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# YALE LAW & POLICY REVIEW

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## Executive Power and the Office of Legal Counsel

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\* Yale Law School, J.D. expected 2011; Yale University, B.A. 2008. I would like to thank Professors Robert W. Gordon and Jerry Mashaw for their thoughtful contributions to this paper. I would also like to thank Rob Heberle, Chris Griffin, and Brad Tennis for their excellent suggestions.

## INTRODUCTION

In the summer of 2004, the now famous “Bybee Memorandum” was leaked to the press. The memorandum, entitled *Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A*,<sup>1</sup> was signed by Assistant Attorney General Jay S. Bybee but written by John C. Yoo, a lawyer at the Department of Justice’s Office of Legal Counsel (OLC) whose legal advice is now regarded as having facilitated the George W. Bush Administration’s broad exercise of executive power in the war on terrorism.<sup>2</sup> The memorandum’s release, followed by the disclosure of other OLC opinions relating to questions about executive power, quickly sparked widespread debate not only about the wisdom and morality of the Administration’s policy, but also about the role of the OLC and its lawyers within the executive branch.

Both the federal government and the legal community have continued to struggle with the question of what the responsibility of government lawyers was in providing advice in response to the war on terrorism. In 2008, the Justice Department’s Office of Professional Responsibility (OPR) began an investigation into whether several OLC opinions (including the Bybee Memorandum), authorizing waterboarding and other controversial interrogation techniques, violated the professional standards that apply to Justice Department attorneys.<sup>3</sup> Finally, in February 2010, the OPR released its 260-page report<sup>4</sup> condemning the torture memos<sup>5</sup> and recommending discipline for the lawyers who wrote them. Around the same time, Associate Deputy Attorney General David Margolis issued a memorandum for the Attorney General dismissing the OPR’s recommendation that Bybee and Yoo be

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1. Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, *Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002) [hereinafter *Bybee Memorandum*], available at [http://www.humanrightsfirst.org/us\\_law/etn/gonzales/memos\\_dir/memo\\_20020801\\_JD\\_%20Gonz\\_.pdf](http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonz_.pdf).
  2. For a discussion of the early uses of this term, see BOB WOODWARD, *BUSH AT WAR* 17, 45 (2002).
  3. See, e.g., Dan Eggen, *Justice Probes Authors of Waterboarding Memos*, WASH. POST, Feb. 23, 2008, at A03.
  4. OFFICE OF PROF'L RESPONSIBILITY, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS (2009) [hereinafter *OPR REPORT*], available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>.
  5. In addition to the Bybee Memorandum, the OPR Report discusses several other opinions regarding “enhanced interrogation techniques,” identified as the “Bradbury Memos” because they were signed by Principal Deputy Assistant Attorney General Stephen G. Bradbury in 2004 and 2005. *Id.* at 132.

referred to their state bar associations for professional discipline.<sup>6</sup> Margolis rejected the OPR's imputation of a "duty [on the part of OLC attorneys] to exercise independent legal judgment and to render thorough, objective, and candid legal advice,"<sup>7</sup> arguing both that such a requirement was too stringent and that Bybee and Yoo had not been warned that they would be held to such a standard.<sup>8</sup> Meanwhile, other members of the legal community have rejected Margolis's conclusion, arguing that he "upped the burden of proof beyond what the ethics rules require"<sup>9</sup> and that neither Bybee nor Yoo "behaved according to the high standards we should expect of government attorneys."<sup>10</sup>

These reactions echo the debate that has surrounded the torture memos for several years. Despite broad consensus within the legal community about the deficiencies of many of these memos, however, it is not immediately clear from the commentary whether or how the George W. Bush OLC ("Bush OLC") departed from previous OLC practice—an inquiry that is important to understanding both how the Bush OLC's decisions may have reflected institutional tradition and whether the authority of the office as a key executive legal adviser will be different going forward. The OLC exercises its opinion function, which has been delegated by the Attorney General since Congress created the office in 1933,<sup>11</sup> in response to requests from the White House and executive agencies. Its opinions are viewed as binding throughout the executive branch<sup>12</sup> and are regarded as having significant influence on presidential decision-making.<sup>13</sup> At the same time, the OLC remains a lawyer *for* the

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6. Memorandum from David Margolis, Assoc. Deputy Attorney Gen., to Eric Holder, Attorney Gen. (Jan. 5, 2010) [hereinafter Margolis Memorandum], available at <http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf>
  7. OPR REPORT, *supra* note 4, at 11.
  8. Margolis Memorandum, *supra* note 6, at 11.
  9. David Luban, *David Margolis Is Wrong*, SLATE, Feb. 22, 2010, <http://www.slate.com/id/2245531>.
  10. *Justice Department Will Not Punish Yoo and Bybee Because Most Lawyers Are Scum Anyway*, Posting of Jack Balkin to Balkinization, <http://balkin.blogspot.com/2010/02/justice-department-will-not-punish-yoo.html> (Feb. 19, 2010, 19:46 EST).
  11. Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337 (1993).
  12. HAROLD H. BRUFF, *BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR* 208 (2009); see also John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 428 (1993) ("The formality of the process and the product also allows the Office to appear to be more than simply another legal office within the government, but rather *the* oracle of executive branch legal interpretation.").
  13. OLC opinions have been credited with guiding Presidents in "many famous executive decisions." LUTHER HUSTON, *THE DEPARTMENT OF JUSTICE* 60 (1967).

President and the Attorney General—a role with the potential to lead to inappropriately politicized advice-giving. One scholar has identified the “central dilemma” of the OLC as its obligation to provide its clients with “advice and opinions they find generally congenial,” while simultaneously “upholding the reputation of the office as an elite institution whose legal advice is independent of the policy and political pressures associated with a particular question.”<sup>14</sup> Concerns about the independence of the OLC as a legal adviser are therefore understandably well-rehearsed.<sup>15</sup>

The broad purpose of this Note is to examine the OLC’s treatment of issues involving executive power since the advent of published opinions in 1977.<sup>16</sup> More specifically, it will examine the extent to which the OLC’s response to the war on terrorism comports with an institutional tradition of promoting executive power.<sup>17</sup> This inquiry is important for two reasons. First, the OLC is less likely to fall victim to political pressure from the President and his Cabinet when it exposes its opinions to public scrutiny; indeed, the Bush OLC’s extensive use of secrecy has commonly been criticized as contributing to its interpretive excesses. It is therefore important to understand the OLC’s use of secrecy during the war on terrorism in the context of a tradition of publishing important opinions. Second, focusing on opinions issued within the past three decades helps to focus the analysis on a conception of the presidency as it has developed in recent years. This is particularly important in light of a widespread conception of executive power as having been at a historically low ebb after Watergate and Vietnam in the mid-1970s.<sup>18</sup> During the period ranging from President Carter’s sole term through President Clinton’s second term, the executive branch was consistently working to regain a more equitable place in the struggle for power among the branches—particularly during the Reagan Administration, when the concept of the unitary executive emerged.<sup>19</sup> Discussing the Bush OLC opinions in this recent historical context is therefore “fair” in the sense that the executive was consistently seeking to regain its power during this period.

Part I provides a brief introduction to the debate surrounding some of the most controversial opinions issued in response to the war on terrorism. In Part

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14. McGinnis, *supra* note 12, at 422 (1993).

15. See, e.g., Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513 (1993); Symposium, *In Memory of Rex E. Lee*, 2003 BYU L. REV. 1, 168-69.

16. Foreword, 1 Op. Off. Legal Counsel, at vi (1977).

17. See Eric Posner & Adrian Vermeule, Op-Ed., A “Torture” Memo and Its Tortuous Critics, WALL ST. J., July 6, 2004, at A22.

18. See, e.g., Charlie Savage, *Takeover: Return of the Imperial Presidency*, 48 WASHBURN L.J. 299, 309 (2009).

19. See, e.g., Jeffrey Rosen, *The Roberts Court and Executive Power*, 35 PEPP. L. REV. 503 (2008).

II, a review of OLC memoranda issued during the past three decades suggests that the office's tradition of promoting executive power has been especially evident in two contexts: (1) opinions regarding activities that are historically associated with core executive powers; and (2) opinions confronting legislative encroachments on such powers. Opinions issued by the OLC under the Bush Administration purported to be consistent with this longstanding tradition of pro-executive jurisprudence. Part III, however, concludes that the office's opinions demonstrated a stark departure from opinions published under previous administrations in their heavy and ahistorical use of open-ended constitutional arguments, their disparagement of legislative power and dramatically narrow statutory construction, and their secrecy and after-the-fact approval of executive action. This analysis suggests that the opinions issued by the Bush OLC did not simply manifest a well-established pro-executive tradition, as Eric Posner and Adrian Vermeule have suggested.<sup>20</sup> On the contrary, the way in which the OLC exercised its opinion function during the Bush Administration so transformed its role that the changes may prove to be irreversible.

## I. THE OLC AND THE WAR ON TERRORISM

### A. *The Memos: An Overview*

After September 11, 2001, the OLC issued a series of memoranda designed to address the President's capabilities in the war on terrorism. The first memorandum—written by John Yoo, at the time Deputy Assistant Attorney General, and published two weeks after the 9/11 attacks—argued that the President had “broad constitutional power to take military action in response to the terrorist attacks on the United States” and concluded that he could deploy preemptive military force against terrorist organizations or “the States that harbor or support them.”<sup>21</sup> This document set the tone for the OLC over the next two years<sup>22</sup> by focusing on broad constitutional arguments about the President's Article II powers as Commander-in-Chief and Chief Executive. Other opinions that drew similarly on a broad view of the President's inherent powers addressed such topics as the legality of military commissions,<sup>23</sup> the

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20. Posner & Vermeule, *supra* note 17.

21. Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., to Timothy E. Flanigan, Deputy Counsel to the President, *The President's Constitutional Authority To Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001) [hereinafter *Military Operations Memorandum*], available at [http://dspace.wrlc.org/doc/bitstream/2041/70942/00110\\_010925display.pdf](http://dspace.wrlc.org/doc/bitstream/2041/70942/00110_010925display.pdf).

22. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 97 (2007).

23. Memorandum from Patrick F. Philbin, Deputy Assistant Attorney Gen., to Alberto Gonzales, Counsel to the President, *Legality of the Use of Military*

status of the Taliban under the Third Geneva Convention,<sup>24</sup> interrogation methods,<sup>25</sup> and the President's authority to use military force against Iraq.<sup>26</sup> Although a detailed analysis is not included here,<sup>27</sup> a brief discussion of selected memoranda provides a foundation for the following discussion of how these opinions fit into the OLC's tradition of promoting executive power.

A common criticism of Yoo's work at the OLC is that it appears to be scholarly and thoroughly researched yet omits or mischaracterizes key sources of law.<sup>28</sup> This criticism is particularly applicable to the Bybee Memorandum, issued almost a year after the 9/11 attacks, which appeals to an extensive body of authorities.<sup>29</sup> Yet the memorandum's broad conclusion that "[a]ny effort by Congress to regulate the interrogation of battlefield detainees would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President . . . has no foundation in prior OLC opinions, or in judicial decisions, or in any other source of law."<sup>30</sup> Similarly, in the first memorandum issued after 9/11, which addressed the President's ability to conduct military operations in

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Commissions To Try Terrorists (Nov. 6, 2001) [hereinafter Military Commissions Memorandum], available at <http://www.justice.gov/olc/2001/pub-millcommfinal.pdf>.

24. Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto Gonzales, Counsel to the President, Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949 (Feb. 7, 2002), available at <http://www.justice.gov/olc/2002/pub-artc4potusdetermination.pdf>.
25. See Bybee Memorandum, *supra* note 1.
26. Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto Gonzales, Counsel to the President, Authority of the President Under Domestic and International Law To Use Military Force Against Iraq (Oct. 23, 2002), available at <http://www.justice.gov/olc/2002/iraq-opinion-final.pdf>; Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., to Alberto Gonzales, Counsel to the President, Effect of a Recent United Nations Security Council Resolution on the Authority of the President Under International Law To Use Military Force Against Iraq (Nov. 8, 2002), available at <http://www.justice.gov/olc/2002/iraq-unscr-final.pdf>.
27. For additional analysis, see, for example, David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005); Symposium, *War, Terrorism, and Torture: Limits on Presidential Power in the Twenty-First Century*, 81 IND. L.J. 1139 (2006); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005); and Postings of Jack Balkin et al. to Balkinization, *The Anti-Torture Memos: Balkinization Posts on Civil Liberties, the War on Terror and Presidential Power*, <http://balkin.blogspot.com/2006/12/anti-torture-memos.html>.
28. See, e.g., GOLDSMITH, *supra* note 22, at 144 ("On the surface the interrogation opinions seemed like typically thorough and scholarly OLC work. But not far below the surface there were problems.").
29. Bybee Memorandum, *supra* note 1.
30. GOLDSMITH, *supra* note 22, at 148-49.

response to the attacks, Yoo's treatment of constitutional text departed from the OLC's established preference for relying on available statutory provisions and legislative history.<sup>31</sup> The impact of this interpretive choice is perhaps most notable in the memorandum's textual distinction between "making" and "declaring" war. Citing documents from the 1787 Constitutional Convention, Yoo placed great emphasis on an earlier draft of Article I that gave Congress the power to "make war,"<sup>32</sup> interpreting the change from "make" in the draft to "declare"<sup>33</sup> in the final version as an indication that Congress's power is a mere formality that does not detract from the President's broad power to "make war" as Commander-in-Chief.<sup>34</sup> Yoo also provided an interpretation of constitutional structure, arguing that the Constitution's provision for a "unitary executive,"<sup>35</sup> coupled with its failure to prescribe a detailed procedure for war-making, suggests that the constraints on the President's war powers should be "flexible."<sup>36</sup>

In addition to relying heavily on broad constitutional interpretation, the opinions issued under the Bush OLC aggressively used contingent constitutional arguments to preserve authorization for executive action even in the event that relevant statutes were found to prohibit it. In another early memorandum issued on November 6, 2001, *Legality of the Use of Military Commissions To Try Terrorists*,<sup>37</sup> Deputy Assistant Attorney General Patrick F. Philbin concluded that although the President had the authority to convene military commissions under the Uniform Code of Military Justice (UCMJ), he would have inherent power as the Chief Executive to convene them even without statutory authorization. This contingent argument provided backup authorization in case the Supreme Court later decided that the UCMJ did not, in fact, provide presidential authority that was sufficiently broad—a conclusion the Court eventually reached in *Hamdan v. Rumsfeld*.<sup>38</sup>

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31. See, e.g., The President's Power To Remove Members of the Federal Council on the Aging, 5 Op. Off. Legal Counsel 337, 339 (1981) ("[W]e focus initially on the statutory scheme and the legislative history because of the familiar injunction that [a] decision on constitutional grounds should be avoided if a statutory ground is sufficient.") (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

32. See Military Operations Memorandum, *supra* note 21, at 3 (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-19 (Max Farrand ed., rev. ed. 1966) (1911)).

33. U.S. CONST. art. I, § 8, cl. 11.

34. See Military Operations Memorandum, *supra* note 21, at 3.

35. *Id.* at 4.

36. *Id.*

37. Military Commissions Memorandum, *supra* note 23.

38. 548 U.S. 557 (2006).

The Bybee Memorandum displayed a similarly dismissive view of legislative limitations on executive power. After interpreting the text of the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) to apply only in extremely narrow circumstances, Yoo argued: “Even if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached on the President’s constitutional power to conduct a military campaign.”<sup>39</sup> The overly broad nature of this argument ultimately led Jack Goldsmith, who replaced Jay Bybee as head of the OLC in 2003, to withdraw the opinion. According to Goldsmith, the opinion licensed too much unspecified behavior on the part of the President: “When OLC is asked whether proposed government actions comply with criminal laws, it usually has precise actions in mind, and it usually conforms its analysis to these precise actions.”<sup>40</sup>

The extent to which the work of John Yoo and others may have departed from usual OLC practice can be inferred from Goldsmith’s decision to rescind some of the opinions. There were few precedents for rescinding opinions and no precedents for rescinding opinions issued while an administration still held office.<sup>41</sup> Further, the opinion issued by Daniel Levin, Goldsmith’s successor, to replace the Bybee Memorandum in December 2004 stated explicitly that it was intended to “supersede[] the August 2002 Memorandum in its entirety,” on the grounds that “the discussion in that memorandum concerning the President’s Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary.”<sup>42</sup>

### B. Responses Within the Legal Community

Because much of the popular controversy surrounding the Bybee Memorandum is well-known, the discussion here is restricted to a brief overview of the debate within the legal community about the role of the OLC. A majority of legal scholars who commented on the torture memos viewed their

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39. Bybee Memorandum, *supra* note 1, at 31 (discussing United Nations Convention Against Torture, June 26, 1987, 1465 U.N.T.S. 85); *see also* MICHAEL JOHN GARCIA, CONG. RES. SERV., U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW AND APPLICATION TO INTERROGATION TECHNIQUES (2009) (“In order to ensure U.S. compliance with CAT obligations . . . the United States enacted chapter 113C of the United States Criminal Code, which prohibits torture occurring *outside* the United States (torture occurring inside the United States was already generally prohibited . . .).”).

40. GOLDSMITH, *supra* note 22, at 150.

41. *Id.* at 145-46.

42. Memorandum from Daniel Levin, Acting Assistant Attorney Gen., to James B. Comey, Deputy Attorney Gen., Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A, at 2 (Dec. 30, 2004) [hereinafter Replacement Memorandum], available at <http://news.findlaw.com/hdocs/docs/terrorism/doj/torture123004mem.pdf>.

legal reasoning as poor.<sup>43</sup> Central to the criticism was Yoo's failure in the Bybee Memorandum to apply critical sources of law,<sup>44</sup> including the famous separation of powers analysis in Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>45</sup> the CAT, and § 2340A. It is generally accepted that all legal advisers, not just government lawyers, should address sources that are potentially contrary to their position in order to "alert[] the client to counter-arguments, weaknesses, and risks."<sup>46</sup> Because Yoo's argument failed to satisfy this basic standard of legal reasoning, it may be particularly troubling that it appeared in an OLC opinion. OLC opinions, which are treated as binding rulings within the executive branch, influence what the government does in the future; thus, "an OLC lawyer giving advice has even greater responsibility than a private attorney to do justice to all sides of a question."<sup>47</sup>

Similarly, legal ethics scholar David Luban argues that the OLC should present measured advice rather than legal briefs.<sup>48</sup> OLC opinions should not aim to persuade, but rather should display "candor and independence"<sup>49</sup> through: (1) faithfully evaluating the strength of all available sources of authority; (2) refraining from misrepresenting or omitting contrary authorities; and (3) offering conclusions that "fit on the bell curve" of accepted interpretations.<sup>50</sup> Although it is permissible to argue a nonstandard view of the law, the writer must make clear the conclusion is in fact unconventional.<sup>51</sup>

Martin S. Lederman suggests that OLC traditionally employs the kind of argument that Luban describes:

As a general matter, OLC attempts to give the President the "best" view of what the law allows, where "best" is generally understood to mean the answer to which the governing legal doctrines would most likely point (more or less akin to what a lower court does when it's trying to follow the "rules laid down" by the Supreme Court).<sup>52</sup>

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43. See Adam Liptak, *Legal Scholars Criticize Memos on Torture*, N.Y. TIMES, June 25, 2004, at A14.

44. *Id.*

45. 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

46. FREDERICK A.O. SCHWARTZ JR. & AZIZ Z. HUQ, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR* 190 (2007).

47. *Id.* at 191.

48. DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 198 (2007).

49. *Id.*

50. *Id.* at 198-99.

51. *Id.*

52. *Chalk on the Spikes: What Is the Proper Role of Executive Branch Lawyers, Anyway?*, Posting of Marty Lederman to Balkinization, <http://balkin.blogspot.com/2006/07/chalk-on-spikes-what-is-proper-role-of.html> (July 4, 2006, 11:28 EDT).

Lederman also recognizes, however, that the OLC historically provides “a justification for Executive conduct that lies at one extreme of the range of possible ‘reasonable’ legal answers, but that is fairly clearly *not* the ‘best’ view of the law” in cases related to national security.<sup>53</sup> It seems obvious that government lawyers should not give advice that is clearly beyond the spectrum of reasonableness—as many think John Yoo did in his interpretation of the torture statute. The more difficult question is “whether Executive branch lawyers ought to ‘push the envelope,’ *within* the bounds of what the legal culture views as ‘reasonable,’ in order to enhance matters of national security.”<sup>54</sup>

Lederman’s comments about national security demonstrate that the mainstream response to the Bybee Memorandum has been characterized not simply by professional allegations of incompetence, but also by the view that the reasoning employed somehow departed from normal OLC practice. This departure, moreover, is said to have involved violations of a particular set of ethical standards that has come to apply to government lawyers in the OLC. Law professors Eric Posner and Adrian Vermeule disputed both charges in a July 6, 2004, opinion piece in the *Wall Street Journal*. Responding to general criticism about Yoo’s extremely narrow definition of torture and Professor Jack Balkin’s criticism of Yoo for failing to cite *Youngstown*, Posner and Vermeule maintained that the arguments were “standard lawyerly fare, routine stuff.”<sup>55</sup> They argued that Yoo’s definition of torture was permissibly narrow because of the statute’s own “narrowing limitations” and that it may have warranted academic disagreement but did not violate professional standards. More interestingly for the purposes of the inquiry here, they viewed the Bybee Memorandum’s broad executive power arguments as squarely in line with the OLC’s traditional jurisprudence, which they described as “highly pro-executive.”<sup>56</sup> According to Posner and Vermeule, the academic outcry was a reaction not to transgression of the OLC’s traditional role, but rather a rejection of the tradition itself:

Not everyone likes OLC’s traditional jurisprudence, or its awkward role as both defender and adviser of the executive branch: but former officials who claim that the OLC’s function is solely to supply “disinterested” advice, or that it serves as a “conscience” for the government, are providing a sentimental, distorted and self-serving picture of a complex reality.<sup>57</sup>

This view is a more strongly formulated version of Lederman’s suggestion that the OLC is historically likely, in some cases, to reach conclusions that enhance

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53. *Id.*

54. *Id.*

55. Posner & Vermeule, *supra* note 17.

56. *Id.*

57. *Id.*

the President's authority and that, while not the best legal interpretations, are nevertheless reasonable. The next Part, which explores the OLC's history of promoting executive power in its opinions, provides a framework for examining whether and how the controversial opinions issued by the Bush OLC departed from tradition.

## II. A HISTORY OF PROMOTING EXECUTIVE POWER

The OLC is traditionally pro-executive. This fact is hardly surprising given the office's structural position and role within the government. Because it exercises its opinion function only when asked, the OLC's opportunity to opine on issues touching presidential power is maximized when its legal analysis might be conducive to an administration's agenda. OLC lawyers, moreover, are independently likely to do what they can to promote the interests of the President and the executive branch.<sup>58</sup> This pattern may be true either because of self-interest—as Nelson Lund points out, the President, the Attorney General, and the White House staff with whom OLC attorneys work “hold the keys to some of the most desirable appointments to which lawyers aspire”<sup>59</sup>—or simply because employees who devote their careers to the executive branch are interested in ensuring that OLC opinions reflect executive interests more broadly.<sup>60</sup> Former members of the Clinton OLC have defended the legitimacy of this pro-executive enthusiasm on the part of OLC lawyers on the grounds that the office “serves both the institution of the presidency and a particular incumbent, democratically elected President in whom the Constitution vests executive power.”<sup>61</sup>

The OLC's responsiveness to the President's agenda or to the long-term interests of the executive, however, does not mean that it promotes executive power in every circumstance. There are two main structural reasons why the OLC's pro-executive bent might be limited to certain contexts. First, a President experiencing pressure from his political base to take action on a legally sensitive issue may ask for an opinion from the OLC that he can use to shield himself

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58. Jack Goldsmith writes that, as head of President George W. Bush's OLC, “[e]specially on national security matters, I would work hard to find a way for the President to achieve his ends.” GOLDSMITH, *supra* note 22, at 35.

59. Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 499 (1993).

60. See Thomas W. Merrill, *High-Level, “Tenured” Lawyers*, 61 LAW & CONTEMP. PROBS. 83 (1998) (discussing the tendency on the part of career government employees to develop a long-term perspective about the branch of government or institution they serve).

61. Walter E. Dellinger et al., *Principles To Guide the Office of Legal Counsel* (Dec. 21, 2004) [hereinafter *Principles To Guide OLC*], available at [http://www.acslaw.org/files/2004%20programs\\_OLC%20principles\\_white%20paper.pdf](http://www.acslaw.org/files/2004%20programs_OLC%20principles_white%20paper.pdf).

from the political fallout of nonaction.<sup>62</sup> As a result, the OLC occasionally issues nonpermissive opinions that restrain rather than promote executive power. In addition, “if [the OLC’s] opinions garner a reputation as naked briefs for the executive, the influence of the office will evaporate.”<sup>63</sup> Thus, in order to establish and preserve reputational capital,<sup>64</sup> the OLC has traditionally been highly deferential to the precedential value of opinions issued under previous administrations.<sup>65</sup> The OLC’s use of *stare decisis* to preserve the integrity of its opinion function necessarily limits the degree to which it may opine on politically partisan issues. Pro-executive OLC opinions therefore have arisen mainly in contexts where it is in the executive’s interest to preserve or enhance its position with respect to the other branches, regardless of a particular administration’s political agenda, i.e., where the legislature has encroached on “core” executive powers.

All this suggests that it makes sense for the OLC to issue permissive opinions only in limited circumstances. The OLC makes strong claims where it can derive a high degree of utility from wielding a particular power.<sup>66</sup> In the context of separation of powers, a branch of government derives more utility from asserting authority when it is likely to face little opposition, either because of historical expectations or because it is well-suited to performing a particular function. The President, for example, can be successful in exercising power over foreign affairs because “expectations . . . have developed about his responsibilities in the area of foreign affairs and war powers,” and because he has the “unique capabilities of acting with ‘secrecy and dispatch.’”<sup>67</sup> Indeed, an overview of OLC opinions between 1977 and 2008<sup>68</sup> shows that pro-executive

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62. Lund, *supra* note 59, at 457 (suggesting that OLC’s “cautionary advice” may “serve[] to relieve the President from choosing between . . . unpalatable alternatives”).

63. BRUFF, *supra* note 12, at 75.

64. See McGinnis, *supra* note 12.

65. See *id.* at 423-24 (discussing the interest of the Attorney General and the OLC in preserving the OLC’s institutional reputation); see also GOLDSMITH, *supra* note 22, at 145 (“If OLC overruled every prior decision that its new leader disagreed with, its decisions would be more the whim of individuals than the command of impersonal laws.”).

66. John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS. 293 (1993).

67. *Id.* at 305-06.

68. OLC opinions were not routinely published until 1977, when President Carter’s Attorney General, Griffin Bell, decided the value of OLC opinions “as precedents and as a body of executive law on important matters would be enormously enhanced by publication and distribution in a manner similar to those of the formal opinions of the Attorneys General.” Foreword, 1 Op. Off. Legal Counsel, at vi (1977). Because publication remains discretionary—the seventy-three opinions

opinions have fallen mainly into two categories: (1) opinions addressing the President's ability to engage in activities for which constitutional authority is well-grounded in historical precedent; and (2) opinions addressing acts of Congress that encroach upon core executive powers.

#### A. *Core Executive Powers and Historical Precedent*

Although the Constitution's allocation of powers over foreign affairs is "notoriously uncertain," historical precedent—meaning both executive willingness to take initiative in the realm of foreign affairs and approval of executive action by both Congress and the Supreme Court—shows that broad power in this area is traditionally understood as resting with the executive.<sup>69</sup> After the advent of published opinions in 1977 and prior to the war on terrorism, the OLC had addressed the President's power to act when the lives of American civilians were in immediate danger in only one case: the Iran hostage crisis under President Carter. The opinions issued during this period are representative of the OLC's historical tendency to issue permissive opinions when foreign affairs or war powers are at stake. In confronting questions of presidential authority in response to the Iran hostage crisis, the OLC concluded in several opinions that the President had the power to act pursuant to his Article II powers.<sup>70</sup> A characteristic appeal to the President's inherent powers

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published in the 1977 volume represented only twenty-five percent of the opinions rendered that year, *see id.*, at v—the body of opinions available for comparative analysis is limited. *See McGinnis, supra* note 12, at 376 ("In OLC's library sit at least five filing cabinets of largely unpublished opinions dating from the time of OLC's creation in 1932.").

69. BRUFF, *supra* note 12, at 84; *see also* CONGRESS AND THE POLITICS OF FOREIGN POLICY, at ix (Colton C. Campbell, Nicol C. Rae & John F. Stack, Jr. eds., 2003) ("There still remains strong consensus between the political parties and between the branches of government that the executive should generally predominate on national security matters."); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 31 (2d ed. 1996) ("Students of United States government, and newspaper-readers generally, know that U.S. foreign relations are in the charge of the President."); JUDGING EXECUTIVE POWER: SIXTEEN SUPREME COURT CASES THAT HAVE SHAPED THE AMERICAN PRESIDENCY 88 (Richard J. Ellis ed., 2009) (describing the government's argument in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), that Congress had endowed the President with broad discretion to act in the international arena "[f]rom the republic's earliest days"); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 117 (1990) (discussing the President's tendency to "win" in the realm of foreign affairs).
70. *See, e.g.*, Presidential Power To Regulate Domestic Litigation Involving Iranian Assets, 4a Op. Off. Legal Counsel 236 (1980); Legality of Certain Nonmilitary Actions Against Iran, 4a Op. Off. Legal Counsel 223 (1980); Presidential Power To Expel Diplomatic Personnel from the United States, 4a Op. Off. Legal Counsel 207 (1980); Presidential Power To Use the Armed Forces Abroad Without Statutory Authorization, 4a Op. Off. Legal Counsel 185 (1980) [hereinafter Iran Armed

appeared in the opinion *Presidential Power To Use the Armed Forces Abroad Without Statutory Authorization*, which invoked the Commander-in-Chief power and the presidential duty to make sure that laws are faithfully executed to support a conclusion that “[t]he power to deploy troops abroad without the initiation of hostilities is the most clearly established exercise of the President’s general power as a matter of historical practice.”<sup>71</sup> This opinion relied heavily on a number of historical situations in which former Presidents had deployed troops abroad “in defense of American lives and property,” ranging from “President Jefferson’s use of the Navy to suppress the Barbary pirates” to the “evacuation of civilians during the civil war in Lebanon.”<sup>72</sup>

A comparison of two opinions issued by President Reagan’s OLC provides a particularly good example of the way in which the OLC distinguishes between executive powers that are grounded strongly in historical precedent and those that are not. First, addressing the Reagan Administration’s proposal to extend the territorial sea by presidential proclamation, the OLC concluded that the President “acting alone” had the ability, derived from his Article II power to conduct foreign affairs, to extend the territorial sea from three miles to twelve miles from shore.<sup>73</sup> The opinion noted that, although there was no explicit constitutional authorization for the President’s power to acquire territory,<sup>74</sup> this power was grounded in the existence of “several venerable, and unchallenged, historical examples of such acquisitions,” including the original reliance of President Washington and Secretary of State Thomas Jefferson on the President’s foreign affairs power to proclaim sovereignty over the three-mile sea as well as the Navy’s “discovery and occupation” of the Midway and Wake Islands in 1869 and 1899.<sup>75</sup> In contrast, the Reagan OLC was unwilling to take a similarly permissive position where historical precedent regarding the President’s power was lacking. Contravening both the Administration’s general program of promoting unitary executive power and President Reagan’s specific hope of using the line-item veto “for fiscal reasons,” the OLC ruled in 1988 that

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Forces Memorandum]; Presidential Power Concerning Diplomatic Agents and Staff of the Iranian Mission, 4a Op. Off. Legal Counsel 174 (1980); The President’s Authority To Take Certain Actions Relating to Communications from Iran, 4a Op. Off. Legal Counsel 153 (1980); Supplementary Discussion of the President’s Powers Relating to the Seizure of the American Embassy in Iran, 4a Op. Off. Legal Counsel 123 (1980); Presidential Powers Relating to the Situation in Iran, 4a Op. Off. Legal Counsel 115 (1980) [hereinafter *Iran Presidential Powers Memorandum*].

71. Iran Armed Forces Memorandum, *supra* note 70, at 187.

72. *Id.*

73. Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea, 12 Op. Off. Legal Counsel 238 (1988) [hereinafter *Territorial Sea Memorandum*].

74. *Id.* at 241.

75. *Id.* at 248.

the President did not have line-item veto power<sup>76</sup>—a decision that Douglas W. Kmiec, who served as head of the OLC from 1988 to 1989, has described as “a great disappointment to the president.”<sup>77</sup>

Although the text of the Constitution addresses neither the President’s power to acquire territory nor the line-item veto,<sup>78</sup> the OLC was willing to derive legal authority from abstract constitutional powers to extend the territorial sea but not to justify the line-item veto—an outcome Kmiec attributes to the existence of “less timorous” historical precedent.<sup>79</sup> The line-item veto opinion was a forty-two-page study of the legislative process in England and the United States from the colonial era through the Ford Administration.<sup>80</sup> Despite the scope of its inquiry, the OLC was unable to find any clear evidence that the line-item veto enjoyed any legal tradition; accordingly, it ruled that the President had no authority to exercise such power. Kmiec’s characterization of the discrepancy between these two opinions as representative of the OLC’s systematic deference to historical precedent is striking. Even under the Reagan Administration, which produced the concept of the unitary executive<sup>81</sup> and is traditionally regarded as having had a strongly pro-executive agenda, the OLC apparently limited its endorsement of executive authority where reliance on abstract constitutional powers was not supported historically.

### B. *Proportionality and Legislative Encroachment*

If OLC opinions are permissive where a historically supported core executive power is at issue, they are most forceful where another branch of government threatens to encroach upon that power. During the past three decades, Congress has provoked extraordinarily pro-executive opinions from the OLC in two main contexts: (1) when Congress attempts to restrict the President’s power to conduct international negotiations; and (2) when Congress attempts to limit the Commander-in-Chief powers, particularly under the War Powers Resolution of 1973 (WPR).<sup>82</sup> Unsurprisingly, the OLC’s claims regarding the scope of executive power generally have corresponded to the scale of congressional encroachment. For example, the OLC responded to a direct legislative attempt to limit the President’s ability to conduct international negotiations with the controversial claim that he could simply refuse to execute

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76. The President’s Veto Power, 12 Op. Off. Legal Counsel 128 (1988) [hereinafter Line-Item Veto Memorandum].

77. Kmiec, *supra* note 11, at 353.

78. *Id.* at 363.

79. *Id.*

80. Line-Item Veto Memorandum, *supra* note 76.

81. BRUFF, *supra* note 12, at 99.

82. 50 U.S.C. §§ 1541-1548 (2006).

the law. The OLC has met lesser encroachments, however, with the more modest approach of narrow statutory construction.

1. Desperate Times Call for Desperate Measures: Support for Constitutional Review

Although the OLC is generally deferential to precedent, it may be more likely to depart from conventional legal analysis when there has been an especially egregious legislative encroachment on a core executive power. The OLC's willingness to make such exaggerated claims was demonstrated in 1990, when Congress passed the Foreign Relations Authorization Act (FRAA). The FRAA included a provision prohibiting the President from spending any money appropriated for international conferences on the U.S. delegation to the Conference on Security and Cooperation in Europe unless the delegation included representatives of the Commission on Security and Cooperation in Europe—a body composed mainly of legislators.<sup>83</sup> President George H.W. Bush responded by declaring that the provision was unconstitutional and that he would refuse to enforce it, thus asserting the presidential power of constitutional review.<sup>84</sup> President Bush's signing statement accompanying the FRAA relied on an OLC opinion that not only invalidated Congress's attempt to limit the exercise of a core executive function, but also affirmed the President's ability to refuse to enforce the statute.<sup>85</sup> Drawing heavily on *United States v. Curtiss-Wright Export Corp.*<sup>86</sup> and other historical and judicial materials, the OLC argued that, as "head of the unitary Executive" and "Commander in Chief," the President had the exclusive authority to represent the United States abroad.<sup>87</sup> Under *Curtiss-Wright*, the Act was "constitutionally

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83. Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, Pub. L. No. 101-246, § 102, 104 Stat. 15, 19.

84. See Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, 1 PUB. PAPERS 239-40 (Feb. 16, 1990) ("By purporting to deny certain funds for the negotiation of certain arms control agreements unless representatives of the Commission are included in the U.S. delegation to such negotiations, this section impermissibly intrudes upon my constitutional authority to conduct our foreign relations and to appoint our Nation's envoys. I therefore shall construe it to express the sense of the Congress but not to impose any binding legal obligation, and as severable from the ability to continue the critically important negotiations at issue.").

85. See Issues Raised by Foreign Relations Authorization Bill, 14 Op. Off. Legal Counsel 37 (1990) [hereinafter Foreign Relations Authorization Memorandum].

86. 299 U.S. 304 (1936) (holding that Congress's authorization of the President to prohibit arms sales by American companies to Bolivia was not an improper delegation of legislative power); *id.* at 319 ("[T]he President alone has the power to speak or listen as a representative of the nation.").

87. Foreign Relations Authorization Memorandum, *supra* note 85, at 38-41.

offensive” on the ground that the congressional appointments to the delegation would violate the President’s inherent right to control “disclosure of the content of negotiations.”<sup>88</sup> The second part of the opinion, which affirmed the President’s power of constitutional review, represented a stark departure from the OLC’s traditionally diligent reliance on historical precedent. As the opinion itself pointed out, there were few judicial authorities regarding this power; the historical authorities cited in support of it, moreover, also had been used to support the contrary position.<sup>89</sup> Nevertheless, emphasizing the seriousness of “legislative encroachment,” the OLC concluded that, “in the context of legislation that infringes the separation of powers, the President has the constitutional authority to refuse to enforce unconstitutional laws.”<sup>90</sup> This response was both a trenchant denial of Congress’s attempt to restrict the President’s authority over foreign affairs using the power of the purse and a retaliatory grasp at expanded executive influence.

## 2. Narrow Statutory Construction

In authorizing the President to refuse to enforce a statutory provision, the opinion invalidating the FRAA was one of the most dramatically permissive opinions that the OLC had issued. In general, where legislative encroachments are less targeted and therefore less egregious, opinions authorizing presidential action have simply construed the statute in question to prevent it from limiting executive power. This OLC previously applied this tactic when confronting a similar issue in 1978. In this instance, the OLC refused to construe the Trade Act of 1974<sup>91</sup> as either authorizing or preventing presidential engagement in international negotiations, since he already had the inherent power to do so under Article II. It rejected the statute as a source of executive authority, holding that “the source of this negotiating authority is the Constitution itself. Negotiation is a necessary part of the process by which foreign relations are conducted, and the power to conduct foreign relations is given to the President by the Constitution.”<sup>92</sup> In further keeping with OLC tradition, President Carter’s OLC assigned great weight to historical precedent, remarking that the President has engaged in negotiations with representatives of foreign countries “[s]ince the founding of our Nation.”<sup>93</sup>

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88. *Id.* at 42-44.

89. *Id.* at 50.

90. *Id.* at 49-50.

91. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (codified at 19 U.S.C. §§ 1201-2497b (2006)).

92. The President—Authority To Participate in International Negotiations—Trade Act of 1974 (19 U.S.C. § 2101)—Participation in Producer-Consumer Fora, 2 Op. Off. Legal Counsel 227, 228 (1978) [hereinafter International Negotiations Memorandum].

93. *Id.* at 228.

The OLC consistently has engaged in narrow statutory construction as a shield against legislative encroachment in the context of the WPR. Since the WPR was passed over President Nixon's veto in 1973, OLC opinions considering its limitations on executive power consistently have concluded that the WPR does not apply to particular factual situations. In November 1979, the Iran hostage crisis presented an early opportunity for abrogating the WPR. The OLC was repeatedly confronted with questions implicating executive power, the answers to which potentially affected the lives and well-being of American citizens; it had to provide the President with legal options in a situation where he effectively was negotiating with terrorists.<sup>94</sup> As noted by Warren Christopher, President Carter's Deputy Secretary of State, who played an important role in the Administration's deliberations and negotiations with Iran,<sup>95</sup> "the scope of executive authority would be constrained and our bargaining position thus undermined if the courts or the Congress acted."<sup>96</sup> The OLC accordingly held that the WPR did not limit the President's power to respond with military force in Iran.<sup>97</sup> Relying on legislative history of the WPR that suggested, in "normal practice," the President's unilateral use of forces to rescue American nationals in danger abroad did not constitute an exercise of the war power, the OLC refused to construe the WPR as constraining the President's exercise of constitutional power "in this instance."<sup>98</sup>

The OLC's efforts to nullify the WPR and other measures designed to control the President's power as Commander-in-Chief reached their height during the Clinton Administration. Expanding upon the OLC's approach during the Iran hostage crisis of narrowly construing the WPR, the Clinton Administration avoided its requirements by characterizing the situation as a national emergency—an exception to the legislation's general requirement that Congress authorize the introduction of U.S. armed forces into active hostilities.<sup>99</sup> In September 1991, a military junta overthrew Haiti's seven-month-old constitutionally elected government. As the new, illegitimate government terrorized Haiti's civilian population over the next two years, Haitian refugees seeking asylum in the United States were systematically rebuffed. In 1993 and 1994, relations between Congress and the executive became increasingly

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94. WARREN CHRISTOPHER ET AL., *AMERICAN HOSTAGES IN IRAN: THE CONDUCT OF A CRISIS* 19 (1985) ("One of the most controversial questions raised about U.S. policy on the Iranian crisis is whether it was right, as a matter of principle, to negotiate with the terrorists who took over the embassy. In this case, a refusal to negotiate with the terrorists would have entailed a refusal to negotiate with the government that subsequently embraced the terrorists' actions.").

95. *Id.* at ix.

96. *Id.* at 4-5.

97. Iran Presidential Powers Memorandum, *supra* note 71, at 121.

98. *Id.* (quoting 119 CONG. REC. 33,558 (1973) (statement of Sen. Javits)).

99. See 50 U.S.C. § 1541(c)(3) (2006).

strained as the President planned for military intervention with the support of the United Nations.<sup>100</sup> President Clinton, over the objections of Congress,<sup>101</sup> eventually deployed 1500 U.S. troops to Haiti in September 1994, increasing the number to 10,000 in the following weeks.<sup>102</sup> After the deployment, four U.S. senators submitted a request for a summary of legal opinions issued by the OLC on the lawfulness of the President's use of troops in Haiti. Assistant Attorney General Walter Dellinger responded that the legal grounds for their deployment were threefold.<sup>103</sup> First, the President had complied with the 1993 requirement<sup>104</sup> that he report to Congress about any planned deployment in Haiti.<sup>105</sup> Second, the WPR allowed unilateral deployments in national emergencies.<sup>106</sup> Finally, the conflict in Haiti was "not a 'war' in the constitutional sense,"<sup>107</sup> both because it took place "with the full consent of the *legitimate* government" of the country involved<sup>108</sup> and because the scope and duration of the engagement were to be limited. Thus, instead of encroaching on Congress's power to declare war, the deployment was in fact a fulfillment of the President's inherent power as Chief Executive and Commander-in-Chief to "conduct . . . diplomatic and foreign affairs."<sup>109</sup>

The OLC's narrow construction of the WPR's statutory requirements has effectively nullified the law,<sup>110</sup> representing a strong rejection of congressional attempts to abridge the authority of the Commander-in-Chief. In the international negotiations context, the OLC has noted that permissive treatment of executive power comes with an inherent check. In the 1978 memorandum for President Carter discussed above,<sup>111</sup> the OLC noted that, although the President could derive authority from his constitutional power to

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100. RYAN C. HENDRICKSON, *THE CLINTON WARS: THE CONSTITUTION, CONGRESS, AND WAR POWERS* 48-50 (2002).

101. Several House members made floor statements questioning the constitutionality of a U.S. deployment to Haiti; in the Senate, Republican Senator Bob Dole from introduced legislation to prevent U.S. troops from serving under foreign command. *Id.* at 51-56.

102. *Id.* at 59.

103. Deployment of United States Armed Forces into Haiti: Letter Opinion for Four United States Senators, 18 Op. Off. Legal Counsel 173 (1994) [hereinafter Haiti Deployment Memorandum].

104. See Pub. L. No. 103-139, § 17, 107 Stat. 1418 (1993).

105. Haiti Deployment Memorandum, *supra* note 103, at 174-75.

106. *Id.* at 175-77.

107. *Id.* at 173.

108. *Id.* (emphasis added).

109. *Id.* at 178 (quoting *Johnson v. Eisentrager*, 339 U.S. at 753, 789 (1950)).

110. McGinnis, *supra* note 66, at 319.

111. See *supra* notes 92-93 and accompanying text.

conduct foreign affairs, “[t]he legal force of a particular international agreement may depend upon the presence or absence of congressional authorization.”<sup>112</sup> In contrast, nullification of the WPR represents an effectively nonreviewable assertion of the President’s inherent powers.<sup>113</sup>

### C. *Risks of Politicization*

As the foregoing Sections illustrate, there are some circumstances under which the OLC has used its opinion function as an important tool in maintaining the balance of powers among the branches. This Section addresses a third category in which the OLC has sometimes promoted executive power: highly politicized situations in which a particular policy option is important to the President’s agenda. Pro-executive opinion-writing in this category carries the greatest risks for the integrity of OLC legal analysis and the reputation of the office itself. Opinions written in response to politicized questions therefore require significant scrutiny. Although the OLC’s opinion function is necessarily tied to the political agenda of the administration in power, both its ethical integrity and its continued relevancy as a binding legal voice within the executive branch depend on its use of restraint when answering highly politicized legal questions. It is generally contrary to the interests of the executive for the OLC to support executive action in circumstances that are likely to draw heated conflict. This fact follows from the President’s interest in others’ regarding the OLC’s opinions as strong legal analysis so that he can use them legitimately to justify his actions.<sup>114</sup>

There are a number of examples, however, when the OLC has fallen victim to political pressures, thus departing from its normal practice of relying on historical precedent or responding to legislative encroachment. These examples occur when the OLC fails to publish an opinion on a legally controversial issue or when it issues an opinion validating a presidential action that already has

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112. International Negotiations Memorandum, *supra* note 92, at 230.

113. The Constitution Project’s report on the War Powers Resolution explains that once the President avoids obtaining congressional approval under the WPR, Congress often fails to “insist on a collective judgment about initiating force abroad, either because it tries to evade political accountability for a decision on war or because it defers to the presumed superior competency of the executive to make that decision.” In addition, the Court’s employment of “doctrines of avoidance” when contemplating issues related to executive war power has “left the interpretation of war powers to the President.” THE CONSTITUTION PROJECT, DECIDING TO USE FORCE ABROAD: WAR POWERS IN A SYSTEM OF CHECKS AND BALANCES 3 (2005).

114. McGinnis, *supra* note 12, at 424 (“[T]he President is perceived to have legal obligations and he will thus want a mechanism by which he is perceived to be taking these responsibilities seriously. Hence it is useful for the office to cultivate a reputation of applying the law scrupulously without regard to political or policy interest.”).

occurred. Both of these actions have increased the chance of provoking conflict with another branch of government or necessitating a reversal of position by the OLC, thus exposing the President and the OLC itself to political controversy.

### 1. Opacity and Overruling

The OLC's publication of its opinions is important to avoid "opacity," which can be understood as "the danger that it may support political action that cannot be publicly examined or tested."<sup>115</sup> At this point a distinction should be drawn between nonpublication and secrecy. The OLC's publication of its opinions is discretionary, and many of its opinions are not published. Although nonpublication is not problematic per se, it runs a high risk of becoming problematic when the answer to a legal question has significant political implications. In such a case, the OLC may be tempted to keep opinions secret in order to induce reliance by actors who might otherwise object to the President's position. Opaque decision-making poses at least two significant problems. First, where the reasoning used to reach a particular conclusion is not made public, insufficient public scrutiny may lead to acts that violate the law—a proposition that is particularly worrisome when civil or human rights are at stake. Second, when the OLC fails to publish its analysis of a politically charged legal question before the President acts, it loses the opportunity to test the legal and political waters and may ultimately find itself at the center of political controversy if the approved action draws public ire.

As an illustration of the first problem, Professor Harold Koh documents the example of *United States v. Alvarez-Machain*,<sup>116</sup> which involved the kidnapping of a criminal suspect from Mexico by the U.S. government in potential violation of an extradition treaty that did not authorize state-sponsored kidnapping. While the case was pending in the Supreme Court, the OLC issued a confidential opinion concluding that the facts of the kidnapping rendered it an exception to the customary rule of international law that extraterritorial apprehension is permissible only when the asylum state consents.<sup>117</sup> As Koh points out, the OLC's refusal to release the opinion left the public with no way of knowing whether the factual circumstances upon which it was based constituted an appropriate basis for the legal conclusions<sup>118</sup>—a dangerous outcome when U.S. compliance with international law hung in the balance. Indeed, in reference to the opinion's conclusions, the Supreme Court remarked that "the Executive's intense interest in punishing respondent in our courts . . . provides no justification for disregarding the Rule of Law that this Court has a duty to uphold."<sup>119</sup>

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115. Koh, *supra* note 15, at 515.

116. 504 U.S. 655 (1992).

117. Koh, *supra* note 15, at 518-19.

118. *Id.* at 519.

119. *Alvarez-Machain*, 504 U.S. at 686 (footnotes omitted).

In addition to increasing the risk that the executive will violate the rule of law, the OLC's failure to publish opinions may result in the President's committing an act that will expose both the Oval Office and the OLC to strong political backlash. Keeping an opinion secret initially may avoid sounding political alarms and may prevent the President from facing roadblocks *ex ante*. If the resulting act causes controversy, however, the OLC may be forced to retract its conclusions, thus abridging its commitments to *stare decisis* and damaging its reputation.

An example of the OLC's endorsing an overly politicized presidential action occurred during the Iran hostage crisis; yet, perhaps surprisingly, the presidential action at issue did not relate to foreign affairs or war powers. In a presidential proclamation on April 2, 1980, President Carter instituted a gasoline consumption tax through the Petroleum Import Adjustment Program (PIAP),<sup>120</sup> claiming authority under § 232(b) of the Trade Expansion Act of 1962.<sup>121</sup> Section 232(b) allowed the President to restrict imports if the Secretary of the Treasury determined that they threatened to impair national security.<sup>122</sup> Treasury Secretary Michael Blumenthal, apparently motivated by the hostage crisis in Iran and accompanying worries about the potential for further interruption in foreign oil supplies, had concluded in March 1979 that the country's "growing reliance on oil imports has important consequences for the nation's defense and economic welfare."<sup>123</sup> Indeed, authority for an earlier embargo placed on Iranian oil in November 1979 had rested on Blumenthal's determination.<sup>124</sup> According to the *Washington Post*, however, the apparent policy goals of this program were not to insulate the market from harmful disruption resulting from international conflict, but rather to discourage energy consumption by driving up costs and to help balance the following year's budget.<sup>125</sup>

The President's announcement of the PIAP sparked immediate outcry among petroleum consumers, marketers, refiners, importers, and members of Congress, a coalition of which challenged the program in federal court.<sup>126</sup> In *Independent Gasoline Marketers Council, Inc. v. Duncan*,<sup>127</sup> a federal judge in the District of Columbia invalidated the PIAP on the grounds that Congress had "thus far denied the President authority to reduce gasoline consumption

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120. Presidential Proclamation No. 4744, 3 C.F.R. 38 (1980).

121. Pub. L. No. 87-794, 76 Stat. 872 (1962).

122. *Id.* § 232(b).

123. Effects of Oil Imports on National Security, 44 Fed. Reg. 18,818 (Mar. 29, 1979).

124. See H.R. REP. NO. 96-1061, at 9 (1980).

125. Laura A. Kiernan & Art Pine, *Federal Judge Bars Fee on Oil Imports*, WASH. POST, May 14, 1980, at A1.

126. *Id.*

127. 492 F. Supp. 614 (D.D.C. 1980).

through a gasoline conservation levy.”<sup>128</sup> The *Washington Post*, reporting on the political unpopularity of the import fee, quoted the district court judge’s remark that “[e]xisting statutes cannot be used for purposes never contemplated by Congress and in [a] way contrary to congressional intent.”<sup>129</sup> Congress subsequently terminated the PIAP over President Carter’s veto in June 1980.<sup>130</sup>

As reported in a later OLC opinion during the Reagan Administration, the OLC apparently had expressed concerns in January 1980 that the proposed PIAP’s allocation of a consumption tax to domestic producers was not authorized by § 232(b).<sup>131</sup> These memoranda, however, had not been published, and the OLC ultimately had approved the final version of Proclamation No. 4744 over considerable doubt.<sup>132</sup> As a result, the Carter OLC’s only public action was final approval of the President’s legally suspect program. In January 1982, a year after the conclusion of the hostage crisis, the Reagan OLC clarified its position on what kind of presidential action was valid under § 232(b). This opinion confirmed the President’s ability to restrict imports that threatened to impair national security but explained that the PIAP had been legally unsound because its impact on imports was too remote. As a conservation measure, the tax was structured to fall equally on domestic producers.<sup>133</sup> In explaining the legal problems with the PIAP, the OLC noted that its analysis was in line with preapproval reservations about the program.

If the OLC’s early opinions regarding the legality of the PIAP had been published, they would have figured more heavily in the preproclamation policy debate, and the OLC would have had a more difficult time endorsing the President’s eventual proclamation. This outcome would have been disappointing to the President—a circumstance that is never desirable for OLC lawyers.<sup>134</sup> There is good reason, however, to think that publishing opinions, even when they may be disappointing to the President, is the correct course of

128. *Id.* at 618.

129. Kiernan & Pine, *supra* note 125 (quoting *Indep. Gasoline Marketers Council*, 492 F. Supp. at 620).

130. See An Act To Extend the Present Public Debt Limit Through June 30, 1980, Pub. L. No. 96-264, § 2, 94 Stat. 439 (1980).

131. The President’s Power To Impose a Fee on Imported Oil Pursuant to the Trade Expansion Act of 1962, 6 Op. Off. Legal Counsel 74, 78 (1982) [hereinafter Imported Oil Fee Memorandum].

132. *Id.* “All executive orders and proclamations proposed to be issued by the President are reviewed by the Office of Legal Counsel for form and legality, as are various other matters that require the President’s formal approval.” United States Department of Justice, Office of Legal Counsel, <http://www.justice.gov/olc> (last visited July 1, 2010).

133. Imported Oil Fee Memorandum, *supra* note 131, at 77.

134. See Lund, *supra* note 59, at 499.

action. In this case, falling victim to political pressure ultimately resulted in embarrassment for both the President and the OLC. When a court scrutinizes the OLC's conclusions, Congress invalidates them, or the OLC itself subsequently reverses its position, the office's role as legal adviser invites suspicion, diminishing the extent to which other actors may be willing to rely on its conclusions in the future.

## 2. Ex Post Approval of Presidential Action

Failing to opine *ex ante* on a legally controversial presidential act similarly increases the risk that the OLC will fall victim to political pressure. Validating presidential actions after the fact creates a risk that respect for the OLC will decline if its opinions are regarded as exculpatory "rubber stamps" for unilateral presidential action:<sup>135</sup>

[W]hen our government commits itself to a political position and then becomes locked in, with a weak legal opinion or no legal opinion at the front end, the OLC legal opinion that finally issues will be suspect precisely because we can no longer be certain that its result has not been "precooked."<sup>136</sup>

When members of the executive act in perceived "emergency" circumstances, there is a temptation to avoid institutional or political roadblocks by acting first and obtaining legal endorsement later. What was most remarkable about Walter Dellinger's letter to Congress regarding President Clinton's use of U.S. armed forces in Haiti<sup>137</sup> was not its content—the conclusions were in line with the OLC's consistent nullification of the WPR—but rather its release after the President already had acted. Although there was undoubtedly informal communication beforehand between the President and the OLC regarding his legal options, the OLC's legal analysis was not made public until Congress sent Dellinger a letter requesting "a copy or summary of any legal opinion that may have been rendered, orally or in writing, by [the OLC] concerning the lawfulness of the President's planned deployment of United States military forces into Haiti."<sup>138</sup>

By seemingly absolving the President for an action that was both legally and politically controversial, the OLC lost its character as a source of objective legal advice when it was drawn into a tug-of-war between the legislature and the executive. One month after the release of Dellinger's letter, Congress passed a joint resolution noting that "the President should have sought and welcomed Congressional approval before deploying United States Armed Forces to Haiti"

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135. See Koh, *supra* note 15, at 515 (discussing the problem of "lock-in" where the OLC fails to evaluate a proposed action *ex ante*).

136. *Id.* at 516-17.

137. See *supra* Section II.B.

138. Haiti Deployment Memorandum, *supra* note 103, at 173.

and calling for a withdrawal as soon as possible.<sup>139</sup> President Clinton's heavy involvement in U.N. peacekeeping operations thereafter became a significant issue in the midterm elections.<sup>140</sup> Largely in response to President Clinton's decision to send American troops to Bosnia to enforce the Dayton Peace Accords in 1996, the Republican-controlled House introduced legislation that would have limited the President's ability to place U.S. forces under United Nations operational or tactical control.<sup>141</sup> Having arguably provoked this attempt on the part of Congress to cabin executive power, the OLC then issued an opinion arguing that the bill was both an impermissible obstacle to the President's fulfillment of his responsibilities as the country's representative in foreign relations and a violation of his constitutional authority as Commander-in-Chief.<sup>142</sup> Although it was trying to reassert its position as a credible legal voice, the politicized action of approving the President's conduct *ex post* had created an atmosphere of uncertainty about the objectivity of the OLC.

### III. THE BUSH OLC IN CONTEXT

The previous Part outlined three categories into which the OLC's aggressive pro-executive opinions have traditionally fallen and argued that opinions falling into one of these categories carries significant ethical and institutional risks. Many of the opinions written during the George W. Bush Administration reflect longstanding traditions in OLC legal reasoning, most notably a tendency to invoke "core" executive powers to support presidential action in the realm of foreign affairs or war powers.<sup>143</sup> The Bush OLC opinions, however, went beyond past practice in a number of significant ways.

First, the OLC routinely appealed to core executive powers as authorizing presidential action in contexts where historical precedent was lacking or even contrary to the proposed outcome. In addition, although the OLC historically had responded aggressively to apparent encroachments by the legislature on core executive powers, the Bush OLC consistently invalidated or avoided applying statutes that posed no conflict in a particular factual setting, thereby laying the groundwork for expanded executive action in hypothetical future situations. Finally, many of the Bush OLC's most aggressively pro-executive opinions fell into the suspect third category identified in Section II.C. In offering support for the President's position on highly politicized questions, the Bush OLC frequently resorted to secrecy or *ex post* analysis. Although prior

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139. Joint Resolution Regarding United States Policy Toward Haiti, Pub. L. No. 103-423, 108 Stat. 4358 (1994).

140. See HENDRICKSON, *supra* note 100, at 79-80.

141. See H.R. 3308, 104th Cong. (1996).

142. Placing of United States Armed Forces Under United Nations Operational or Tactical Control, 20 Op. Off. Legal Counsel 182 (1996).

143. See, e.g., Bybee Memorandum, *supra* note 1, at 31.

examples of the OLC's use of secrecy and ex post confirmation of presidential action existed, the Bush OLC transformed both practices into default policies.

By pushing the boundaries of its own well-established traditions, the OLC not only endorsed executive actions that now have been repudiated as contrary to law, but also produced a large number of opinions that were later rejected by the Supreme Court or repealed by the OLC itself, resulting in severe damage to the OLC's reputational integrity.

### A. *Departing from Historical Practice*

Before the war on terrorism, the OLC had issued a substantial body of permissive opinions where authority for particular acts was historically grounded in the President's constitutional powers. Although appearing to draw on the OLC's traditional methods of legal reasoning, the Bush OLC routinely failed to engage in sufficiently detailed explanations of why certain precedential citations were appropriate.<sup>144</sup> In addition, the OLC tended to invoke the President's constitutional powers as sources of authority in highly unconventional and legally problematic contexts.

#### 1. Misuse of Precedent

The most obvious historical model upon which the OLC relied in its post-9/11 opinions was the tradition of making broad appeals to the President's Commander-in-Chief powers in a time of war. Because the OLC had traditionally been protective of executive war powers, these examples were instrumental to its arguments in favor of expanded presidential power. But whether the war paradigm was wholly appropriate to the context of terrorism was less apparent: "[S]ince our nation has been engaged in some form of conflict for about 80 percent of our history," the decision to apply the rules of war warranted careful consideration.<sup>145</sup> On the one hand, the OLC recognized and indeed appealed to the unprecedented character of the U.S. conflict with al-Qaeda;<sup>146</sup> on the other, it routinely treated old rules as readily applicable.<sup>147</sup>

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144. See BRUFF, *supra* note 12, at 129.

145. *Id.*

146. See Bybee Memorandum, *supra* note 1, at 31 ("The situation in which these issues arise is unprecedented in American history.").

147. In one memorandum, for example, the OLC invoked Congress's established inability to constrain the President's tactics against the enemy on a battlefield. It offered no historical support, however, for treating domestic life in the United States as a "battlefield" sufficient to trigger expanded Commander-in-Chief powers. BRUFF, *supra* note 12, at 147 (discussing a classified opinion, the contents of which are described in CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 130-31 (2007)).

The Bush OLC's failure to explain sufficiently the limits of the war powers model allowed it to provide unduly strong support for controversial positions through inconsistent use of wartime precedent. The OLC relied heavily on the analogy to conventional war as a basis for appeals to the inherent powers of the Commander-in-Chief, going so far as to use the preeminence of this model as a basis for denying the application of criminal laws to executive officers conducting their duties in furtherance of the war on terrorism.<sup>148</sup> Alternatively, in an opinion discussing whether treaties to which the United States is a party apply in the conflict against al-Qaeda, the OLC concluded that members of al-Qaeda could not be afforded prisoner-of-war status because their organization was "merely a violent political movement" and therefore not subject to the laws of war.<sup>149</sup> The rules of war were therefore deemed to apply when exonerating executive officials from criminal liability but not when defining the rules of engagement with the enemy.

## 2. Unconventional Use of Inherent Powers To Abrogate International Law

The Bush OLC's conclusory and inconsistent use of doctrinal models also allowed it to derive authority from the President's inherent constitutional powers in circumstances that expressly violated historical precedent. Perhaps most notably, the Bybee Memorandum appealed to the President's Commander-in-Chief power as a basis for authorizing harsh interrogation methods in spite of the legal tradition regarding torture, a conclusion that one former OLC attorney has described as "extreme."<sup>150</sup> Not only was there a lack of historical basis for the OLC's importing criminal law concepts of necessity and self-defense, but this line of argument also expressly conflicted with the official U.S. position that no provision existed in American law that could permit or excuse torture.<sup>151</sup>

Similarly, in treating the Geneva Conventions either as non-self-executing or inapplicable, John Yoo ignored an established U.S. tradition of honoring the law of war and exaggerated the executive's powers as conventionally understood.<sup>152</sup> In one memorandum,<sup>153</sup> Yoo argued that because the Geneva

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148. See Bybee Memorandum, *supra* note 1, at 39-45.

149. BRUFF, *supra* note 12, at 204 (discussing a draft of the memorandum as reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 49, 67 (Karen J. Greenberg & Joshua L. Dratel eds., 2005)).

150. Dawn Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 *UCLA L. REV.* 1559, 1570 (2007).

151. LUBAN, *supra* note 48, at 179 n.60 (citing U.S. DEP'T OF STATE, INITIAL REPORT OF THE UNITED STATES OF AMERICAN TO THE UN COMMITTEE AGAINST TORTURE (1999), available at [http://www.state.gov/www/global/human\\_rights/torture\\_toc99.html](http://www.state.gov/www/global/human_rights/torture_toc99.html)).

152. BRUFF, *supra* note 12, at 202-03.

Conventions did not apply to U.S. conduct with respect to the governments of “failed states,” the U.S. treatment of the Taliban was not subject to the Geneva Conventions.<sup>154</sup> This “failed state” theory, lifted from the academic political science literature, was not grounded in international law or precedent and conflicted with the previously expressed position of the United States and the United Nations.<sup>155</sup> The memorandum also exaggerated the President’s constitutional authority to interpret treaties. Yoo claimed that, because the treaty power is inherently executive, the President has *unlimited* power to interpret treaties.<sup>156</sup> This position lies significantly outside the legal mainstream. Far from assuming unlimited interpretive power for the executive, Professors Eric Posner and Cass Sunstein have argued that the executive should receive *Chevron* deference in interpreting foreign relations law.<sup>157</sup> And even this scaled-back approach to deference is controversial. In response to Posner and Sunstein, Professors Derek Jinks and Neil Katyal have argued that even *Chevron* deference is inappropriate in the case of foreign relations law that operates in an “executive-constraining zone,” since reduced judicial scrutiny risks undermining the rule of law.<sup>158</sup>

Failing to apply international law was decidedly inconsistent with OLC precedent. Rather than dismissing international law at the outset in order to ensure maximum authority for the President under his inherent constitutional powers, the OLC traditionally had been more likely to consult sources of international law to guide executive action in response to a conflict. The OLC’s response to the Iran hostage crisis illustrates this trend. Its opinions during the crisis often demonstrated a priority for determining first whether the executive could derive authority from sources of laws subject to mutual agreement, whether between the United States and its allies or between Congress and the President as achieved through the legislative process. In an important opinion evaluating the President’s ability to place an embargo on satellite communications between Iran and the United States,<sup>159</sup> the OLC began by

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153. Application of Treaties and Laws to Al Qaeda and Taliban Detainees, Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel of the Dep’t of Def. (Jan. 22, 2002) [hereinafter Application of Treaties Memorandum], available at <http://news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf>.

154. BRUFF, *supra* note 12, at 204.

155. *Id.* at 205-06.

156. *Id.* at 147.

157. Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170 (2007).

158. Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1234 (2007).

159. The President’s Authority To Take Certain Actions Relating to Communications from Iran, 4a Op. Off. Legal Counsel 153 (1979).

arguing that the President could interpret the United Nations Charter as providing the power to regulate economic relations between the United States and Iran.<sup>160</sup> It turned next to potential sources of statutory authority. Finally, it addressed inherent constitutional authority as a residual source of power that, in the absence of explicit limits, might provide the President with the authority to take action that would protect American nationals overseas.

Although not all opinions issued during the Iran hostage crisis prioritized international law over abstract constitutional powers, the OLC systematically looked to conventional sources of statutory interpretation, such as legislative history, rather than claiming unlimited interpretive power for the executive. In considering the President's power to expel Iranian diplomatic personnel, the Carter OLC derived this expulsion authority from the President's enumerated Article II, § 3 power to "receive Ambassadors and other Public Ministers," explaining that "[t]he President's power to accept or reject a particular envoy has been beyond serious question since President Washington demanded the recall of Citizen Genet, the French Minister" and citing other historical materials to demonstrate the President's ability to require a diplomat's departure.<sup>161</sup> Having grounded authority for the proposed action in historical precedent, the OLC then considered whether the President's inherent power in the Iran hostage crisis was limited by international law. Supplying evidence from customary practice and the negotiation record, it concluded that the 1961 Vienna Convention on Diplomatic Relations did not pose a conflict with the President's inherent power. This opinion, which accounted for both historical practice and the negotiation of the treaty itself, is in stark contrast to the Bush OLC memoranda, which often avoided considering international treaties according to their terms.<sup>162</sup>

These later, broad appeals to the President's constitutional powers as a means of avoiding U.S. obligations under international law also contrasted with the OLC's earlier tendency to take a particularly expansive view of the President's constitutional powers when such powers would operate in *furtherance* of international cooperation.<sup>163</sup> Under President Clinton, for

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160. See U.N. Charter art. 41 (listing measures that may be employed to give effect to the decisions of the Security Council, including "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication").

161. Presidential Power To Expel Diplomatic Personnel from the United States, 4a Op. Off. Legal Counsel 207, 208-09 (1980).

162. See, e.g., Application of Treaties Memorandum, *supra* note 153 (concluding that the Third Geneva Convention does not apply to al-Qaeda and that the President could suspend U.S. treaty obligations with respect to the Taliban); see also BRUFF, *supra* note 12, at 202 (discussing a draft version of this memorandum).

163. Goldsmith points out that although the "Clinton OLC tended to invoke aggressive presidential military powers primarily for humanitarian rather than security ends," it nevertheless engaged in the assertion of "robust presidential powers." GOLDSMITH, *supra* note 22, at 37.

example, the OLC had argued that Congress's introduction of funding restrictions to prevent the President from placing armed forces under U.N. operational or tactical control unconstitutionally constrained the President's inherent power over diplomatic relations and his inherent powers as Commander-in-Chief.<sup>164</sup> Because the aggressive legacy of the Clinton OLC was, in its own turn, beyond the pale of prior OLC tradition, it is in one sense an inappropriate model for executive action regardless of whether the opinions promoted international law.<sup>165</sup> Still, the Clinton OLC's opinions can at least be viewed as further evidence of the OLC's entrenched tradition of viewing international cooperation as an important responsibility of the executive—a tradition from which the Bush OLC manifestly departed.

In spite of the OLC's consistent claims of reliance on history, the precedents it invoked during the Bush presidency were often ill-suited to the facts at hand.<sup>166</sup> Furthermore, the OLC departed from its substantive tradition in several significant respects, most notably by invoking expanded Commander-in-Chief powers in order to authorize harsh interrogation methods or to abrogate the requirements of international law.

### B. *Disparaging Legislation in the Absence of Encroachment*

As discussed in Section II.B, the OLC traditionally has issued its most aggressively pro-executive opinions when Congress has interfered with the President's ability to exercise authority usually regarded as belonging to the executive. During the George W. Bush Administration, Congress rarely acted to circumscribe the President's power with respect to the terrorist threat after 9/11 and, in fact, passed several laws containing broad authorization of presidential discretion. Rather than relying on legislation as a basis for executive power, however, the OLC often dismissed statutes as unnecessary sources of authority, arguing that the President would have the power to act even in the absence of legislation. By unnecessarily creating constitutional questions—or invoking the constitutional avoidance canon even when the statute at issue in fact represented a broad grant of power to the executive—the Bush OLC effectively

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164. See *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. Off. Legal Counsel 182 (1996).

165. See Neal Katyal & Richard Caplan, *The Surprisingly Stronger Case for the Legality of the NSA Surveillance Program: The FDR Precedent*, 60 STAN. L. REV. 1023, 1063 (2008) (noting that “the fact that other Presidents have engaged in such conduct does not automatically immunize or excuse a current President from doing the same thing. Rather, the pattern of past presidential conduct should be closely analyzed before accepting the precedent”).

166. See, for example, the OLC's conclusory use of the war metaphor to support unlimited executive power in the Bybee Memorandum, *supra* note 1, and its heavy reliance on characterizing Afghanistan as a “failed state” in order to avoid applying the Geneva Convention in the Application of Treaties Memorandum, *supra* note 153153, at 15.

repudiated *Youngstown's* accepted emphasis on congressional authorization as the most important evidence of executive authority. The OLC instead made sweeping claims about the President's authority that were intended to reach beyond specific questions in individual opinions, thereby stripping Congress of its role in maintaining the "equilibrium established by our constitutional system."<sup>167</sup>

During most of President Bush's time in office, Congress was dominated by the President's party and was generally deferential to the President on matters of war and national security. Soon after 9/11, Congress showed its eagerness to work with the President by passing the Authorization for the Use of Military Force (AUMF), which authorized the President to use military force "against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by any such nations, organizations, or persons."<sup>168</sup> Congress continued to support the Bush Administration's policies related to the war on terrorism for several years. After the Supreme Court invalidated the Administration's detainee policy in *Rasul v. Bush*<sup>169</sup> and *Hamdi v. Rumsfeld*,<sup>170</sup> Congress responded by passing the Detainee Treatment Act of 2005 (DTA), which imposed sharp restrictions on judicial review of the government's decisions regarding the "propriety of detention" for individual detainees.<sup>171</sup> In 2006, Congress once again demonstrated support for the President's detainee policy by passing the Military Commissions Act of 2006 (MCA),<sup>172</sup> which considerably narrowed the scope of the existing torture statute.<sup>173</sup> Indeed, the Supreme Court's subsequent use of the Suspension Clause in *Boumediene v. Bush*<sup>174</sup> to invalidate the MCA's restrictions on judicial review demonstrates the degree to which Congress's position on terrorism policy was permissive of executive discretion.

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167. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring).

168. Pub. L. No. 107-40, 115 Stat. 224 (2001).

169. 542 U.S. 466 (2004) (recognizing, under the habeas statute in effect at the time, the right of foreign nationals held at Guantánamo Bay to invoke the writ of habeas corpus).

170. 542 U.S. 507 (2004) (recognizing due process rights for U.S. citizens detained as enemy combatants).

171. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739, 2742.

172. Pub. L. No. 109-366, 120 Stat. 2600 (2006).

173. See War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (codified as amended at 18 U.S.C. § 2401 (2006)).

174. 128 S. Ct. 2229 (2008) (holding that the MCA's provision denying federal courts jurisdiction to hear habeas corpus actions pending at the time of its enactment effected an unconstitutional suspension of habeas corpus).

Despite Congress's amenability toward the Administration's exercise of broad security-related powers, the Bush OLC consistently declined to acknowledge that Congress could limit the President's actions in the realm of war powers or foreign affairs in any way. After the Supreme Court granted certiorari in *Hamdi* in 2004,<sup>175</sup> Assistant Attorney General Jack Goldsmith asked the Vice President's Chief of Staff, David Addington, why the President could not simply "go to Congress and get it to sign off on the whole detention program."<sup>176</sup> Addington responded by asking: "Why are you trying to give away the President's power?"<sup>177</sup> This view of congressional authorization as restrictive and unnecessary appears to have shaped the OLC's post-9/11 opinions.

Soon after 9/11 and immediately following Congress's hasty grant of power through the AUMF, the OLC began issuing opinions that either raised constitutional doubts about or narrowly construed statutes relating to war powers or foreign relations. Certainly the OLC had previously taken a broad view of the Commander-in-Chief's powers. In his memorandum discussing the President's power to use military force in response to the 9/11 attacks, John Yoo cited multiple OLC opinions that had endorsed the President's unilateral use of force, including two issued under President Clinton.<sup>178</sup> But the Bush OLC claimed greater plenary power for the President in the context of foreign policy, even in cases where Congress had issued permissive legislation. Rather than looking first to sources of treaty and statutory authority while keeping open the possibility of appealing to the Constitution in residual cases—as President Carter's OLC had done in response to the Iran hostage crisis—the Bush OLC denied Congress's role in deciding questions of war powers or foreign affairs.

In determining the President's ability to respond to 9/11 using military force, the OLC dismissed the AUMF as unable to "place *any* limits on the President's determinations as to . . . the amount of military force to be used"; it claimed that "[t]hese decisions, under our Constitution, are for the President alone to make."<sup>179</sup> Similarly, although Congress likely would have been willing to authorize a domestic surveillance program, the OLC's classified memorandum *Authority for Use of Military Force To Combat Terrorist Activities Within the United States* concluded that Congress could not intrude if the President decided to impose a surveillance program on domestic communications.<sup>180</sup> Numerous commentators have objected to such expansive conclusions as negating Congress's enumerated constitutional powers in the

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175. See *Hamdi v. Rumsfeld*, cert. granted, 540 U.S. 1099 (2004).

176. GOLDSMITH, *supra* note 22, at 124.

177. *Id.*

178. Military Operations Memorandum, *supra* note 21, at 8-9.

179. *Id.* at 19.

180. BRUFF, *supra* note 12, at 148.

realm of war and national security.<sup>181</sup> Congress had already granted power to retaliate against al-Qaeda and probably would have extended authority in other contexts, yet the OLC focused instead on expanding the scope of the President's freestanding constitutional powers.

Beyond its dismissal of statutes that might be used to limit the President's power, President Bush's OLC relied heavily on the constitutional avoidance canon—according to which ambiguous statutes should be construed to avoid constitutional questions—to sidestep applying inconvenient statutes. The Bybee Memorandum notoriously avoided the important question of how far-reaching the President's war powers might be simply by stating that the constitutional avoidance canon is particularly strong in the context of the Commander-in-Chief power. The memorandum thus concluded that the domestic torture statute must be construed as not limiting the President's powers to determine interrogation policy.<sup>182</sup> As discussed previously,<sup>183</sup> the OLC did have an established tradition of narrowly construing statutes to avoid constraining the President's ability to act in situations implicating the exercise of core executive powers. But the OLC's post-9/11 approach conflicts with the conclusion of some prominent scholars that blanket appeals to the Commander-in-Chief power are inappropriate where Congress has “extensively grappled with the constitutional question in the legislative process” and “crafted [a] statute specifically in order to preclude the President from invoking a constitutional authority.”<sup>184</sup>

### C. *Pro-Executive Opinions Addressing Politicized Questions*

As discussed in Section II.C, the OLC prior to the George W. Bush Administration had sometimes issued secret or ex post pro-executive opinions to support politicized policies important to the President's agenda. Probably because of their potential to invite unwanted political controversy, such opinions appear to have been rare. In contrast to previous administrations, the Bush OLC habitually employed both approaches.

It is in one sense difficult to determine whether the Bush OLC's heavy reliance on secrecy and after-the-fact opinion-writing constituted a departure from tradition, since the Bush OLC arguably opined on more issues for which these approaches might have made sense. As John Yoo has pointed out: “These decisions were controversial because the events of 9/11 itself were

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181. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (“Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”); see also BRUFF, *supra* note 12, at 135; Johnsen, *supra* note 150, at 1568.

182. BRUFF, *supra* note 12, at 245-46.

183. See *supra* Part II.

184. David Cole & Martin S. Lederman, *The National Security Agency's Domestic Spying Program: Framing the Debate*, 81 IND. L.J. 1355, 1357 (2006).

unprecedented . . . .”<sup>185</sup> Because the ethical and reputational risks discussed in Section II.C were particularly high in the context of the war on terrorism, however, these opinions merited especially careful scrutiny. This consideration appears to have motivated the Carter Administration’s response to the Iran hostage crisis. In 1980, the OLC issued two volumes of published opinions rather than its usual one volume, the first of which was almost entirely composed of memoranda relating to the President’s legal options in responding to the crisis.<sup>186</sup> The President’s communications with the OLC on particular issues were carefully iterative.<sup>187</sup> And the OLC’s opinions routinely considered the strength of authority provided by all relevant sources of law<sup>188</sup> as well as identifying the legal boundaries of the executive power at issue.<sup>189</sup> Although the

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185. JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR*, at vii (2006).

186. *See* 4a Op. Off. Legal Counsel 71-330 (1980).

187. Immediately after the start of the crisis, the OLC issued a memorandum outlining a range of potential actions the President could take. *Presidential Powers Relating to the Situation in Iran*, 4a Op. Off. Legal Counsel 115 (1979). Over the next year, the OLC would revisit many of these solutions in more detail. *See*, for example, its expanded analysis of the President’s authority with respect to Iranian diplomats in *Supplementary Discussion of the President’s Powers Relating to the Seizure of the American Embassy in Iran*, 4a Op. Off. Legal Counsel 123 (1979); *Presidential Power Concerning Diplomatic Agents and Staff of the Iranian Mission*, 4a Op. Off. Legal Counsel 174 (1980); and *Presidential Power to Expel Diplomatic Personnel from the United States*, 4a Op. Off. Legal Counsel 207 (1980).

188. *See, e.g.*, *The President’s Authority To Take Certain Actions Relating to Communications from Iran*, 4a Op. Off. Legal Counsel 153 (1980) (considering authorization under United Nations Charter art. 41 and the International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1625 (1977) (codified as amended at 50 U.S.C. §§ 1701-1707 (2006)) (authorizing the President to use such means as he deems “necessary and proper” to effect the release of American citizens held by a foreign government, identified by the OLC as providing the “best” source of authority)); *see also* *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

189. *See, e.g.*, *Legality of Certain Nonmilitary Actions Against Iran*, 4a Op. Off. Legal Counsel 223 (1980) (concluding that although the President had statutory power to impose a ban on travel by American citizens to Iran, his authority was limited with respect to journalists); *Presidential Power Concerning Diplomatic Agents and Staff of the Iranian Mission*, 4a Op. Off. Legal Counsel 174 (1980) (concluding that although there was some basis in law for criminal jurisdiction over Iranian diplomats, the contested nature of the legal support counseled against the exercise of jurisdiction); *The President’s Authority To Take Certain Actions Relating to Communications from Iran*, 4a Op. Off. Legal Counsel 153 (1980) (concluding that although the President had statutory and constitutional authority to limit satellite communications from Iran, his authority was limited by the First Amendment).

events of 9/11 were unprecedented, the OLC's use of interpretive restraint in identifying legal solutions to a national crisis was not.

### 1. Secrecy as Default

The problem of “opacity” has existed at the OLC for decades.<sup>190</sup> Indeed, Attorney General Griffin Bell recognized the importance of increasing the transparency of executive branch legal reasoning in 1977 when he began the practice of publishing selected opinions. The OLC's failure to publish many of its opinions has occasionally led to illegal executive actions<sup>191</sup> or resulted in reputational embarrassment for the OLC.<sup>192</sup> Opacity at the OLC reached new heights during the Bush Administration<sup>193</sup> when, beyond failing to publish its legal opinions, it routinely “limit[ed] readership of controversial legal opinions to a very small group of lawyers.”<sup>194</sup>

Goldsmith reports that the Bybee Memorandum was not shared even with the State Department for the express reason that it would have “strenuously objected.”<sup>195</sup> This account of OLC practice resembles the issuing of a secret opinion to support the government's position while *Alvarez-Machain* was pending in the Supreme Court. Although Assistant Attorney General William Barr testified before Congress that the President could legally override customary international law in this case, the OLC refused to release the opinion supporting this conclusion, thereby “[leaving] outsiders with no way to tell whether it rested on [legitimate] factual assumptions . . . or whether the overruling opinion contained nuances, subtleties, or exceptions that Barr's . . . testimony simply omitted.”<sup>196</sup> The OLC apparently attempted to shield the executive from liability by avoiding exposing the facts of the opinion to public review.<sup>197</sup> Similarly, the Bush OLC employed an express policy of secrecy to avoid legal challenges to the President's actions. In the absence of any check on its legal analysis, whether by other legal advisers in the executive branch or by the public at large, the Bush OLC's extensive policy of secrecy was ethically

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190. Koh, *supra* note 15, at 515.

191. *See, e.g., id.* at 517-20 (discussing the U.S. government's official kidnapping of a criminal suspect from Mexico in violation of a United States-Mexico extradition treaty); *see also supra* Subsection II.C.1 (discussing President Carter's introduction of the PIAP through executive order).

192. *See supra* Section II.C.

193. Dawn Johnsen, a former OLC attorney, has called the secrecy in which the OLC's operations were conducted during the Bush Administration “extraordinary.” *See* Johnsen, *supra* note 150, at 1599.

194. GOLDSMITH, *supra* note 22, at 167.

195. *Id.*

196. Koh, *supra* note 15, at 518-19.

197. *See supra* Subsection II.C.1.

problematic. Further, because the Bush OLC's secrecy was more extensive than in previous administrations, the policy resulted in a more significant expenditure of reputational capital when the opinions finally were made public. The poor quality of the legal analysis in the Bybee Memorandum ultimately led Jack Goldsmith, when serving as Assistant Attorney General, to retract the opinion during the tenure of the same President for whom it had been written—an event with apparently no precedent.<sup>198</sup> When the opinion was finally leaked, public outcry forced Attorney General Alberto Gonzales to repudiate the opinion.<sup>199</sup>

## 2. Exculpation for Completed or Continuing Acts

The Bush OLC issued several ex post opinions validating policies that were already in place—a practice that had been rare in the past and that had usually produced trenchant objections from the public.<sup>200</sup> As Congress was considering the DTA, the OLC issued an opinion concluding that the bill would not require any change in the CIA's practices.<sup>201</sup> As Harold Bruff points out, a contrary conclusion would have meant that systemic practices had consistently violated international and even domestic law.<sup>202</sup> The OLC apparently interpreted the DTA to ensure that previously committed actions were not classified later as illegal. Acting Assistant Attorney General Daniel Levin's replacement for the Bybee Memorandum can be viewed as similarly exculpatory.<sup>203</sup> Although Levin's analysis is widely regarded as a more accurate construction of the federal torture statute, his memorandum is also generally understood not to disturb the Bybee Memorandum's ultimate conclusions about the scope of the DTA.<sup>204</sup>

The ethical problem in these cases can be viewed as implicating two activities: vetting and continuation. Walter Dellinger's letter to Congress after President Clinton's Haiti troop deployment serves as a useful point of comparison. First, President Clinton's use of U.S. armed forces in Haiti had the

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198. See GOLDSMITH, *supra* note 22, at 146.

199. See John W. Dean, *The Torture Memo by Judge Jay S. Bybee that Haunted Alberto Gonzales's Confirmation Hearings*, FINDLAW, Jan. 14, 2005, <http://writ.news.findlaw.com/dean/20050114.html>.

200. See *supra* Section II.C.

201. BRUFF, *supra* note 12, at 256-57.

202. *Id.*

203. See Replacement Memorandum, *supra* note 42.

204. See Johnsen, *supra* note 150, at 1573 ("The definition of torture remains extremely narrow, and a footnote reassures recipients of earlier OLC advice—namely, the CIA—that the changes in analysis and tone do not affect the bottom line."); see also LUBAN, *supra* note 48, at 180 (describing the changes as "cosmetic").

prior support of the United Nations.<sup>205</sup> In the same way that the Carter OLC's communication with other executive agencies prior to endorsing the PIAP provided at least some opportunity for a democratic check, President Clinton's communication with other nations provided an opportunity for vetting the proposed action. In the case of the Bush Administration's interrogation policy, however, writing *ex post* opinions involved the validation of interrogation policies that had been reviewed by very few people beforehand. Second, although sending troops often entails a continuing commitment, President Clinton's legally controversial act was completed upon deployment and could be debated at leisure in Congress or in the courts, regardless of the OLC's *ex post* legality determination. The Bush Administration's interrogation policy, in contrast, had been in operation for almost four years before Congress began considering the DTA. As a result, many prior actions by many people—including actions still occurring as the bill was pending—could potentially be declared illegal.<sup>206</sup> The OLC therefore was forced to try manipulating the legislative process by interpreting the bill in a manner that would protect active government officers from potential liability.

The Bush OLC's unique policy of secrecy can be understood as creating a systemic risk of "lock-in."<sup>207</sup> By keeping its opinions on interrogation policy secret, the OLC foreclosed any *ex ante* opportunity for public review and approved the implementation of legally suspect policies. When these policies came to light and their legality was questioned, the OLC effectively was locked into protecting the government employees who had relied on their prior opinions and was compelled to issue additional legally suspect interpretations of pending laws.

#### D. *Overruling and Retraction*

The Bush OLC appears to have been extraordinarily willing "simply to legitimate the policy preferences of the administration of which it is a part," a role that several former OLC attorneys have identified as impermissible.<sup>208</sup> Similarly, David Luban has described the torture memos as "advocacy briefs" rather than permissible legal advice.<sup>209</sup> He explains that the Bybee Memorandum in particular "merely goes through the motions of legal

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205. See HENDRICKSON, *supra* note 100, at 51.

206. See GOLDSMITH, *supra* note 22, at 152 ("[W]ithdrawing the opinions would be unfair to the men and women who had engaged in dangerous and controversial actions in reliance on OLC's blessing, and who might view the withdrawal of the opinions as a treacherous first step in a Justice Department effort to hold them legally responsible for past acts.").

207. See Koh, *supra* note 15, at 515.

208. Principles To Guide OLC, *supra* note 61.

209. See LUBAN, *supra* note 48, at 198.

argument,<sup>210</sup> ignoring obvious counterarguments, failing to mention adverse authorities, and citing conventional sources of law in unconventional ways. Such willingness to find ostensibly legal means to reach preordained policy conclusions ultimately resulted in executive action that provoked hostile reactions from the Court and the public and resulted in the largest number of retractions of OLC opinions ever to emerge from a single presidency.<sup>211</sup>

### 1. Contrary Positions of Congress and the Supreme Court

The most dramatic legal invalidation of an OLC-supported executive action at the Supreme Court came in the 2006 *Hamdan v. Rumsfeld* decision.<sup>212</sup> In the November 6, 2001, opinion *Legality of the Use of Military Commissions To Try Terrorists*,<sup>213</sup> the OLC had concluded that the President possessed “inherent authority under the Constitution, as Chief Executive and Commander-in-Chief of the Armed Forces . . . to establish military commissions to try and punish terrorists captured in connection with the attacks of September 11 or in connection with U.S. military operations in response to those attacks.”<sup>214</sup> The OLC relied almost entirely on *Ex Parte Quirin*,<sup>215</sup> in which the Court held that “Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law.”<sup>216</sup> The OLC argued further that the President’s authority to establish military commissions could be derived from the Uniform Code of Military Justice (UCMJ), but that, even without statutory authority, he possessed inherent power as the Chief Executive. In *Hamdan*, however, the Supreme Court held not only that the Bush Administration’s military tribunals in fact *violated* the UCMJ, but also that they were illegal under the Geneva Conventions.<sup>217</sup>

The sequence of congressional and judicial responses to the Administration’s interrogation practices was somewhat more complicated. In the Bybee Memorandum, John Yoo had concluded that behavior defined under international law as “cruel, inhuman, and degrading” punishment (CID) was

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210. *Id.*

211. GOLDSMITH, *supra* note 22, at 146.

212. 548 U.S. 557 (2006).

213. Military Commissions Memorandum, *supra* note 23.

214. *Id.*

215. 317 U.S. 1 (1942).

216. Military Commissions Memorandum, *supra* note 23, at 5 (citing *Quirin*, 317 U.S. at 30 (emphasis added by the OLC)).

217. *Hamdan*, 548 U.S. at 560. Similarly, the Court held in *Rasul v. Bush*, 542 U.S. 466 (2004), that habeas corpus extended to prisoners at Guantánamo and in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), that the government must provide a citizen it seeks to imprison as an “enemy combatant” with an opportunity to challenge the detention before a neutral decision-maker.

not torture, and it therefore did not violate the U.S. torture statute.<sup>218</sup> The leak of this memo in 2004 helped spur Congress's 2005 passage of the DTA, which declared that "[n]o individual in the custody or under the physical control of the United States Government" would be subject to CID.<sup>219</sup> The Supreme Court expressed similar concerns about the Administration's OLC-sanctioned interrogation methods in *Hamdan* by holding, contrary to the OLC's view, that the prohibitions against "cruel treatment and torture" and "humiliating and degrading treatment"<sup>220</sup> in Article 3 of the Geneva Convention applied to al-Qaeda.<sup>221</sup> Partly in response to *Hamdan*, Congress passed the 2006 MCA limiting the application of Article 3,<sup>222</sup> though its passage reflected serious executive lobbying to limit legislative restrictions on interrogation techniques. Congress's iterative rejection of CID coupled with the Supreme Court's emphasis on Article 3 suggest that the office was not "on the bell curve"<sup>223</sup> of legal interpretation on this issue.

The OLC's heavy reliance on the President's inherent powers to the exclusion of other sources of authority partially accounts for why the other branches reached conclusions that either invalidated or threatened executive policy. In contrast to the Bush OLC's approach to the war on terrorism, the Carter OLC's approach to the Iran hostage crisis involved a careful commitment to invoking the President's Article II powers only when constitutional authority was supported by other legal authorities, either treaty-based or statutory. In October 1980, the OLC issued an opinion concluding that the International Emergency Economic Powers Act,<sup>224</sup> as supported by the President's inherent constitutional power over foreign relations, authorized him to reach a settlement that would extinguish all judicial claims against Iran.<sup>225</sup> In *Dames & Moore v. Regan*, the Supreme Court held that because Congress specifically authorized President Carter's nullification of claims involving Iranian assets, such action was "supported by the strongest presumptions and

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218. Bybee Memorandum, *supra* note 1, at 27-29.

219. Pub. L. No. 109-148, § 1003, 119 Stat. 2739 (2005). It was this provision that caused the OLC to produce the opinion concluding that the DTA would not require the CIA to change any of its practices. This conclusion effectively meant that no interrogation methods currently in use would be classified as CID. *See* BRUFF, *supra* note 12, at 256-57.

220. Geneva Convention Relative to the Treatment of Prisoners at War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

221. *Hamdan*, 548 U.S. at 561.

222. Pub. L. No. 109-366, 120 Stat. 2600 (2006).

223. LUBAN, *supra* note 48.

224. Pub. L. No. 95-223, 91 Stat. 1625 (1977) (codified as amended at 50 U.S.C. §§ 1701-1707 (2006)).

225. Presidential Authority To Settle Claims of the Hostages and Their Families, 4b Op. Off. Legal Counsel 236 (1980).

the widest latitude of judicial interpretation” under *Youngstown*.<sup>226</sup> Furthermore, the Court extrapolated from the “character” of legislation “which Congress has enacted in the area of the President’s authority to deal with international crises” that the President was authorized to suspend the claims at issue.<sup>227</sup> In contrast to *Hamdan*, where the Court reached a conclusion opposite to that reached by the OLC, the Court’s analysis in *Dames & Moore* was substantially the same as the reasoning the OLC had provided to the President. Although there is scholarly disagreement about how much the OLC should defer to the probable resolution of an issue in the Supreme Court,<sup>228</sup> this comparison nevertheless demonstrates that the Bush OLC was sharply out of line with tradition in its routine failure to anticipate the Court’s response, even if it would not have deferred to it. This departure, moreover, resulted in a high number of conflicts with the other branches about international relations and national security-related policies.

## 2. Withdrawal of the OLC’s Opinions

The OLC’s production of brief-like opinions provoked negative responses from Congress and the Supreme Court, along with the withdrawal of many such opinions by the OLC itself. Assistant Attorney General Jack Goldsmith, “despite [OLC’s] superstrong stare decisis presumption,” first decided to withdraw two torture-related opinions for their “errors of statutory interpretation,” their “unusual lack of care and sobriety in their legal analysis,” their “tendentious tone,” and the fact that they were “wildly broader than was necessary to support what was actually being done.”<sup>229</sup> In addition, the Obama OLC withdrew five more opinions regarding CIA interrogation methods during President Obama’s first five months in office.<sup>230</sup> These numerous retractions, especially when viewed in conjunction with judicial invalidation of executive policies, represent a severe curtailment of the OLC’s tradition of stare decisis. The Bush OLC therefore politicized the OLC in a way that will imperil future

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226. 453 U.S. 654, 656 (1981) (internal quotation mark omitted).

227. *Id.*

228. See, e.g., Kmiec, *supra* note 11, at 361-62 (explaining that there are two modes the OLC can use to counsel against executive action: flagging risks of adverse litigation and objectively declaring an action unconstitutional).

229. See GOLDSMITH, *supra* note 22, at 146-50.

230. See Withdrawal of Office of Legal Counsel CIA Interrogation Opinions, Memorandum from David J. Barron, Acting Assistant Attorney Gen., to Eric Holder, Attorney Gen. (April 15, 2009) (withdrawing four opinions concerning CIA interrogations), available at <http://www.justice.gov/olc/2009/withdrawalofficelegalcounsel.pdf>; Memorandum from David J. Barron, Acting Assistant Attorney Gen., to Eric Holder, Attorney Gen. (June 11, 2009) (withdrawing an additional opinion), available at <http://www.justice.gov/olc/2009/memo-barron2009.pdf>.

reform. Because the opinions themselves were controversial, either a President Obama or a President McCain faced a difficult choice. Repealing them might reflect a political repudiation of the previous Administration and would further damage the OLC tradition of *stare decisis*; failing to repeal them, however, would allow opinions that were both legally and politically problematic to remain on the books with potential precedential effect. The Obama OLC chose the legally correct option, but the resulting dissipation of the OLC's reputation as an objective advisor—as the “oracle” of executive legal interpretation<sup>231</sup>—may change the character of OLC opinions as binding within the executive branch. If the weight of OLC opinions is diminished, the office will be nothing more than another collective private counsel for the President, whose advice may be less well-regarded or followed than that of the White House Counsel.

## CONCLUSION

An analysis of the OLC's pro-executive tradition lends weight to Eric Posner and Adrian Vermeule's criticism of the view that the OLC's role is merely to “supply ‘disinterested’ advice.”<sup>232</sup> The OLC has traditionally adopted an expansive view of executive power in contexts implicating “core” executive powers, particularly when these powers are subject to encroachment by the legislature. The claim that the Bush OLC simply continued the office's traditionally pro-executive posture, however, is a dramatic oversimplification. The Bush OLC invoked the President's inherent constitutional powers to support executive action in historically unconventional and legally problematic contexts, while manifesting qualities that have been viewed as OLC failures to an unprecedented degree. The Bush OLC's systemic opacity and routine *ex post* use of the opinion function drew the OLC into repeated interbranch conflicts and ultimately undermined its own commitment to *stare decisis*. This transformation has created a dilemma for future administrations, which will bear the burden of trying to restore the OLC's reputational capital. Until the OLC's reputation is restored, the office may lose much of its relevancy as an objective voice in the executive branch, and, accordingly, much of its usefulness to the President as a source of sound legal advice.

The Bush OLC opinions also left the current Administration, as well as future ones, with important questions about the ethical, professional, and institutional responsibilities of government lawyers. The Obama OLC's withdrawal of several opinions was an implicit statement about the professional incompetence of the attorneys who produced them. In failing to release the opinions themselves or to explain why they were wrong, however, it avoided substantive ethical questions about the legal analysis. From an institutional standpoint, this decision may have been a good one, since it necessarily limited the political debate; on the other hand, restoring the OLC's reputation both

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231. See McGinnis, *supra* note 12, at 428.

232. See Posner & Vermeule, *supra* note 17.

within the government and among the public requires more than depoliticization. It also requires reassurance that the office is capable of maintaining ethical behavior—something the Obama OLC will be unable to provide without demonstrating its own ethical competency.

In spite of its decision not to release the repealed opinions or to engage with their reasoning, the Obama OLC appears generally to have demonstrated commendable transparency, a trend that will be important to proving its ethical and professional integrity and ultimately to restoring the office's reputation.<sup>233</sup> Attorney General Eric Holder's decision to release all prior drafts of the OPR report on the Yoo and Bybee memoranda also was helpful in this regard.<sup>234</sup> On the other hand, the Justice Department's decision not to refer Yoo and Bybee for disciplinary action by the bar confuses the question of exactly what the Obama Administration takes the role of government lawyers to be. This is a longstanding and difficult question and one that is particularly pressing for this Administration. Procedurally, the Administration's increased transparency is an important component of restoring the professional, ethical, and institutional integrity of the OLC. In order to restore its role going forward, the Obama OLC should also align itself with the OLC's substantive traditions of respect for historical precedent, commitment to considering all relevant legal authorities, and a willingness to delimit the legal boundaries of executive authority.

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233. Berkeley public policy professor John Ellwood has described the Obama OLC's publication of its opinions—sometimes within less than two months—as occurring at “breakneck speed” compared with historical publication periods of a year or more. *New Opinions from the Office of Legal Counsel*, Posting of John Ellwood to Volokh Conspiracy, [http://volokh.com/posts/chain\\_1251168446.shtml](http://volokh.com/posts/chain_1251168446.shtml) (Aug. 24, 2009, 22:47 EDT).

234. For copies of these released memoranda, see U.S. HOUSE OF REPRESENTATIVES, COMM. ON THE JUDICIARY, DOJ REPORT ON BUSH ADMINISTRATION INTERROGATION MEMOS AND RELATED DOCUMENTS (2009), available at [http://judiciary.house.gov/issues/issues\\_OPRReport.html](http://judiciary.house.gov/issues/issues_OPRReport.html).