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REFORMING THE OFFICE OF LEGAL COUNSEL

BARRY SULLIVAN*

In 2001, I rejoined my law firm after spending seven years as a law teacher and administrator and was soon asked to consult on a litigated matter involving a corporate client. I reviewed the relevant materials and met with the litigation team. I told them that I did not find one of their arguments to be persuasive and that I did not think that a judge would be persuaded either. I suggested an alternative line of argument that seemed more promising to me. After the meeting, a young lawyer who exuded self-confidence took me aside. He thought I should know that the world of law practice had changed during the years I was away, that the theory I found unpersuasive had been developed by in-house counsel, and that our job, in this new world of law practice, was just to make the arguments we were told to make. Quoting Marshall Field, the young lawyer pronounced that our job was to “give the lady what she wants.”¹

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1. See LLOYD WENDT & HERMAN KOGAN, *GIVE THE LADY WHAT SHE WANTS! THE STORY OF MARSHALL FIELD & COMPANY* 223 (1952). Anthony Trollope describes a male character’s view of lawyering in similar terms: “Bold . . . merely wanted a man who knew the forms of law, and who would do what he was told for his money. He had no idea of putting himself in the hands of a lawyer. He wanted law from a lawyer as he did a coat from a tailor, because he could not make it so well himself.” ANTHONY TROLLOPE, *THE WARDEN* 20 (Everyman’s Library ed. 1855). The sexism of Marshall Field’s remark would be amplified by later generations of marketers. See LIZABETH COHEN, *A CONSUMERS’ REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* 314 (2003) (“Behavioral differences between the sexes had origins, they argued, that extended beyond the social and cultural to the psychological and even physiological. In 1958, for example, Janet Wolff claimed . . . that women were marked as shoppers by their biology—reproductive systems and sexual characteristics, size and muscular power, proportions and acute senses—mediated by distinctive personality traits like intuition, compassion, loyalty, and irrationality While marketers subjected female customers to this kind of psychological analysis, often aimed at their insecurities, they credited men as a market segment with authority and financial resources but spared them the same mental probing.”).

I doubt that his perspective was shared by most of my colleagues, but it was a viewpoint that clearly had traction for some, even if few would have presented it so baldly.²

I recalled that conversation recently when I read about the oral argument in *Kareem v. Haspel*.³ In *Kareem*, a United States citizen who works as a journalist in Syria, brought suit in federal court to ascertain whether the government had targeted him for summary execution under an Obama-era Presidential Policy Guidance.⁴ The government's argument on appeal did not address the merits. Instead, the government argued that Kareem lacked standing to sue, and that his claims were barred in any event by the political question doctrine and the state secrets privilege.⁵ The court of appeals ultimately ruled that the plaintiff lacked standing, and that the government's other grounds for dismissal need not be reached, because Kareem's "complaint fail[ed] to allege plausibly that any of the five aerial bombings were attributable to the United States and specifically targeted [him]."⁶ At oral argument, however, at least one judge expressed incredulity at the government's argument that its determinations were not reviewable: "Judge Patricia Millett characterized the DOJ's argument as giving the government the ability to 'unilaterally decide to

2. See MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR. ASS'N 2002). If the argument had been frivolous (which it was not), that would have raised a different issue for the litigation team. See *id.* at r. 3.1. See also Barry Sullivan, *Professions of Law*, 9 GEORGETOWN J. LEG. ETHICS 1235, 1251-52 (1996) ("A professional, [Saul] Linowitz asserts, does not simply do a client's bidding or execute a client's orders A lawyer chooses clients and has a duty to provide . . . those chosen with the fruits of judgment, which may well be something very different from what they wish to hear.").

3. See *Kareem v. Haspel*, 986 F.3d 859 (D.C. Cir. 2021).

4. See PROCEDURES FOR APPROVING DIRECT ACTION AGAINST TERRORIST TARGETS LOCATED OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES (May 22, 2013), https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terroris_t_targets/download. The 2013 Policy Guidance was originally classified "Top Secret," but was finally made public, pursuant to a court order, in 2016; it was based on a 2010 Office of Legal Counsel opinion. See Karen DeYoung, *Newly Declassified Document Sheds Light on How President Approves Drone Strikes*, WASH. POST (Aug. 6, 2016), https://www.washingtonpost.com/world/national-security/newly-declassified-document-sheds-light-on-how-president-approves-drone-strikes/2016/08/06/f424fe50-5be0-11e6-831d-0324760ca856_story.html ("The document's dry, bureaucratic language seems in stark contrast to the presumably dire consequences of the actions it outlines, and it leaves a number of questions unanswered. What appears to be a description of information to be included in the profile of an individual target is blacked out."). An earlier version of the 2010 OLC memorandum was prepared in late 2009. See Charlie Savage, *Court Releases Large Parts of Memo Approving Killing of American in Yemen*, N.Y. TIMES (June 23, 2014), <https://www.nytimes.com/2014/06/24/us/justice-department-found-it-lawful-to-target-anwar-al-awlaki.html>.

5. See *Kareem v. Haspel*, 412 F. Supp. 3d 52, 55 (D.D.C. 2019). The court of appeals vacated the district court's order dismissing the complaint on the government's state secrets defense and remanded for entry of an order of dismissal based on Kareem's failure to establish his standing to sue.

6. *Kareem v. Haspel*, 986 F.3d at 861.

kill U.S. citizens,' according to coverage of the argument by Courthouse News Service. 'Do you appreciate how extraordinary that proposition is?'"⁷ Judge Millett was apparently persuaded that the plaintiff lacked standing, and she did not dissent from the panel decision.

If the government's assertion of non-reviewability seemed new to Judge Millett, the underlying, substantive policy was not. The Presidential Policy Guidance that the plaintiff alleged to be involved in *Kareem* was based on a classified memorandum, which was prepared in 2010 by the Office of Legal Counsel ("OLC"), the division of the Justice Department tasked with giving legal advice to the executive branch.⁸ The memorandum endorsed the President's authority to order the targeted killing of U.S. citizens believed to be terrorists.⁹ Neither the legality nor the wisdom of that policy was initially opened to debate outside the executive branch.¹⁰ Like much of OLC's work product, the memorandum was not intended for public consumption, and its

7. See Debra Cassens Weiss, *US Can Kill Its Own Citizens Without Review When State Secrets Are Involved*, DOJ Lawyer Argues, ABA J. (Nov. 18, 2020 2:09 PM), <https://www.abajournal.com/news/article/doj-lawyer-argues-us-can-kill-its-own-citizens-without-review-when-state-secrets-are-involved>. Kareem's lawyer argued that, "[w]hether that's in a parking lot in the United States or abroad in Syria, the government has claimed—for the first time ever in this case—that it has unfettered and unreviewable discretion to kill US citizens at will." *Id.*

8. See 28 U.S.C. § 510 (authorizing the Attorney General to delegate his statutory authority to other Justice Department personnel); 28 C.F.R. § 0.25 (1988) (setting forth the duties of the Office of Legal Counsel).

9. See Memorandum from David J. Barron, Acting Assistant Att'y Gen., Off. of Legal Couns., to the Att'y Gen. Regarding the Applicability of Fed. Crim. Ls. and the Const. to Contemplated Lethal Operations Against Shaykh al-Aulaqi (July 16, 2010) https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16_-_olc_aaga_barron_-_al-aulaqi.pdf. See also MAUREEN DUFFY, DETENTION OF TERRORISM SUSPECTS: POLITICAL DISCOURSE AND FRAGMENTED PRACTICES 151–54 (2018) (discussing the Al-Aulaqi case). For a thoughtful defense of the government's policy (but not its reasoning), see H. JEFFERSON POWELL, TARGETING AMERICANS: THE CONSTITUTIONALITY OF THE U.S. DRONE WAR 145–46 (2016) ("[T]he Obama administration turned to an antiseptic language about a 'balancing of interests' that lacks even the basic candor without which law becomes a meaningless charade: The administration was not trying to respect or take into account al-Awlaki's interests but to destroy them. The killing was constitutional, and it may have been wise, but we should not pretend that it was something it was not."). President Obama gave a full-throated defense of the policy at the University of Chicago Law School in April 2016. See *President Obama's Response to the Use of Drones: Clip of President Obama Town Hall Meeting on the Supreme Court*, C-SPAN (Apr. 7, 2016), <https://www.c-span.org/video/?c4587864/user-clip-drone-response>. In 2017, President Trump apparently altered the Obama policy to make it easier for government personnel to launch drone attacks. See Charlie Savage, *Trump's Secret Rules for Drone Strikes Outside War Zones Are Disclosed*, N.Y. TIMES (May 1, 2021), <https://www.nytimes.com/2021/05/01/us/politics/trump-drone-strike-rules.html?searchResultPosition=8>.

10. Although the document was classified, the government's actions pursuant to the document soon became the subject of scholarly and professional debate. See Ryan Alford et al., *Targeted Killing and the Rule of Law*, CATO UNBOUND (June 2011), <https://www.cato-unbound.org/issues/june-2011/targeted-killing-rule-law>; John C. Dehn & Kevin Jon Heller, *Targeted Killing: The Case of Anwar Al-Aulaqi*, 159 U. PA. L. REV. PENNUMBRA 175 (2011).

conclusions were not likely to be tested in court.¹¹ Indeed, the government made every effort to ensure that the memorandum would remain secret.¹² Why was the government so reluctant to have the extent of the President's constitutional and legal authority debated in public? Was this legitimate legal advice or an example of what one commentator has called "a jurisprudence of mere political expedience, engaging in . . . opportunistic, situational constitutionalism through which lawyers advance whatever arguments support the president's immediate agenda"?¹³ In other words, was it simply a case of "giving the lady what she wants"?¹⁴

As a legal strategy, "giving the lady what she wants" is dubious enough when it comes to representing a corporate client in private law litigation that will eventually be decided by an impartial decisionmaker after an adversary proceeding.¹⁵ The strategy is even more dubious, however, when one is a public

11. OLC has published some of its opinions since 1977. See H. JEFFERSON POWELL, *THE CONSTITUTION AND THE ATTORNEYS GENERAL* xv n.2 (1999). However, not all OLC opinions are made public, and some are made public long after the fact. See, e.g., Note, *The Immunity-Confering Power of the Office of Legal Counsel*, 121 HARV. L. REV. 2086, 2090 (2008).

12. See Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES (Oct. 8, 2011), <https://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html>. The Second Circuit finally ordered release of the OLC opinion in 2014. See Greg Miller, *Legal Memo Backing Drone Strike That Killed American Anwar al-Awlaki Is Released*, WASH. POST (June 23, 2014), https://www.washingtonpost.com/world/national-security/legal-memo-backing-drone-strike-is-released/2014/06/23/1f48dd16-facc-11e3-8176-f2c941cf35f1_story.html; Savage, *Court Releases Large Parts of Memo Approving Killing of American in Yemen*, *supra* note 4.

13. See Cornelia T. L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 717 (2005). See also JACK L. GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 36–37 (2007) ("The Clinton OLC tended to invoke aggressive presidential military powers primarily for humanitarian rather than security ends, and its arguments for presidential power were more cautious than in the Bush II OLC and relied more on congressional authorization But . . . the Clinton lawyers—like all OLC lawyers and Attorneys General over many decades—were driven by the outlook and the exigencies of the presidency to assert more robust presidential powers, especially during a war or crisis, than had been officially approved by the Supreme Court or than is generally accepted in the legal academy or by Congress."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 647 (1952) (Jackson, J., concurring) ("The claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy But prudence has counseled that actual reliance on such nebulous claims stop short of provoking a judicial test.").

14. WENDT, *supra* note 1.

15. As Brad Wendel suggests, "[L]itigation is a special case, in which lawyers share responsibility [with] other institutional actors for getting the law right. In counseling and transactional representation, by contrast, the lawyer is frequently the only actor who has any power to render a judgment about what the law permits." W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 53 (2010).

official charged with providing legal advice that is not likely to be made public, let alone scrutinized by a disinterested adjudicator.¹⁶

INTRODUCTION

OLC does not have the final word concerning government policy. Nor does it directly enforce any law. Its sole function is to provide legal advice to the executive branch.¹⁷ But the advice it provides addresses some of the most important questions of war and peace, the limits of executive power, the separation of powers, civil rights, and civil liberties.¹⁸ OLC is staffed by an

16. See, e.g., Cristian Farias, *The Justice Department Can't Keep Its Own Law Secret Forever*, POLITICO (Aug. 29, 2019), <https://www.politico.com/magazine/story/2019/08/29/the-justice-department-cant-keep-its-own-law-secret-forever-227984>. Many OLC opinions will be exempt from mandatory disclosure under the Freedom of Information Act pursuant to the deliberative process or attorney-client privilege. See, e.g., Citizens for Responsibility and Ethics in Wash. v. U.S. Dep't of Just., No. 19-1552 (ABJ), 2021 WL 1749763, at *10 (D.D.C. May 3, 2021).

17. See Pillard, *supra* note 13, at 710. Much of OLC's advice is given orally or informally. See, e.g., Josh Gerstein, *Official: FOIA Worries Dampen Requests for Formal Legal Opinions*, POLITICO (Nov. 5, 2015), <https://www.politico.com/blogs/under-the-radar/2015/11/official-foia-worries-dampen-requests-for-formal-legal-opinions-215567> (discussing Obama Administration's allegedly increased use of requests for oral advice, presumably to avoid creating documents that might require disclosure in response to a Freedom of Information Act request). The government regularly argues, based on *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997), that an “OLC Opinion itself determines no ‘rights or obligations’ and produces no ‘legal consequences.’ . . . OLC opinions are predecisional and deliberative documents, produced at the request of the President or an agency, containing candid legal advice to aid in a governmental decisionmaking process.” *N.H. Lottery Comm'n v. Barr*, No. 19-1835 (1st Cir. Jan. 20, 2021), Opening Brief for Appellants-Defendants, filed Dec. 20, 2019, available at <https://www.onlinepokerreport.com/wp-content/uploads/2019/12/Wire-Act-Opening-Brief-Appellants-122019.pdf>. On the other hand, it has been argued that OLC opinions are not merely pre-decisional and deliberative documents, but binding adjudications, in one type of circumstance, namely, when OLC, subject to possible overruling by the President or the Attorney General, definitively resolves an inter-agency dispute as to what the law requires. See, e.g., *Campaign for Accountability v. U.S. Dep't of Just.*, 486 F. Supp. 3d 424, 437–41 (D.D.C. 2020). In addition, executive branch officials are required to follow OLC opinions, and they may receive immunity if they break the law in reliance on an OLC opinion. See *The Immunity-Confering Power of the Office of Legal Counsel*, *supra* note 11. OLC should not be confused with the Office of White House Counsel, which provides legal advice to the President and has been described as “the hub of virtually all presidential activity.” See Maryanne Borrelli, Karen Hult & Nancy Kassop, *The White House Counsel's Office*, 31 PRESIDENTIAL STUDIES Q. 561, 561 (2001). “Its mandate is to be watchful for and attentive to legal issues that may arise in policy and political contexts involving the president.” *Id.*

18. See, e.g., Citizens for Responsibility & Ethics in Wash. v. Dep't of Just., 922 F.3d 480, 483–84 (D.C. Cir. 2019) (“The OLC’s responsibilities currently include ‘[p]reparing the formal opinions of the Attorney General; rendering informal opinions and legal advice to the various agencies of the Government; and assisting the Attorney General in the performance of his functions as legal adviser to the President.’ . . . Over the years, the OLC has opined on ‘some of the weightiest matters in our public life: from the [P]resident’s authority to direct the use of military force without congressional approval, to the standards governing military interrogation of ‘alien unlawful combatants,’ to the [P]resident’s power to institute a blockade of Cuba.’”).

Assistant Attorney General and five deputies, four of whom are political appointees, and by a cohort of attorney-advisors, most of whom are ambitious, young lawyers who typically serve for relatively short terms.¹⁹ All are appropriately interested in the success of the administration for which they work.²⁰ And OLC's client—the modern executive—is powerful beyond measure, unbounded unless by law.²¹

Much of OLC's advice will never be made public or be reviewed by the courts.²² Some opinions will come to light eventually, but only when they are

19. See Annie L. Owens, *Reforming the Office of Legal Counsel: Living Up to Its Best Practices*, AM. CONST. SOC'Y: ISSUE BRIEF (Oct. 2020), <https://www.acslaw.org/wp-content/uploads/2020/12/Owens-Reforming-OLC-Final.pdf>.

20. See, e.g., Bradley Lipton, *A Call for Institutional Reform of the Office of Legal Counsel*, 4 HARV. L. & POL'Y REV. 249, 255–56 (2010) (“The political nature of OLC is substantially exacerbated by the type of lawyers the office tends to attract and their career ambitions. OLC’s heady task attracts an ambitious group of lawyers who seem to be particularly ‘on the make.’”). Although OLC is often compared to the Solicitor General’s Office, the two offices are fundamentally different in at least one important respect, as Trevor Morrison has noted: “Whereas . . . the Solicitor General’s aim of prevailing before the Supreme Court limits the extent to which she can profitably pursue an extreme agenda inconsistent with the current doctrine, OLC faces no such immediate constraint. Whether OLC honors its oft-asserted commitment to legal advice based on its best view of the law depends largely on its own self-restraint.” Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1463 (2010).

21. See, e.g., GARRY WILLS, *BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE* 2–3 (2010):

[W]e have had a continuous state of impending or partial war, with retained constitutional restrictions. World War II faded into the Cold War, and the Cold War into the war on terror, giving us over two-thirds of a century of war in peace, with growing security measures, increased governmental secrecy, broad classification of information, procedural clearances of those citizens able to know what rulers were doing in secret. The requirements became more stringent, not less, after World War II and then again after the Cold War. Normality never returned, and the executive power increased decade by decade, reaching a new high in the twenty-first century—a continuous story of unidirectional increase in the executive power.

See also *New York Times v. United States*, 403 U.S. 713, 727–28 (1971) (Stewart, J., concurring) (“[T]he Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative and Judicial branches, has been pressed to the very hilt since the advent of the nuclear missile age. For better or for worse, the simple fact is that a President of the United States possesses vastly greater constitutional independence in these two vital areas of power than does, say, a prime minister of a country with a parliamentary form of government.”).

22. Legal advice will be disclosed contemporaneously, of course, if the administration believes that it would be politically beneficial to do so. For example, then-Assistant Attorney General William Rehnquist prepared an opinion for the President with respect to the constitutionality of the government’s incursion into Cambodia during the Vietnam War. See Memorandum from Assistant Att’y Gen., William H. Rehnquist, Off. of Legal Couns., to the Special Counsel to the President regarding Presidential Authority to Permit Incursion into Communist Sanctuaries in the Cambodia-Vietnam Border Area (May 31, 1970), <https://www.justice.gov/sites/>

no longer salient. Practically speaking, the law will be whatever OLC pronounces it to be. It is critical, therefore, that OLC provide legal advice that is faithful to the Constitution and intellectually honest. The law is sometimes unclear, and OLC must be committed to advancing the policy goals of its client, but that is not an excuse for “opportunistic, situational constitutionalism.”²³ OLC prides itself on its independence and professionalism,²⁴ but not all of its work product incarnates those values. Some important opinions have contained highly aggressive—and sometimes spurious—advice; those opinions seem more interested in pleasing the executive than in rigorously analyzing the relevant law. The infamous torture memorandum²⁵ comes immediately to mind, but there are others.²⁶ OLC’s performance, like that of the Justice Department as a whole, has provided the occasion for much soul-searching. How can OLC

default/files/olc/opinions/1970/05/31/op-olc-supp-v001-p0313_0.pdf. Assistant Attorney General Rehnquist also gave congressional testimony and public speeches explaining the government’s position. *See, e.g.*, Congress, the President, and the War Powers: Hearings Before the Subcomm. on National Security Policy and Scientific Developments of the H. Comm. on Foreign Affairs, 91st Cong. 235 (1970); William H. Rehnquist, *The Constitutional Issues – Administration Position*, 45 NYU L. Rev. 628 (1970). *See also* ROBERT H. JACKSON, *THAT MAN: AN INSIDER’S PORTRAIT OF FRANKLIN D. ROOSEVELT* 93 (John Q. Barrett ed. 2003) (discussing President Roosevelt’s strategic transmittal to Congress of Attorney General Jackson’s legal opinion on the destroyers deal).

23. *See* Pillard, *supra* note 13, at 717.

24. *See, e.g.*, Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1582–83 (2007) (“Virtually all [former and current OLC lawyers, congressional staffers and others who had worked with OLC], regardless of party or institutional affiliation, described the primary function of OLC as ensuring the legality of executive action, and they ranked the ability to say no to the President as an essential qualification for the job of heading OLC.”); Memorandum from David J. Barron, Acting Assistant Att’y Gen., Off. of Legal Couns., to Att’y’s of the Off. of Legal Couns. regarding Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf>.

25. *See* Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., to John A. Rizzo, Senior Deputy Gen. Couns., Central Intelligence Agency, regarding Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees (May 30, 2005), <https://www.justice.gov/sites/default/files/olc/legacy/2013/10/21/memo-bradbury2005.pdf>; *see also*, Memorandum from Jay S. Bybee, Assistant Att’y Gen., Off. of Legal Couns., to John Rizzo, Acting Gen. Couns., Central Intelligence Agency, regarding Interrogation of al Qaeda Operative (August 1, 2002), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf>; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., to John A. Rizzo, Senior Deputy Gen. Couns., Central Intelligence Agency, regarding Application of 18 U.S.C. §§2340–2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005), <https://fas.org/irp/agency/doj/olc/techniques.pdf>.

26. *See, e.g.*, THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 3, 38 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (reproducing OLC Memoranda dated Sept. 25, 2001, and Jan. 9, 2002, concerning unilateral presidential power to wage war); Rachel Ward Saltzman, *Executive Power and the Office of Legal Counsel*, 28 YALE L. & POL’Y REV. 439 (2010).

better perform its critical role? That question has recently received much attention,²⁷ and this Article seeks to advance that discussion.

First, this Article situates OLC within the context of a political system in which the executive has grown in power far beyond anything that the founders could have foreseen. As the chief legal advisor to the executive branch, OLC performs a critically important function in protecting our constitutional system and ensuring adherence to the rule of law. Second, the Article reviews the recent recommendations of the American Constitution Society (“ACS”) concerning the reform of OLC. Among other things, those recommendations include a systematic review of existing opinions and greater transparency going forward. This Article generally concurs in those recommendations but also suggests the possibility of additional reforms such as a reduction in the number of political appointees in OLC and a focus on recruiting more experienced lawyers to fill its ranks. Third, the Article reviews the relevant case law and evaluates the possibility of a more fundamental reform, namely, that OLC be given greater independence by providing the head of OLC with a fixed term coterminous with that of the President. Finally, the Article concludes that such a reform is legally possible and worthy of serious consideration, whether as a matter of legislative enactment or administrative regulation.

I. CONSTITUTIONAL DEMOCRACY, THE EXECUTIVE BRANCH, AND OLC

Our system of limited government is based on principles of separation of powers, checks and balances, and the rule of law.²⁸ In such a government,

27. See, e.g., Press Release, Am. Const. Soc’y, Statement on The Office of Legal Counsel and the Rule of Law (Oct. 30, 2020), <https://www.acslaw.org/wp-content/uploads/2020/10/OLC-ROL-Doc-103020.pdf> (“The Department of Justice (DOJ) is in need of a renewal. . . . [I]ts credibility and integrity have eroded to the point of crisis. In particular, actions of the Department’s leadership have cast doubt on its independence from the partisan and personal interests of the president. In its refusal to collaborate with Congress on oversight matters, the Department has retreated into a defensive, isolationist crouch.”) [hereinafter ACS Statement on OLC and the Rule of Law]. Confidence in the independence of the Department as a whole may be lower now than at any time since Watergate, when Senator Sam Ervin proposed transferring the Department’s duties and functions to an independent agency not directly answerable to the President. See NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL’S OFFICE, 1789–1990* 28 (1992) (discussing Ervin plan); CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY 103–07* (1992) (same).

28. See, e.g., Philip B. Kurland, *The Rise and Fall of the “Doctrine” of Separation of Powers*, 85 MICH. L. REV. 592, 593 (1986) (“The original constitutional notions of division of powers and functions were based not only on ‘separation of powers,’ but on a concept of ‘balanced government’ and of ‘checks and balances’ as well.”); Jeremy Waldron, *Separation of Powers in Thought and Practice*, 54 B.C. L. REV. 433, 433 (2013) (We should “distinguish the separation of powers from two other important principles that are commonly associated, if not identified with it. These other principles are, *first*, the principle of the division of power—counseling us to avoid excessive concentrations of political power in the hands of any one person, group, or agency; and, *second*, the principle of checks and balances—holding that the exercise of power by any one power-holder needs to be balanced and checked by the exercise of power by other power-holders”);

policy must be rooted in law—which means that the executive must have access to legal advice that is both rigorous and honest. The executive is now the colossus of American government, and there is little that the executive cannot do, especially when fortified by compliant legal advice. But the founders intended to create a balanced government, not one in which the President is unbounded by law.²⁹ As Abner Greene has argued,

[T]he framers were overwhelmingly concerned with either political branch aggrandizing its own power without sufficient checks. To the extent that there is any “original understanding” of the division of power between the President and Congress, it is that both are to be feared, neither is to be trusted, and if either one grows too strong we might be in trouble. The framers’ support for a strong, unitary executive cannot be understood apart from the limited powers they gave to the executive, nor apart from their need to create an executive *strong enough* to counteract overreaching legislatures.

In the post-New Deal world, however, the framers’ factual assumptions have been displaced. Now, it is the President whose power has expanded and who therefore needs to be checked.³⁰

As Professor Greene further notes, the modern Congress has delegated substantial lawmaking authority to the President,³¹ contrary to the founders’ expectation that each branch would jealously guard its own power.³² In addition, the President increasingly has chosen to govern through unilateral

William Lucy, *Access to Justice and the Rule of Law*, 40 OXFORD J. LEGAL STUD. 377 (2020) (discussing aspects of the rule of law).

29. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (“The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.”); but see GARRY WILLS, *supra* note 21, at 241 (“Few people even consider, anymore, Madison’s lapidary pronouncement, ‘In republican government the legislative authority, necessarily, predominates.’ Instead, we are all, as citizens, asked to salute *our* Commander in Chief.”) (internal citation omitted) (citing THE FEDERALIST NO. 51 (James Madison)).

30. See Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 125 (1994).

31. *Id.* at 124 (“Presidential lawmaking presents an unusual problem for constitutional theory. . . . [W]e live with an enormous amount of such lawmaking, and few appear ready to condemn the system as invalid. If . . . we have accepted presidential lawmaking as constitutional, must we accept without reservation this concentration of executive and legislative power, or should we deem appropriate other structural responses that seek to reduce the agglomeration of presidential power?”).

32. See THE FEDERALIST NO. 51, *supra* note 29 (“But 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 encroachments of the others. . . . Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”).

presidential directives, even in the absence of delegated power.³³ In recent years, Congress has proved to be barely functional, and that also has favored the executive branch.³⁴ Modern conditions have even allowed the President to circumvent Congress's constitutional spending power,³⁵ diverting billions of dollars in funds from the purposes for which they were appropriated to projects that Congress had declined to fund.³⁶ The Supreme Court has added to the President's power by embracing (at least in part) the "unitary executive" theory, which holds that the President, by virtue of his presumed "accountability" to the people, must have ultimate authority over all those who exercise "executive" authority on behalf of the United States.³⁷ In addition, the pardon power can be

33. See generally GRAHAM G. DODDS, TAKE UP YOUR PEN: UNILATERAL PRESIDENTIAL DIRECTIVES IN AMERICAN POLITICS (2013).

34. See, e.g., LEE H. HAMILTON, STRENGTHENING CONGRESS 3-4 (2009) ("Congress sometimes cannot get its act together well enough to be a strong, effective, and sustained counterbalance to the power of the presidency."); THOMAS E. MANN & NORMAN J. ORENSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK 158 (2006) ("The passivity and indifference of Congress and its leaders to their independent and assertive role fit perfectly with the [George W.] Bush administration's assertive and protective attitude toward executive power and its aversion to sharing information with Congress and the public."). See also JULIAN E. ZELIZER, BURNING DOWN THE HOUSE: NEWT GINGRICH, THE FALL OF A SPEAKER, AND THE RISE OF THE NEW REPUBLICAN PARTY 293-94 (2020) ("Gingrich's scandal was escalated to create one of the most contentious periods in the government's history as the needs of governance and of legislating steadily took a back seat to the imperatives of intense partisan warfare where compromise was considered toxic and where almost any threat to destroy another politician's career or hijack the legislative process was permissible if it was legal.").

35. See U.S. CONST. art I, § 8.

36. See *Sierra Club v. Trump*, 963 F.3d 874 (9th Cir. 2020) cert. granted, 141 S. Ct. 618 (Oct. 19, 2020); *California v. Trump*, 963 F.3d 926 (9th Cir. 2020) cert. granted, 141 S. Ct. 618 (Oct. 19, 2020). Petitions for certiorari in both cases were granted on October 19, 2020. The Supreme Court previously had stayed an injunction entered by the district court, thereby permitting the continued diversion of funds. See *Trump v. Sierra Club*, 140 S. Ct. 1 (2019). See also Andrew Solender, *Biden Returning Billions Trump Diverted for Border Wall to Pentagon*, FORBES (Apr. 30, 2021), <https://www.forbes.com/sites/andrewsolender/2021/04/30/biden-returning-billions-trump-diverted-for-border-wall-to-pentagon/?sh=1f03bc9162e6>.

37. See, e.g., *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) (holding that CFPB's single-administrator for-cause-removal feature violated the separation of powers); *Free Enter. Fund v. Pub. Co. Oversight Bd.*, 561 U.S. 477 (2010) (holding that a provision of the Sarbanes-Oxley Act violated the separation of powers because it made PCOB members removable only for cause to be determined by the members of the SEC, who were also removable only for cause). But see U.S. CONST. art. II, § 2, cl. 2 (providing that Congress may vest the appointment of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments."). See also ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 14 (2010) ("From the standpoint of liberal legalism, the administrative state does indeed feature an imperial executive; the critics are wrong only in thinking that anything can be done about this fact."); Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981-2000*, 89 DENV. U. L. REV. 197 (2011).

used to thwart investigations into executive wrongdoing.³⁸ Finally, the President derives great, extraconstitutional power from his position as head of party,³⁹ something that the founders did not anticipate.⁴⁰ Indeed, one might be tempted to conclude from recent events that the presidency is effectively unbounded by law, so long as the opposition party lacks a supermajority in the Senate.⁴¹

Much recent criticism of the Department of Justice in general—and of OLC in particular—has focused on the perceived shortcomings of the

38. See Carol D. Leonnig et al., *Trump's Lawyer Raised Possibility of Pardons for Manafort, Flynn Last Summer*, WASH. POST (Mar. 28, 2018, 3:12 PM), https://www.washingtonpost.com/politics/trumps-lawyer-allegedly-raised-possibility-of-pardons-for-manafort-flynn-last-summer/2018/03/28/3c5e570c-32ae-11e8-8abc-22a366b72f2d_story.html. The President pardoned Manafort and Flynn after the 2020 election. See Maanvi Singh, *Donald Trump's Latest Wave of Pardons Includes Paul Manafort and Charles Kushner*, GUARDIAN (Dec. 23, 2020, 9:17 PM), <https://www.theguardian.com/us-news/2020/dec/23/donald-trumps-latest-wave-of-pardons-includes-paul-manafort-and-charles-kunsher>. See also Peter Baker, *For a Defeated President, Pardons as an Expression of Grievance*, N.Y. TIMES (Dec. 24, 2020), <https://www.nytimes.com/2020/12/24/us/politics/trump-pardon-power.html>; Tim Naftali, *Trump's Pardons Make the Unimaginable Real*, ATLANTIC (Dec. 23, 2020), <https://www.theatlantic.com/ideas/archive/2020/12/how-abuse-presidential-pardon/617473/>; Matt Ford, *The Most Unpardonable Presidential Power*, NEW REPUBLIC (Dec. 2, 2020), <https://newrepublic.com/article/160420/trump-pardon-michael-flynn-giuliani>.

39. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring) (“Party loyalties and interests, sometimes more binding than law, extend [the President’s] effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution. Indeed, Woodrow Wilson, commenting on the President as leader both of his party and of the Nation, observed, ‘If he rightly interpret the national thought and boldly insist upon it, he is irresistible . . . His office is anything he has the sagacity and force to make it.’”).

40. See, e.g., Daryl J. Levinson & Richard Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2313–14 (2006) (noting that, although the rise of the party system almost immediately altered the system of inter-branch competition that the founders contemplated, “Madison’s account of rivalrous, self-interested branches is [still] embraced as an accurate depiction of political reality and a firm foundation for the constitutional law of separation of powers”).

41. See U.S. CONST. art. I, § 3, cl. 6 (“When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.”); see also, Sam Levine & Lauren Gambino, *Donald Trump Acquitted in Second Impeachment Trial*, OBSERVER (Feb. 13, 2021, 7:12 PM), <https://www.theguardian.com/us-news/2021/feb/13/donald-trump-acquitted-impeachment-trial>; Michael D. Shear & Nicholas Fandos, *Republicans Block Impeachment Witnesses, Clearing Path for Trump Acquittal*, N.Y. TIMES (Jan. 31, 2020), <https://www.nytimes.com/2020/01/31/us/politics/trump-impeachment-trial.html>; Igor Derysh, *Senate Juror Mitch McConnell Brags that He’s Coordinating Trump’s Impeachment Trial with White House*, SALON (Dec. 13, 2019, 2:52 PM), <https://www.salon.com/2019/12/13/senate-juror-mitch-mcconnell-brags-that-hes-coordinating-trumps-impeachment-trial-with-white-house/>.

Department's political leadership during the Trump era.⁴² That focus is not surprising, given that the abuses of the Trump Administration are still so raw.⁴³ One is hard-pressed, for example, to think of another recent administration that has so consistently thwarted Congress's efforts to exercise its oversight authority.⁴⁴ But the line between the institutional interests of the presidency and the political and personal interests of a current incumbent is not always clear; nor is there any consensus about just how independent the Department of Justice should be. The Department is situated in the executive branch, and law enforcement is an important executive function. Surely the President's general views on antitrust enforcement should be taken into account, for example, but

42. See, e.g., Katie Benner, *Barr Leaves a Legacy Defined by Trump*, N.Y. TIMES (Dec. 28, 2020), <https://www.nytimes.com/2020/12/28/us/politics/William-barr-trump.html?searchResultPosition=1>; Katie Benner, *Barr's Approach Closes Gap Between Justice Dept. and White House*, N.Y. TIMES (Sept. 25, 2020), <https://www.nytimes.com/2020/09/25/us/politics/william-barr-justice-department.html?searchResultPosition=1>; Michael S. Schmidt & Nick Corasaniti, *Justice Dept. Aids Trump's False Narrative on Voting*, N.Y. TIMES (Sept. 25, 2020), <https://www.nytimes.com/2020/09/25/us/politics/mail-ballots-pennsylvania-justice-department.html?searchResultPosition=1>; Aaron Blake, *A GOP-Appointed Judge's Scathing Review of William Barr's "Candor" and "Credibility," Annotated*, WASH. POST (Mar. 5, 2020, 5:32 PM), <https://www.washingtonpost.com/politics/2020/03/05/gop-appointed-judges-scathing-review-william-barrs-candor-credibility-annotated/>; Natasha Bertrand, *The Critical Part of Mueller's Report That Barr Didn't Mention*, ATLANTIC (Mar. 26, 2019), <https://www.theatlantic.com/politics/archive/2019/03/barrs-summary-omits-key-aspect-muellers-report/585703/>. A federal district judge recently found that the Department of Justice was not entitled, under Exemption 5 of the Freedom of Information Act, to withhold documents prepared in connection with Attorney General William Barr's response to the Mueller investigation. The court held that the Department's claim was based on untruthful affidavits. See, e.g., *Citizens for Responsibility and Ethics in Wash. v. U.S. Dep't of Just.*, No. 19-1552 (ABJ), 2021 WL 1749763 (D.D.C. May 3, 2021). The court found that:

[T]he [government's] affidavits are so inconsistent with evidence in the record, they are not worthy of credence. The review of the unredacted document *in camera* reveals that suspicions voiced by the judge in [an earlier litigation] and the plaintiff here were well-founded, and that not only was the Attorney General being disingenuous then, but DOJ has been disingenuous to this Court with respect to the existence of a decision-making process that should be shielded by the deliberative process privilege. The agency's redactions and incomplete explanations obfuscate the true purpose of the memorandum, and the excised portions belie the notion that it fell to the Attorney General to make a prosecution decision or that any such decision was on the table at any time.

Id. at 25.

43. See, e.g., MASHA GESSEN, *SURVIVING AUTOCRACY* (2020); STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018); YASCHA MOUNK, *THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER AND HOW TO SAVE IT* (2018).

44. See, e.g., Liz Hempowicz & Anne Tindall, *Trump won't Cooperate with Congressional Oversight. Here Are Congress's Options*, WASH. POST (Sept. 15, 2020, 5:00 AM), <https://www.washingtonpost.com/politics/2020/09/15/trump-wont-cooperate-with-congressional-oversight-here-are-congress-options/>; *Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees*, 43 Op. O.L.C., at 1 (May 23, 2019).

what if the President urges enforcement against only a few firms, all or most of whom he considers to be his political enemies?⁴⁵ Similarly, the Department should be responsive to the President's views when it sets criminal law enforcement priorities, but should the President be able to dictate the prosecution (or non-prosecution) of particular individuals?⁴⁶ And what role should the Department play when advising the President concerning the extent and limits of his power?⁴⁷ Should OLC approve the executive's preferred course of action whenever defending it in litigation would not violate Rule 11?⁴⁸ In short, the problems that concern us did not arise with the Trump Administration. They are longstanding and deep-seated; they reflect the necessarily ambiguous relationship of the Department of Justice and the President. They touch on the proper meaning and sweep of the "vesting clause,"⁴⁹ and on a proper understanding of the President's duty to "take [c]are that the [l]aws be faithfully executed."⁵⁰

45. See, e.g., Spencer Weber Waller & Jacob E. Morse, *The Political Misuse of Antitrust: Doing the Right Thing for the Wrong Reason*, COMPETITION POL'Y INT'L (July 16, 2020), <https://www.competitionpolicyinternational.com/the-political-misuse-of-antitrust-doing-the-right-thing-for-the-wrong-reason/>.

46. See, e.g., Bruce A. Green & Rebecca Roiphe, *May Federal Prosecutors Take Direction from the President?*, 87 FORDHAM L. REV. 1817 (2019); Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1 (2018). See also Eli Watkins, *Donald Trump Laments he's 'Not Supposed' to Influence DOJ, FBI*, CNN (Nov. 3, 2017), <https://www.cnn.com/2017/11/02/politics/donald-trump-justice-department-fbi/index.html> ("The saddest thing is that because I'm the President of the United States, I am not supposed to be involved with the Justice Department," Trump said. "I am not supposed to be involved with the FBI . . . I'm very unhappy with it that the Justice Department isn't going [after Secretary Clinton]," Trump said. "I am not supposed to be doing the kind of things that I would love to be doing. And I am very frustrated by it.").

47. Attorney General Caleb Cushing observed that the Attorney General was "not a counsel giving advice to the Government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and of legal obligation." See Caleb Cushing, *Office and Duties of Attorney General*, 6 Op. Att'y Gen. 326, 334 (1854). Interestingly, the Israeli Attorney General's role is conceived in that way. See YOAV DOTAN, *LAWYERING FOR THE RULE OF LAW: GOVERNMENT LAWYERS AND THE RISE OF JUDICIAL POWER IN ISRAEL* 54–57 (2014). But see H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION* 77 (2008) ("A political-branch lawyer . . . is thus in much the same quandary as a Supreme Court justice: there is no way to exclude politics in the sense I am using the term, by technique or by moral effort, and yet the very shape of her tasks assumes that law is not simply politics."). Another commentator suggests that the Attorney General's role is indistinguishable from that of a private lawyer representing a private client. See Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 449 (1993). See also William H. Rehnquist, *The Old Order Changeth: The Department of Justice Under John Mitchell*, 12 ARIZ. L. REV. 251, 254–56 (1970) (contrasting the Johnson and Nixon administrations' views of the proper function of the Department of Justice).

48. See Fed. R. Civ. P. 11.

49. U.S. CONST. art II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

50. *Id.* § 3 ("[H]e shall take Care that the Laws be faithfully executed.").

II. THE ACS PROPOSAL

ACS recently offered several recommendations designed to “reposition OLC around its core tradition of providing independent legal advice that offers its attorneys’ best view of the law to the president and executive branch actors.”⁵¹ “It is vital,” ACS wrote, “that an office within government perform this function to help ensure ongoing respect for a basic principle of our constitutional system—that executive action is constrained by law.”⁵² ACS articulated three guiding principles, followed by three specific recommendations. The three guiding principles were that OLC should explicate and defend the separation of powers “through careful consideration of the authorities and interests of the different branches of government;” that it must “strive[] to provide independent legal advice . . . that makes clear the limits the Constitution and statutes place on the executive’s authority to act;” and that it “must help promote accountability for the executive branch, which requires demonstrating a good-faith and robust commitment to transparency.”⁵³

ACS’s first specific recommendation was that OLC’s new leadership should survey its recent work product “to identify opinions or advice that fail to promote a legitimate interpretation of the law at issue, or that advance a conception of the separation of powers that unduly shields the president or the executive branch from scrutiny and accountability;” that those opinions and advice should be subjected to vigorous review; and that those that fail the test should be rescinded.⁵⁴ ACS’s second specific recommendation was that OLC’s new leadership should “articulate[] its rule-of-law values as principles and practices to bind its interpretation and analysis” in two ways: (1) by articulating “a set of best practices both tied to Office traditions and reflective of the changing structure and distribution of authority within the executive branch,” and (2) by “draft[ing] a new charter [of powers] that takes account of developments over the last quarter century in the law and politics of the separation of powers.”⁵⁵

According to ACS, OLC’s new statement of “best practices” should contain three commitments: (1) to provide the President and the executive branch “with [OLC’s] best view of what the law requires, rather than with advice that gives [OLC’s] imprimatur . . . to legal justifications that are merely colorable or arguably defensible,” (2) to “articulate structural and substantive

51. See ACS Statement on OLC and the Rule of Law, *supra* note 27, at 8.

52. *Id.*

53. *Id.* at 2-3.

54. *Id.* at 3. ACS further explains: “Over the last four years, the Office has issued and made publicly available opinions that arguably distort the separation of powers by brooking no recognition for Congress’s prerogatives as a co-equal branch, in high-visibility disputes with Congress over politically charged legal questions.” *Id.* ACS’s proposed “retrospective review would help determine whether and to what extent . . . reconsideration is required for OLC to sustain its credibility as a source of legal interpretation appropriately insulated from policy and political pressures.” *Id.* at 5.

55. *Id.* at 5.

strategies for ensuring that its advice remains independent from partisan political pressures,” and (3) to “articulat[e] a strong presumption in favor of publishing its final formal opinions.”⁵⁶

With respect to the new “charter of powers,” ACS recommends that OLC’s new leadership make “a serious study of separation of powers jurisprudence that has emerged since 1996 [when OLC prepared the memorandum upon which it currently relies], as well as a study of the major separation of powers conflicts between Congress and the executive branch that may never have reached the courts, or as they played out before the Supreme Court intervened, including the [OLC] opinions . . . that have been part of that conflict.”⁵⁷ OLC’s objective should be to chart an approach to separation of powers that is “less combative, more functional and [more] consistent.”⁵⁸

ACS’s third specific recommendation was that OLC should adopt a strong presumption in favor of timely publication of its final opinions. “[T]here will be exceptions for classified, privileged, or sensitive material. But the value of transparency in promoting accountability should guide OLC’s decision-making.”⁵⁹

The ACS suggestions are well-taken. The only question is whether they go far enough. The seriousness of OLC’s shortcomings over several administrations may suggest the need for a more radical solution than simply exhorting future OLC leaders to do better. To be sure, the professionalism and good faith of those who staff OLC is essential, and every effort should be made to encourage the return of that ethos to OLC. Transparency is equally important, and OLC advice should be made public to the greatest extent possible, consistent with the necessities of governing. On the other hand, are there personnel and structural reforms that Congress or the executive could initiate to reinforce positive change through greater institutional independence? If so, further questions arise as to what the optimal level of independence might be and whether attaining that level of independence is legally possible, given the recent trend in Supreme Court jurisprudence.

III. THE CONSTITUTIONAL BACKGROUND

The founders recognized the need for executive offices in addition to those of the President and Vice President. We know that because the Constitution specifies the manner in which “Officers of the United States” are to be appointed, and it also specifically empowers the President to “require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”⁶⁰ But the founders left the structure and design of the executive

56. *Id.*

57. *Id.* at 7.

58. *Id.*

59. *Id.* at 7–8.

60. *See* U.S. CONST. art. II, § 2, cl. 1–2.

branch to Congress. Under the “necessary and proper” clause,⁶¹ Congress may create and abolish executive departments, as well as particular offices or bureaus within the departments; prescribe the duties that attach to those offices and departments; transfer duties from one office or department to another; and prescribe qualifications for service in those offices.⁶² The founders also specifically provided that principal officers must be appointed by the President, with the advice and consent of the Senate, but they left Congress to decide whether the power to appoint “inferior Officers” should be vested “in the President alone, in the Courts of Law, or in the Heads of Departments.”⁶³ Since the Court’s decision in *Marbury v. Madison*, it has also been clear that Congress may impose on executive officials specific statutory duties that must be discharged according to the terms of the relevant law, without regard to the President’s wishes.⁶⁴

The precise degree to which Congress may exercise its power without infringing on the constitutional powers of the executive has long been contested.⁶⁵ During the time of the Watergate scandal, for example, Senator Sam Ervin, who was generally considered to be the Senate’s preeminent constitutional lawyer, introduced legislation that would have freed the Justice Department from direct presidential control; his proposed legislation would

61. See *id.* art. I, § 8, cl. 18.

62. See Mary M. Cheh, *When Congress Commands a Thing to Be Done: An Article on Marbury v. Madison, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 259 (2003).

Thus, *Marbury* makes plain that it is Congress’s job to create the executive offices of the United States, to set the terms of those offices, and to identify the bases for removal.

Finally, *Marbury* established that Congress may prescribe the duties to be performed by executive officials, and that, if they are commanded to perform certain acts, they are accountable to the law only. Their acts may not be controlled by the President and, should they fail in their duty, the laws of the country will afford a remedy to any person injured as a result.

Id.

63. See U.S. CONST. art. II, § 2, cl. 2.

64. See *Marbury v. Madison*, 5 U.S. 137, 158 (1803) (“It is the duty of the Secretary of State to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.”).

65. See, e.g., *Myers v. United States*, 272 U.S. 52, 117 (1926) (Taft, C.J.) (“[T]he reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be . . . that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.”). Justices McReynolds, Holmes, and Brandeis dissented. Justice Holmes wrote that, “[t]he duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.” *Id.* at 295 (Holmes, J., dissenting).

have transformed the Department into an independent agency, with the Attorney General and two other key officials being appointed by the President with the advice and consent of the Senate, serving set terms that would not coincide with the President's, and being removable only for cause.⁶⁶ Jimmy Carter made a similar proposal during the 1976 presidential campaign.⁶⁷

The Ervin bill was widely opposed by constitutional law scholars and failed to advance.⁶⁸ While the bill was criticized on numerous grounds, "one study found constitutional infirmity in the attempt . . . to transfer the total Department rather than specific Department functions."⁶⁹ According to that study, removal of the entire Department from presidential oversight would have interfered with the President's ability to see that the laws are faithfully executed, to recommend legislation to Congress, and to decide whether to approve or veto legislation.⁷⁰ What seems particularly troublesome is the provision that would

66. See S. 2803, 93d Cong. (1973). The bill provided that the President would appoint the Attorney General, the Deputy Attorney General, and the Solicitor General, with the advice and consent of the Senate, to six-year terms. Senator Ervin explained, in introducing the bill, that, "[a]ll subordinate officers in the Department, including the Director of the [FBI], would be appointed by the Attorney General. The officers appointed by the President would be removable by the Chief Executive only for neglect of duty or malfeasance in office. They, accordingly, would be protected under the doctrine of the Humphrey's Executor and Wiener cases." See *Removing Politics from the Administration of Justice: Hearings Before the Subcommittee on Separation of Powers of the Committee on the Judiciary*, 93d Cong. at 4 (1974) (Opening Statement of Sen. Ervin). The bill obviously was the product of Senator Ervin's reflections on the abuses of the Nixon Justice Department. Ironically, Chief Justice Rehnquist, while serving as an Assistant Attorney General in the Nixon Administration in 1970, had criticized Ramsey Clark, President Johnson's Attorney General, for leading the Department of Justice in a way more appropriate to "a European 'Ministry of Justice,' where in effect the Department or Ministry is itself responsible for the end product that emerges from the administration of the system of criminal justice," rather than as simply another participant in the adversary process. See William H. Rehnquist, *The Old Order Changeth: The Department of Justice Under John Mitchell*, 12 ARIZ. L. REV. 251, 255 (1970).

67. See 1 COMM. ON HOUSE ADMIN., U.S. HOUSE OF REPRESENTATIVES, THE PRESIDENTIAL CAMPAIGN 1976: JIMMY CARTER 490, 618 (1978) (proposing fixed term for Attorney General, removable for malfeasance mutually determined by President and designated congressional leaders); GRIFFIN B. BELL WITH RONALD J. OSTROW, TAKING CARE OF THE LAW 28 (1982). OLC advised Judge Bell that "there is serious doubt as to the constitutionality of such legislation," and he so advised the President. Proposals Regarding an Independent Attorney General, 77 Op. O.L.C. 75 (Apr. 11, 1977). At about the same time, OLC suggested that legislation to create inspectors general was also unconstitutional. See *Inspector General Legislation*, 77 Op. O.L.C. 16 (Feb. 21, 1977).

68. See *Watergate Reorganization and Reform Act of 1975: Hearings Before the Committee on Government Operations*, 94th Cong., 288-95 (1976).

69. *Id.* at 288.

70. *Id.* In 2008, Senators Russ Feingold and Diane Feinstein introduced a more limited bill, entitled the OLC Reporting Act of 2008, which would have required the Attorney General to report to Congress whenever the Department issued certain kinds of "authoritative legal interpretation[s]" of "Federal statute[s]." See S. 3501, 110th Cong., § 2 (2008). According to the Senate Committee Report, "The purpose of the [bill was] to provide a targeted response to a particularly problematic

have granted the Attorney General and two other key officials a set term that would not have been coterminous with that of the President. In other words, not only would the Attorney General and two other high-ranking officials be protected from termination (except for cause) during their terms, they might also be individuals who were chosen by the incumbent President's predecessor, and they might be wholly unsympathetic to the incumbent President's goals and policies.⁷¹ How could the President "take care that the laws be faithfully executed" if the principal members of the President's legal team were neither chosen by the President nor answerable to him? In retrospect, the bill seems premised on a somewhat naïve view that law and policy can be wholly separated in our constitutional system and on a lack of attentiveness to their necessary connections.⁷²

manifestation of 'secret law'—secret legal opinions issued by the Department of Justice (DOJ) that effectively exempt the executive branch from compliance with federal statutes." See S. Rep. No. 110-528, at 1 (2008). The Bush Administration strongly opposed the legislation, which was not enacted. See, e.g., Letter from Michael B. Mukasey, Att'y Gen., U.S. Dep't of Just., to Hon. Harry Reid, Majority Leader, United States Senate (Nov. 14, 2008); see also Kel McClanahan, *How One Secretive Justice Department Office Can Sway the Whole Government*, WASH. POST (Sept. 26, 2019), <https://www.washingtonpost.com/outlook/2019/09/26/how-one-secretive-justice-department-office-can-sway-whole-government/>.

71. Given the present degree of political polarization in the country, as well as the deep distrust that currently characterizes the relations of the two principal political parties, it is difficult to believe that anyone today would propose such a solution to the problem of Justice Department politicization. To imagine the difficulties that a President might face from having to govern with the assistance of an Attorney General who was appointed by his or her predecessor, and is removable only for cause, one need only think of the fraught intra-branch relations that sometimes exist at the beginning of a new President's term, when the Department of Justice may be led for a short time by a hold-over from the previous administration. The beginning weeks of the Trump Administration are instructive in that regard. See, e.g., Marty Lederman, *Sally Yates Did the Right Thing*, JUST SECURITY (Jan. 31, 2017), <https://www.justsecurity.org/37029/sally-yates/>; see also Sally Q. Yates, *Protect the Justice Department from President Trump*, N.Y. TIMES (July 28, 2017), <https://www.nytimes.com/2017/07/28/opinion/sally-yates-protect-the-justice-department-from-president-trump.html>. This Article suggests that the head of OLC might be given a fixed term, either by statute or by administrative regulation, see *infra* at 749, but the current proposal suffers from none of the infirmities identified with respect to Senator Ervin's bill. First, the Attorney General and other top leadership of the Department of Justice would not be insulated from presidential control. Second, the President would never have to rely for the execution of the laws on a head of OLC or on any other officer of the Department of Justice who had been appointed by the President's predecessor. Third, the head of OLC, unlike the Attorney General, does not directly enforce any law, and any determination made by the head of OLC would be subject to revision or reversal by the Attorney General or the President. Finally, this proposal, unlike Senator Ervin's, is fully consistent with a proper understanding of the essential connections between law and policymaking.

72. Justice Jackson reflected on the close connections between law and policy in his account of President Roosevelt's decision to exchange destroyers for leases on British bases, and to do so by executive agreement, rather than asking Congress to enact new legislation:

It will disappoint those who imagine that the President decided to go it on his own and ordered the Attorney General to turn out a sustaining opinion to learn that the Attorney

In his opening statement at the Senate hearing on S. 2803, Senator Ervin did not focus on the possible objections to transferring *all* law enforcement responsibilities to an entity beyond the immediate control of the President. Senator Ervin invoked two Supreme Court cases in support of his proposed legislation—*Wiener v. United States*⁷³ and *Humphrey's Executor v. United States*.⁷⁴ But he made no mention of the Court's earlier decision in *Myers v. United States*,⁷⁵ which has now become the standard against which the Supreme Court evaluates the constitutionality of all structural innovations. In the 1970s, *Myers* did not cast such a long shadow, and Senator Ervin understandably may have thought that the case was not relevant to his project; he intended to create an independent agency, and, as *Wiener* and *Humphrey's Executor* made clear, fixed terms and “for cause” removal provisions were constitutionally permissible in that context. Moreover, Senator Ervin doubtless understood that the legal question in *Myers* was not whether Congress, in the exercise of its undisputed authority to provide for the architecture of the executive branch, could constitutionally create an executive position with a fixed term; the narrow question presented in *Myers* was whether Congress could empower the Senate to override the President's decision to remove a particular executive official.

In addition, the Supreme Court's most recent pronouncement on the subject was Justice Frankfurter's opinion for a unanimous Court in *Wiener*, which viewed much of the *Myers* opinion as unnecessary (and unwarranted) dicta, and reaffirmed Congress's power to specify the conditions for removing members of independent agencies.⁷⁶ In *Wiener*, Justice Frankfurter parsed the earlier decisions:

General advised some time before the decision itself that existing law gave the president the necessary power. The legal opinion, far from being the result of the President's decision, was a contributing factor in reaching it, as may be inferred from the fact that the opinion was sent to Congress and the country to accompany the message announcing the exchange.

ROBERT H. JACKSON, *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* 93 (John Q. Barrett ed. 2003).

73. *Wiener v. United States*, 357 U.S. 349 (1958).

74. *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

75. *Myers v. United States*, 272 U.S. 52 (1926).

76. *Wiener* involved a back-pay claim by a former War Claims Commissioner who maintained that he had been unlawfully removed from his position. *Wiener*, 357 U.S. 349. The case was largely indistinguishable from *Humphrey's Executor*, the main difference being that the Commission was meant to be short-lived, and Congress had not specified the members' terms apart from setting the Commission's sunset date. “This limit on the Commission's life was the mode by which the tenure of the Commissioners was defined, and Congress made no provision for removal of a Commissioner.” *Id.* at 350. The *Wiener* Court also noted that, in the absence of specific statutory language concerning removal, “the most reliable factor for drawing an inference regarding the President's power of removal is the nature of the function that Congress vested in the . . . Commission.” *Id.* at 353. In *Wiener*, “[a]s in *Humphrey's Executor* . . . the Commissioners were entrusted by Congress with adjudicatory powers that were to be exercised free from executive control.” *Morrison v. Olson*, 487 U.S. 654, 688 (1988).

Speaking through a Chief Justice who himself had been President, the Court [in *Myers*] did not restrict itself to the immediate issue before it, the President's inherent power to remove a postmaster, obviously an executive official. As of set purpose and not by way of parenthetic casualness, the Court announced that the President had inherent constitutional power of removal also of officials who have "duties of a quasi-judicial character * * * whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control."

....

Within less than ten years a unanimous Court, in *Humphrey's Executor v. United States* . . . narrowly confined the scope of the *Myers* decision to include only "all purely executive officers." The Court explicitly "disapproved" the expressions in *Myers* supporting the President's inherent constitutional power to remove members of quasi-judicial bodies.

....

And what is the essence of the decision in *Humphrey's* case? It drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are members of a body "to exercise its judgment without the leave or hindrance of any other official or any department of the government," as to whom a power of removal exists only if Congress may fairly be said to have conferred it.⁷⁷

The *Wiener* Court read *Humphrey's Executor* as having drawn "a sharp line of cleavage between officials who were part of the Executive establishment and [therefore] removable by virtue of the President's constitutional powers, and those who are members of a body 'to exercise its judgment without the leave or hindrance of any other official or any department of the government,'" who may be removed by the President "only if Congress may fairly be said to have conferred" that power.⁷⁸ *Wiener* made clear that Congress could grant

77. *Wiener*, 357 U.S. at 351–53 (internal citations omitted). Many contemporary admirers of the *Myers* decision view it as an example of originalism. As Robert Post has recently shown, however, Chief Justice Taft "was unwilling to rest his conclusion entirely on evidence of original meaning," and the opinion relies as much on the Chief Justice's policy judgments about effective presidential leadership as on original meaning. See Robert Post, *Tension in the Unitary Executive: How Taft Constructed the Epochal Opinion of Myers v. United States*, J. SUP. CT. HIST (forthcoming 2020) (manuscript at 28), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3600064. Likewise, Professor Post shows that Chief Justice Taft's acknowledgment of Congress's constitutional authority with respect to determining the removal rules for inferior officers "is surely not an argument that would be embraced by contemporary advocates of a powerful 'unitary executive,' who argue for 'a hierarchical, unified executive department under the direct control of the President.'" *Id.* at 31. Professor Post also notes that the Chief Justice's argument "received scathing reviews in the scholarly literature of the time." *Id.*

78. *Wiener*, 357 U.S. at 353.

tenure of employment to the members of at least some independent agencies,⁷⁹ but the *Wiener* Court had no reason to decide whether all executive officials must be subject to at-will removal by the President. The Court finally addressed that question in 1988 in *Morrison v. Olson*.⁸⁰

In *Morrison*, the Court was asked to determine the constitutionality of the independent counsel provisions of the post-Watergate Ethics in Government Act.⁸¹ The provisions, which authorized the appointment of an independent counsel “to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws,” placed the appointment power in a specially designated court⁸² and the removal power in the Attorney General; but the Attorney General was required to exercise the removal power personally and “only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel’s duties.”⁸³ The provision relating to the appointment of the independent counsel was challenged under the appointments clause and Article III, while the removal provision and the Act as a whole were challenged as a violation of separation of powers.⁸⁴ In an opinion by Chief Justice Rehnquist, the Court rejected each of these contentions.⁸⁵ The Court described the two separation of powers issues as follows:

The first is whether the provision of the Act restricting the Attorney General’s power to remove the independent counsel to only those instances in which he can show “good cause,” taken by itself, impermissibly interferes with the President’s exercise of his constitutionally appointed functions. The second is whether, taken as a whole, the Act violates the separation of powers by reducing the President’s ability to control the prosecutorial powers wielded by the independent counsel.⁸⁶

The *Morrison* Court began its analysis of the separation of powers issues by reaffirming the explanation of *Myers* that the Court had given two years before in *Bowsher v. Synar*,⁸⁷ namely, that “the essence of . . . *Myers* was the judgment that the Constitution prevents Congress from ‘draw[ing] to itself . . . the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of the

79. In *Humphrey’s Executor*, the Court emphasized the “quasi-judicial” and “quasi-legislative” nature of the Commission’s work. See *Humphrey’s Executor*, 295 U.S. at 872.

80. *Morrison v. Olson*, 487 U.S. 654 (1988).

81. 28 U.S.C. §§ 49, 591 *et seq.* The provisions lapsed in 1999. See Helen Dewar, *With Few Backers, Independent Counsel Law Is Set to Lapse*, WASH. POST, June 5, 1999, at A2, <https://www.washingtonpost.com/wp-srv/politics/special/counsels/stories/counsel060599.htm>.

82. *Morrison*, 487 U.S. at 660–61 (citing to 28 U.S.C. §§ 591–599 & 48).

83. *Id.* at 663 (quoting 28 U.S.C. § 596(a)(1)).

84. *Id.* at 659–60.

85. *Id.* at 660. Justice Scalia dissented. *Id.* at 697.

86. *Id.* at 685.

87. See *Bowsher v. Synar*, 478 U.S. 714 (1986).

[Appointments Clause] and to infringe the constitutional principle of the separation of governmental powers.”⁸⁸ That was not the case with respect to the removal provision at issue in *Morrison*, which “puts the removal power squarely in the hands of the Executive Branch.”⁸⁹ “In our view,” the Court said, “the removal provisions of the Act make this case more analogous to *Humphrey’s Executor* . . . and *Wiener* . . . than to *Myers* or *Bowsher*.”⁹⁰ The Court then rejected the argument that “*Humphrey’s Executor* rests on a distinction between ‘purely executive’ officials and officials who exercise ‘quasi-legislative’ and ‘quasi-judicial’ powers,” as well as the argument that, “under *Myers*, the President must have absolute discretion to discharge ‘purely executive’ officials at will.”⁹¹ The Court continued: “The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President’s exercise of the ‘executive power’ and his constitutionally appointed duty to ‘take care that the laws be faithfully executed.’”⁹² Importantly, the Court observed that “the real question is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.”⁹³

After concluding that the removal provision did not by itself violate the separation of powers, the Court proceeded to consider whether “the Act, taken as a whole, violates the . . . separation of powers by unduly interfering with the role of the Executive Branch.”⁹⁴ The Court again noted that the Act was not an attempt by Congress to increase its own powers at the expense of the Executive’s; nor did it work any judicial usurpation of properly executive functions.⁹⁵

Finally, the Court held that although “[i]t is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity,” the Act did not impermissibly undermine the powers of the Executive Branch or disrupt the proper balance between the branches by preventing the Executive from performing its constitutionally assigned functions.⁹⁶ The Court observed that the Attorney General’s authority was limited in that he could not appoint the individual of his choice, determine the counsel’s jurisdiction, or remove her without cause.⁹⁷

88. *Morrison*, 487 U.S. at 686.

89. *Id.*

90. *Id.*

91. *Id.* at 688–89.

92. *Id.* at 689–90.

93. *Id.* at 691.

94. *Id.* at 693.

95. *See id.* at 694–95.

96. *Id.* at 695.

97. *Id.* at 695–96.

But the Court found that these limitations were balanced by provisions that gave the Attorney General the exclusive power to request the appointment of an independent counsel, provided for “good cause” removal (which preserved the Executive’s “substantial ability to ensure that the laws are ‘faithfully executed’ by an independent counsel”), and made the independent counsel’s jurisdiction dependent on the facts submitted by the Attorney General and its exercise subject to general Department of Justice policy.⁹⁸ The Court concluded:

Notwithstanding the fact that the counsel is to some degree “independent” and free from executive supervision to a greater extent than other federal prosecutors, in our view these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.⁹⁹

In 2010, the Court returned to removal in the context of independent agencies. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*,¹⁰⁰ the Court invalidated a provision of the Sarbanes-Oxley Act that protected the members of the Public Company Accounting Oversight Board (“PCAOB”) from removal by the members of the Securities and Exchange Commission (“SEC”) except “for good cause shown.”¹⁰¹ Citing *Myers*, Chief Justice Roberts noted that “the Constitution has been understood [since 1789] to empower the President to keep these officers accountable—by removing them from office, if necessary,” but that the Court has nonetheless held that the

98. *Id.* at 696.

99. *Id.* Justice Scalia dissented. *Id.* at 697. Justice Scalia started from the proposition that Article II, Section 1, clause 1 vests in the President “not . . . some of the executive power, but all of the executive power.” *Id.* at 705. The statute therefore required invalidation “on fundamental separation-of-powers principles if the following two questions are answered affirmatively: (1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power? (2) Does the statute deprive the President of the United States of exclusive control over the exercise of that power?” *Id.* Since he answered both questions in the affirmative, he would have invalidated the statute. *Id.* Justice Scalia’s dissent has many admirers. See, e.g., Noel J. Francisco, *Justice Scalia: Constitutional Conservative*, 84 U. CHI. L. REV. 2169, 2171 (2017) (“Justice Scalia’s dissent in *Morrison v. Olson* is regarded by many as his masterpiece.”). Alfred Aman and Carol Greenhouse have noted that, notwithstanding the current influence of the unitary executive theorists, “the durability of *Humphrey’s Executor* is impressive.” Alfred C. Aman, Jr. & Carol J. Greenhouse, *Fire Power: Constitutional Limits and Institutional Norms Governing the United States President’s Power of Removal* in PENSER LE DROIT A PARTIR DE L’INDIVIDU: MELANGES EN L’HONNEUR D’ELISABETH ZOLLER 15 (2018). Professors Aman and Greenhouse also emphasize the importance of certain rule-of-law norms that limit the President’s removal power, even absent “for cause” protection. *Id.*

100. 561 U.S. 477 (2010).

101. See 15 U.S.C. § 7211(e)(6). Under the statute, “good cause” required a finding, made “on the record” and “after notice and opportunity for a hearing,” that the Board member has “willfully violated any provision of this Act,” “willfully abused [his or her] authority,” or, “without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof.” See 15 U.S.C. § 7217(d)(3).

removal power is “not without limit.”¹⁰² Thus, in *Humphrey’s Executor*, “we held that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause.”¹⁰³ Further, “the Court [has] sustained similar restrictions on the power of principal executive [branch] officers—themselves responsible to the President—to remove their own inferiors.”¹⁰⁴

According to the Chief Justice, *Free Enterprise* presented a novel question, namely, whether Congress violates the Constitution when it provides for more than one level of “for cause” removal protection. The Chief Justice stated the question: “[W]hether these separate layers of protection may be combined. May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?”¹⁰⁵ That issue was presented in *Free Enterprise* because the members of the PCAOB were removable only for cause by the SEC commissioners, who were themselves assumed to be removable only for cause.¹⁰⁶ In a 5 to 4 vote, the Court held that “such multilevel protection from removal is contrary to Article II’s vesting of the executive power in the President.”¹⁰⁷ According to the majority:

The President cannot “take Care that the Laws be faithfully executed” if he cannot oversee the faithfulness of the officers who execute them. Here the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President’s determination, and whom the President cannot remove simply because that officer disagrees with him. This contravenes the President’s “constitutional obligation to ensure the faithful execution of the laws.”¹⁰⁸

102. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010).

103. *Id.*

104. *Id.* The Court observed that, “[t]he parties do not ask us to reexamine any of these precedents, and we do not do so.” *Id.* at 483.

105. *Id.* at 483–84.

106. *Id.* at 493. The parties and the majority assumed that the members of the SEC were removable only for cause. *Id.* Justice Breyer’s dissent provided substantial grounds for doubting the accuracy of that assumption. *Id.* at 514.

107. *Id.* at 484.

108. *Id.* The Chief Justice further noted that,

The added layer of tenure protection makes a difference. Without a layer of insulation between the Commission and the Board, the Commission could remove a Board member at any time, and therefore would be fully responsible for what the Board does. The

Finally, in *Seila Law v. Consumer Fin. Prot. Bureau*,¹⁰⁹ the Court considered the constitutionality of the Consumer Financial Protection Bureau (“CFPB”), which was organized under the control of a single administrator appointed for a five-year term and removable only for “inefficiency, neglect of duty, or malfeasance in office.”¹¹⁰ As in *Free Enterprise*, the Court viewed this structure as an anomaly that could be upheld only if the Court were willing to extend its prior precedents, which the Court, again by a 5–4 vote, declined to do.¹¹¹ Echoing Justice Scalia’s dissent in *Morrison*, Chief Justice Roberts observed that, “[u]nder our Constitution, the ‘executive Power’—all of it—is ‘vested in a President,’ who must ‘take Care that the Laws be faithfully executed.’”¹¹² Excavating the facts of prior cases, he then went on to explain that there are only two exceptions to the President’s unrestricted removal power:

In *Humphrey’s Executor* . . . we held that Congress could create expert agencies led by a group of principal officers removable by the President only for good cause. And in . . . *Morrison v. Olson* . . . we held that Congress could provide tenure protections to certain inferior officers with narrowly defined duties. We are now asked to extend these precedents to a new configuration: an independent agency that wields significant executive power and is run by a single individual who cannot be removed by the President unless certain statutory criteria are met . . . [T]here are compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director. Such an agency lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control.¹¹³

President could then hold the Commission to account for its supervision of the Board, to the same extent that he may hold the Commission to account for everything else it does.

Id. at 495–96. However, as Justice Breyer pointed out in his dissent, the President’s power to hold the SEC responsible “for everything else it does” would be severely limited by the first layer of “for cause” removal protection in any event, assuming that the majority was correct in its belief that the members of the SEC were themselves protected from termination except for cause. *See id.* at 496.

109. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).

110. *See* 12 U.S.C. §§ 5491(b)(1), (b)(2), (c)(1), (c)(3).

111. *Seila*, 140 S. Ct. at 2192.

112. *Id.* at 2191.

113. *Id.* at 2192. Rather than invalidating the statute, the Court severed the removal provision—a result in which the dissenters concurred, *see id.* at 2217, but from which Justice Thomas and Justice Gorsuch dissented. *See id.* 2211. Justice Thomas commended the Court for limiting *Humphrey’s Executor*, but suggested that it should be overruled in the future. *Id.* at 2211. Justice Kagan noted in dissent that the Court traditionally had left most decisions about the structure of the Executive Branch “to Congress and the President, acting through legislation they both agree to.” *Id.* at 2224. That included creating “zones of administrative independence” through “for cause” limitations on the President’s removal power for the Federal Reserve, the Federal Trade Commission, and the National Labor Relations Board. “Those statutes, whose language the Court

At the most general level, *Free Enterprise* and *Seila* may be seen to reflect an embrace of the unitary executive theory and a lack of sympathy for the administrative state. Taken at face value, they also seem to reflect a somewhat naïve view of presidential accountability.¹¹⁴ Those attitudes are manifested in the Court's technique, namely excavating and attributing constitutional significance to the facts of its earlier precedents as a way of creating narrowing distinctions that bear only the slightest relationship to the Court's reasoning in those earlier cases. For now, however, *Humphrey's Executor* and *Morrison* remain good law on their own terms, and it is difficult to see how much further the Court can go in hollowing out these precedents without bringing down such fundamental, indispensable aspects of our current constitutional order as the independence of the Federal Reserve Board.¹¹⁵ Justices Thomas and Gorsuch might be willing to go to that extreme, but it would be surprising if others were not ultimately persuaded by Justice Kagan's warnings in *Seila*.¹¹⁶

IV. THE POSSIBILITIES FOR REFORM

Given the state of the law, what might be done to ensure a greater degree of independence and professionalism for OLC? First, as ACS has suggested, OLC should be as transparent as possible, consistent with the true necessities of governing, and it should be committed to understanding the separation of powers from the perspectives of each of the branches of government, not simply

repeatedly has approved, provide the model for the removal restriction before us today. If precedent were any guide, that provision would have survived its encounter with this Court—and so would the intended independence of the [CFPB].” *Id.* at 2224–25.

114. See, e.g., PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 161–62 (2009) (“[D]espite common references to a presidential candidate’s unique “national constituency,” a presidential candidate is subject to election only twice—and only once after the country has actually witnessed the President’s performance During both an initial campaign and another for reelection, a presidential candidate knows that his detailed stances on matters of policy are not likely to make decisive differences in his political fortunes.”). Moreover, the indirect nature of the role played by the people in the election of the President cannot be overemphasized. See, e.g., JESSE WEGMAN, LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE (2020).

115. As Christine Chabot has noted, the *Seila* majority seem to have recognized that the Federal Reserve might prove problematic and seemingly “held open the possibility that the ‘Federal Reserve can claim a special historical status.’” Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1, 18 (2020) (quoting *Seila*, 140 S. Ct. at 2202 n.8). Interestingly, Professor Post has noted that Justice Harlan Fiske Stone, who joined the majority in *Myers*, had pushed Chief Justice Taft to hold that the President had “unrestricted removal power of all executive subordinates, superior and inferior, whether appointed by the president or by the head of a department.” Post, *supra* note 77, at 30. Professor Post observed that “Taft, as a practical politician, refused even to intimate that the Civil Service was constitutionally infirm in this way. [As a result,] Taft’s argument was thus left curiously suspended and unsatisfying.” *Id.*

116. See *Seila*, 140 S. Ct. at 2226–36, 2244–45.

from that of the executive.¹¹⁷ Second, the presence of four politically appointed deputies sends a strong message that OLC's primary mission is political rather than legal.¹¹⁸ That is unfortunate and unnecessary. Until the Reagan administration, the Solicitor General had no political deputies, and even now there is only one.¹¹⁹ There is no need for all but one of the OLC deputies to be political appointees, and there is little danger that fewer political deputies will result in a failure to promote the executive's viewpoint within appropriate bounds. As Trevor Morrison has argued, "the generally pro-executive tenor in OLC's opinions simply reflects that OLC is part of the Executive Branch."¹²⁰ That will continue whether or not all four deputies are political appointees. What might not continue are "assertions of executive authority, no matter how audacious."¹²¹ Third, as Bradley Lipton has suggested, the recruitment of more experienced lawyers to staff OLC would also be helpful.¹²² Newly minted, politically ambitious lawyers are more likely than experienced career lawyers to be receptive to political suggestion, regardless of how far-fetched an argument might be necessary to justify the executive's preferred course of action.¹²³

Serious consideration should also be given to endowing OLC with greater structural independence by providing the head of OLC with a fixed term coterminous with that of the President, during which time the head of OLC could be removed only for cause. Under such a scheme, the head of OLC would remain someone of the President's choosing, who would presumably share the President's goals and be committed to the President's policies. Providing the head of OLC with a fixed term, however, would ensure a modest degree of institutional independence that would strengthen his or her position if unreasonable pressures ever were brought to bear. As the Court observed in

117. Many OLC opinions will probably be exempt from mandatory disclosure under Exemption 5 of the Freedom of Information Act. *See, e.g., Campaign for Accountability v. U.S. Dep't of Justice*, 486 F.Supp.3d 424 (D.D.C. 2020). It warrants noting, however, that Freedom of Information Act exemptions are generally permissive, rather than mandatory. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979).

118. *See, e.g., Lipton, supra* note 20, at 254–55.

119. *See, e.g., Rex E. Lee Conference on the Office of the Solicitor General of the United States*, 2003 BYU L. REV. 1, 44 (2003) (remarks of Andrew L. Frey); *id.* at 54 (remarks of Michael McConnell). As Donald Ayer noted, the politically appointed deputy position came about after no senior member of the Solicitor General's Office was willing to sign the government's brief in a case in which the Solicitor General was recused. *Id.* at 87–89 (remarks of Donald Ayer). *See Bob Jones Univ. v. United States*, 461 U.S. 547 (1983); Olatunde C.A. Johnson, *The Story of Bob Jones University v. United States: Race, Religion, and Congress' Extraordinary Acquiescence*, in STATUTORY INTERPRETATION STORIES 126, 144–48 (William Eskridge et al., eds., 2010).

120. *See Morrison, supra* note 20, at 150.

121. *Id.*

122. Lipton, *supra* note 20, at 255.

123. *See, e.g., Erica Newland, I'm Haunted by What I Did as a Lawyer in the Trump Justice Department*, N.Y. TIMES, (Dec. 20, 2020), <https://www.nytimes.com/2020/12/20/opinion/trump-justice-department-lawyer.html?searchResultPosition=1>. The author graduated from Yale Law School in 2015 and worked at OLC from 2016 to 2018.

Humphrey's Executor, "one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."¹²⁴ Here, of course, the goal is something far less than complete independence. The goal is simply to provide the head of OLC with some measure of security that might strengthen his or her position in the event that he or she were pressured to give an opinion that was not in accordance with OLC's "best view of the law."¹²⁵ Such a scenario may be unlikely to occur in any event, but granting this limited degree of security of position to the head of OLC could serve the prophylactic purpose of rendering that possibility even more remote.

Moreover, removal for cause need not be the anemic remedy that the Court has recently conceived it to be. In *Bowsher v. Synar*,¹²⁶ for example, a key consideration in the Court's determination that Congress had improperly retained control over the Comptroller General was the fact that Congress could remove him for "inefficiency," "neglect of duty," or "malfeasance."¹²⁷ According to the *Bowsher* Court, "[t]hese terms are very broad and, as interpreted by Congress, could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will."¹²⁸ So construed, they should provide the President with an appropriate degree of control over an official of his own choosing, without interfering with the President's duty to "take Care that the Laws be faithfully executed."¹²⁹

The role of OLC is important but limited. OLC does not directly enforce any law. Nor does it have the final word concerning any government policy. Its sole function is to provide legal advice to the executive branch.¹³⁰ Moreover, any legal determination that OLC might make is subject to revision by the Attorney General or the President, and any such determination with which they might disagree necessarily will give way to their superior authority. Although the Attorney General does not routinely review the advice given by OLC, that need not be the case. For these reasons, the head of OLC would qualify as an "Inferior Officer," and, under *Morrison*, Congress could structure OLC in a way that provided the limited degree of independence that we have considered. Alternatively, the Attorney General could so provide by regulation, as is

124. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935).

125. See ACS Statement on OLC and the Rule of Law, *supra* note 27, at 8.

126. 478 U.S. 714 (1986).

127. *Id.* at 729.

128. *Id.* The Court further noted that the Constitutional Convention chose to permit impeachment of executive officers only for "Treason, Bribery, or other high Crimes and Misdemeanors." It rejected language that would have permitted impeachment for "maladministration," with Madison arguing that "[s]o vague a term will be equivalent to a tenure during pleasure of the Senate." *Id.* at 729-30.

129. U.S. CONST., art. II, sec. 3.

130. *But see* Campaign for Accountability v. U.S. Dep't of Just., 486 F. Supp. 3d 424, 437-41, 445 (D.D.C. 2020) (noting the possibility that OLC opinions that definitively resolve interagency disputes may be subject to mandatory disclosure).

currently the case with the special counsel.¹³¹ There seems, therefore, to be no legal obstacle to such a reform. That suggests the need for a robust discussion of the relevant policy arguments.

Finally, it is essential to our form of government that OLC “provid[e] independent legal advice that offers its attorneys’ best view of the law to the president and executive branch actors.”¹³² That will require certain structural and other reforms, but, as others have noted, it will also require the development of a particular institutional ethos and sense of mission within OLC. The nurturing of that kind of ethos will not be easy because we live in a world in which there are many mutually reinforcing forces that create strong incentives simply to “give the lady what she wants.”¹³³

131. See 28 C.F.R. § 600.1 *et seq.*; see also U.S. Dep’t of Just., Off. of the Att’y Gen., Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters, Order No. 3915-2017 (May 7, 2017).

132. See ACS Statement on OLC and the Rule of Law, *supra* note 27, at 8.

133. WENDT & KOGAN, *supra* note 1, at 223.

