgment and the executive branch makes a bona fide claim that the Supreme Court’s prior decision is incorrect.<sup>122</sup>

One year later, another law professor and alumnus of the Solicitor General’s office, Professor Michael McConnell, substantially concurred with this view,<sup>123</sup> lending further support to Solicitor General Fried’s approach.

3. *Phase III (1989–Present): The Increasing Involvement of the President in Decisions Not to Defend Statutes.* — After the Reagan-Fried years, a more deferential Department of Justice in general and Solicitors General in particular enabled Presidents to take more active roles in decisions not to defend statutes. In *Turner Broadcasting System, Inc. v. FCC*,<sup>124</sup> President George H.W. Bush’s Solicitor General declined to defend a statute enacted over a veto by President Bush.<sup>125</sup> According to Solicitor General Waxman, there were “professionally respectable arguments” for the statute’s constitutionality that could have been made.<sup>126</sup> In fact, just as in *League of Women Voters*, an intervening change in the presidency resulted in the defense of the statute by the new Administration.<sup>127</sup> According to Waxman, the Solicitor General did not defend the statute because “it [wa]s manifest that the President ha[d] concluded that the statute [wa]s unconstitutional.”<sup>128</sup> As the *Los Angeles Times* reported, Assistant Attorney General Stuart Gerson declined to defend the statute due to an “ethical conflict of interest [that] would be created were the department now to defend these actions of the statute.”<sup>129</sup>

Equally important is the other George H.W. Bush–era case that Solicitor General Waxman identifies: “In 1990 . . . the United States filed an amicus brief in *Metro Broadcasting v. FCC* not defending but *challenging* the constitutionality of” an act of Congress.<sup>130</sup> Unlike Solici-

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<sup>121</sup> *Id.* at 1294 (internal quotation marks omitted).

<sup>122</sup> *Id.* at 1297.

<sup>123</sup> See McConnell, *supra* note 39, at 1118.

<sup>124</sup> 512 U.S. 622 (1994).

<sup>125</sup> Waxman, *supra* note 20, at 1084.

<sup>126</sup> *Id.* at 1083.

<sup>127</sup> See *id.* at 1084.

<sup>128</sup> *Id.* at 1083.

<sup>129</sup> Jube Shiver, Jr., *Justice Dept. Won’t Defend “Must-Carry” Cable Rule*, L.A. TIMES (Nov. 6, 1992), [http://articles.latimes.com/1992-11-06/business/fi-1371\\_1\\_cable-operators](http://articles.latimes.com/1992-11-06/business/fi-1371_1_cable-operators) (internal quotation marks omitted).

<sup>130</sup> Waxman, *supra* note 20, at 1083 (footnote omitted); see *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

tor General Bork's multiple briefs in *Buckley*,<sup>131</sup> the goal here was not to provide the Court with a balanced view of the legal issues but to advocate for the executive branch at the expense of Congress.<sup>132</sup> As both Solicitor General Waxman and Professor Marty Lederman have noted, this case could not be classified under any of the Solicitor General's enumerated exceptions to the defense of statutes.<sup>133</sup> Rather, Lederman persuasively argues that President Bush must have personally, albeit not publicly, authorized the nondefense of the statute in question.<sup>134</sup> Furthermore, Solicitor General Waxman suggests that when the nondefense of a statute does not fall within an exception, it is usually due to the President's "manifest" belief in the statute's unconstitutionality.<sup>135</sup> Thus, both *Metro Broadcasting* and *Turner Broadcasting* appear to be signs of a new presidential involvement in statutory defense decisions.

In part, President Bush's involvement in nondefense of statutes stemmed from his strong belief in the unitary executive branch and from his efforts to involve himself fully with the happenings of the executive branch.<sup>136</sup> President Bush found support for his views in the work of some scholars of the time. In 1992, Professor John McGinnis, reviewing Solicitor General Fried's memoir, insisted that the Solicitor General owed a duty of absolute loyalty to the President: "[I]t is the duty of the Solicitor General to reflect all of the President's expressed jurisprudential views."<sup>137</sup>

President Bill Clinton continued the tradition that President Bush began. Solicitor General Drew Days recounts that, in his interview for the position with President Clinton, the President "said, 'What is the relationship between the president and the solicitor general?' And I said, 'Mr. President, you are in the Constitution and the solicitor general is not.' I somewhat regretted that after the fact, giving him that

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<sup>131</sup> See *supra* pp. 2120–21.

<sup>132</sup> To be sure, before *Metro Broadcasting* there had been a few cases in which the Department of Justice and Congress had been on opposite sides. See Fois Letter, *supra* note 52, at 3–7. The point here is not to contend that the Department of Justice's decision to litigate against Congress's interests was new but to show how ethics and personal decisionmaking by the President had become central components of the process.

<sup>133</sup> See Waxman, *supra* note 20, at 1083; Marty Lederman, *John Roberts and the SG's Refusal to Defend Federal Statutes in Metro Broadcasting v. FCC*, BALKINIZATION (Sept. 8, 2005, 12:11 AM), <http://balkin.blogspot.com/2005/09/john-roberts-and-sgs-refusal-to-defend.html>.

<sup>134</sup> See Lederman, *supra* note 133. This is not to say that then-Acting Solicitor General John Roberts did not actively attempt to persuade the President that the statute was unconstitutional, and Lederman believes that now-Chief Justice Roberts did in fact do so. See *id.*

<sup>135</sup> Waxman, *supra* note 20, at 1083.

<sup>136</sup> See CALABRESI & YOO, *supra* note 51, at 384–90 ("More than almost any other president besides William Howard Taft, George Herbert Walker Bush staunchly defended the unitariness of the executive branch." *Id.* at 384.)

<sup>137</sup> McGinnis, *supra* note 8, at 803.

insight. But I really believe that.”<sup>138</sup> It is interesting that Solicitor General Days would later give a lecture turned article explaining the ethical dilemmas of the Solicitor General, in which he suggested that the White House might *not* be the only client,<sup>139</sup> but it is perhaps more telling that President Clinton’s relationship with Solicitor General Days began with the understanding that the President’s authority to command the Solicitor General was nearly absolute, to the point where Solicitor General Days began to lament his statement.

Furthermore, it is clear that President Clinton saw no need to defer to the Solicitor General when, in a 1996 signing statement, he directed the Department of Justice not to defend a statutory provision discriminating against HIV-positive members of the military.<sup>140</sup> For President Clinton, the traditional model of an independent Solicitor General who would dispassionately review the defensibility of such a statute had no relevance; by including in a signing statement an instruction to the Department of Justice not to defend the provision, President Clinton bypassed the usual procedure. Indeed, “[a]lthough the Department of Justice orally advised the President of the applicable legal standards to apply in evaluating the constitutionality of [the provision], it did not provide the President any written advice.”<sup>141</sup> Moreover, because President Clinton’s decision seemed to lower the threshold at which the executive branch would not defend statutes from “no ‘reasonable’ argument” to “‘probably’ unconstitutional,”<sup>142</sup> there is an excellent chance that the Solicitor General’s decision would have differed from President Clinton’s.

President Clinton appears to have used his prerogative to decline to defend statutes in *Dickerson v. United States*,<sup>143</sup> albeit in an indirect fashion. In his essay, Solicitor General Waxman curiously suggests, echoing Attorney General Smith, that the need for the Solicitor General to ask the Court to overrule its own precedents remains an exception to the presumption of defense,<sup>144</sup> although not an absolute one.<sup>145</sup> Solicitor General Waxman uses this rule to justify his decision in *Dickerson* not to defend a statute that seemed contrary to *Miranda v. Arizona*.<sup>146</sup> However, Professor Neal Devins has expressed skepticism over this account in part because there are strong argu-

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<sup>138</sup> *Rex E. Lee Conference*, *supra* note 18, at 159.

<sup>139</sup> See Days, *supra* note 25, at 681.

<sup>140</sup> See Fois Letter, *supra* note 52, at 1–2.

<sup>141</sup> *Id.* at 1.

<sup>142</sup> Gussis, *supra* note 6, at 623.

<sup>143</sup> 530 U.S. 428 (2000).

<sup>144</sup> Waxman, *supra* note 20, at 1085.

<sup>145</sup> See *id.* at 1087.

<sup>146</sup> 384 U.S. 436 (1966); see Waxman, *supra* note 20, at 1087–88.

ments that the statute could be upheld without overruling *Miranda*.<sup>147</sup> A much more straightforward and plausible explanation, which a statement Solicitor General Waxman made elsewhere supports, is that the Solicitor General, like his immediate predecessors, deferred to the President's will.<sup>148</sup>

President George W. Bush's tenure as President appears to have been rather quiet with regard to nondefense of statutes. Indeed, in what may have been the only decision not to defend a statute during the Bush years, then-Acting Solicitor General Paul Clement made clear that *he* as Acting Solicitor General had made a decision not to defend.<sup>149</sup> It is possible, of course, that President Bush retreated from the pattern that had marked Presidents' involvement in statutory non-defense since 1977. A more interesting possibility, however, is that two other developments in the President's authority during the early twenty-first century — the use of signing statements<sup>150</sup> and the lack of independence of the Office of Legal Counsel<sup>151</sup> — rendered President Bush's use of his power not to defend statutes less necessary. Insofar as President Bush used both mechanisms to ensure that the law, including congressionally enacted statutes, conformed with his understanding of the Constitution, there would be little need to argue that any statute infringed his power.

Thus, from 1977 through the Clinton Administration, the President's role in determining when the executive branch would decline to defend a statute expanded greatly. In this light, President Obama's decision not to defend DOMA despite Acting Solicitor General Katyal's objections hardly seems like an unprecedented abuse of power.<sup>152</sup>

Attorney General Holder's letter announcing the decision not to defend DOMA cited two grounds for the decision: a lack of reasonable arguments and the fact that "it is manifest that the President has concluded that the statute is unconstitutional."<sup>153</sup> In his letter to Speaker of

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<sup>147</sup> See Neal Devins, Essay, *Politics and Principle: An Alternative Take on Seth P. Waxman's Defending Congress*, 81 N.C. L. REV. 2061, 2064 (2003).

<sup>148</sup> See *Rex E. Lee Conference*, *supra* note 18, at 148 ("I told the President that I was firmly of the view that principles of stare decisis and the long-term interests of the United States counsel against asking the Court to overrule *Miranda* — but that, *of course*, he could direct the contrary position. He looked straight across the table and said, 'How can I help you?'" (emphasis added)).

<sup>149</sup> Letter from Paul D. Clement, Acting Solicitor Gen., U.S. Dep't of Justice, to Patricia Mack Bryant, Senate Legal Counsel, U.S. Senate 1 (Dec. 23, 2004), available at <http://www.drugpolicy.org/docUploads/USDOJStookLetter012605.pdf>.

<sup>150</sup> See *supra* Part II, pp. 2068–89.

<sup>151</sup> See *supra* Part III, pp. 2090–2113.

<sup>152</sup> *Contra* sources cited *supra* notes 3–5.

<sup>153</sup> See Press Release, *supra* note 2 (quoting Waxman, *supra* note 20, at 1083) (internal quotation mark omitted).

the House John Boehner, Attorney General Holder discussed the nature of unreasonable arguments:

As you know, the Department has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense, a practice that accords the respect appropriately due to a coequal branch of government. However, the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because the Department does not consider every plausible argument to be a “reasonable” one. . . . This is the rare case where the proper course is to forgo the defense of this statute.<sup>154</sup>

With the nondefense of DOMA, the reasonability requirement appears to have moved from being relatively immaterial<sup>155</sup> to having a real effect on decisions not to defend statutes. Most importantly, the new force of the reasonability standard reinforces the authority of the *President* to make such decisions, as reasonability is not tethered to the mere ethical standard required of all lawyers but rather is placed somewhat higher: Attorney General Holder’s letter seems to suggest, in the words of one commentator, “that the ‘reasonable’ threshold requires some undefined quantum of force beyond what ‘plausible’ or ‘professionally responsible’ arguments provide.”<sup>156</sup> The modern reasonability inquiry is thus highly subjective and is precisely the kind of decision that the President, with his own constitutional vision, must make.<sup>157</sup> Because of the inherent subjectivity of this decision in contentious circumstances, no lawyer, including the Solicitor General, can determine whether an argument is reasonable; only the President can make that determination.<sup>158</sup>

Clearly, with modern Presidents’ practice of using signing statements as a means to assert their interpretations of the Constitution,<sup>159</sup> one should expect that Presidents will continue to recognize an ability to use decisions whether to defend statutes as a means of interpreting

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<sup>154</sup> Press Release, *supra* note 2.

<sup>155</sup> See Marcott, *supra* note 101, at 1318–19.

<sup>156</sup> *Defending Marriage*, *supra* note 104, at 57 (statement of Edward Whelan, President, Ethics and Public Policy Center).

<sup>157</sup> *Cf.* McGinnis, *supra* note 8, at 802 (noting the President’s responsibility to put forward an independent interpretation of the Constitution).

<sup>158</sup> Even if this reality is a modern development, this limitation on the Solicitor General’s capacities was recognized in 1977. See *Role of the Solicitor Gen.*, 1 Op. O.L.C. 228, 235 (1977) (“[C]ases may arise in which questions of policy are so important to the correct resolution of the case that the principles that normally justify the Solicitor General’s independent and dispositive function may give way to the greater need for the Solicitor General to seek guidance on the policy question. Questions of policy are questions that can be effectively addressed by the Attorney General, a Cabinet officer who participates directly in policy formation and who can go to the President for policy guidance when the case demands.”).

<sup>159</sup> See *supra* p. 2068.

the Constitution. Not all Presidents will necessarily use this tool. President Obama's reduced use of signing statements vis-à-vis his immediate predecessor, even as President Obama has increased his control over the nondefense of statutes, suggests that Presidents might have personal preferences regarding *how* they express their constitutional views. Like signing statements and like increasing influence over the Office of Legal Counsel,<sup>160</sup> therefore, presidential control over statutory defense serves as just one more tool in a growing kit of *alternative* means, not necessarily all to be deployed at once, to assert executive power.

*C. Implications of the President as Decisionmaker  
in Nondefense Cases*

With recent commentary suggesting that the Solicitor General ought to remember that she or he is, fundamentally, an advocate,<sup>161</sup> it is unlikely that the nondefense of DOMA signals the final chapter in the President's expanding power vis-à-vis the Solicitor General over federal litigation. Recent Solicitors General have affirmed that there is still a presumption that the Solicitor General will defend the constitutionality of an act of Congress<sup>162</sup> and have continued to cite specific exceptions, which are more or less clearly delineated, as the only justifications for refusal to defend such statutes.<sup>163</sup> However, even though cases like DOMA are currently the exception rather than the rule, the increasing power of the President suggests that the President may at some point in the future demand the final word over whether to defend most statutes, or at least any politically important ones. While current Solicitor General Donald Verrilli assured the Senate that he would resign from the position if asked not to defend a statute that he believed could be defended,<sup>164</sup> it seems as though such a categorical stance regarding the Solicitor General's duty will ultimately become untenable once the President becomes more involved in the defense *vel*

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<sup>160</sup> See *supra* pp. 2090–91.

<sup>161</sup> See, e.g., Chandler, *supra* note 21, at 730 (citing MODEL RULES OF PROF'L CONDUCT pmb. ¶¶ 2, 8–9 (2009)); Marcott, *supra* note 101, at 1331 (suggesting that "the Solicitor General's constitutional obligations as a member of the executive branch" trump any duty to defend congressional statutes).

<sup>162</sup> See *Confirmation Hearings on the Nominations of Thomas Perrelli Nominee to Be Associate Attorney General of the United States and Elena Kagan Nominee to Be Solicitor General of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 47 (2009) [hereinafter *Confirmation Hearings*] (statement of Elena Kagan); Verrilli Letter, *supra* note 33, at 5.

<sup>163</sup> See *Confirmation Hearings*, *supra* note 162, at 95–96; Verrilli Letter, *supra* note 33, at 5–6.

<sup>164</sup> See Verrilli Letter, *supra* note 33, at 4–5; cf. FRIED, *supra* note 8, at 192–93 (arguing that the Solicitor General should resign if given an unlawful order). The Solicitor General could also simply refuse to breach the ethical obligation and risk being terminated. *But see id.* at 193 ("[I]t would not be right for the [Solicitor General] to disregard the President and make him take the initiative to fire him.").

*non* of congressional acts. To be sure, however, the President still does not have limitless discretion to push the Solicitor General; because of the ethical rule of candor toward the courts regarding the law, the Solicitor General will never *defend* a statute unsupported by reasonable legal arguments.<sup>165</sup> Similarly, the Solicitor General may need to resign if the President requires her or him to argue that a statute is unconstitutional when no reasonable argument can be made as to the statute's unconstitutionality.<sup>166</sup> Whenever there are reasonable arguments regarding a statute's unconstitutionality, however, the President will and should expect the Solicitor General to comply with an order to argue against the statute.<sup>167</sup>

The shift of authority from the Solicitor General to the President also does not mean that the President herself or himself will not be guided by certain principles in deciding whether to defend statutes. Although the change that DOMA signaled is too recent to have generated a robust literature on the subject, at least one scholar has laid out a framework for analyzing the propriety of a President's decision not to defend a statute in the wake of DOMA.<sup>168</sup> Professor Carlos Ball's four-prong framework bears little resemblance to the traditional analysis used by Solicitors General to make such a decision.<sup>169</sup> Ball would inquire into "whether (1) there are binding judicial precedents on the relevant constitutional issues; (2) those issues raise significant normative and policy questions; (3) Congress considered the constitutional issues during the enactment process; and (4) it is likely that the President's decision will preclude judicial review."<sup>170</sup> Furthermore, this framework does not appear to envision any decisionmaking on the part of the Solicitor General whatsoever, leaving that task wholly to the President.<sup>171</sup> As Ball notes, the factors used in this framework address concerns for due deference to the legislative and judicial branches of government.<sup>172</sup> If the President follows these guidelines, any risk that she or he will overstep constitutional bounds thus seems remote.

Of course, one might argue that trusting the President to follow these guidelines is foolish — there must be some meaningful constraint

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<sup>165</sup> See MODEL RULES OF PROF'L CONDUCT R. 3.3.

<sup>166</sup> Cf. *id.* R. 3.1 (prohibiting wholly "frivolous" legal arguments). This rule would not stop the Solicitor General from arguing that the Court should overrule its precedents suggesting the constitutionality of the statute. See *id.*

<sup>167</sup> Even if no reasonable arguments can be made that a statute is unconstitutional, the President could still ethically instruct the Solicitor General to abstain from litigating the issue at all.

<sup>168</sup> See Carlos A. Ball, *When May a President Refuse to Defend a Statute? The Obama Administration and DOMA*, 106 NW. U. L. REV. COLLOQUY 77, 79–85 (2011).

<sup>169</sup> See *id.*

<sup>170</sup> *Id.* at 79.

<sup>171</sup> See *id.* at 78–79.

<sup>172</sup> *Id.* at 80.

on the President. The new regime of presidential authority at the expense of the Solicitor General's independence does not necessarily mean that there will not be meaningful checks on the President. For instance, Congress may heed the call of scholars such as Professor Amanda Frost to become more actively involved in federal litigation over the meaning of both statutory and constitutional law, counterbalancing the President's voice in such litigation.<sup>173</sup> Furthermore, as Professors Eric Posner and Adrian Vermeule remind their readers, "political constraints on executive government are real, even as legal constraints have atrophied."<sup>174</sup> Indeed, these political considerations may lead the President to engage in various types of formal or informal "self-binding"<sup>175</sup> that further reduce the risk of the President's asserting too much authority. If a President "self-binds" to the framework laid out by Ball, it seems likely that the public would view her or his work as legitimate.

#### D. Conclusion

The increased role of the President in the defense *vel non* of congressional statutes accords with the long-term increase in the President's power. Indeed, in the Obama Administration, control over the defense of statutes seems to have filled the gap left by a decrease in the use of signing statements and control over the Office of Legal Counsel in comparison with the Bush Administration. It remains to be seen whether Presidents will exercise this increasing authority in an unprincipled fashion or whether they will follow a framework, like that proposed by Ball, that will guide them toward principled and predictable exercises of their power.

### V. EXECUTIVE APPOINTMENTS

#### A. Introduction

The Appointments Clause,<sup>1</sup> which calls for presidential appointment of executive and judicial officials with the advice and consent of the Senate, exemplifies the system of checks and balances the Founders sought to achieve.<sup>2</sup> By assigning a single executive, the President, the authority to appoint all principal executive officers while simultaneously restraining this power by requiring Senate consent, the clause

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<sup>173</sup> See Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914 (2012); see also Gussis, *supra* note 6, at 628.

<sup>174</sup> ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* 14 (2010).

<sup>175</sup> *Id.* at 138.

<sup>1</sup> U.S. CONST. art. II, § 2.

<sup>2</sup> See THE FEDERALIST NO. 51, at 318–19 (James Madison) (Clinton Rossiter ed., 2003).

ensures that no branch goes unchecked. While this constitutional institutionalization of conflict over control is not unique to the appointments context,<sup>3</sup> appointments have become a major battleground between administrations and Congress over the last dozen years.<sup>4</sup> For most of the twentieth century, despite the rise of the administrative state, the appointments process functioned relatively smoothly; however, this stability has deteriorated dramatically since the turn of the century. The more polarized political environment and the greater concentration of power within administrative agencies have led to the development of new legal and political tools as the President and Congress each attempt to assert control over the appointments process, and ultimately over administrative agencies. As such, the area is ripe for scholarly exploration of the conflict through the prisms of separation of powers and the unitary executive theory.

The uniqueness of this conflict in the administrative state stems from the performance of a quasi-legislative role by the executive branch.<sup>5</sup> Thus, scholars have argued over whether the solution to this violation of separation of powers — arising from this handover of legislative power to the executive branch — is to allow intrusion by the legislative branch on the executive.<sup>6</sup> Congress's attempts to control the legislative powers it has ceded, by asserting greater authority over who is appointed to head the quasi-legislative, quasi-executive administrative agencies, reflect this dynamic. Meanwhile, presidents generally resist "attempts to insulate"<sup>7</sup> administrative agencies from their control. As a result, the President's appointments power has become a central battleground today.<sup>8</sup>

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<sup>3</sup> See, e.g., U.S. CONST. art. I, § 7 (providing for the President's veto power and congressional power to override).

<sup>4</sup> See, e.g., David Frum, *Obama-GOP Battle Turns Ruthless*, CNN (Jan. 9, 2012, 10:14 AM), <http://www.cnn.com/2012/01/09/opinion/frum-recess-appointments/index.html> (describing recent "machinations" over the appointment of a director to head the Consumer Financial Protection Bureau as anything but politics as usual and stating that "[t]he increasing prevalence of recess appointments to very important jobs in the George W. Bush and now Obama Administrations reveals a widening divide between administrations and Congress — and declining respect for each others' prerogatives").

<sup>5</sup> See, e.g., *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935) (noting that the Federal Trade Commission performs "quasi-legislative" duties).

<sup>6</sup> See Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 601 (2005) (contending with those scholars who suggest that "the added policymaking role of the modern administrative state means Congress ought to be able to impose greater limits on presidential control over the execution of the law").

<sup>7</sup> DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN* 15 (2003).

<sup>8</sup> See Frum, *supra* note 4.

While battles over agency structure and control of agency officials are common,<sup>9</sup> the recent political and legal battles over presidential nominations and Senate confirmations have taken center stage.<sup>10</sup> Both Bush and Obama nominees have been held up by the Senate's refusal even to hold up-or-down votes on candidates.<sup>11</sup> Whereas in previous eras, the Senate typically rejected those nominees who were unqualified or otherwise patently defective,<sup>12</sup> it has become more common for the Senate to reject candidates based on consideration of ideological beliefs.<sup>13</sup> Thus, indisputably qualified nominees have been held up because the Senate — or even a minority of the Senate<sup>14</sup> — objected to their political views.<sup>15</sup> Finally, the Senate has stalled nominations in order to gain presidential concessions on policy or prevent the operation of the agencies themselves.<sup>16</sup>

<sup>9</sup> See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010); see also Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822, 1822–29 (2012).

<sup>10</sup> Although hostilities have increased significantly over judicial, executive, and independent agency nominations, this Part's focus is on nominations to executive and independent agencies — those appointments within the administrative state.

<sup>11</sup> See, e.g., Elisabeth Bumiller & Sheryl Gay Stolberg, *President Sends Bolton to U.N.; Bypasses Senate*, N.Y. TIMES, Aug. 2, 2005, at A1 (describing Bush's installation of John Bolton as Ambassador to the United Nations in spite of what he called the Senate's "partisan delaying tactics"); Richard W. Stevenson, *Bush's Road Gets Rougher: President Presses Ahead with Agenda, but Fewer on Capitol Hill Are Following*, N.Y. TIMES, June 20, 2005, at A13 (describing President Bush's accusation that Democrats were being "obstructionists" by hindering John Bolton's nomination); Press Release, White House, Office of the Press Sec'y, *President Obama Announces Recess Appointments to Key Administration Positions* (Mar. 27, 2010) [hereinafter 2010 Press Release], <http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions>.

<sup>12</sup> For example, past nomination failures include the rejection of the nomination of John Tower, "one of the most influential and knowledgeable lawmakers on military and national security issues," for Secretary of Defense after allegations of excessive drinking and womanizing. See Martin Tolchin, *John G. Tower, 65, Longtime Senator from Texas*, N.Y. TIMES, Apr. 6, 1991, at A26.

<sup>13</sup> See Jonathan Bernstein, *In Blocking Cordray, Senate GOP Proves How Radical It's Become*, WASH. POST (Dec. 8, 2011, 1:04 PM), [http://www.washingtonpost.com/blogs/plum-line/post/in-blocking-cordray-senate-gop-proves-how-radical-its-become/2011/12/08/gIQA4xobfO\\_blog.html](http://www.washingtonpost.com/blogs/plum-line/post/in-blocking-cordray-senate-gop-proves-how-radical-its-become/2011/12/08/gIQA4xobfO_blog.html).

<sup>14</sup> Because sixty votes are needed for cloture, even a minority of forty-one senators is able to hold up a nominee indefinitely by filibustering the nomination on the floor of the Senate.

<sup>15</sup> See, e.g., Andrew C. McCarthy, *Reid Backs Obama on Recess Appointments*, NAT'L REV. ONLINE (Jan. 4, 2012, 4:39 PM), <http://www.nationalreview.com/corner/287218/reid-backs-obama-recess-appointments-andrew-c-mccarthy> (noting that in 2007 Democrats blocked "the eminently qualified Steve Bradbury's appointment to head DOJ's Office of Legal Counsel").

<sup>16</sup> Senate Republicans had refused to give an up-or-down vote on the head of the Consumer Financial Protection Bureau unless the President agreed to weaken the agency's statutory powers. See Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 5, 2012, at A1. Senate Republicans similarly blocked up-or-down votes for three National Labor Relations Board nominees; failure to confirm at least one of them would have shut the agency down as it cannot operate without a quorum. Tim Mak, *It's World War III*

In response, President Obama began using his recess appointments power to bypass the Senate.<sup>17</sup> To counteract the President's use of recess appointments, the Senate has been holding pro forma sessions designed to frustrate this power.<sup>18</sup> Recently, President Obama has responded by asserting that he has the constitutional power to make recess appointments despite such pro forma Senate sessions.<sup>19</sup>

This Part will discuss these and other developments in the law surrounding executive appointment. Section B chronicles the rise of the administrative state and summarizes the scholarly discussion of its effect on the authority of the executive and legislative branches. Section C discusses the changing dynamics of executive appointments in today's increasingly polarized political climate. Particularly, it uses individual case studies of the various skirmishes between the President and Congress over executive appointments to show how the increased polarization is interfering with the effective operation of government. Section D briefly concludes that the courts will likely need to provide resolution to this escalating battle.

This Part traces the increasing contentiousness of executive appointments to two causes. First, the ascending role of the administrative state has increased the stakes of executive appointments. Second, with greater political polarization, both parties have become more willing to resort to increasingly combative tactics in order to gain an advantage in the sphere of executive appointments. This nearly constant battle over the structure, direction, and control of administrative agencies results from the shifting balance of power in the administrative state. This shift has placed the President's appointment and removal powers at the center of the struggle between the legislative and executive branches. While other skirmishes over control of administrative agencies are ongoing,<sup>20</sup> this Part will focus exclusively on executive appointments because of the wide-ranging and timely developments in

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at the *NLRB*, POLITICO (Dec. 26, 2011, 8:57 AM), <http://www.politico.com/news/stories/1211/70856.html>.

<sup>17</sup> See 2010 Press Release, *supra* note 11.

<sup>18</sup> See Laurence H. Tribe, Op-Ed., *Games and Gimmicks in the Senate*, N.Y. TIMES, Jan. 6, 2012, at A25 ("[S]ince the twilight years of the George W. Bush Administration, the Senate has tried to nullify [the recess appointments] power by holding 'pro forma' sessions every three days, during what no one doubts would otherwise be an extended recess. In these sham sessions, manifestly serving only to circumvent the recess appointment safety valve, a lone senator gavels the Senate to order, usually for just a few minutes; senators even agree beforehand that no business will be conducted.")

<sup>19</sup> See Press Release, Office of the Press Sec'y, President Obama Announces Recess Appointments to Key Administration Posts (Jan. 4, 2012) [hereinafter 2012 Press Release], <http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts>; see also Tribe, *supra* note 18.

<sup>20</sup> See sources cited *supra* note 9.

this field and because the uncertain state of the law will almost certainly require judicial resolution.<sup>21</sup>

### B. *The Rise of the Administrative State*

Although some sixty years ago Justice Jackson called the rise of the administrative state “probably . . . the most significant legal trend of the last century,” he had seen just the beginning of the rise of what he dubbed the “fourth branch.”<sup>22</sup> While many scholars question the constitutionality of today’s administrative state,<sup>23</sup> they are also aware that it is here to stay.<sup>24</sup> Thus, “the President maintains either direct or primary control over the ‘administrative state,’ the colossal array of agencies that legislate and adjudicate under any but the broadest definition of ‘executing’ the laws.”<sup>25</sup> And this expansion of presidential power with the rise of the administrative state has come at the expense of Congress.<sup>26</sup>

The rise of the administrative state has altered the legislative-executive power struggle in two ways. First, it has brought the presidential appointments process to the forefront of the battle.<sup>27</sup> Second, it has led to increased interbranch and interparty hostility, which has resulted in tit-for-tat escalation in the conflict.<sup>28</sup> The danger of such mutual reprisals is the annihilation of the reciprocal respect necessary to run the government.<sup>29</sup>

Congressional attempts to control the actions of executive agencies are not new. For example, various enacted or proposed legislative veto<sup>30</sup> provisions would have allowed either house or both houses of

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<sup>21</sup> For an early example of a federal court adjudicating a challenge to President Obama’s recess appointments, see *National Ass’n of Manufacturers v. NLRB*, No. 11-1629 (ABJ), 2012 WL 691535 (D.D.C. Mar. 2, 2012).

<sup>22</sup> *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

<sup>23</sup> See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) (“The post–New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.” (footnote omitted)).

<sup>24</sup> See Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 2 (1994).

<sup>25</sup> Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1728 (1996).

<sup>26</sup> See *id.*

<sup>27</sup> For example, President Obama’s recess appointment of Richard Cordray to head the new Consumer Financial Protection Bureau garnered front page coverage by the *New York Times*. See Cooper & Steinhauer, *supra* note 16.

<sup>28</sup> See, e.g., Jennifer Bendery, *Harry Reid Will Ask Obama to Recess Appoint All Nominees If GOP Delays Continue*, THE HUFFINGTON POST (Feb. 17, 2012, 3:45 PM), [http://www.huffingtonpost.com/2012/02/17/harry-reid-obama-recess-appointments-gop-delays\\_n\\_1285309.html?ref=politics](http://www.huffingtonpost.com/2012/02/17/harry-reid-obama-recess-appointments-gop-delays_n_1285309.html?ref=politics).

<sup>29</sup> See Frum, *supra* note 4.

<sup>30</sup> *The Supreme Court, 1990 Term — Leading Cases*, 105 HARV. L. REV. 177, 206 n.1 (1991) (defining the legislative veto).

Congress to reject rules enacted by executive agencies.<sup>31</sup> Neither is the battle over executive appointments unique to the recent past. After all, *Marbury v. Madison* was a fight over a presidential appointment. The recent development has been the increasing conflict over executive appointments coupled with the use of new legal and political tools by the competing branches.

1. *The Legislative Power Delegated.* — Born of the New Deal, the administrative state has allowed Congress to enact general laws that executive or independent agencies administer.<sup>32</sup> Congressional shortcomings in running a larger and more complex nation were obvious.<sup>33</sup> First, Congress did not have the expertise necessary to address the complicated policy issues before it.<sup>34</sup> Second, Congress did not have the bandwidth to provide the detailed regulations necessary across and within many economic sectors.<sup>35</sup> Third, Congress reacted too slowly to the frequent and rapid shifts of the modern economy. The separation of powers system created by the Framers left an inexperienced, undermanned, and inefficient Congress unable to handle the legislative demands of a global economic crisis. As such, Congress has to delegate some of its legislative powers to the executive in a manner that even some supporters of the administrative state have acknowledged violates the Constitution's separation of powers principles.<sup>36</sup>

To overcome these three shortcomings during the Great Depression, "Congress created scores of new administrative agencies charged with overseeing economic policy and implementing novel social welfare programs."<sup>37</sup> Even after the Great Depression, the need for expertise and speed only increased. Thus, today Congress has deemed it necessary

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<sup>31</sup> See Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulations: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1370–71 (1977). However, the Supreme Court has rejected the legislative veto as unconstitutional. See, e.g., *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991); *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>32</sup> See Julian Ku & John Yoo, *Globalization and Structure*, 53 WM. & MARY L. REV. 431, 452 (2011) ("In order to regulate an economy of [great] scope and complexity effectively, Congress delegated broad authority to independent agencies that stressed technical expertise over partisan politics.").

<sup>33</sup> See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (noting that the Supreme Court's "jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives").

<sup>34</sup> Congress looked to administrative agencies rather than the courts to provide the expertise it lacked. See Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 404 (2007).

<sup>35</sup> See Ku & Yoo, *supra* note 32, at 452.

<sup>36</sup> Cf. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 488–94 (1989) (describing how the Great Depression sparked the creation of the administrative state and likening this to a popular constitutional amendment that has been accepted without enactment).

<sup>37</sup> Schiller, *supra* note 34, at 399.

to delegate an even greater portion of its legislative power to both executive and independent agencies.<sup>38</sup> The delegation of this power by Congress to the executive branch has led to the growth in the power of the Executive at the expense of congressional authority.<sup>39</sup>

These agencies provide greater expertise by focusing on specific tasks. Congress can also expand the number of agencies in order to reach more sectors that need governmental monitoring or support, expanding its regulatory bandwidth. Moreover, Congress can delegate to the agencies the authority to respond to changing conditions *sua sponte*, thus reducing response time. By delegating to administrative agencies, Congress can address its deficiencies in expertise, limited bandwidth, and slow response. Thus, rather than functioning as the “legislative” branch, Congress has become the “delegative” branch, assigning various agencies the power to make law, while providing some limited guidance.<sup>40</sup>

For this type of seismic shift in constitutional power to be acceptable, the Supreme Court had to ignore the nondelegation doctrine at times.<sup>41</sup> The Court has repeatedly and explicitly justified abandoning the nondelegation principle on the grounds that “the modern administrative state could not function if Congress were actually required to make a significant percentage of the fundamental policy decisions.”<sup>42</sup> As a result, “[w]idespread institutional and cultural reliance interests have formed around the ability of Congress to delegate its power to executive and independent agencies.”<sup>43</sup> Given the reliance interests that have formed, these “[b]road delegations of power to regulatory agencies, questionable in light of the grant of legislative power to Congress in Article I of the Constitution, have been allowed largely on the as-

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<sup>38</sup> Cf. Ku & Yoo, *supra* note 32, at 452 (comparing today’s need for congressional delegation, which is driven by globalization, with the need for congressional delegation in the early 1900s, which was driven by nationalization).

<sup>39</sup> See Flaherty, *supra* note 25, at 1727 (“Never has the executive branch been more powerful, nor more dominant over its two counterparts, than since the New Deal.”).

<sup>40</sup> An “intelligible principle” is constitutionally sufficient guidance. *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472 (2001).

<sup>41</sup> The Supreme Court has not invalidated a statute on nondelegation grounds since 1935 with *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935). Cf. Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002) [hereinafter Posner & Vermeule 2002] (arguing that “a statutory grant of authority to the executive never effects a delegation of legislative power,” *id.* at 1721, but rather simply authorizes the exercise of executive power); Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-mortem*, 70 U. CHI. L. REV. 1331 (2003) (rejecting critiques by Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003), of Posner & Vermeule 2002, *supra*).

<sup>42</sup> See Lawson, *supra* note 23, at 1241.

<sup>43</sup> McCutchen, *supra* note 24, at 36.

sumption that courts would be available to ensure agency fidelity to whatever statutory directives have been issued.”<sup>44</sup>

2. *The Unitary Executive and Separation of Powers.* — The Constitution vests the executive power in the President,<sup>45</sup> thus creating a unitary executive.<sup>46</sup> The President, of course, cannot personally execute all of the laws, leaving much of the execution to a congressionally created administrative bureaucracy.<sup>47</sup> Beginning with the Reagan Administration, “Congress and the President have fought hard . . . over control of the federal administrative machinery, and the courts have adjudicated such disputes in some high-profile cases.”<sup>48</sup> The debates in these cases have focused on whether and when the President must have complete power to remove executive agency officials<sup>49</sup> and, more recently, on the power to appoint these officials as well.<sup>50</sup> The Court’s jurisprudence has always vacillated between a “formalist” unitary theory<sup>51</sup> and a “functionalist” theory that allows for congressional involvement.<sup>52</sup> On the one hand, proponents of a unitary executive theory argue that in order to “take Care that the Laws be faithfully executed,”<sup>53</sup> the President must have complete authority over all executive officers, which is impossible without unlimited power to remove a subordinate executive official.<sup>54</sup> On the other hand, the delegation of legislative powers to the executive branch and the President’s exercise of those powers creates significant separation of powers concerns.<sup>55</sup> This tension

<sup>44</sup> CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 143 (1990).

<sup>45</sup> See U.S. CONST. art. II, § 1, cl. 1.

<sup>46</sup> Under the unitary executive theory, the President must have authority over the exercise of all discretionary executive power. See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992).

<sup>47</sup> The Framers foresaw the development of an executive bureaucracy when they provided for the appointment of “inferior officers” and referred to “Heads of Departments.” See U.S. CONST. art. II, § 2, cl. 2.

<sup>48</sup> Lawson, *supra* note 23, at 1244 (citing *Morrison v. Olson*, 487 U.S. 654, 696–97 (1988); *Bowsher v. Synar*, 478 U.S. 714, 721–27 (1986)).

<sup>49</sup> *Id.*

<sup>50</sup> See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3162–64 (2010) (holding, *inter alia*, that Securities and Exchange Commission appointment of Board members was constitutional).

<sup>51</sup> See, e.g., *Myers v. United States*, 272 U.S. 52 (1926).

<sup>52</sup> See, e.g., *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

<sup>53</sup> U.S. CONST. art. II, § 3.

<sup>54</sup> Justice Scalia’s dissent in *Morrison v. Olson*, 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting), is the preeminent expression of the unitary executive theory in a judicial opinion. For scholarly arguments over whether the President must be able to remove subordinate officials, compare Calabresi & Rhodes, *supra* note 46, at 1165–68, with A. Michael Froomkin, *The Imperial Presidency’s New Vestments*, 88 NW. U. L. REV. 1346 (1994), which critiques Calabresi and Rhodes and argues that Congress has some power in structuring the executive branch.

<sup>55</sup> Cf. David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 110–12 (2009) (positing that a duty-based theory of executive power rather than the rights-based unitary executive theory does more to quell separation of powers issues).

between the unitary executive theory and separation of powers is ubiquitous when it comes to the work of executive agencies.<sup>56</sup>

“The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787.”<sup>57</sup> Similarly, the Court has at times found a clear intent by the Framers to create a unitary executive responsible for executing the laws.<sup>58</sup> Despite providing for and expecting the President to have subordinate officers, the Framers chose a model under which a single individual can be responsible and accountable for the execution of the laws.<sup>59</sup> Moreover, despite constitutional silence on the issue of removal, the Supreme Court has concluded that this executive power entrusted to the President alone must come with a general power of removal.<sup>60</sup> However, the Court has upheld some congressional limitations on the President’s removal power.<sup>61</sup>

The President’s authority to appoint and remove government officials is crucial because it is one of the principal gateways through which he can promote his policies and influence the direction of administrative agencies. The President can appoint an agency official who agrees with the President’s vision for the agency, creating a surrogate to further the policies he favors. Moreover, if a current official’s policy preferences and decisions do not line up with those of the President, the President’s removal power<sup>62</sup> can change the direction of the agency.

However, by replacing an agency official, the President exposes his new appointee to the confirmation process in the Senate, which may block the appointment. To avoid this potential roadblock, the President can follow a different, less drastic path. Instead of replacing the

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<sup>56</sup> See, e.g., *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1817 (2009) (“There is no reason to magnify the separation-of-powers dilemma posed by the Headless Fourth Branch by letting Article III judges — like jackals stealing the lion’s kill — expropriate some of the power that Congress has wrested from the unitary Executive.” (internal citation omitted)).

<sup>57</sup> *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) (per curiam).

<sup>58</sup> See, e.g., *Myers v. United States*, 272 U.S. 52, 116–17 (1926).

<sup>59</sup> See *Clinton v. Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring).

<sup>60</sup> *Buckley*, 424 U.S. at 136 (noting the President’s “general administrative control of those executing the laws, including the power of appointment and removal of executive officers — a conclusion confirmed by his obligation to take care that the laws be faithfully executed” (quoting *Myers*, 272 U.S. at 163–64)).

<sup>61</sup> See Michael A. Thomason, Jr., Note, *Auditing the PCAOB: A Test to the Accountability of the Uniquely Structured Regulator of Accountants*, 62 VAND. L. REV. 1953, 1968–70 (2009) (reviewing such cases).

<sup>62</sup> The Constitution does not contain a removal clause. The President’s removal power has been recognized as an at-will removal power, though certain restrictions exist. Compare *Myers*, 272 U.S. 52, with *Morrison v. Olson*, 487 U.S. 654 (1988), and *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

current official, the President can simply make clear his policy choices and priorities for the agency as well as signal his willingness to replace an agency official who does not comport with his agenda. In order to keep his job, the agency official will then feel compelled to follow the President's preferences more closely. The mere threat of replacing an agency official not in line with the President can have the same impact as an actual removal and appointment, but without the need for Senate confirmation.

To influence agency officials in this way requires the President to communicate credibly the threat of firing and replacement. If agency officials believe that the President would struggle to replace them because of the difficulty of getting a replacement confirmed by the Senate, they are much less likely to comport their actions with the President's policies.<sup>63</sup> As such, by making the confirmation process more difficult, the Senate insulates agency officials from presidential control, thus hampering the unitary executive.<sup>64</sup>

The Framers created a system that separated the legislative and executive powers. Moreover, they restricted each branch to its sphere — Congress to the legislative and the President to the executive — ensuring that neither encroached on the other. However, Congress has delegated much of its legislative power to the executive branch.<sup>65</sup> Applying the theory of the unitary executive to these circumstances leads to a violation of the separation of powers principle as the President would be in charge of both legislative and executive power.<sup>66</sup>

Paradoxically, the congressional response to this structural constitutional failing has been to mingle powers further. Congress has attempted to gain greater leverage over administrative agencies to offset the growth in the President's power. To balance the addition of legislative power to the President's control, Congress is trying to strip executive powers from him, reshaping how our constitutional system allocates power to ensure that no single branch grows too strong.<sup>67</sup>

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<sup>63</sup> Cf. Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations 1885–1996*, 43 AM. J. POL. SCI. 1122, 1141–42 (1999) (noting that delays in confirmations may lead to “presidential difficulties in using his removal power to deal with wayward appointees once they are in office,” *id.* at 1142).

<sup>64</sup> Under the unitary executive theory, the President's at-will removal power over executive agency officials is necessary to ensure that the laws are faithfully executed. This interference disrupts the functioning of a unitary executive because one of the three tools necessary for a unitary executive is “the [P]resident's power to direct the manner in which subordinate officials exercise discretionary executive power.” Yoo, Calabresi & Colangelo, *supra* note 6, at 607.

<sup>65</sup> See *supra* pp. 2139–41.

<sup>66</sup> See *supra* p. 2136.

<sup>67</sup> The stripping of executive powers has been done both by appropriating the stripped power to Congress — as in attempts to enact the legislative veto — and by providing for independent agencies that are not subject to direct presidential control. The existence of independent agencies whose members may be removed only for “good cause” provides Congress with an opportunity to

### C. Conflict over Executive Appointments

1. *Establishing a Baseline: Executive Appointments in Historical Perspective.* — Despite the growing power of executive agencies over the course of the twentieth century and the constitutional lever afforded by the Senate’s “advice and consent” role to limit the expansion of presidential control, as of the late 1990s, “the conventional wisdom ha[d] emerged that when it [came] to appointees to the executive branch the confirmation process [was] little more than a technicality, formality, or perhaps nuisance.”<sup>68</sup> By deferring to the President, the Senate failed not only to establish political control over the process, but also failed to live up to its constitutional role as a coequal partner.<sup>69</sup>

A political science study by Professors Nolan McCarty and Rose Razaghian reviewed the more than 3500 nominations to positions in domestic executive branch agencies from 1885 to 1996.<sup>70</sup> Overall, McCarty and Razaghian deemed only 4.4% of the nominations failures — nominations that either were rejected by the Senate, were withdrawn by the President, or expired without Senate action.<sup>71</sup> The study revealed that the Senate rejected only four of the nominations during

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delegate legislative authority without placing it directly in the hands of the President. Independent agencies challenge the unitary executive system because they are insulated from the President. By keeping legislative power out of the direct control of the executive branch, Congress minimizes the violation of separation of powers principles in the form of presidential control of legislative powers. See Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 41 (noting that independent agencies are “strange amalgam[s] of executive, legislative, and judicial powers, combining functions of all three branches yet [being] the creature[s] of none”). The absence of presidential oversight allows Congress to assert more control over independent agencies. See, e.g., *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1815 (2009) (“[Independent agencies’] freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.”); Frank H. Easterbrook, *The State of Madison’s Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1341 (1994) (arguing that congressional committees gain relative influence when the President lacks power); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2271 n.93 (2001) (“[S]uccessful insulation of administration from the President . . . will tend to enhance Congress’s own authority . . .”). After all, “absent presidential control, congressional oversight and appropriations powers become the only concern for the officers of the allegedly ‘independent’ agencies.” Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 583 (1994). Because “Presidents typically see themselves as heads of the regulatory state[, they] fight tooth and nail to resist congressional delegations to independent agencies.” Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 466 (2008). But see Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 601 (2010) (“The President may actively support a degree of agency independence, rather than simply swallow it.”).

<sup>68</sup> McCarty & Razaghian, *supra* note 63, at 1123.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1124.

<sup>71</sup> *Id.* at 1126.

the entire time period.<sup>72</sup> And while some nominations were withdrawn, the majority of failed nominations were due to Senate inaction and expiration of the nomination at a Senate recess.<sup>73</sup> Not surprisingly, the failure rate was relatively higher (7%) during divided control of the Senate and White House, and relatively lower (3%) during periods of same-party control.<sup>74</sup>

Moreover, the study recognized that because failure most often happened as “the result of obstruction and delay, resulting in expiration of the nomination,” an analysis of failure rates alone is not enough.<sup>75</sup> Rather, the study focused on the length of time between presidential nomination and Senate confirmation using survival analysis.<sup>76</sup>

The McCarty and Razaghian study revealed that from before the New Deal to the fully developed administrative state of the late 1990s, there was some moderate change in the conflict over executive appointments to administrative agencies. Failures became more common during the final thirty years of the study.<sup>77</sup> The study noted that “the increasing average duration [of the confirmation process began] climbing in the early 1970’s. This development coincide[d] with increases in other types of Senate obstruction such as filibusters.”<sup>78</sup> However, at the same time, the study revealed that the factors that led to confirmation delays in 1996 were almost identical to those in 1885, thus suggesting similar patterns of conflict over the bureaucracy in the pre-New Deal and post-New Deal time periods.<sup>79</sup> The primary reasons for longer confirmation battles were polarization and the interaction between polarization and divided government.<sup>80</sup>

Party polarization in the House and Senate began increasing in the late 1970s, and that trend has only accelerated more recently.<sup>81</sup> Today, the House and Senate are at the highest level of polarization since the end of Reconstruction.<sup>82</sup> With increasing polarization during the George W. Bush and Barack Obama presidencies, one would expect that confirmation delays would increase. Moreover, because the Presi-

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 1135.

<sup>77</sup> *Id.* at 1126.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 1136.

<sup>80</sup> *Id.* at 1136–38.

<sup>81</sup> *Party Polarization: 1879–2010*, VOTEVIEW (Jan. 11, 2011), [http://voteview.com/polarized\\_america.htm](http://voteview.com/polarized_america.htm); see also Ronald Brownstein, *Pulling Apart*, NAT’L J. (Feb. 24, 2011, 4:40 PM), <http://www.nationaljournal.com/magazine/congress-hits-new-peak-in-polarization-20110224>.

<sup>82</sup> *Party Polarization*, *supra* note 81.

dent's party controlled the Senate for eight of the last eleven and a half years,<sup>83</sup> one would predict that confirmation failures would continue to come in the form of stalled nominations that are withdrawn or expire, rather than through failed up-or-down votes. The increased use of the filibuster to "routinely thwart[] noncontroversial actions like . . . low-level executive appointments"<sup>84</sup> also reflects this dynamic in which the minority party in the Senate attempts to assert control over executive appointments.

2. *Today's Escalating Appointments Battle.* — Because whoever can exert more influence over administrative agencies can ultimately control the direction of the government and further particular policy preferences, the legislative and executive branches have battled over executive appointment and removal powers. Over the last twelve to twenty years, the Senate has been more active in opposing nominees, especially through the use of the filibuster. Recently, Presidents have responded by asserting their power to appoint government officials without the advice and consent of the Senate during Senate recesses.<sup>85</sup> These recess appointments have become the most hotly contested and publicly scrutinized field of battle on which the legislative and executive armies vie for control. The three sections below proceed through case studies that demonstrate the conflict that has developed today between the President and Congress over executive appointments. The first considers the use of Senate filibusters, as illustrated by the case of Dawn Johnsen. Facing increased congressional obstructionism, Presidents have turned to making recess appointments. Congress has attempted to regain control by asserting its oversight powers as discussion of both the U.S. Attorneys firing scandal of 2006–07 and the Senate's attempts to stop recess appointments by holding pro forma sessions will illustrate. The analysis concludes with President Obama's recent response to this combination of congressional obstructionism: disregarding the Senate pro forma sessions and making a recess appointment of Richard Cordray to head the new Consumer Financial Protection Bureau (CFPB).

(a) *Filibusters of Qualified Candidates: The Experience of Dawn Johnsen.* — The constitutional understanding of the executive appointments process is not in question: the President nominates and the

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<sup>83</sup> Democrats controlled the Senate after Sen. James Jeffords began to caucus with them in June 2001–January 2003. They again controlled the Senate from January 2007 until the end of the Bush Presidency in January 2009. For the rest of the January 2001–June 2012 time period, the President's party also controlled the Senate.

<sup>84</sup> Mimi Marziani, *FILIBUSTER ABUSE* 3 (2010).

<sup>85</sup> "If the confirmations process is gridlocked, the President can circumvent the constitutionally prescribed appointments process with more aggressive use of recess appointments . . ." Aaron-Andrew P. Bruhl, *The Senate: Out of Order?*, 43 *CONN. L. REV.* 1041, 1052–53 (2011).

Senate votes on whether to confirm the nominee.<sup>86</sup> While there could be a debate on what level of deference the Senate should grant the President's choice of nominee, the Senate's constitutional role is either to accept or to reject the nominee. Although historically there were occasions when qualified nominees were rejected, these rejections were more likely to be the result of a vote rather than a filibuster.<sup>87</sup> However, after the rejection of John Tower as President George H.W. Bush's defense secretary in 1989, the practice of filibustering increased from a handful of cases during the Bill Clinton and George W. Bush Administrations to the across-the-board filibustering that is common today.<sup>88</sup> Forcing every nominee to get sixty votes to overcome a filibuster "is a radical change in the way the Senate does its business."<sup>89</sup> Traditional norms of deference for at least high-level executive appointments are eroding due to the exploitation of formal rules by those legislators seeking to influence or control executive appointments.

In one incident emblematic of this trend, President Obama nominated Dawn Johnsen to head the Office of Legal Counsel (OLC) at the start of his Administration.<sup>90</sup> Johnsen was a constitutional law scholar and professor at Indiana University School of Law and had served at OLC during the Clinton Administration, including as its acting head.<sup>91</sup> Given that background, she was eminently qualified to head the office. Also in Johnsen's favor was the nature of OLC as a nonpartisan group of presidential advisors.<sup>92</sup>

While the Judiciary Committee approved her nomination on a party-line vote, Johnsen never received an up-or-down vote in the full Senate.<sup>93</sup> Before the Senate recessed in December 2009, Senator Patrick Leahy, the Chair of the Senate Judiciary Committee, excoriated his fellow senators for not voting on the appointment of Johnsen and

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<sup>86</sup> See U.S. CONST. art. II, § 2 ("The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . .").

<sup>87</sup> For example, the Senate rejected the nomination of John Tower in 1989 because of stories of drinking and womanizing. Tolchin, *supra* note 12; Michael Oreskes, *Senate Rejects Tower, 53-47; First Cabinet Veto Since '59; Bush Confers on New Choice*, N.Y. TIMES, Mar. 10, 1989, at A1.

<sup>88</sup> Bernstein, *supra* note 13.

<sup>89</sup> *Id.*

<sup>90</sup> Charlie Savage, *Long After Nomination, an Obama Choice Withdraws*, N.Y. TIMES, Apr. 10, 2010, at A16.

<sup>91</sup> *Id.*

<sup>92</sup> The struggle over Johnsen's nomination suggests that politicization has occurred. Moreover, Johnsen eventually withdrew her nomination because she felt she would be ineffective as the head of a nonpartisan institution given the politics surrounding the confirmation fight. *Id.*; *cf. supra* pp. 2094-2100 (discussing OLC internal norms and safeguards and arguing that OLC non-partisanship ensures that OLC's legal opinions are accurate and unbiased).

<sup>93</sup> Savage, *supra* note 90.

other nominees.<sup>94</sup> Although Senator Leahy was correct in pointing out that there had been “unprecedented delays” and that the candidates were “qualified,” he incorrectly argued that Johnsen was “noncontroversial.”<sup>95</sup> Johnsen’s nomination was controversial because she had previously worked for the National Abortion and Reproductive Rights Action League (NARAL).<sup>96</sup> Despite being a “highly qualified” nominee whom the Senate should have confirmed and whose treatment by the Senate was a “travesty,” Johnsen never received an up-or-down vote.<sup>97</sup> The nomination was sent back to the White House, and after being renominated, Johnsen eventually withdrew because of Senate opposition.<sup>98</sup>

The failed nomination of Johnsen to head OLC is simply a single example of a broader trend in the Senate’s handling of presidential appointments. Increasingly, qualified appointees fail to receive up-or-down votes simply because their politics are not acceptable.<sup>99</sup> The politics of the nominee are often not out of step with the President, who has a mandate to institute his policies and who does so primarily through agents he appoints to fill executive agency positions. In blocking nominees through a filibuster, Senate members, even in a minority, are able to limit the President’s control over executive appointments.

Republican minorities are not alone in frustrating the confirmation of a qualified presidential nominee by obstructing a Senate vote. The nomination of John Bolton to be the United States Ambassador to the United Nations was stalled in the Senate for five months before President George W. Bush exercised his recess appointment power to bypass the Senate and to install him to the post.<sup>100</sup> Similarly, President Obama responded to the stalling of nominations by making recess appointments and directly cited the languishing of nominees in the Senate as the reason for exercising this constitutional power.<sup>101</sup>

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<sup>94</sup> Stephanie Woodrow, *Leahy: Confirm Nominees Before Recess*, MAIN JUST. (Dec. 9, 2009, 3:50 PM), <http://www.mainjustice.com/2009/12/09/leahy-confirm-nominees-before-recess/>.

<sup>95</sup> *Id.*

<sup>96</sup> Savage, *supra* note 90.

<sup>97</sup> Editorial, *Nominees in Limbo; The Senate Should Do Its Job Before Taking a Vacation*, WASH. POST, Dec. 23, 2009, at A18; *see also* Savage, *supra* note 90.

<sup>98</sup> Savage, *supra* note 90.

<sup>99</sup> In the two years of a Democratic Senate during the George W. Bush presidency, the Senate confirmed 740 of 981 nominees for civilian positions. In the current Congress with a Democratic Senate, the Senate has confirmed 285 of 503 civilian nominees: seventy-five percent versus fifty-seven percent. Jonathan Weisman, *Appointments Challenge Senate Role, Experts Say*, N.Y. TIMES, Jan. 8, 2012, at A19.

<sup>100</sup> *See* Bumiller and Stolberg, *supra* note 11 (describing nomination and recess appointment of John Bolton to be the U.S. Ambassador to the United Nations).

<sup>101</sup> *See, e.g.*, 2010 Press Release, *supra* note 11. “President Obama has made a number of recess appointments; some of the appointees had faced significant opposition, while others were delayed despite being noncontroversial.” Bruhl, *supra* note 85, at 1053 n.50. Note that the overall num-

(b) *Congressional Oversight as a Response: U.S. Attorneys' Firings.* — President George W. Bush responded to stalled nominations in the early part of his second term by making recess appointments.<sup>102</sup> The Administration was looking for ways to avoid the Senate confirmation process in executive appointments. The USA Patriot Improvement and Reauthorization Act of 2005<sup>103</sup> presented another opportunity. Section 502 of the Act allowed the Attorney General to appoint interim U.S. Attorneys who could serve indefinitely without Senate confirmation.<sup>104</sup> In the past, the pertinent federal district court would have selected a replacement within 120 days of the interim nominee's taking office. This change was approved by Senators who later claimed to be unaware of its inclusion in the bill.<sup>105</sup>

Thus, the change in the law allowed the President, through his Attorney General, to appoint U.S. Attorneys who could serve indefinitely without Senate confirmation. The President could direct the Attorney General to appoint an individual who closely shares the President's policy preferences even if that appointee would be unacceptable to the Senate.<sup>106</sup> The Senate, particularly the Senate Judiciary Committee,

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ber of recess appointments by President Obama is slightly down compared to that of his predecessors. See HENRY B. HOGUE, CONG. RESEARCH SERV., RS21308, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS 1 (2012), available at <http://www.senate.gov/CRSReports/crs-publish.cfm?pid='oDP%2BP%5CW%3B%2oP%2o%2o%oA>. President Obama likely has restricted his recess appointments to cases in which a nominee has been unable to get an up-or-down vote in the Senate because recess appointments by President George W. Bush became symbols of executive overreaching. Cf. *supra* pp. 2084–89 (noting that the public outcry against presidential signing statements as executive branch abuses in the separation of powers scheme induced executive self-binding and diminished claims of presidential power). Moreover, recess appointments have been used more frequently to appoint independent agency officials. See Ryan C. Black, Anthony J. Madonna, Ryan J. Owens & Michael S. Lynch, *Adding Recess Appointments to the President's "Tool Chest" of Unilateral Powers*, 60 POL. RES. Q. 645, 646 (2007). This finding suggests that recess appointments may be a general tool Presidents use to overcome congressional efforts to limit presidential control of policymaking.

<sup>102</sup> Along with the more famous recess appointment of John Bolton as U.S. Ambassador to the U.N., President Bush appointed Peter Flory as Assistant Secretary of Defense after his nomination languished in the Senate for seven months and appointed Eric S. Edelman as Under Secretary of Defense for Policy during the same Senate recess in August of 2005.

<sup>103</sup> Pub. L. No. 109-177, 120 Stat. 192 (2006).

<sup>104</sup> *Id.* § 502, 120 Stat. at 246.

<sup>105</sup> See Press Release, Senator Dianne Feinstein, Senator Feinstein Delivers Speech on Senate Floor Highlighting the Recent History of U.S. Attorney Firings (Feb. 15, 2007), <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=c73e7f7c-7e9c-9af9-759e-46d7c2565c35>; Press Release, Senator Dianne Feinstein, Senate Reverses Administration Effort to Circumvent Senate Confirmation Process for U.S. Attorneys (Mar. 20, 2007) [hereinafter Reversal Press Release], <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=7103fbb9-03cfoff1-fe09-c220c06d728b>.

<sup>106</sup> The appointment by Attorney General Alberto Gonzales of J. Timothy Griffin, a former aide to Karl Rove, to replace Bud Cummins as U.S. Attorney for the Eastern District of Arkansas in December 2006 provides one such example. See Linda Satter, *Prosecutor Post Is Filled in Recess*, ARK. DEMOCRAT GAZETTE, Dec. 16, 2006. Griffin stated, "to submit my name to the

takes the appointment of U.S. Attorneys seriously, especially its role in confirming the nominees.<sup>107</sup> After all, while U.S. Attorneys serve at the pleasure of the President, there is a tradition that as prosecutors they are to behave in a way that rises above the politics of the moment and are not to be swayed by the White House's political preferences on individual prosecutions while responding to the general policy choices and prosecutorial priorities of the White House.<sup>108</sup> Most importantly, U.S. Attorneys "should carry out their duties in a nonpartisan, fair, and professional manner."<sup>109</sup>

With this landscape in mind, the George W. Bush Administration decided that it wanted to replace some U.S. Attorneys in 2006.<sup>110</sup> Department of Justice personnel such as Kyle Sampson advocated that the Attorney General, rather than the President, appoint U.S. Attorneys in order to avoid the Senate confirmation process.<sup>111</sup> The President fired seven U.S. Attorneys in December 2006, with two more let go earlier.<sup>112</sup> "The decision to fire these prosecutors str[uck] many legal professionals, including many legal scholars, as wrong — an unfortunate break from a proud tradition of prosecutorial independence."<sup>113</sup>

When members of Congress returned from recess in January 2007, they were angry at both the firings of U.S. Attorneys — and thus the White House's assertion of control over prosecutions — and the change in the USA Patriot Improvement and Reauthorization Act of 2005 that allowed the Attorney General to appoint U.S. Attorneys without Senate confirmation.<sup>114</sup> Multiple days of hearings before the

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Senate would be like volunteering to stand in front of a firing squad in the middle of a three-ring circus." *Interim U.S. Attorney to Avoid Senate Confirmation Process*, AM. CONST. SOC'Y (Feb. 16, 2007), <http://www.acslaw.org/acsblog/interim-us-attorney-to-avoid-senate-confirmation-process>.

<sup>107</sup> Note that as soon as the Senate Judiciary Committee learned of the change allowing the interim appointment of U.S. Attorneys by the Attorney General for indefinite time periods, it held hearings and voted out of committee a bill to reverse the change. The full Senate approved the bill by March 20, 2007 — within about two months. See Reversal Press Release, *supra* note 105.

<sup>108</sup> See James Eisenstein, *The U.S. Attorney Firings of 2006: Main Justice's Centralization Efforts in Historical Context*, 31 SEATTLE U. L. REV. 219, 226–27, 260 (2008); see also David C. Weiss, Note, *Nothing Improper? Examining Constitutional Limits, Congressional Action, Partisan Motivation, and Pretextual Justification in the U.S. Attorney Removals*, 107 MICH. L. REV. 317, 349–50 (2008).

<sup>109</sup> Eisenstein, *supra* note 108, at 227.

<sup>110</sup> Weiss, *supra* note 108, at 322–27.

<sup>111</sup> See *id.* at 324 n.32, 326 n.51.

<sup>112</sup> *Id.* at 319 & n.4.

<sup>113</sup> David M. Driesen, Recent Development, *Firing U.S. Attorneys: An Essay*, 60 ADMIN. L. REV. 707, 708 (2008).

<sup>114</sup> See, e.g., Press Release, Senator Dianne Feinstein, Senators Feinstein, Leahy, Pryor to Fight Administration's Effort to Circumvent Senate Confirmation Process for U.S. Attorneys (Jan. 11, 2007), <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=18a696d7-7e9c-9af9-7a2b-397a786a69fc> ("It has come to our attention that the Bush Administration is

Senate Judiciary Committee and House Judiciary Committee revealed political motivations behind the firings.<sup>115</sup> The scandal ended with the resignation of Attorney General Alberto Gonzales and many other Justice Department officials.<sup>116</sup>

The firings were an effort by the White House to gain more control over traditionally independent executive appointees.<sup>117</sup> Congress rebuffed this power grab by using its oversight power to hold hearings and subpoena documents and testimony as well as by enacting legislation. Thus, Congress not only exercised statutory and constitutional power to constrain the Executive, but also, through the hearings, put significant political pressure on the President to reverse the executive overreach.<sup>118</sup> The Senate's role in confirmations was thus preserved. The duty-based theory of executive power — which leaves room for the separation of powers by enabling Congress, the courts, and even executive officials to check the power of the President — thus prevailed over the rights-based unitary executive theory.<sup>119</sup>

In addition, the Senate has attempted to respond to the perceived overreaching evidenced by the President's recess appointments by conducting pro forma sessions designed to prevent such appointments.<sup>120</sup> This practice began during the Bush Administration and continued as a countermeasure to President Obama's recess appointments.<sup>121</sup> The House of Representatives has supported and even forced these sessions by not allowing the Senate to go on recess.<sup>122</sup> The resulting pro forma sessions consist of a lone senator's gaveling

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pushing out U.S. Attorneys from across the country under the cloak of secrecy and then appointing indefinite replacements without Senate confirmation." (quoting Sen. Feinstein)).

<sup>115</sup> See Weiss, *supra* note 108, at 327–34.

<sup>116</sup> See *id.* at 329–34. The success of oversight in forcing the resignations of leaders within the Department of Justice parallels the success of oversight in bringing public pressure to bear on the Administration in other areas such as signing statements. See *supra* pp. 2084–89.

<sup>117</sup> The precedent set by the President's firing U.S. Attorneys for political reasons would provide the President with greater control over the executive officials who should carry out their duties in a nonpartisan manner. See Eisenstein, *supra* note 108, at 262 ("The absence of vigorous and visible rebuttals to assertions of a president's unfettered right to fire U.S. Attorneys does not bode well for the survival of the traditional limits on the power of removal. As a result, one of the principle foundations upon which U.S. Attorneys' ability and willingness to make independent judgments in carrying out their duties is being seriously eroded.").

<sup>118</sup> Cf. *supra* pp. 2084–89 (arguing that popular political constraints have stymied perceived executive overreach with respect to presidential signing statements); pp. 2095–97 (arguing that the publication of OLC opinions helps to ensure their accuracy and to "protect it from presidential demands for increased power or authority").

<sup>119</sup> Driesen, *supra* note 113, at 727; see also Driesen, *supra* note 55, at 110–12.

<sup>120</sup> See Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions 2 (Jan. 6, 2012) [hereinafter OLC Opinion], available at <http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf>.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 2–3. In order to "adjourn for more than three days," each chamber of Congress must receive approval from the other chamber. U.S. CONST. art. I, § 5, cl. 4.

the chamber to order for a few seconds before adjourning every three or four days.<sup>123</sup> Senators have agreed beforehand that no business is to be transacted during this time.<sup>124</sup> In this way, the Senate breaks up what would typically be a long recess, during which a President could make recess appointments, into several shorter adjournment periods interrupted by extremely brief pro forma sessions.

(c) *The President Reasserts His Power: The Appointment of Richard Cordray.* — Senate Republicans attempted to block nominees as a form of leverage to control policy when they filibustered the appointment of Richard Cordray to head the new Consumer Financial Protection Bureau (CFPB).<sup>125</sup> They stated that they would not confirm any nominee until certain changes were made to the CFPB, including subjecting the CFPB to the congressional appropriations process rather than having funding carved from the Federal Reserve.<sup>126</sup> Similarly, union leaders have claimed that Republicans have attempted to cripple the National Labor Relations Board by refusing to confirm nominees, leaving the Board without a quorum.<sup>127</sup>

The President criticized the Senate for attempting to cripple the CFPB by refusing to perform its constitutional role of confirming executive appointments. This obstruction of Richard Cordray's appointment combined with the pro forma sessions to prevent the effective operation of the CFPB. Moreover, the Senate's action of leveraging the power to consent to nominations in order to intrude on the direction of an executive agency fell outside of constitutional bounds. While the Senate certainly has a constitutional role in determining the direction of the CFPB, that constitutional role is limited to enacting legislation that directs the CFPB, performing oversight such as holding hearings, and approving acceptable or rejecting incompetent nominees.<sup>128</sup>

President Obama and Democratic supporters claimed that the pro forma sessions are intended to strip the President of his constitutional

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<sup>123</sup> OLC Opinion, *supra* note 120, at 2.

<sup>124</sup> *Id.*

<sup>125</sup> According to the White House, Senate Republicans “had no objections to Mr. Cordray himself and found him qualified, but they wanted to use his nomination as leverage to win significant changes in the agency he was to head before confirming him.” Cooper & Steinhauer, *supra* note 16.

<sup>126</sup> News Release, Senator Richard Shelby, 44 U.S. Sens. To Obama: No Accountability, No Confirmation (May 5, 2011), <http://shelby.senate.gov/public/index.cfm/2011/5/44-u-s-sens-to-obama-no-accountability-no-confirmation>.

<sup>127</sup> Melanie Trottman, *Obama Makes Recess Appointments to NLRB*, WALL ST. J. ONLINE, Jan. 4, 2012, [http://online.wsj.com/article/SB10001424052970203513604577141411919152318.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB10001424052970203513604577141411919152318.html?mod=googlenews_wsj).

<sup>128</sup> In the case of other agencies, the Senate has the additional power of setting the agency's budget, though this tool is not available in the case of the CFPB.

power to make recess appointments.<sup>129</sup> After all, during such pro forma sessions the Senate is not available “to receive and act on nominations.”<sup>130</sup> As such, the President declared that he would ignore the pro forma sessions, consider the Senate in recess, and make appointments.<sup>131</sup> As a result, President Obama sought and received an OLC opinion that confirmed he could make a recess appointment despite the pro forma sessions.<sup>132</sup> In possession of the opinion, he announced the appointment of Richard Cordray to head the newly created CFPB and the appointments of three new members to the NLRB, giving it a quorum.<sup>133</sup>

The Recess Appointments Clause of the Constitution gives the President the “Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”<sup>134</sup> Two questions have arisen among scholars regarding the President’s recess appointments power. First, must the vacancy being filled have arisen during the recess?<sup>135</sup> Second, while recess appointments are certainly allowed during an intersession recess, is the President empowered to make a recess appointment during a break within a congressional session?<sup>136</sup> The appointments of Richard Cordray and the NLRB members raise a third question: can the President make a recess appointment even though the Senate conducts pro forma sessions every three days?

While the OLC answered this final question in the affirmative,<sup>137</sup> doubts remain. Senate Republicans reacted predictably by claiming that the President was stripping the Senate of its authority to advise and consent on nominees. Senator Orrin Hatch expressed the most effective arguments made by those who oppose such recess appointments, stating, “[b]y opening this door, the White House is saying it can appoint any person at any time to any position it chooses without

<sup>129</sup> See 2012 Press Release, *supra* note 19; see also Tribe, *supra* note 18.

<sup>130</sup> OLC Opinion, *supra* note 120, at 1.

<sup>131</sup> See 2012 Press Release, *supra* note 19; see also Tribe, *supra* note 18.

<sup>132</sup> OLC Opinion, *supra* note 120. For why the President would want such an opinion, see *supra* pp. 2092–2100.

<sup>133</sup> See 2012 Press Release, *supra* note 19; see also Tribe, *supra* note 18.

<sup>134</sup> U.S. CONST. art. II, § 2, cl. 3.

<sup>135</sup> See *Evans v. Stephens*, 387 F.3d 1220, 1226–27 (11th Cir. 2004) (en banc) (holding that vacancies need not have arisen during a recess to be filled via a recess appointment); see also Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 930 (2009); Patrick Hein, Comment, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 CALIF. L. REV. 235, 238–40 (2008). However, this scholarly debate seems to be mostly ignored in practice.

<sup>136</sup> See *Evans*, 387 F.3d at 1224–26; see also O’Connell, *supra* note 135, at 930; Hein, *supra* note 135, at 260.

<sup>137</sup> OLC Opinion, *supra* note 120, at 1.

the advice and consent of the Senate. This is not how our republic was designed to function.”<sup>138</sup>

The President’s best argument in reply would similarly accuse the Senate of violating the spirit of the Constitution in failing to give his nominees an up-or-down vote and would couch these recess appointments as necessary given the circumstances. The President could claim that the Senate’s refusal to confirm so many of his nominees is an intrusion on his executive power. After all, he needs the officers to run the executive branch.<sup>139</sup> Persistent vacancies interfere with the President’s duty to take care that the laws are faithfully executed. Thus, the Senate’s refusal encroaches upon presidential control of executive agencies and violates separation of powers principles.

Opponents of broad recess-appointment power could retort that while President Obama may claim textual constitutional authority for his recess appointments, his aggressive use of the power is not what the Framers envisioned when they drafted the Recess Appointments Clause. Writing during an era of slow communications and even slower travel, they imagined the need to fill a critical vacancy while the Senate was not in session and could not readily be reconvened.<sup>140</sup> The Framers did not create the recess appointments power, so the argument goes, to allow appointments when the Senate would not confirm a nominee.

While there are arguments to be made based on precedent<sup>141</sup> and constitutional text,<sup>142</sup> the resolution must and will hinge on courts’ understanding of the overriding issues of the unitary executive and separation of powers. Do recess appointments that occur when the President deems the Senate to be in recess violate the separation of powers principles embodied in the Appointments Clause? Can the President stretch his recess appointment power when necessary to take care that the laws are faithfully executed?

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<sup>138</sup> Cooper & Steinhauer, *supra* note 16 (quoting Sen. Hatch).

<sup>139</sup> *Cf.* O’Connell, *supra* note 135, at 935–46 (describing how vacancies disrupt the running of government).

<sup>140</sup> *Cf. Evans*, 387 F.3d at 1228 n.2 (Barkett, J., dissenting) (arguing that the Recess Appointments Clause was designed for a time of slow travel).

<sup>141</sup> *See, e.g., id.* at 1225 (majority opinion) (“The Constitution, on its face, does not establish a minimum time that an authorized break in the Senate must last to give legal force to the President’s appointment power under the Recess Appointments Clause.”).

<sup>142</sup> For example, the House’s refusal to allow the Senate to adjourn may play no role in the constitutional analysis of whether a recess exists, as the term “adjourn” in Article I, Section 5 may be constitutionally distinct from the term “recess” in Article II, Section 2. *See* John Elwood, *Recess Appointment of Richard Cordray Despite Pro Forma Sessions*, THE VOLOKH CONSPIRACY (Jan. 4, 2012, 10:45 AM), <http://volokh.com/2012/01/04/recess-appointment-of-richard-cordray-despite-pro-forma-sessions/>.

*D. Conclusion: The Courts to Settle This Fight*

While the rise of the administrative state and its delegation of legislative functions to the executive branch led to a battle for control over administrative agencies, it was not until the greater political polarization of today that executive appointments became the central and most intense sphere of this conflict. The longer, more intense confirmation battles led Presidents to seek out ways to avoid Senate confirmation whether through legislation<sup>143</sup> or recess appointments.<sup>144</sup> The President and Congress now appear to be engaged in a series of tit-for-tat responses that not only seem to escalate the conflict, but also to expand the field of battle.<sup>145</sup> The battle is at its most intense point to date, but it remains unclear whether the trend of mutual reprisals will continue, or whether a court decision,<sup>146</sup> an electoral realignment, or another event will break the current pattern and forge a ceasefire. Nothing in this escalating tit-for-tat suggests that the war will be over soon, but it will likely be up to the courts to referee and restore order. The government cannot function effectively if Senate Republicans block nominees en masse.<sup>147</sup> Due to the continuing pattern of increased political polarization,<sup>148</sup> the courts will likely need to step in to end the cycle of mutual reprisals, ensure that neither branch grows too powerful, uphold the constitutional mandates of the separation of powers, and restore an effective government to the people.

<sup>143</sup> See, e.g., USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 502, 120 Stat. 192, 246 (2006).

<sup>144</sup> See, e.g., 2010 Press Release, *supra* note 11.

<sup>145</sup> See *supra* pp. 2136–37.

<sup>146</sup> The President's recess appointment of NLRB members during Senate pro forma sessions has already been challenged in court. See, e.g., Bill Mears, *Judge Rules for Administration over Recess Appointments Power*, CNN (Mar. 2, 2012), [http://articles.cnn.com/2012-03-02/politics/politics\\_judge-recess-appointments\\_1\\_recess-appointments-judge-rules-president-obama?\\_s=PM:POLITICS](http://articles.cnn.com/2012-03-02/politics/politics_judge-recess-appointments_1_recess-appointments-judge-rules-president-obama?_s=PM:POLITICS).

<sup>147</sup> See Seth Stern, *Judge Confirmed as Republicans Object to Obama Nominations*, BLOOMBERG BUSINESSWEEK (Jan. 25, 2012 6:11 AM), <http://www.businessweek.com/news/2012-01-25/judge-confirmed-as-republicans-object-to-obama-nominations.html>; cf. O'Connell, *supra* note 135, at 935–46 (describing how vacancies disrupt the running of government when the confirmation process has slowed down and agency positions are open).

<sup>148</sup> See *supra* p. 2146.