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Institutional Advocacy, Constitutional Obligations, and Professional Responsibilities: Arguments for Government Lawyering without Glasses

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INSTITUTIONAL ADVOCACY, CONSTITUTIONAL OBLIGATIONS, AND PROFESSIONAL RESPONSIBILITIES: ARGUMENTS FOR GOVERNMENT LAWYERING WITHOUT GLASSES

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Response to: Trevor W. Morrison, Stare Decisis in the Office of Legal Counsel, 110 Colum. L. Rev. 1448 (2010).

In *Stare Decisis in the Office of Legal Counsel*, Trevor Morrison provides valuable insights into the work of the Office of Legal Counsel (OLC) that scholars examining executive power or practice should thoroughly consider.[1] His previous work, *Constitutional Avoidance in the Executive Branch*, is required reading for those studying constitutional avoidance doctrine generally, or its use in the executive branch specifically.[2] In this latest effort, Professor Morrison empirically demonstrates that OLC legal opinions serve as a form of binding precedent for that office, and posits that there are many good reasons for giving those opinions stare decisis effect.[3]

As Professor Morrison recounts, the idea that Attorney General opinions, and by extension those of the OLC, should be treated as a form of binding precedent is an old one.[4] Professor Morrison's

* Assistant Professor, United States Military Academy, and J.S.D. candidate, Columbia Law School. I thank Trevor Morrison, Mark Welton, Dan Rice, Rich Meyer, Tim Bakken, and particularly Colonel Jody Prescott for their insights and advice, as well as Philip Kehl for his excellent editorial assistance. Any remaining errors are my sole responsibility. A West Point graduate, I have served for over 20 years in the Army in various capacities as a commissioned officer, almost 13 of those years as a military lawyer or judge advocate. The views presented here are mine and do not necessarily reflect those of the Department of Defense, U.S. Army, U.S. Military Academy, or any other government department or agency.

1. Trevor W. Morrison, Stare Decisis in the Office of Legal Counsel, 110 Colum. L. Rev. 1448 (2010) [hereinafter Morrison, Stare Decisis].

2. Trevor W. Morrison, Constitutional Avoidance in the Executive Branch, 106 Colum. L. Rev. 1189 (2006) [hereinafter Morrison, Avoidance].

3. Morrison, Stare Decisis, supra note 1, at 1455.

4. Id. at 1470–74 (discussing views of many nineteenth-century Attorneys General in favor of adhering to prior Attorney General opinions).

descriptive empirical examination provides a deeper understanding of the publicly available factors influencing precedential adherence in the OLC.[5] His normative theoretical inquiry marshals an abundance of prudential arguments in favor of the practice of adhering to such institutional "precedent," while proposing limited reasons for "overruling" precedent and further echoing the call for increased public disclosure of OLC's work.[6] Ultimately, Professor Morrison argues that while "'differences in approach' from one head of OLC to the next are insufficient to support a departure from precedent," differences in approach from one President to the next may, so long as the decision to depart from precedent is publicly disclosed.[7] "Differences in approach," in this context, appear to be differences in opinion on discrete legal issues.

This response addresses only the normative theoretical inquiry and makes one essential point: Professor Morrison's analysis relies heavily upon institutional considerations and potentially problematic OLC perceptions of its role. He does not consider, and therefore potentially undervalues, the proper effect of an OLC attorney's individual ethical and legal obligations. Potentially problematic OLC practices include its identification of the opinion-requesting agency—the President and/or the executive branch—as the client.[8] This causes OLC, in Morrison's words, to view the law "through a particular lens," and not to give "*the* best view [of the law]" but "*OLC's* best view of the law."[9] Other institutional considerations, such as OLC's legitimacy within the executive branch,[10] may also cause OLC to misidentify or to over-identify with its client(s). These factors may generate consistent, executive-friendly error in OLC legal opinions. Such error diminishes the interpretive value of OLC precedent, and thereby the propriety of applying judicial stare decisis principles to OLC legal opinions.

This response briefly introduces how overvaluing executive branch institutional interests and undervaluing individual obligations might detract from Professor Morrison's normative analysis. There are two principle sources of individual obligations: constitutional and ethical. First, all officers of the federal government are constitutionally obligated to swear an oath, not to the branch, department, office, or official that they serve or advise, but to "support" the Constitution.[11] Subordinate

5. Id. at 1479–92 (identifying and analyzing factors influencing precedential adherence in OLC).

6. Id. at Part III.

7. Id. at 1525.

8. See infra Part I (noting evidence of OLC's tendency toward over-identification with executive branch institutional interests and suggesting weaker attitude toward OLC precedent might counter consequences of this tendency).

9. Morrison, Stare Decisis, supra note 1, at 1456.

10. See id. at 1496–97 (arguing credibility gains from adhering to precedent rather than will of clients).

11. U.S. Const. art. VI, cl. 3 ("[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .").

government officials are required to take such oaths by statute.[12] Additionally, the executive's obligations to "preserve, protect and defend the Constitution of the United States"[13] and to "take Care that the laws be faithfully executed"[14] also devolve upon subordinate executive branch officials.[15] Finally, all government attorneys, including Department of Justice attorneys,[16] have an ethical responsibility stemming from federal statutes[17] and their licensing authority's codes of professional conduct to give independent, competent, and candid advice.[18] While further analysis of the effect of these obligations in this context is needed, I here outline concerns that might support removing the "lens" from OLC's view of both the law and its precedent. The natural tendency of this lens is to distort OLC's legal analysis. This tendency counsels against observing stare decisis in the OLC.

It is important to note that while the theoretical space between Professor Morrison's position regarding stare decisis in the OLC and mine is large, the practical differences in our views regarding the value of OLC precedent is unclear and certainly narrower. In the end, our differences may be more about the general attitude or obligations of an OLC or government lawyer toward institutional precedent than the particulars of whether and when to "overrule," distinguish, or modify it.

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12. See 5 U.S.C. § 3331 (2006) (prescribing oath for civil servants and uniformed services to "support and defend the Constitution of the United States against all enemies, foreign and domestic" and to "bear true faith and allegiance to the same"); 28 U.S.C. § 544 (2006) (requiring Department of Justice attorneys to swear oath to faithfully execute their duties). I will not here address the legal distinction between "officers" of the U.S. government and other subordinate officials.

13. U.S. Const. art. II, § 1, cl. 8.

14. U.S. Const. art. II, § 3.

15. See infra Part II (discussing extent to which individual constitutional oaths of OLC or other executive branch officials relate to executive branch's constitutional obligations).

16. See 28 C.F.R. § 77.2 (2010) (implementing 28 U.S.C. § 530B and providing that "attorney for the government" includes "any attorney employed in . . . a Department of Justice agency").

17. See, e.g., 28 U.S.C. § 530B ("An attorney for the Government shall be subject to State laws and rules . . . .").

18. See, e.g., Model Rules of Prof'l Conduct R. 1.1 (2010) (regarding duty of competence); id. R. 2.1 (candid advice); id. R. 5.4 (professional independence). This was the conclusion of the Justice Department's Office of Professional Responsibility when investigating what have been called the torture memoranda. See Office of Prof'l Responsibility, U.S. Dep't of Justice, Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists 24 (2009) [hereinafter OPR Report], available at http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf (on file with the *Columbia Law Review*) (requiring attorneys who drafted and reviewed torture memoranda to meet "the minimum standards of independent professional judgment, candid advice, thoroughness, and care").

I. INSTITUTIONAL ADVOCACY AND THE RISK OF CLIENT OVER-IDENTIFICATION

In practicing the craft of government lawyering, an attorney must be acutely aware of the risk of over-identification with the client or institution that she advises, as well as the potential for misidentification of the client. In the worst case, a lawyer might over-indentify with a misidentified client. This Part briefly notes evidence of OLC's tendency to over-identify with executive branch institutional interests, and how the potential consequences of that executive-friendly tendency might be countered by adopting a weaker attitude toward OLC precedent.

Professor Morrison's description of OLC's practices is quite familiar to me and, I suspect, to many government attorneys. In my experience as an Army lawyer, or "judge advocate," almost every office providing advice to a major military command element, from an Army division or installation to the Department of the Army, maintained precedential or historical files. Requests for legal opinions prompted a review of these files for similar or related requests and the opinions issued. If the particular office had previously issued a relevant opinion, it was considered authoritative, not necessarily "binding."

Disagreement with a prior opinion prompted a reexamination of its legal rationale. Minor errors were usually corrected without review. Any decision to significantly alter or repudiate a prior opinion required an appropriate level of review and approval. Although this review was almost always necessary when a change would counsel against action that a previous opinion had permitted, simple legal error in the prior opinion was *usually* sufficient to "overrule" it. Of course, the willingness to supersede erroneous opinions and the manner by which such decisions were communicated depended very much upon the personalities of individual supervisory attorneys and the anticipated response from the opinion-requesting entity. Unlike OLC, military lawyers and legal offices are dispersed worldwide, which substantially hinders development of a homogeneous understanding of institutional precedent or an empirical examination of how it is treated.

A primary reason for adhering to "precedent" in the Army, as in OLC, is the perceived legitimacy of the legal office providing the opinion.[19] Like in OLC, personnel turnover in military legal offices is quite high—though career civil servants provide continuity and institutional memory. A legal office will lose credibility with the entities and individuals it advises if every change in personnel prompts a change in legal advice.[20] Of course, institutional legitimacy concerns can

19. Morrison, Stare Decisis, supra note 1, at 1496.

20. A secondary consideration in many Army offices, and possibly in OLC, is attorney experience with the specific legal issues presented. Judge advocates are rarely assigned to positions based on their demonstrated competence or past experience in a *similar* or *identical* position. They are assigned to positions that will broaden their skills or range of competence and experience and also measure their potential for promotion and increased responsibility. Consulting precedential files and providing review by a senior

sometimes be in tension with the duty to provide objective and accurate legal advice. In some cases, lawyers might need to admit the errors of predecessors in order to fully vindicate the duties and responsibilities of their positions, including their ethical obligations of competent, candid, and independent advice to or on behalf of their clients. The problem is that in the Army, as in OLC, identifying the client is not as straightforward as it might seem.

Army lawyers advise units, offices, or commands within the Army, and sometimes joint (meaning multiservice) or multinational commands. There is a natural inclination, due to otherwise appropriate cultural norms of loyalty and subordination, to view these entities, their commanders, or other principals as the client. This creates the risk that military lawyers will over-identify with or take a vested interest in the actual or perceived preferences of the entities or individual(s) they advise. They may tend to shape their advice to their advisee's preferred decision, or to their own idea of what is a situational, advisee-friendly view of the law. Any of these developments might undermine larger Army organizational interests. For this reason, the Army formally identifies its attorneys' client as the "Army," and not as the individual command or entity to which an attorney is assigned, or as the commander or other individual(s) she advises.[21]

Professor Morrison embraces a view of OLC that both permeates and supports his normative analysis. By accepting at face value how OLC alumni describe its role and client,[22] he accepts that "OLC's work should 'reflect the institutional traditions of and competencies of the executive branch as well as the views of the President who currently holds office.'"[23] He refers to OLC's "clients" as "the White House, the Attorney General, and the various departments . . . that seek its advice."[24] He notes that OLC's location within the executive branch means that "its best view of the law might legitimately differ on some issues from that of a differently situated actor."[25] And he cites James Madison for the notion that each branch of government must affirmatively resist encroachment by the others in order to preserve the separation of powers.[26] He then asserts that OLC lawyers "are players" in this process,

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attorney help to develop inexperienced attorneys. In OLC, the use of precedent and review by senior attorneys may serve a similar function.

21. U.S. Dep't of the Army, Reg. 27-26, Rules of Prof'l Conduct for Lawyers, app. B, R. 1.13 (1992) ("[A]n Army lawyer represents the Department of the Army acting through its authorized officials . . . [including] the heads of organizational elements within the Army, such as the commanders of armies, corps and divisions, and the heads of other Army agencies or activities.").

22. Morrison, Stare Decisis, supra note 1, at 1452–54.

23. Id. at 1455 (quoting Walter Dellinger et al., Principles to Guide the Office of Legal Counsel (2004), reprinted in Dawn E. Johnsen, Faithfully Executing the Laws: Internal Legal Constraints on Executive Power, 54 UCLA L. Rev. 1559, 1603 app. 2 (2007)).

24. Id. at 1496–97.

25. Id. at 1456.

26. Id. at 1499.

and that "Madison's vision of the separation of powers provides a lens through which OLC provides its legal advice."[27]

In spite of this evidence of institutional bias in legal interpretation, and the candid statement that "the generally pro-executive tenor in OLC's opinions simply reflects that OLC is part of the executive branch," Professor Morrison does not believe that OLC acts as an "advocate" for the President or the executive branch.[28] For Professor Morrison, OLC's situational, executive-friendly "best view of the law" is "different from the job of an advocate but also need not carry the pretense of 'true' neutrality."[29] Other OLC alumni share this view.[30]

This position seems tenuous. It is one thing for a lawyer's objectively-derived best view of the law to be that the law governing a certain matter is ambiguous in certain respects, and to advise that a course of action or policy is arguably consistent with the law, or at least not clearly prohibited by it. This is no doubt often necessary in the OLC. The Constitution marks "only its great outlines" and designates only "important objects," but "the minor ingredients which compose those objects [must] be deduced from the nature of the objects themselves."[31] As Justice Robert Jackson observed, "[a] judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves."[32] It is quite another matter, though, to adopt an admittedly shaded or favorable situational interpretation of the law that more affirmatively supports or defends a particular "institutional tradition," prerogative, or policy decision. Such an interpretation is more like advocacy than objective advice.[33] It is not spared from this

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27. Id. at 1502.

28. Id.

29. Id.

30. See Walter Dellinger et al., Principles to Guide the Office of Legal Counsel (2004), reprinted in Dawn E. Johnsen, Faithfully Executing the Laws: Internal Legal Constraints on Executive Power, 54 UCLA L. Rev. 1559, 1604–07 (2007) ("The advocacy model of lawyering . . . inadequately promotes the President's constitutional obligation to ensure the legality of executive action."); see also Jack Goldsmith, The Terror Presidency 34–35 (2007) (agreeing with Dellinger's OLC principles).

31. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

32. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

33. It is important to distinguish between a "contextual" and "situational" interpretation of the law, though it is a subtle distinction. From my perspective, the former considers the application of the law to a given set of facts and circumstances in light of the reason for which a lawyer's advice is sought. It can be "client immaterial," meaning the identity and situation of the client is not necessarily an intrinsic or necessary aspect of the legal analysis and advice. Situational legal analysis and advice considers a client's legal position vis-à-vis other potential actors. It is only appropriate when providing advice to a client as such, in circumstances demanding a situational analysis.

This distinction is important for lawyers advising internal elements of organizational clients. These internal components might have differing interests based on the internal dynamics of the organizational entity, such as those I have articulated with regard to the Army. While either contextual or situational advice may be objective in theory, the latter is inherently less so in practice given the analysis of the client's legal status against that of

categorization by the fact that it is an executive branch "*office's* best view of the law"[34] and not that of an individual attorney.[35]

Professor Morrison's position appears largely based on his view of the import of Madison's separation of powers commentary to OLC's role. Madison stated, as Morrison quotes, that "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachment of the others."[36] Professor Morrison takes this to mean that OLC should assist the executive in defending its institutional prerogatives by interpreting the law through an executive lens.[37]

This conclusion does not necessarily follow. The right and duty to interpret the law that the executive must faithfully execute is no doubt part of its "constitutional means" of resisting encroachment,[38] as is the executive's power to veto a proposed law in the first instance.[39] However, the need to prevent encroachment does not require an executive-friendly interpretation of the law. Only advice that fairly addresses and objectively evaluates the scope, limits, and relationship of executive, legislative, and judicial power is necessary.[40] Objective advice can give "the benefit of reasonable doubt as to the law"[41] without espousing a view of the law that affirmatively supports rather than merely allows a desired course of action. Constitutional ambiguity will unquestionably require OLC to extrapolate a great deal from available data, including from its

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others. Professor Morrison would no doubt argue that the executive's "situation" or position within the government is necessarily a part of the context within which OLC must interpret the law. This is a fair point, but one which assumes the identity of the client and emphasizes the need for maintaining absolute objectivity in OLC legal analysis and advice. The remainder of this Part discusses the potential dangers of situational rather than contextual legal interpretation in the executive branch.

34. Morrison, Stare Decisis, supra note 1, at 1502 (citation omitted).

35. But see id. (indicating inattention to situation in which OLC, though not engaging in advocacy, by rendering advice as an "office," may invite erroneous calls for OLC to be neutral decision-maker, and which "demands too much of OLC").

36. Id. at 1499 (quoting The Federalist No. 51, at 321–32 (James Madison) (Clinton Rossiter ed., 1961)).

37. Id. at 1501.

38. The Federalist No. 44, supra note 36, at 282 (James Madison) ("[I]n case the Congress shall misconstrue . . . the Constitution and exercise powers not warranted by its true meaning, . . . the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts . . . .").

39. See The Federalist No. 73, supra note 36, at 439–40 (Alexander Hamilton) (stating veto power protects against laws that would violate President's constitutional prerogatives).

40. See, e.g., John C. Dehn, The Commander-in-Chief and the Necessities of War: A Conceptual Framework, Temp. L. Rev. at Part I (forthcoming Winter 2011), available at http://ssrn.com/abstract=1539257 (on file with the *Columbia Law Review*) (arguing Justice Jackson's *Youngstown* framework does not necessarily imply existence of a preclusive or plenary core of Commander-in-Chief power and might simply address an incomplete overlap of executive and legislative powers, to be discovered through careful analysis of the nature of those powers).

41. Goldsmith, supra note 30, at 35 (citation omitted).

prior opinions. It would seem that only an attempt at true objectivity might prevent this extrapolation from becoming purely presidentially preferred or executive-friendly conjecture.

Professor Morrison attempts to assuage any concerns regarding this institutionally-sensitive approach to legal interpretation by asserting that OLC's need to "defend its conclusions by means of recognized forms of legal argumentation" and to "show that its views are not just plausible but are indeed its best view of the law" will prevent "audacious" claims of executive power.[42] But former OLC head Jack Goldsmith observed that "all OLC lawyers and Attorneys General over many decades," for Presidents of both parties, are "driven by the outlook and exigencies of the presidency to assert more robust presidential power, especially during a war or crisis, than ha[s] been officially approved by the Supreme Court or than is generally accepted in the legal academy or by Congress."[43] In the hands of a skilled lawyer, "recognized forms of legal argument" are a tool for shaping or preserving a preferred view of the law, not for objectively analyzing it. Nevertheless, Professor Morrison suggests that observing stare decisis in the OLC "cuts both ways," meaning that it applies equally to precedent expanding and limiting executive power.[44] While this is true in theory, Goldsmith's observation, Professor Morrison's Madisonian model, and Morrison's related suggestion that the executive branch may properly use the constitutional avoidance doctrine in its legal interpretation for purposes of "self-protection,"[45] indicate that, in practice, only one side of the knife is sharpened.[46]

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42. Morrison, Stare Decisis, supra note 1, at 1502–03.

43. Goldsmith, supra note 30, at 37. Professor Morrison also notes that "[w]e can fairly predict that OLC will face great pressure to conform its views to those of the President, and it is worth attending to those pressures." Morrison, Stare Decisis, supra note 1, at 1455.

44. Id. at 1503.

45. Morrison, Avoidance, supra note 2, at 1232. Professor Morrison accurately describes the canon as requiring that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to the intent of Congress." Id. at 1192 (citations omitted). The canon's "self-protective" use in interpreting constitutionally ambiguous powers is problematic because often it would seem to require presuming the fact to be proved, that there is a "serious constitutional problem" to be avoided while interpreting a statute delimiting executive power. By way of example, one's approach to interpreting a statute delimiting the nation's conduct in war might differ if one presumes (or recklessly interprets precedent to conclude that) the President's Commander-in-Chief power is entirely inherent and autonomous, and therefore that any such regulation potentially raises a "serious constitutional problem."

46. OLC insiders may object to this description of their role and approach. Professor Morrison suggests that "[t]he in-between nature of [OLC's] role can be 'uncomfortabl[e]' and difficult to specify in all its particulars, but that does not make it incoherent or unattainable." Morrison, Stare Decisis, supra note 1, at 1502 (internal citation omitted). Professor Morrison's clearly superior knowledge of OLC practice may support this observation. It would seem to be incumbent upon OLC alumni to better explain, or perhaps demonstrate through public disclosure, how it "defends" executive branch institutional interests without tending toward advocacy in the form of favorable situational

Professor Morrison also asserts that judicial precedent resolving issues of executive power by settled practice supports the observance of stare decisis in the OLC,[47] while recognizing that public and congressional disclosure is important.[48] Putting to one side the slightly circular reasoning of this argument (because "settled" OLC precedent coupled with presidential action and congressional acquiescence becomes law in some cases, OLC precedent should be observed because it is "a more central, constitutive part of what the law *is*"[49]), the fact that the courts sometimes consider "historical gloss" when resolving constitutional issues only serves to emphasize the importance of OLC's giving *the* best view of the law and correcting erroneous precedent.

Courts resort to settled historical practice on the belief that it represents the good faith understanding of the elected branches, equally sworn to uphold and support the Constitution, as to the constitutional assignment or balance of power.[50] If OLC consistently favors the institutional and policy concerns of the executive branch and also observes stare decisis, such gloss will come to represent not what the Constitution permits or assigns, but what the executive branch has, over time, found to be acceptable legal argument rather than correct legal analysis. In the worst case, perhaps represented by the torture memoranda, OLC opinions may reflect what a current administration finds to be expedient legal argument supporting a predetermined policy decision that is simply judicially and politically unchallengeable under the circumstances.[51] In any case, the gradual accumulation of executive-friendly precedent—especially when classified or otherwise publicly, politically, and judicially unreviewable[52]—may incrementally expand

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or "self-protective" legal analysis.

47. Id. at 1495–96 (noting efficiency gains by not treating each issue as one of first impression and by viewing earlier OLC precedent as constitutional "gloss").

48. Id. at 1499–500 ("Assertions of executive power that are kept secret from Congress constitute evasions of [the separation of powers] checking mechanism . . . .").

49. Id. at 1504.

50. In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Frankfurter's concurrence endorsed resort to settled practice when there exists "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government." 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring); see also United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 327 (1936) ("[W]hile this court may not, and should not, hesitate to declare acts of Congress . . . to be unconstitutional . . . an impressive array of legislation such as we have just set forth . . . must be given unusual weight in the process of reaching a correct determination of the problem.").

51. See, e.g., Dehn, supra note 40, at 7 ("[C]laims of plenary commander-in-chief power [are] more than a 'persuasive dialectical weapon in political controversy.' They sustain an ability to act in complete secrecy on a broad range of matters, avoiding political discourse that might lead to controversy until a given matter is a *fait accompli*." (citation omitted)).

52. Professor Morrison recognizes that "many of the issues addressed by OLC are unlikely ever to come before a court in justiciable form" and that therefore "OLC's opinions often represent the final word in those areas unless later overruled by OLC itself, the Attorney General, or the President." Morrison, Stare Decisis, supra note 1, at 1451.

claims of executive power and upset what Justice Jackson called the "constitutional equilibrium."[53] A fair view of the available information is that observing stare decisis in the OLC would, more often than not, trend in this direction.

The OLC's over-identification with executive branch institutional interests, and the most likely effect of its over-identification, counsel against observing stare decisis in the OLC. Objective analysis and independent judgment can serve to correct any trends toward overly expansive claims of executive power, while the mere existence of precedent and a simple requirement to explain deviations from it should curtail such claims in most cases (those not involving secrecy and expedient legal argument). This discussion also implicates the possible effect of constitutional obligations and professional responsibilities on an OLC's lawyer's role, and on the identification of OLC's "client."

II. THE EFFECT OF CONSTITUTIONAL OBLIGATIONS AND PROFESSIONAL RESPONSIBILITIES

The D.C. Circuit has observed that a government attorney's oath means that "[u]nlike a private practitioner, the loyalties of a government lawyer . . . cannot and must not lie solely with his or her client agency."[54] This view is also supported by professional responsibility norms and academic commentary. Diverse sources agree that the executive's constitutional oath and obligations are relevant to OLC's advisory function. The Department of Justice's Office of Professional Responsibility (OPR) approvingly cited what is often called OLC's Best Practices Memorandum for the proposition that "OLC's core function is to help the President fulfill his constitutional duty to uphold the Constitution and take care that the laws be faithfully executed."[55] Commentators—frequently OLC alumni—agree,[56] but understandings of the legal and practical effect of this fact appear to vary widely.[57] This

53. *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring).

54. In re Lindsey, 158 F.3d 1263, 1273 (D.C. Cir. 1998).

55. OPR Report, supra note 18, at 17 (internal quotation marks and citation omitted).

56. See, e.g., Douglas W. Kmiec, OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive, 15 Cardozo L. Rev. 337, 351 (1993) ("[I]nsofar as the [P]resident has the express responsibility to take care that the Laws including the Constitution as the supreme law be faithfully executed, enforcing an invalid law would be contrary to a [P]resident's constitutional duty and oath." (internal quotation marks and citation omitted)); John O. McGinnis, Models of the Opinion Function of the Attorney General: A Normative, Descriptive and Historical Prolegomenon, 15 Cardozo L. Rev. 375, 380 (1993) ("[A] model of the Attorney General as opinion writer would begin with the notion that he is aiding the President in carrying out the legal responsibilities, including that of constitutional interpretation, with which the President has been entrusted by the Constitution itself.").

57. An exhaustive list is impractical here, but an excellent source collecting views on the role of the Attorney General, Solicitor General, and OLC in this context is Robert C. Power, Lawyers and the War, 34 J. Legal Prof. 39 (2009); see also McGinnis, supra note 56, at 382–406 (comparing, contrasting, and critiquing various approaches Attorney General

is perhaps a reflection of the varied approaches to lawyering in the broader legal profession.[58] This Part introduces how these constitutional and professional responsibility obligations might counsel, and perhaps even require, OLC attorneys to subordinate institutional interests and prudential concerns supporting the observance of stare decisis to their best view of the law.

Little commentary thoroughly examines the extent to which the individual constitutional oaths of OLC or other executive branch attorneys relate to or supplement the executive branch's constitutional obligations.[59] A weak view might posit that they are largely superfluous in a unitary executive already constitutionally obligated to "faithfully execute" the law. Such a view would discount the apparent purpose of constitutionally or statutorily requiring the oath from all executive, legislative, and judicial officials—to ensure each federal government official is loyal first to the Constitution rather than to her state, branch, department, institution, office, official, or political party. Such oaths might therefore have practical value for government attorneys, rather than simply moral force.

Of many possible effects of the oath, one might be identifying the client. The earlier-referenced OPR Report stated that the executive branch is OLC's client.[60] Like the Army,[61] it identified the client as the larger organization within which an attorney is situated, rather than as the departments, officers, or agencies she advises. An oath to support the Constitution, however, undermines the notion that a government lawyer's professional responsibilities run to only one of the three branches it creates. Thus, it might be said that an OLC lawyer's client is the Constitution, or, perhaps even more appropriately, the government that it creates. Some have argued that a government lawyer's client is the rule of law itself.[62]

Accepting the view that the "government" is the client would place OLC on roughly the same footing as corporate counsel. Whether corporate counsel advise the chief executive officer, the board of directors, a major corporate department, or a senior corporate officer, their client is properly understood as the legal entity created by the corporate charter, not as the officers, departments, or other individuals

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and OLC should take to law and executive branch when giving legal advice).

58. See, e.g., Mary Ann Glendon, A Nation Under Lawyers 36–39, 80–83 (1996) (discussing varying ideologies influencing legal profession, including those that overvalue client interests).

59. See, e.g., Note, Without Lawyers: An Ethical View of the Torture Memos, 23 Geo. J. Legal Ethics 241, 267 (2010) ("A government lawyer, then, is obliged to consider more than his client's wishes. He is bound by his oath to uphold the Constitution and, by extension, the laws of the Nation.").

60. OPR Report, supra note 18, at 17 ("If the OLC fails to provide complete and objective legal advice, it fails to properly advise its client—the Executive Branch.")

61. See U.S. Dep't of the Army, Reg. 27–26, Rules of Prof'l Conduct for Lawyers, app. B, R. 1.13 (1992).

62. Jose E. Alvarez, Torturing the Law, 37 Case W. Res. J. Int'l L. 175, 220 (2006) (citation omitted).

receiving their advice.[63] The main difference in this context, of course, is the relationship of the law to the "corporation." In the context of a private corporation, the law is extrinsic to the corporation and its charter. In the government, the fundamental law is also the corporate charter. It is therefore true that "[l]egal advice to the President from the Department of Justice is neither like advice from a private attorney nor like a politically neutral ruling from a court."[64] It would appear that the closer it is to the latter, however, the better the "constitutional corporation" and the rule of law that creates it are served.

Even assuming the client is properly identified as the executive branch, another possible effect of the oath may be to more clearly elevate a government lawyer's obligations to the law above those owed the client. All lawyers have professional responsibility obligations both to the law and to their clients.[65] They must sometimes decide difficult questions of ethical duty where obligations to the law and to a client might conflict.[66] If the executive branch is an OLC attorney's client, a constitutional oath might serve to remind the attorney that the interests of the law and not the client are paramount.[67] As the OPR Report stated, "[i]n order to effect its mission of providing authoritative legal advice to the executive branch, the OLC must remain independent and produce thorough, *objective*, and candid legal opinions."[68] This is certainly the professional responsibility of every licensed attorney, but it carries greater meaning and consequence for government lawyers guiding the powerful arms of government and solemnly sworn to support the fundamental law.

Observing either of these possible effects would seem to require OLC to remove the lens through which it views both the law and its precedent—to discard its executive branch glasses. While OLC must undoubtedly assist the President to preserve the separation of powers, it must do so only in ways that comport with *the* best view of the law. The diversity of legal scholarship on what the law is indicates that the ideological (or even neutrally derived) theoretical predisposition of OLC

63. See, e.g., Model Rules of Prof'l Conduct R. 1.13 (2010) (outlining professional responsibilities when representing an organization as a client).

64. Goldsmith, supra note 30, at 35.

65. Model Rules of Prof'l Conduct pmbl. ("A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs."); see also id. R. 1.2(d) (stating "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct the lawyer knows is criminal or fraudulent," but may assist a client "to make a good faith effort to determine the validity, scope, meaning or application of the law"); id. R. 1.16(a)(1) (mandating withdrawal from representation that would result in violation of law).

66. Ann. Model Rules of Prof'l Conduct 102 (2007) (discussing various state rules regarding disclosure of privileged client information to prevent crime or fraud, noting some states permit disclosure while some require it in some circumstances).

67. See W. Bradley Wendel, Government Lawyers, Democracy and the Rule of Law, 77 Fordham L. Rev. 1333, 1362 (2009) ("[Government l]awyers cannot understand their role as merely executing their clients' preferences; the distinctive function of lawyers is that they act as agents of their clients, but only within the bounds of the law.").

68. OPR Report, supra note 18, at 260 (emphasis added).

lawyers may affect the consistency of OLC's opinions. One hopes that such predispositions will naturally subordinate to an OLC lawyer's obligation to provide objective, accurate, and independent advice, though there are clear indications that this is not the case.[69] In fact, some commentary indicates that an executive branch lawyer's preexisting ideology or understanding of the law is replaced with OLC's executive-centric approach.[70] Nevertheless, adherence to one's oath of office appears to require that the opinions of predecessors receive due consideration, but ultimately that OLC give advice based upon *the* best view of the law.[71]

Of course, arguments that one's constitutional oath might require her to overrule or ignore erroneous precedent are potentially just as applicable to the judiciary. Judicial observance of stare decisis is certainly "one of the main devices thought to constrain political and ideological preferences within the Judicial Branch."[72] Because stare decisis is not constitutionally mandated, there are plausible arguments both for and against its propriety. It is, nevertheless, a constitutionally derived form of judicial decisionmaking.[73] Judicial opinions are, for better or worse, a constitutional gloss that coordinate branches ignore at their peril. OLC opinions are not, and should not be.[74]

While I agree with Professor Morrison that many considerations supporting judicial stare decisis are "portable" to the executive branch, this does not mean that those considerations carry the day. Institutional

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69. See Goldsmith, supra note 30, at 34 (describing author's selection as OLC head as result of his legal "philosophical attunement" with key administration officials and noting this attunement "would shape [his] legal decisions as the head of OLC").

70. See Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, The Obama Administration and International Law, Remarks at the 104th Annual Meeting of the American Society of International Law (Mar. 25, 2010), at http://www.state.gov/s/l/releases/remarks/139119.htm (on file with the *Columbia Law Review*) ("[Executive branch attorneys] are expected to look to the previous opinions of the Attorneys General and of heads of [the State Department Legal Adviser's] office to develop and refine the *executive branch's* legal positions." (emphasis added)); see also supra note 23 and accompanying text (discussing institutional views which ought to guide OLC lawyer's work).

71. Indeed, it may be this fact alone that will prevent John Yoo from professional disciplinary action. See Morrison, Stare Decisis, supra note 1, at 1452 n.11 (citing OLC memoranda finding Yoo's views were held in good faith). This indicates both the strength and weakness of accepting this view of a government attorney's oath.

72. Id. at 1448.

73. I, like Professor Morrison, am quite sympathetic to the constitutional arguments supporting stare decisis in judicial adjudication. See id. at 1492 n.174.

74. Professor Morrison may believe this statement to be descriptively false *within* the executive branch given his view that OLC opinions are a "source of law" for that branch. Id. at 1493. However, the point is that neither the judiciary nor Congress need accept OLC's view of the law, no matter how often repeated. Professor Morrison seems to agree with this view. See id. at 1500–51 (noting longstanding disagreement between Congress and presidency over congressional regulation of certain foreign affairs matters and concluding "it should be permissible for OLC to give extra weight to longstanding executive branch understandings of executive power unless and until the courts resolve the matter in favor of Congress, or Congress takes some other measure forcing the Executive's acquiescence").

and practical realities are clearly different. Judicial opinions are (*almost* universally) public, and result from an adversarial process intended to prevent legal and factual error. The secrecy of much of OLC's work, as well as its insulated position in the executive branch and "special sensitivity to incursions on executive power,"[75] might tend toward the development of dysfunctional norms and the perpetuation of executive-friendly legal errors. This potential self-dealing problem, which Professor Morrison acknowledges but perhaps too easily overcomes,[76] ultimately weakens arguments in favor of observing judicial principles of stare decisis in the OLC.

CONCLUSION

Professor Morrison makes a strong prudential case for the application of judicial stare decisis principles to OLC legal opinions. While institutional and other considerations play a role in the analysis of this issue, misinterpreting or overemphasizing institutional considerations weaken the value of OLC precedent, and thereby the propriety of adhering to it. Overemphasizing institutional concerns also masks the important place of individual legal and ethical obligations in the dialogue. A complete theoretical inquiry must more thoroughly consider the import and effect of these individual considerations. Given these individual obligations, "differences in opinion"—a good faith finding of simple legal error after due consideration of precedent and thorough legal analysis—might be sufficient to "overrule" OLC precedent, and perhaps even demand it.

A personal story might serve to amplify this point and to reveal my own potential bias. In 2004, only weeks before the public airing of photos depicting abuse at Abu Ghraib, I was assigned as the new legal advisor to two criminal investigations into late-2002 deaths of detainees at Bagram, Afghanistan. These investigations produced evidence of abusive practices surrounding the interrogation and internment of the decedents and others. As I studied the law to determine the proper scope of the investigations going forward, OLC memoranda justifying enhanced interrogation techniques were leaked to the media. After reviewing them closely, I determined that these memoranda contained flawed and incomplete legal analysis and were, at any rate, inapplicable to the subjects of these investigations. The Army ultimately prosecuted cases involving not torture but "merely" unlawful, unauthorized, and unjustified acts of cruel, inhuman, and degrading treatment by interrogators and guards.[77]

In the course of my work, it never occurred to me that erroneous

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75. Id. at 1503.

76. See id. at 1502–03 (claiming OLC's location within executive branch "does not compel any particular understanding of the precise scope of executive power").

77. In full disclosure, it was not possible to determine criminal responsibility for every questionable practice or event raised by the evidence. Additionally, the investigations and prosecutions never established criminal responsibility for the deaths.

OLC legal opinions, charitably described as "deeply flawed," "sloppily reasoned, overbroad, and incautious,"[78] and less charitably as "torturing the law,"[79] might be a "source of law . . . within the executive branch."[80] My oath and professional responsibilities were to the law, not to an erroneous legal opinion; my ethical obligation as a prosecutor was to ensure the appropriate measure of justice for the victims and for any potential defendants.

Upon returning to West Point, I was encouraged to see that a monument to the Constitution had been erected a few years after I had graduated. A plaque on that monument provides:

> The United States boldly broke with the ancient military custom of swearing loyalty to a leader. Article VI required that American officers thereafter swear loyalty to our basic law, the Constitution.
>
> While many other nations have suffered military coups, the United States never has. Our American code of military obedience requires that, should orders and the law ever conflict, our officers must obey the law. Many other nations have adopted our principle of loyalty to the basic law.
>
> This nation must have military leaders of principle and integrity so strong that their oaths to support and defend the Constitution will unfailingly govern their actions. The purpose of the United States Military Academy is to provide such leaders of character.[81]

It is not only our country's military leaders who take this oath. Thus, it may be not only OLC's responsibility to correct or ignore legal error rather than to perpetuate it, but also every government lawyer's or other official's solemn obligation—to be diligently researched, objectively analyzed, and judiciously exercised.

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78. Goldsmith, supra note 30, at 10.

79. Alvarez, supra note 62, at 175–78.

80. Morrison, Stare Decisis, supra note 1, at 1493. Although the view that OLC opinions are binding or even "law" within the executive branch is well accepted, id. at 1464 & n.60, my doctoral work will propose the proper response of the armed forces when those opinions sanction, and the President thereafter orders or authorizes, presumptive violations of applicable international or domestic law in the nation's armed conflicts.

81. A photograph of this plaque, entitled "Loyalty to the Constitution," is available at http://www.aogusma.org/class/1943jan/Constitution_Corner/cc.pdf (on file with the *Columbia Law Review*) (last visited Oct. 30, 2010). This monument was donated by the Class of 1943 and, although the Academy approved its design and construction, it does not necessarily reflect the views of the Department of Defense, the United States Military Academy, or the United States Army.

http://www.columbialawreview.org/assets/sidebar/volume/110/73_Dehn.pdf.