

NOTE

THE PARTIALITY NORM: SYSTEMATIC DEFERENCE IN THE OFFICE OF LEGAL COUNSEL

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INTRODUCTION

A flurry of action marks contemporary presidential terms, as Presidents mold domestic and foreign policy through often-controversial executive orders, proclamations, and other actions.¹ The Obama administration, for instance, suspended deportation of undocumented individuals who arrived in the United States as children,² and authorized a drone strike on Anwar al-Awlaki (or, al-Aulaqi), a U.S. citizen and a member of al-Qaeda.³ President Trump issued two executive orders suspending travel and immigration from certain countries,⁴ as well as an executive order permitting religious organizations to engage in political activities.⁵ The aforementioned orders affect a variety of matters, but the legal minds crafting and justifying the actions came mostly from the same office—the Office of Legal Counsel (OLC).⁶

The OLC, located within the Department of Justice, provides legal advice to the President and to the Executive Branch agencies.⁷ Headed by the Assistant Attorney General and com-

encouragement. I would also like to thank members of the *Cornell Law Review* for their thorough work in the editing of this piece.

¹ For example, whereas President George Washington issued eight executive orders, President Barack Obama issued 276 during his term. *Executive Orders: Washington - Trump*, THE AM. PRESIDENCY PROJECT (July 20, 2017), <http://www.presidency.ucsb.edu/data/orders.php> [<https://perma.cc/43B6-8Y4S>]. This is not to say that President Obama issued the most orders—Franklin D. Roosevelt currently holds the record at 3,721 orders. *Id.*

² Press Release, Office of the Press Sec'y, White House, Remarks by the President on Immigration (June 15, 2012, 2:09 PM), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration> [<https://perma.cc/N2FF-YYK7>].

³ Conor Friedersdorf, *How Team Obama Justifies the Killing of a 16-Year-Old American*, THE ATLANTIC (Oct. 24, 2012), <https://www.theatlantic.com/politics/archive/2012/10/how-team-obama-justifies-the-killing-of-a-16-year-old-american/264028> [<https://perma.cc/5BZ9-P4RH>].

⁴ See Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

⁵ See Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017). Specifically, this order instructed the Department of Treasury not to take adverse action against religious organizations “on the basis that such individual or organization speaks or has spoken about moral or political issues from a religious perspective.” *Id.*

⁶ See, e.g., Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES (Oct. 8, 2011), <http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?mcubz=0> [<https://perma.cc/E38W-H7H3>] (discussing the OLC’s memorandum that justified the drone strike on al-Awlaki).

⁷ *Office of Legal Counsel: About the Office*, U.S. DEP’T OF JUSTICE, [hereinafter *Office of Legal Counsel*] <https://www.justice.gov/olc> [<https://perma.cc/T9D3-NLSJ>]. While this advisory role is delegated to the Attorney General by 28 U.S.C.

prising around twenty-two lawyers,⁸ the OLC reviews nearly “[a]ll executive orders and proclamations proposed to be issued by the President . . . for form and legality,” as well as “various other matters that require the President’s formal approval.”⁹ In addition to serving as chief counsel on the legality of presidential actions, the OLC provides advice on complex legal matters and inter-agency disputes for all executive branch agencies requesting it.

The OLC was obscure to the public until the mid-2000s, when graphic details on the treatment of detainees at Abu Ghraib as well as an OLC legal opinion that appeared to justify torture, were leaked to the press.¹⁰ This memo, along with other “Torture Memos” released to the public, met widespread condemnation for arguing that the United Nations Convention against Torture and a U.S. torture statute did not cover the interrogations of captured al-Qaeda operatives.¹¹ To some scholars, the memo’s assertion that the President could “simply ignore the law” was a “stunning proposition, and one that no worthy legal adviser would advance without due examination of counterarguments.”¹²

Many scholars depict the “Torture Memos” as aberrations—they assert that the OLC operates under “strong cultural norms of apoliticism” and a “long-standing culture of independence.”¹³ They also assert that the “OLC has developed its own informal procedural norms both to protect its independence and to ensure that the Office will pursue . . . a ‘court-centered’ or ‘independent authority’ model of government lawyering instead of the ‘opportunistic’ model of a private lawyer.”¹⁴

§§ 511–13, the Attorney General delegated these roles to the Assistant Attorney General who serves as the head of the Office of Legal Counsel. *Id.*

⁸ JACK GOLDSMITH, *THE TERROR PRESIDENCY* 9 (2007).

⁹ *Office of Legal Counsel*, *supra* note 7.

¹⁰ See Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1451 (2010) (discussing the leaked “Torture Memorandum”); GOLDSMITH, *supra* note 8, at 9 (stating that the OLC goes largely unrecognized by the public).

¹¹ See Morrison, *supra* note 10, at 1451; Jonathan Canfield, Note, *The Torture Memos: The Conflict Between a Shift in U.S. Policy Towards a Condemnation of Human Rights and International Prohibitions Against the Use of Torture*, 33 HOFSTRA L. REV. 1049, 1089–90 (2005) (arguing that the torture definition advanced in OLC memoranda is impermissibly narrow).

¹² Peter M. Shane, *Executive Branch Self-Policing in Times of Crisis: The Challenges for Conscientious Legal Analysis*, 5 J. NAT’L SECURITY L. & POL’Y 507, 514 (2012).

¹³ Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn’t Let the Terrorists Win*, 57 KAN. L. REV. 579, 584, 594 (2009).

¹⁴ Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 514 (1993) (citing John O. McGinnis, *Models of the Opinion*

Such scholars contend that the OLC provides the President with “detached, apolitical legal advice, as if OLC were an independent court inside the executive branch.”¹⁵ Yet, others point at specific OLC failures as epitomizing the OLC’s “eager[ness] to please its clients.”¹⁶

Assertions at both ends of the spectrum base their conclusions on selective case studies and are rarely supported by more systematic empirical evidence. This Note, therefore, attempts two tasks: first, to resolve the tension between opposing perceptions, and second, to fill in the methodological gap with an empirical analysis of OLC-written legal opinions.

In Part I, I present the study’s dataset and methodology. Analyzing 123 OLC memos written over the past three decades, I determine if OLC memos exhibit deference towards the President, especially in relation to the agencies. This analysis is followed by two qualitative case studies ruling out alternative explanations.

Part II presents the empirical findings, and Part III discusses their implications. I find that the OLC is deeply deferential to the President and to presidential action, while remaining relatively impartial towards the agencies. Contrary to expectations from the literature, this deference is not unique to times of crisis. It is also not limited to the realm of foreign affairs, or to constitutional questions. Rather, the OLC demonstrates systematic partiality toward the President, as illustrated by the higher rate at which opinions to the President are overruled by the courts. Such partiality may be rooted in the OLC’s tendency to perceive its role differently with regard to the President than to the agencies, a conclusion the case studies appear to support. This tendency, I argue, may be inevitable given the larger structural incentives on the OLC to defer to the President.

Finally, in Part IV, I evaluate recent proposals to reform the OLC. These proposals range from informal to structural remedies. I conclude that structural modifications—particularly, for-cause removal—would conceivably reduce incentives for the OLC to exercise deference toward the President. Based on this conclusion, I find that OLC partiality is best addressed by protecting the officeholders from arbitrary removal.

Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon, 15 CARDOZO L. REV. 375, 382–400 (1993)).

¹⁵ GOLDSMITH, *supra* note 8, at 33.

¹⁶ Koh, *supra* note 14, at 515.

I

DATA AND METHODOLOGY

Analyzing OLC written opinions published on the OLC website, this study applies a two-part methodology of statistical analysis and qualitative case study to test the hypothesis that the OLC exercises systematic deference to the President in its written legal advice. This Part introduces the dataset, evaluates the representativeness of the data, describes possible sources of bias, and explains the methodology.

A. OLC Written Opinions Dataset

I compiled a dataset of 202 written OLC legal opinions, or memoranda, addressed to the Counsel of the President and the general counsels of the executive agencies. These memos are available freely on the OLC website.¹⁷ Of these, 123 memos, written in the years between 1987 and 2017, are addressed to the Counsel of the President or the Attorney General.¹⁸ These opinions include responses to requests by the President's Counsel and the Attorney General to the OLC to review the legality of a proposed executive initiative, the scope of a particular statute or clause in the Constitution, the potential consequences of a particular executive action, or the legality of pending legislation.¹⁹ All executive orders and proclamations must pass through the OLC "for form and legality."²⁰

In addition, I have collected a set of 79 opinions, written from 2007–2017, addressed to the general counsels of various executive agencies and departments. The opinions involve

¹⁷ *Opinions*, U.S. DEPT' JUST., OFFICE OF LEGAL COUNSEL, <https://www.justice.gov/olc/opinions-main> [<https://perma.cc/9E9E-P9H2>].

¹⁸ A few of the memos are formally addressed to the Attorney General; they are included in this sample because it was clear that the Attorney General would be giving this advice to the President or the President's Counsel. Not all memos for the Attorney General are considered written for the President. Some memos were written by the OLC for the Attorney General as advice regarding some legal matter that appeared to be of personal concern for the Attorney General and was unrelated to any presidential request for advice.

¹⁹ *Opinions*, *supra* note 17. See App. 2 for a list of memos written to the President.

²⁰ *Office of Legal Counsel*, *supra* note 7. In rare circumstances, the President may rely on agencies' general counsel. See, e.g., Morrison, *supra* note 10, at 1451 (stating that counsel for the President and various departments often handle day-to-day matters for their clients); Carrie Johnson, *Key Justice Dept. Office Won't Say If It Approved White House Executive Orders*, NPR (Jan. 27, 2017, 12:03 PM), <http://www.npr.org/2017/01/27/511998206/key-justice-dept-office-won-t-say-if-it-approved-white-house-executive-orders> [<https://perma.cc/Z2Q7-RYSU>] (noting that the President sometimes bypasses the OLC).

mostly complex legal questions concerning inter-agency disputes, and agency adjudication and rulemaking.²¹

B. Addressing Selection Bias

A large number of written opinions remain undisclosed to the public.²² While it is impossible to know the actual number of opinions written so far, judging from the list of total OLC memos from 1998–2013 published on the OLC website, the number of published OLC memos in that time frame amount to about one-half the total number written. Unfortunately, the large number of undisclosed memos prevents us from drawing firm conclusions using the sample of disclosed memos. However, we may make some inferences as to the representativeness of the sample, using the following facts and assumptions.

First, the sample of disclosed memos conceivably over-represents legal opinions on substantive questions of a non-sensitive nature, for both memos to the President and memos to the agencies.²³ Although the sample includes all opinions disclosed through Freedom of Information Act (FOIA) requests—such opinions tend to be more sensitive—highly classified memos regarding ongoing national security or foreign policy-related initiatives are unlikely to be disclosed under FOIA,²⁴ except on the rare occasion that information on classified initiatives is first leaked to the press, generating sufficient pressure on the administration to force disclosure.²⁵ The sample is

²¹ See App. 3 for a list of memos written to the agencies.

²² See McGinnis, *supra* note 14, at 428 (noting that OLC only publishes its opinions years after producing them); Morrison, *supra* note 10, at 1476–77 (noting that OLC frequently chooses not to publish its opinions at all).

²³ Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., U.S. Dep’t of Justice, to Att’y’s of the Office of Legal Counsel 4 (May 16, 2005), <https://fas.org/irp/agency/doj/olc/best-practices.pdf> [<https://perma.cc/V56W-AHME>] (the OLC must “give[] due weight to the publication recommendations of interested agencies and components, particularly where they raise specific concerns about programmatic or litigation interests,” which amounts to a power to veto disclosure); Memorandum from David J. Barron, Acting Assistant Att’y Gen., U.S. Dep’t of Justice, to Att’y’s of the Office of Legal Counsel 5–6 (July 16, 2010), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> [<https://perma.cc/7HZH-UY5A>] (noting that the OLC will refrain from publishing a memorandum “when doing so is necessary to preserve internal Executive Branch deliberative processes or protect the confidentiality of information covered by the attorney-client relationship between OLC and other executive offices”).

²⁴ Memorandum from Barron, *supra* note 23, at 5 (explaining that the OLC will “decline to publish an opinion when disclosure would reveal classified or other sensitive information relating to national security”).

²⁵ As was the case for the “Torture Memos.” See, e.g., Memorandum from Jay S. Bybee, Assistant Att’y Gen., U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), [hereinafter Bybee, §§ 2340–2340A]

also likely to under-represent memos supporting covert executive actions deemed unsuccessful, except for actions that were later exposed by Congress or the media.²⁶

How does this bias affect the empirical results? As the literature suggests,²⁷ and as the data supports, the OLC is more inclined to defer to the President and the agencies on matters pertaining to foreign affairs than domestic affairs. Matters pertaining to national security and foreign policy are also more likely to remain undisclosed. Despite only 25% of memos to the President in my sample reflecting foreign issues, the actual number of such memos is presumably much higher.²⁸ If so, my empirical results are likely to *underestimate* the deference the OLC routinely gives to the President and the agencies. This does not detract from my overall argument.

There may be some concern of selection bias in the types of requests submitted to the OLC by the President versus the agencies. In general, “All executive orders and proclamations proposed to be issued by the President are reviewed by the Office of Legal Counsel for form and legality, as are various

<http://nsarchive2.gwu.edu//NSAEPP/NSAEPP127/02.08.01.pdf> [<https://perma.cc/UBC2-5JAV>] (discussing OLC’s opinion regarding the legality of torture). Similarly, the Obama administration, despite promising that “the Office will not withhold an opinion merely to avoid embarrassment to the Office or to individual officials, to hide possible errors in legal reasoning, or ‘because of speculative or abstract fears,’” refused to disclose the OLC written opinion supporting a drone strike on U.S. citizen Anwar al-Awlaki. See Memorandum from Barron, *supra* note 23, at 6. A federal court eventually ruled in favor of a freedom-of-information lawsuit filed by the New York Times and the American Civil Liberties Union requesting disclosure. See *N.Y. Times Co. v. U.S. Dep’t of Justice*, 806 F.3d 682, 690–91 (2d Cir. 2015). Additionally, consider the administration’s controversial exercise of executive privilege to protect Justice Department documents on Operation Fast and Furious. See *Operation Fast and Furious Fast Facts*, CNN (Sept. 18, 2017, 10:05 AM), <http://www.cnn.com/2013/08/27/world/americas/operation-fast-and-furious-fast-facts/> [<https://perma.cc/UBN9-RPS8>]; Ian Tuttle, *El Chapo’s Capture Puts ‘Operation Fast and Furious’ Back in the Headlines*, NAT’L REVIEW (Jan. 21, 2016, 7:08 PM), <http://www.nationalreview.com/article/430153/fast-furious-obama-first-scandal> [<https://perma.cc/4JM3-NJZW>]; Kelly Riddell, *Obama Administration Restricts Investigative Powers of Inspectors General*, WASH. TIMES (July 23, 2015), <http://www.washingtontimes.com/news/2015/jul/23/obama-restricts-investigative-powers-inspectors-ge/> [<https://perma.cc/MUT8-2VRY>]. Attempts to withhold key documents from congressional subpoena were likewise overruled in *Committee on Oversight and Government Reform, United States House of Representatives v. Lynch*. See Comm. on Oversight & Gov’t Reform, *U.S. H.R. v. Lynch*, 156 F. Supp. 3d 101, 120–21 (D.D.C. 2016).

²⁶ See *supra* note 25 and accompanying text.

²⁷ See generally GOLDSMITH, *supra* note 8 (suggesting that the OLC is under much greater pressure to defer to the President on decisions regarding security matters).

²⁸ See Morrison, *supra* note 10, at 1478.

other matters that require the President's formal approval."²⁹ The President will not seek a written legal opinion from the OLC, relying on oral advice or email, unless the matter is of such legal complexity as to merit a thoroughly researched written analysis.³⁰ For more menial, mundane matters, the President is likely to rely on White House legal counsel.³¹ Agencies, on the other hand, will generally request written advice from the OLC on two occasions: (1) an inter-agency dispute requiring third-party adjudication; (2) the agency's legal counsel is unsure about a complex legal question.³² The agency "might want to proceed with an initiative that is subject to some legal doubt, and must decide whether to solicit an OLC opinion on the issue."³³ Thus, both the President *and* the agencies are likely to approach the OLC with complex legal questions on which the President's counsel and the general counsels of the agencies need additional legal advice.

C. Methodology

The empirical analysis has two parts. First, I collect basic descriptive statistics using the dataset of OLC opinions. Specifically, I calculate the percentage of presidential and agency memos that expand, rather than limit, executive action, finding that OLC memos expand presidential action at higher rates than they do agency action. I then proceed to dismiss three hypotheses that may explain this variation—namely, that the OLC defers due to: (1) pressures of national crises; (2) the President's power over foreign affairs; or (3) the flexibility of constitutional powers of the President versus the statutory powers of agencies.

Ruling out these explanations, I propose that the OLC exercises intentional deference when writing opinions for the President. I supplement this hypothesis by examining the rate at which courts later litigated and overruled OLC opinion-backed presidential and agency actions. The greater frequency with which the courts overruled presidential actions supports the theory that the OLC's legal advice may consistently over-expand presidential powers relative to agency powers.

²⁹ *Office of Legal Counsel*, *supra* note 7.

³⁰ See Morrison, *supra* note 10, at 1461–62.

³¹ See Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 488 (1993).

³² See *Office of Legal Counsel*, *supra* note 7.

³³ Lund, *supra* note 31, at 493.

Three case studies supplement these findings. The first study compares the texts of two 2002 memos on the interrogation of al-Qaeda detainees, addressed to the President and to the agencies. Although both memos approve the course of action, how the OLC justifies the actions suggests that the OLC perceives its role as a legal adviser to the President and the agencies differently. In particular, the OLC acts as a somewhat impartial adjudicator for the agencies but as a quasi-defense counsel for the President. The second and third case studies examine two memos to the President from 1984 and 1997 on the applicability of a political contribution limitation to executive branch officials, and the removal of an executive official, respectively. Both memos support the conclusion that the OLC tends to behave as the President's defense counsel rather than as an objective legal advisor.

II

SYSTEMATIC DEFERENCE: DESCRIPTIVE STATISTICS

A. Empirical Analysis

Over the past three decades, an overwhelming 92% of OLC written legal opinions to the President supported the expansion of presidential action (see Figure 1). When compared to the proportion of memos written for the agencies, this percentage appears particularly extreme: 57% of memos addressed to the agencies *limited* action over the past decade (see Figure 2).

FIGURE 1. OLC MEMOS TO THE PRESIDENT, 1987-2017

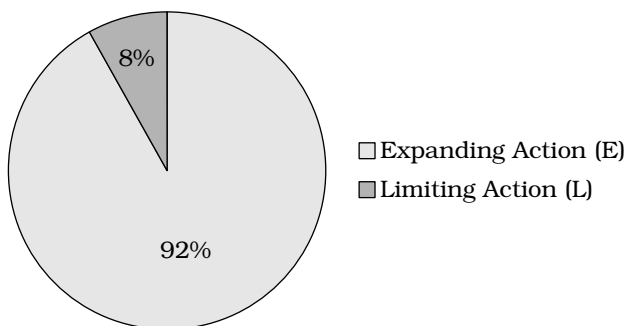
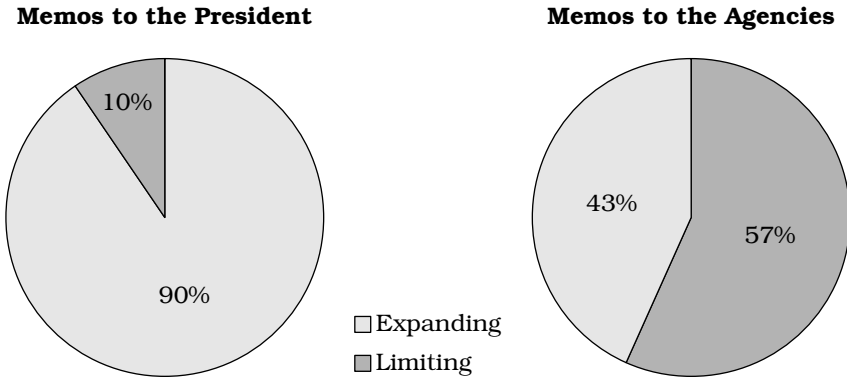


FIGURE 2. OLC MEMOS TO THE PRESIDENT AND TO THE AGENCIES, 2007-2017



These figures raise the question of what causes the discrepancy. I analyze three possible explanations. First, the OLC adheres to norms of impartiality except in times of national crisis, when pressure to give the President full leeway to exercise executive powers reaches a peak. Although crisis might explain the high overall proportion of “expansive” memos, it does not account for the discrepancy between memos addressed to the President and those addressed to the agencies. Second, if the OLC tends to defer more on foreign affairs than on domestic affairs, then the greater proportion of presidential memos dealing with foreign affairs may be creating the appearance of a higher rate of deference to the President. Third, presidential actions may be less subject to statutory and constitutional constraints than agency actions, allowing the OLC greater leeway to approve the former.

In this section, I critique these explanations by analyzing the dataset with statistical calculations. I then propose a fourth, more plausible explanation for the pattern of discrepancy, arguing that the OLC is systematically and intentionally deferential to the President.

1. *Possible Explanation: Response to Crises*

Scholarship on OLC independence seems to suggest that the OLC—impartial and apolitical at most times—yields to political pressures in only the most exceptional of circumstances.³⁴ After all, the most controversial and extreme expansions of presidential power occur in the context of national crisis and war—often with the support of the Attorney

³⁴ See *supra* notes 13–16 and accompanying text.

General and/or the OLC.³⁵ Scholars focusing on OLC politicization emphasize the post-9/11 OLC memos dealing with terrorists and surveillance as evidence of the OLC's role as the President's rubber stamp.³⁶

The OLC's deference for the presidential agenda may be especially pronounced in matters pertaining to national security, humanitarian disasters, and war. Former OLC head Jack Goldsmith has described the immense pressure felt by White House officials in dealing with the barrage of emerging terrorist threats in the aftermath of 9/11. Such pressure may have convinced OLC deputy head John Yoo that giving the President maximum authority to deal with captured terrorists was necessary for the safety of Americans.³⁷

However, the data shows that the proportion of OLC memos supporting presidential action remains excessively high even after excluding all memos written for the President on the legality of executive action on issues of national security, foreign and humanitarian intervention, and war. Since 1987, there have been thirty such OLC opinions.³⁸ These memos range from an opinion on sending military forces to Somalia in 1992, to an opinion regarding the use of military force in Libya in 2011.

Of the ninety-three memos unrelated to crisis, only nine limit presidential action. After excluding the "crisis" memos, the rate at which the OLC supports presidential action remains as high as 90.3%, suggesting that deference to the President is not simply an outcome of pressurized politics in times of crisis. Although the OLC may issue a higher rate of approvals in such situations—indeed, all thirty "crisis" memos expand presidential authority—deference appears to be the norm, not the exception.

³⁵ See Arthur H. Garrison, *The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They Are Significant*, 76 ALB. L. REV. 217, 220 (2012); Norman W. Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 STAN. L. REV. 409, 410 (2011).

³⁶ See, e.g., Peter Margulies, *Reforming Lawyers into Irrelevance?: Reconciling Crisis and Constraint at the Office of Legal Counsel*, 39 PEPP. L. REV. 809, 811 (2012) ("In authorizing coercive interrogation techniques and a broad program of warrantless surveillance . . . [OLC] lawyers allowed the President to operate with minimal accountability . . .").

³⁷ GOLDSMITH, *supra* note 8, at 11, 168–69.

³⁸ See App. 1.

2. Possible Explanation: Foreign Affairs

An alternative explanation for the higher percentage of “expansive” memos written to the President than to the agencies is that a greater proportion of presidential memos pertain to foreign affairs.

The OLC is more likely to defer to the President and the agencies on matters related to foreign affairs than domestic affairs. The Supreme Court has “recognized the President’s ‘vast share of responsibility for the conduct of our foreign relations.’”³⁹ The President, in fact, has “a degree of independent authority to act” in matters of foreign affairs.⁴⁰ This is because “[t]he President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation’s organ in foreign affairs.”⁴¹ On the other hand, the President’s domestic powers are relatively weaker.⁴²

Indeed, for both the President and the agencies, the OLC deferred at a higher rate in opinions related to foreign affairs than it deferred in opinions related to domestic affairs (see Table 1). Moreover, memos pertaining to foreign affairs comprise 30% of presidential memos and only 13% of agency memos in the dataset. If the OLC allows greater deference on foreign affairs, then memos to the President would show a higher overall rate of deference. However, even if I exclude all memos dealing with foreign affairs, the OLC approves 90% of the President’s domestic actions, compared to 60% of the agencies’ domestic actions. Additionally, if I limit the analysis to memos pertaining to foreign matters, the OLC approves 97% of the President’s foreign actions, compared to 70% of agencies’ foreign actions. Thus, the higher rate of deference toward the President must be explained by reasons other than the foreign-domestic distinction.

³⁹ *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952)).

⁴⁰ *Id.*

⁴¹ *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948).

⁴² For example, the President does not have the power to enter into executive trade agreements affecting domestic commerce. *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 658 (4th Cir. 1953), *aff’d*, 348 U.S. 296 (1955) (“We think, however, that the executive agreement was void because it was not authorized by Congress and contravened provisions of a statute dealing with the very matter to which it related and that the contract relied on, which was based on the executive agreement, was unenforceable in the courts of the United States for like reason.”).

TABLE 1. DEFERENCE FOR OLC MEMOS ON FOREIGN VS. DOMESTIC AFFAIRS

Party Addressed by Memo	Type of Issue	Number of Memos	Number of Memos that are Expansive	'Deference Rate'
President	Foreign	37	36	97%
	Domestic	86	77	90%
Agencies	Foreign	10	7	70%
	Domestic	69	40	60%

3. *Possible Explanation: Limited Constitutional Constraints on Presidential Power*

A third explanation is that memos to the President frequently involve the analysis of constitutional rather than statutory questions. Because the Constitution allows greater flexibility in interpretation than many statutes covering executive and agency actions, the OLC may have broader leeway to interpret the scope of presidential powers than to interpret agency powers.

The Constitution appears to vest great power in the President: "The executive Power shall be vested in a President of the United States of America."⁴³ Nonetheless, the powers of the President are limited; the President has no inherent power to act in the public interest that could be implied from the enumerated powers.⁴⁴ For example, the President's decision to make war could not be challenged, so long as Congress authorized the making of war (or at least did not expressly disapprove of it).⁴⁵ On the other hand, the D.C. Circuit Court of Appeals held that a President's decision to wiretap phones was a violation of the Fourth Amendment and that the President and his staff were not entitled to immunity, because they did not act in reliance on any statute.⁴⁶ Moreover, while the President has

⁴³ U.S. CONST. art. II, § 1, cl. 1.

⁴⁴ *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)) ("The President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'").

⁴⁵ See, e.g., *DaCosta v. Laird*, 471 F.2d 1146, 1154 (2d Cir. 1973) (noting that "there has been participation by Congress sufficient to authorize and ratify American military activity in Vietnam," but remarking that the war making could be challenged if "the President's conduct has so altered the course of hostilities in Vietnam as to make the war as it is currently pursued different from the war which we held in *Orlando* and *DaCosta* to have been constitutionally ratified and authorized by the Congress, or that Congressional ratification and authorization has terminated").

⁴⁶ *Halperin v. Kissinger*, 606 F.2d 1192, 1210-11 (D.C. Cir. 1979).

broader discretion when he or she acts in response to an emergency, any order the President issues expires once that emergency situation terminates.⁴⁷

Contrary to presidential power, an administrative agency derives its power wholly from the statute that creates it: “[A]n agency has all the implied authority reasonably necessary to accomplish a delegated purpose.”⁴⁸ Agencies are thus only allowed to make rules that are necessary, reasonably adapted to the purpose for which they are promulgated, and not arbitrary.⁴⁹ With regards to how the agency will adjudicate or enforce those regulations, however, administrative agencies are generally free to devise their own procedure.⁵⁰ For an agency rule or regulation to be valid, it must satisfy a number of requirements. First, rulemaking must be within the authority delegated to the agency.⁵¹ Second, the administrative rule must be appropriate and necessary.⁵² Third, the rule must be uniform and equal in effect;⁵³ in other words, it must not discriminate.⁵⁴ The general principle is that rules and regulations made by agencies must have a rational basis.⁵⁵

Perhaps the greater deference to the President can be explained by the greater flexibility of the Constitution; indeed, the data reveals that a higher percentage of memos to the President, as opposed to the agencies, involve constitutional inter-

⁴⁷ *Bauer v. United States*, 244 F.2d 794, 797 (9th Cir. 1957).

⁴⁸ *Eldercare Props., Inc. v. Dep't of Human Servs.*, 63 S.W.3d 551, 558 (Tex. App. 2001), *abrogated by* *Tex. Dep't of Protective and Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170 (Tex. 2004); *see also* *Morton v. Ruiz*, 415 U.S. 199, 230–31 (1974) (allowing an agency to create reasonable classifications to give effect to congressional appropriation).

⁴⁹ *See Rutherford v. United States*, 438 F. Supp. 1287, 1291 (W.D. Okla. 1977) (“Administrative regulations must be consistent with the statute’s purposes and reasonably adapted to carry out those purposes.”); *Commonwealth v. Diaz*, 95 N.E.2d 666, 668–69 (Mass. 1950) (holding that Congress may delegate power to boards and officers to enact details of an adopted policy, and that this delegated power “must not be exercised arbitrarily”); *Green River Cmty. Coll., Dist. No. 10 v. Higher Ed. Personnel Bd.*, 622 P.2d 826, 829 (Wash. 1980) (“[A]dministrative rules adopted pursuant to a legislative grant of authority . . . should be upheld on judicial review if they are reasonably consistent with the statute being implemented.”), *modified on other grounds on reh'g*, 633 P.2d 1324 (1981).

⁵⁰ *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978).

⁵¹ *See Green River*, 622 P.2d at 829 (holding that agencies only have powers “either expressly granted or necessarily implied from statutory grants of authority”).

⁵² *See N.Y. Foreign Freight Forwarders & Brokers Ass'n v. Fed. Mar. Comm'n*, 337 F.2d 289, 295 (2d Cir. 1964).

⁵³ *Socony Vacuum Oil Co. v. United States*, 44 C.C.P.A. 83, 85 (1957).

⁵⁴ *See Epley v. Comm'r*, 183 F.2d 1020, 1022 (5th Cir. 1950).

⁵⁵ *Coakley v. Postmaster of Bos.*, 374 F.2d 209, 210 (1st Cir. 1967).

pretation (see Figure 3). However, if I limit the sample to memos that perform constitutional interpretation, the difference in the probability of the OLC supporting the action remains: while 71% of memos to the agencies expand agency action, 94% of memos to the President expand presidential action. On the other hand, even when dealing with purely statutory matters (see Figure 4), the OLC still expresses far greater deference toward the President than it does toward the agencies. While 56% of “strictly statutory” memos expand powers for the agencies, 84% of such memos expand powers for the President.⁵⁶

FIGURE 3. PERCENTAGE OF EXPANSIVE VS. LIMITING MEMOS USING CONSTITUTIONAL ANALYSIS

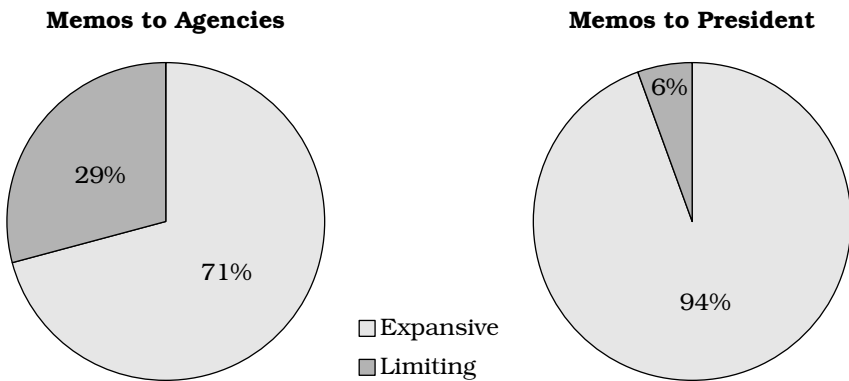
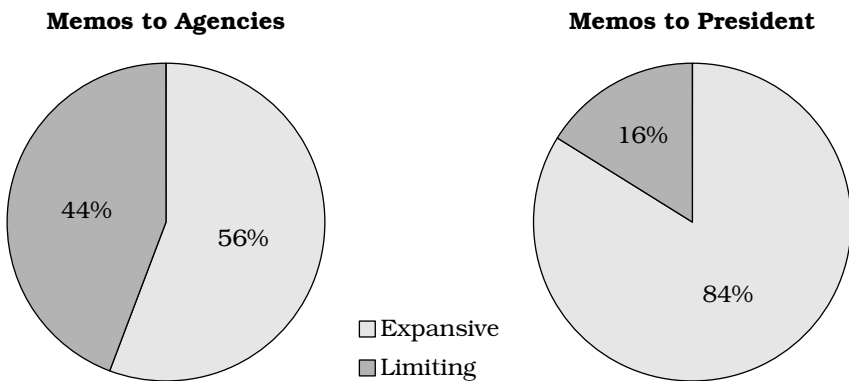


FIGURE 4. PERCENTAGE OF EXPANSIVE VS. LIMITING MEMOS USING STATUTORY ANALYSIS



⁵⁶ Note that memos involving constitutional analysis are more likely to expand powers, both for the President and for agencies, than are memos confined to statutory analysis.

Therefore, I tentatively conclude that OLC memos are deferential toward the President for reasons other than the interpretive flexibility afforded by the Constitution as opposed to statutes.

4. *Proposed Explanation: Systematic Deference*

I have so far shown how the first three possible explanations lack empirical support. The fourth, and most convincing, explanation for why OLC memos addressed to the President expand power at higher rates than those addressed to the agencies is that the OLC gives systematic deference to the President.

In examining both the higher percentage of OLC memos supporting presidential action and the higher percentage that were later overruled by the courts, there emerges a trend of bias in OLC memos toward allowing questionable over-extensions of presidential powers.

Of the 113 OLC memos supporting presidential action over the past three decades, nearly a quarter of memos supported actions that were challenged and litigated in the courts. Of the litigated actions, half were eventually overruled (see Table 2).⁵⁷

TABLE 2. "EXPANSIVE" MEMOS TO PRESIDENT LITIGATED IN COURT, 1987-2017

Memos Litigated in Court	Percentage (out of litigated actions)
Upheld	42%
Overruled	50%
Unreviewable (moot, nonjusticiable, lacks standing)	8%

⁵⁷ See, e.g., Comm. on Judiciary, U.S. H.R. v. Miers, 558 F. Supp. 2d 53, 106–08 (D.D.C. 2008) (disagreeing that the President can assert executive privilege); Chamber of Commerce v. Reich, 74 F.3d 1322, 1336–39 (D.C. Cir. 1996) (disagreeing that the President can issue an executive order on government procurement). Other memos were overruled in dicta. For example, the OLC advised the President that the Geneva Conventions did not apply to captured Taliban combatants. The Supreme Court, however, found that the Geneva Conventions did protect detainees whether or not they qualified as prisoners of war, and that Taliban combatants were entitled to seek habeas corpus to determine their POW status. See *Boumediene v. Bush*, 553 U.S. 723, 796–98 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 633–35 (2006); *Rasul v. Bush*, 542 U.S. 466, 483–85 (2004).

TABLE 3. “EXPANSIVE” MEMOS TO THE PRESIDENT, 1987-2017

Memos Litigated in Court	Percentage (out of total number of memos)
Upheld in Court	10%
Overruled in Court	12%

Such “overruled” memos account for 12% of all OLC memos supporting presidential action over the past thirty years (see Table 3). Taking the courts’ rulings as the final word on the action’s legality, *at least* 12% of OLC opinions in support of more expansive presidential powers appear to *over-expand* presidential powers beyond the bounds of what is permissible by law. Although 12% may not seem particularly egregious, many of the memos are unlikely to be litigated because they do not cause injury.⁵⁸ Other OLC-backed presidential actions have not been litigated due to shifting political circumstances⁵⁹ or have been ruled unreviewable,⁶⁰ yet were ceased and

⁵⁸ Some memos, for example, authorize action that would not create cognizable injury. *See, e.g.*, Whether Bills May Be Presented by Cong. and Returned by the President by Elec. Means, 35 Op. O.L.C. 1, 1–2 (2011) (authorizing President Obama to sign bills electronically); Whether the President May Sign a Bill by Directing that His Signature Be Affixed to It, 29 Op. O.L.C. 97, 97 (2005) (elaborating on previous advice that the President may constitutionally sign a bill using an autopen). The Supreme Court has consistently required a cognizable, personalized, and concrete injury to establish Article III standing. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 766 (1984), *abrogated by* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) (holding that citizens lack standing to sue when a federal agency’s policies fail to prevent school segregation). Others deal with appropriations law, supervision of which is vested in the Comptroller General. *See* 31 U.S.C. § 3526(a) (2012); Reimbursement of Expenses Under 5 U.S.C. § 5503(a), 22 Op. O.L.C. 29, 29 (1998). *See also* About GAO, U.S. GOV’T ACCOUNTABILITY OFFICE, <https://www.gao.gov/about/index.html> [<https://perma.cc/PYN8-UW9B>] (stating that the U.S. Government Accountability Office (GAO), headed by the Comptroller General, “advise[s] Congress and the heads of executive agencies about ways to make government more efficient, effective, ethical, equitable and responsive”). Accordingly, OLC’s legal accuracy would arguably be better measured in reference to the memos litigated, rather than those without subsequent history.

⁵⁹ For example, former Assistant Attorney General, Randolph D. Moss, composed a memo on whether a former president can be indicted and prosecuted for offenses previously addressed by the House and Senate. *See* Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. 110, 110–11 (2000). However, charges of indictment against former President William J. Clinton were dropped when the Independent Counsel entered into a bargain with the President where Clinton accepted non-criminal sanctions, such as penalty from the Arkansas Bar.

⁶⁰ *See, e.g.*, Authority to Use Military Force in Libya, 35 Op. O.L.C. 1, 1 (2011) (advising that the President has the constitutional authority to use military force in Libya). A challenge to the President’s power to use force in Libya was later held to be moot. *Whitney v. Obama*, 845 F. Supp. 2d 136, 139–40 (D.D.C. 2012).

condemned by the OLC in subsequent administrations,⁶¹ criticized by judges and academics,⁶² and/or overruled by subsequent congressional statutes.⁶³

Table 4 shows a comparison of OLC memos supporting presidential versus agency actions that were litigated in court. Twenty-one percent of agency actions backed by OLC opinions were litigated. Of these, only 20% (of such litigated agency actions) were overruled—much lower than the percentage of litigated presidential actions overruled by the courts.

⁶¹ See, e.g., Memorandum from Jack L. Goldsmith, Assistant Att’y Gen., to John Ashcroft, Att’y Gen. 2–5 (May 6, 2004), https://www.justice.gov/sites/default/files/pages/attachments/2014/09/19/may_6_2004_goldsmith_opinion.pdf [<https://perma.cc/B58K-UKSP>] (concluding that the President has legal authority to authorize the NSA to conduct certain signals-intelligence activities and that the STELLAR WIND program is constitutional). The program was ceased and condemned by the Justice Department in 2009. See Eric Lichtblau & James Risen, *Officials Say U.S. Wiretaps Exceeded Law*, N.Y. TIMES, Apr. 16, 2009, at A1. Also, the OLC memo on standards of conduct for interrogation was later condemned by the Justice Department as “poor judgment.” Memorandum from David Margolis, Assoc. Deputy Att’y Gen., to Eric Holder, Att’y Gen. 68 (Jan. 5, 2010), https://www.aclu.org/files/pdfs/natsec/opr20100219/20100105_DAG_Margolis_Memo.pdf [<https://perma.cc/Y49D-CKVY>].

⁶² See, e.g., Assertion of Executive Privilege with Respect to Clemency Decision, 23 Op. O.L.C. 1, 1 (1999) (advising that the President may assert executive privilege over documents and testimony related to decisions to offer clemency). See also *Miers*, 558 F. Supp. 2d at 104 (“[T]he Court is not at all persuaded by the Reno and Bradbury opinions. Unlike the Olson and Cooper OLC opinions, which are exhaustive efforts of sophisticated legal reasoning, bolstered by extensive citation to judicial authority, the Reno and Bradbury OLC opinions are for the most part conclusory and recursive. Neither cites to a single judicial opinion recognizing the asserted absolute immunity.”).

⁶³ See, e.g., Authority to Use Military Force in Libya, *supra* note 60, at 1 (advising that the President has the constitutional authority to use military force in Libya). Congress subsequently passed a resolution for the prompt withdrawal of forces. H.R. Res. 292, 112th Cong., 1st. Sess. (2011) (enacted). Also, President Bush’s exercise of executive privilege in the dismissal of U.S. Attorneys, supported by Paul D. Clement, Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys (2007), was overturned by S. 214, 110th Cong., Pub. L. No. 110-34 (2007) (codified in 28 U.S.C. § 546). See also Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges, 19 Op. O.L.C. 350, 350 (1995) (concluding that 28 U.S.C. § 458 does not apply to presidential appointments of federal judges). Congress did not buy the argument, opting to amend the statute to make it applicable to Article III judges. For a summary, see David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 469 (2007).

TABLE 4. “EXPANSIVE” MEMOS ON PRESIDENTIAL AND AGENCY ACTION LITIGATED IN COURT

Memos Litigated in Court	President	Agencies
Upheld	42%	60%
Overruled	50%	20%
Unreviewable (moot, nonjusticiable, lacks standing)	8%	20%

Put simply, agency actions backed by OLC opinions are overruled at a lower rate than presidential actions backed by OLC opinions. Although these numbers do not establish causality,⁶⁴ I surmise that agency actions are either more thoroughly or more impartially vetted by the OLC. Of the two, the latter is more likely. The OLC puts substantial effort into drafting legal opinions for the President—the typical memo for the President is much longer than that for the agencies. Thus, while the OLC conducts a conceivably impartial legal analysis for agency memos, its analysis for the President takes on a much more partial and expansive interpretation of executive powers. Hence, the data seems to validate Lund’s observation that while the OLC behaves similarly to an independent court in formulating advice for the agencies, it acts as a private attorney for the President.⁶⁵

B. Case Studies

Close reading of OLC opinions reveals contrasting patterns of deference between memos addressed to the President and those addressed to the agencies. This subsection conducts one case study comparing two different memos written for the President and an agency on a similar topic, as well as one case study of a memo to the President.

OLC memos to the President and to the agencies are distinguishable in two ways. First, legal opinions written for the President sometimes include a section of defense justifications that would help prepare for possible litigation.⁶⁶ Second, opinions for agencies tend to be more tentative and cautious in

⁶⁴ More advanced statistical analysis may establish causation, i.e., estimation through linear regression modeling.

⁶⁵ Lund, *supra* note 31, at 498–500.

⁶⁶ See, e.g., Bybee, §§ 2340–2340A, *supra* note 25, at 1, 39–46 (discussing the standards of conduct under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and 18 U.S.C. §§ 2340–2340A, as well as possible defenses to claims of violating the statute).

assessing the legality of a desired course of action.⁶⁷ These distinctions suggest that the OLC perceives its advisory role differently with regard to the President and agencies.

1. *The “Torture Memos”: OLC as Defense Attorneys for the President but Independent Court for the Agencies*

In order to identify any difference in the deference paid to the President as opposed to the agencies, I compare a memo to the President and a memo to an agency that deal with a similar legal question. Assistant Attorney General Jay Bybee’s memo with the subject of “Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A,” and his memo with the subject of “Interrogation of al Qaeda Operative,” were drafted on the same day by Deputy Assistant Attorney General John Yoo, and then signed by Bybee. The memos are, respectively, addressed to Alberto Gonzales, Counsel to the President, and John Rizzo, Counsel to the CIA. Gonzales’s question seems to have been broader in scope, asking for the OLC’s general opinion regarding the standards of interrogation covered by the statutes, while the latter’s question seems to have been specifically whether the several types of interrogation techniques proposed by the CIA would fall under the statute.⁶⁸ Although both memos permit “expansions” of power—indeed, it would be strange for one memo to support the action while the other opposed the same operation—there is substantial variation in the memos’ tones and what the memos include and exclude.

Typical of memos addressing the President, Bybee’s memo to Alberto Gonzales does not demonstrate an objective and rigorous analysis of the legality of the action. Rather, the memo focuses on how the action may be *defended* to the courts, list-

⁶⁷ See, e.g., Memorandum from Walter Dellinger, Assistant Att’y Gen. to Michael Vatis, Deputy Dir., Exec. Office for Nat’l Security 1 (Feb. 14, 1995), <https://www.justice.gov/olc/page/file/936201/download> [<https://perma.cc/JL3X-XP2X>] (advising that courts are likely to adopt the “primary purpose” test when the government collects foreign intelligence).

⁶⁸ Bybee, §§ 2340–2340A, *supra* note 25, at 1 (“You have asked for our Office’s views regarding the standards of conduct under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by Sections 2340–2340A of title 18 of the United States Code.”); Memorandum from Jay S. Bybee, Assistant Att’y Gen., to John Rizzo, Acting Gen. Counsel of the CIA, on Interrogation of al Qaeda Operative 1 (Aug. 1, 2002), [hereinafter Bybee, *al-Qaeda Operative*] <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf> [<https://perma.cc/ZCA6-5FNV>] (“You have asked for this Office’s views on whether certain proposed conduct would violate the prohibition against torture found at Section 2340A of title 18 of the United States Code.”).

ing a number of justifications “that would negate any claim that certain interrogation methods violate the statute.”⁶⁹ Yoo writes:

[W]e believe that under the current circumstances certain justification defenses might be available that would potentially eliminate criminal liability. Standard criminal law defenses of necessity and self-defense could justify interrogation methods We believe that a defense of necessity could be raised, under the current circumstances, to an allegation of a Section 2340A violation.⁷⁰

The inclusion of a list of defenses in advance of possible litigation is absent in the corresponding letter to Rizzo, and is uncommon in memos to agencies in general, when the OLC seems to limit itself to giving straightforward advice on the legality of the action in question.⁷¹ On the other hand, lists of potential defenses are found in OLC memos supporting presidential action. On issues for which the OLC “pushes the envelope” in justifying the President’s desired course of action, the OLC sometimes writes a list of possible defenses in consideration of future litigation.⁷²

The two corresponding memos also take on very different tones. To Gonzales, Yoo argues that even if the proposed action violates the statute, the statute itself would be unconstitutional for constraining a presidential prerogative: “[W]e conclude that under the circumstances of the current war against al Qaeda and its allies, application of Section 2340A to interrogations undertaken pursuant to the President’s Commander-in-Chief powers may be unconstitutional.”⁷³

To Rizzo, however, Yoo finishes on a more cautious note:

[W]e conclude that the interrogation procedures that you propose would not violate Section 2340A. We wish to emphasize that this is our best reading of the law; however, *you should*

⁶⁹ Bybee, §§ 2340–2340A, *supra* note 25, at 1, 39–46.

⁷⁰ *Id.* at 39.

⁷¹ It must be noted, however, that the OLC does act as the agencies’ defense counsel in the limited number of cases where the agencies seek to collect evidence or intelligence—activities wholly geared towards litigation. *See, e.g.*, Memorandum from Dellinger, *supra* note 67, at 1 (advising that courts are likely to adopt the “primary purpose” test when the government collects foreign intelligence).

⁷² *See Cheney’s Law: Interview, Charlie Savage*, PBS FRONTLINE (Oct. 16, 2007), <http://www.pbs.org/wgbh/pages/frontline/cheney/interviews/savage.html> [<https://perma.cc/862U-7KFB>]; *see also* Bybee, §§ 2340–2340A, *supra* note 25, at 1, 39–46 (discussing possible defenses).

⁷³ Bybee, §§ 2340–2340A, *supra* note 25, at 46.

*be aware that there are no cases construing this statute, just as there have been no prosecutions brought under it.*⁷⁴

Indeed, Yoo appears to warn Rizzo that the courts may not accept the OLC's interpretation. This is consistent with Lund's view that the OLC is reluctant to take on the blame for a possible overruling.⁷⁵

2. *OLC Is the President's Law Firm Even on Mundane Issues*

The OLC's position as the President's defense counsel persists not only in "crisis-memos" but in mundane matters as well. In 1984, for example, Assistant Attorney General Theodore Olson advised the President on the application of a political contribution limitation for executive branch officials.⁷⁶ President Reagan's request was narrow: he asked for the OLC's "analysis of the application of 18 U.S.C. § 603 ('section 603') to political contributions made by certain Executive Branch officers and employees."⁷⁷ In addition to answering the question,⁷⁸ the OLC provided a detailed analysis on how Reagan could challenge the constitutionality of section 603.⁷⁹ The OLC advised Reagan that "courts may well find that section 603 is unconstitutionally vague in its intended application, and/or that it is neither supported by a sufficiently important state interest nor drawn narrowly enough to avoid unnecessary abridgment of First Amendment rights."⁸⁰ It even recommended that Reagan solicit political organizations to bring suit, instructing that these organizations would have standing to challenge the statute.⁸¹ Therefore, the OLC did not merely comment on the constitutionality of section 603. Rather, it actively urged the President to challenge the statute in court to

⁷⁴ Bybee, *al-Qaeda Operatives*, *supra* note 68, at 18 (emphasis added).

⁷⁵ Lund, *supra* note 31, at 492–93.

⁷⁶ Memorandum from Theodore B. Olson, Assistant Att'y Gen., to Fred F. Fielding, Counsel to the President 41–43 (Feb. 6, 1984), <https://www.justice.gov/olc/page/file/936116/download> [<https://perma.cc/98FV-EHHH>].

⁷⁷ *Id.* at 1.

⁷⁸ The OLC held that all White House employees—including "Presidential appointees subject to Senate confirmation who are either full-time or part-time employees of the government . . . and Presidential appointees not subject to Senate confirmation"—were prohibited from contributing to Reagan's re-election campaign. *Id.* at 1 (quoting Memorandum from Fred F. Fielding, Counsel to the President, to Theodore B. Olsen, Assistant Att'y Gen. 1 (Nov. 14, 1983)).

⁷⁹ *Id.* at 39–41. However, the OLC did acknowledge that as a matter of policy, "[T]he Department of Justice would vigorously defend the constitutionality of the statute if it were challenged in court." *Id.* at 43.

⁸⁰ *Id.* at 2.

⁸¹ *Id.* at 43.

advance his agenda: “We therefore suggest that the legal interests of the individuals mentioned in your request would best be served by commencement of a civil action seeking declaratory and/or injunctive relief against enforcement of section 603.”⁸² Thus, even in 1984—a year free of major American crises⁸³—and on a mundane matter, the OLC acted not solely as advisors, but also as Reagan’s law firm, zealously advancing Reagan’s agenda even when Reagan did not request it of them. In the end, Reagan apparently decided not to challenge the statute, and 18 U.S.C. § 603 still remains in effect.⁸⁴

The episode repeated in 1997, when Deputy Assistant Attorney General Richard Shiffrin advised the President regarding removal of an executive official.⁸⁵ Clinton asked the OLC whether he could “remove, without cause, members of the Federal Housing Finance Board (‘FHFB’) and Railroad Retirement Board (‘RRB’) who [were] serving in holdover capacities.”⁸⁶ From the beginning, the OLC drafted the memo under the assumption that a removed official would challenge the action in court, stating that “although there is some small risk that a court would find a tenure protection during the holdover period, the clearly better legal view is that such a protection should not be inferred.”⁸⁷ Thus, the OLC does not only act as the President’s defense team when a crisis urges decisive yet illegal action. The OLC’s “Torture Memos” should not, therefore, be discounted as an aberration.⁸⁸

⁸² *Id.*

⁸³ See *What Happened in 1984*, ON THIS DAY, <http://www.onthisday.com/date/1984> [<https://perma.cc/GGP2-H34A>] (citing five “Significant Events,” none of which qualifies as an American crisis).

⁸⁴ In 2012, a federal contractor challenged the constitutionality of this statute, but the District Court for the District of Columbia upheld it. See *Wagner v. FEC*, 901 F. Supp. 2d 101, 112–13 (D.D.C. 2012), *vacated on other grounds*, 717 F.3d 1007 (D.C. Cir. 2013).

⁸⁵ See *Removal of Holdover Officials Serving on the Federal Housing Finance Board and the Railroad Retirement Board*, 21 Op. O.L.C. 135, 135 (1997) (advising President Clinton that he had the right to remove the holdover board members without cause).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Cf. Andrew Cohen, *The Torture Memos, 10 Years Later*, THE ATLANTIC (Feb. 6, 2012), <https://www.theatlantic.com/national/archive/2012/02/the-torture-memos-10-years-later/252439/> [<https://perma.cc/ZTV4-AX68>] (“Right now, *another* administration is justifying *another* extraordinary departure from American legal policy—the assassination of U.S. citizens abroad, with drone strikes, in a secret manner, without affording those citizens any due process.”).

III DISCUSSION

The data supports the hypothesis that OLC legal opinions give greater systematic deference to the President than to agencies, to which it renders more impartial advice. Moreover, whereas the OLC acts almost as an independent court in formulating advice for the agencies, it often assumes the role of private attorney for the President.⁸⁹

What, then, accounts for the OLC's deference toward the President? Several explanations relate to formal structures of accountability. First, the OLC heads are formally accountable to the President, which creates strong incentives to defer to the White House in issuing legal counsel. The OLC head's "interest in giving congenial advice is readily explained: by doing so he protects his position, retains influence with the President and Attorney General, and advances his prospects of promotion."⁹⁰

The Assistant Attorney General and the three Deputy Assistant Attorneys General who run the OLC are traditionally appointed by the President and confirmed by the Senate.⁹¹ That OLC heads are politically appointed and replaced with each presidency implies that OLC heads are chosen not only because they are "competent attorneys" but also because they are "politically and philosophically attuned to the policies of the administration,"⁹² or, in other words, maintain "reputations for holding views of the law that are welcome in the administration in which they serve."⁹³

It also implies that the White House exercises great influence over promotions as well as dismissals. How the White House perceives OLC work can determine the course of the attorneys' careers.⁹⁴ The White House and the Attorney General "hold the keys to some of the most desirable appointments to which lawyers aspire."⁹⁵ In the past few decades, heads of the OLC, more than any other position in government, have

⁸⁹ See *supra* notes 68–88 and accompanying text.

⁹⁰ McGinnis, *supra* note 14, at 422.

⁹¹ According to Jack Goldsmith, however, the OLC has only been led by a Senate-confirmed head for roughly five out of the last twenty-one years. See Jack Goldsmith, *The Decline of OLC*, LAWFARE (Oct. 28, 2015, 6:11 PM), <https://lawfareblog.com/decline-olc> [https://perma.cc/RD25-9RXA].

⁹² GOLDSMITH, *supra* note 8, at 34.

⁹³ Lund, *supra* note 31, at 502.

⁹⁴ See GOLDSMITH, *supra* note 8, at 170–71 (describing how Vice President Dick Cheney's Chief of Staff, David Addington, used his clout to preclude promising, talented young lawyers from advancing because they had obstructed Addington's path in the past).

⁹⁵ Lund, *supra* note 31, at 499–500.

gone on to become Supreme Court Justices. Notables include Chief Justice William Rehnquist and Justice Antonin Scalia.

Because the White House can dismiss OLC leadership without cause, an attorney may lose his or her position for issuing opinions opposing White House objectives. Former head of the OLC Roger C. Cramton was dismissed after refusing to support President Nixon in his attempt to withhold appropriated funds.⁹⁶ Thus, the President's control over appointments and dismissals creates incentives and pressure for OLC heads to issue deferential legal opinions for the White House.

Perhaps more important than formal structures are informal hierarchies that govern the relationships between the White House and the DOJ, exposing the OLC to significant pressure from above. Lund observes that the "relationship between OLC and the White House Counsel's office (which usually serves as the principal point of contact) can be quite informal and collaborative, much like the relationship between in-house counsel and outside counsel in private practice."⁹⁷ Such informal relationships can create "informal pressure," an "extraordinarily effective method of stifling disagreement and guiding decisions in the way top management desires."⁹⁸

Within the Bush administration, it was Alberto Gonzales, Counsel to the President, and David Addington, the Vice President's Chief of Staff, who exercised inordinate influence over Justice Department promotions, the substance of OLC legal opinions, and the method by which opinions would be drafted.⁹⁹ Goldsmith writes how Addington, a powerful figure, prevented certain non-party-liners from receiving promotions in the Justice Department.¹⁰⁰ Goldsmith writes:

[Gonzales and Addington] did not always acquiesce in OLC opinions that reached uncongenial conclusions. Addington in particular had a reputation for ensuring that those who crossed swords with him never received White House approval for advancement, even when it was widely believed that approval was deserved. I was immune to this pressure But others were not.¹⁰¹

⁹⁶ See Blaine Friedlander, *Roger Cramton, Former Cornell Law Dean, Dies at 87*, CORNELL CHRON. (Feb. 7, 2017), <http://news.cornell.edu/stories/2017/02/roger-cramton-former-cornell-law-dean-dies-87> [<https://perma.cc/7ZJX-CUT5>].

⁹⁷ Lund, *supra* note 31, at 498.

⁹⁸ Shane, *supra* note 12, at 512.

⁹⁹ GOLDSMITH, *supra* note 8, at 169–72.

¹⁰⁰ See *id.* at 170–71.

¹⁰¹ *Id.*

The possibility of promotion and dismissal are not the only sources of pressure—there are constant requests from the White House to stay in line with the President’s agenda, creating political pressure that “is unavoidably immense [OLC officials] are regularly present at White House meetings. And in this climate, there is simply no way that OLC’s aspiration to be a neutral decision-maker can play out in practice.”¹⁰²

In comparison, the incentives for the OLC to cater to the agencies are far weaker. The costs of approving questionable agency programs may outweigh the benefits: If the OLC supports an agency initiative, “the benefits will still be captured almost entirely by the client agency, while the costs of taking a legally aggressive position will largely be borne by OLC.”¹⁰³ Unlike for presidential initiatives, the OLC suffers comparatively little cost for not approving an agency initiative that may be legally ambiguous.

Unfortunately, the OLC faces “little or no oversight or public accountability”¹⁰⁴ to counteract pressures from the White House. In fact, OLC heads suffer few personal costs for writing deferential memos for the President. Despite a report by the Office of Professional Responsibility that Yoo and Bybee had committed “professional misconduct” by drafting and signing the 2002 “Torture Memos,”¹⁰⁵ the former OLC officials were acquitted by David Margolis, the Associate Deputy Attorney General.¹⁰⁶ They were not referred to the state bar, and continued to practice (Bybee is now a federal circuit judge; Yoo is on the faculty at Berkeley Law School).¹⁰⁷

Although OLC heads may have an interest in maintaining the OLC’s reputation as independent and impartial—“prestige and reputation of the office will be what will enhance his status as he returns to private practice”¹⁰⁸—OLC attorneys do not always uphold those standards. The public is prevented from viewing many sensitive written opinions, and the memos that

¹⁰² Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2337 (2006).

¹⁰³ Lund, *supra* note 31, at 494.

¹⁰⁴ GOLDSMITH, *supra* note 8, at 33.

¹⁰⁵ OFFICE OF PROF’L RESPONSIBILITY, U.S. DEP’T OF JUSTICE, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS 11 (2009).

¹⁰⁶ Memorandum from Margolis, *supra* note 61, at 2.

¹⁰⁷ *Id.*; Eric Lichtblau & Scott Shane, *Report Faults 2 Authors of Bush Terror Memos*, N.Y. TIMES (Feb. 19, 2010), <http://www.nytimes.com/2010/02/20/us/politics/20justice.html?mcubz=0> [<https://perma.cc/ZTH3-BK56>].

¹⁰⁸ McGinnis, *supra* note 14, at 422.

are revealed tend to be disclosed years after the action has occurred.¹⁰⁹ This does not mean, however, that the OLC always feels pressured to say “yes” to the President, “especially with respect to issues in which the White House or the Attorney General has not appeared to take any strong interest.”¹¹⁰

Although the degree of informally originating pressures on the OLC is likely to vary across administrations—according to the type of people installed in the White House, the White House culture, the strength of hierarchical relations, as well as the distinct situations facing the administration—the OLC consistently risks succumbing to White House pressures.

IV

POSSIBLE REMEDIES

In the aftermath of the “Torture Memos,” the OLC issued two best practices guidelines in 2005 and 2010, encouraging its lawyers to render more thorough and impartial advice.¹¹¹ The 2010 memorandum presents the following principles:

- OLC must provide advice based on its best understanding of what the law requires—not simply an advocate’s defense of the contemplated action or position proposed by an agency or the Administration.¹¹²
- [I]n rendering legal advice, OLC seeks to provide an accurate and honest appraisal of applicable law, even if that appraisal will constrain the Administration’s or an agency’s pursuit of desired practices or policy objectives.¹¹³
- [OLC] should strive to ensure that it candidly and fairly addresses the full range of relevant legal sources and significant arguments on all sides of a question.¹¹⁴
- OLC’s analyses may appropriately reflect its responsibilities, which include facilitating the work of the Executive Branch and the objectives of the President, consistent with the law.¹¹⁵

¹⁰⁹ It is unclear how beneficial frequent disclosure would be. It is also never clear what degree of partiality in the legal analysis will earn public praise or approbation. Ultimately, whether an opinion is praised or criticized may depend not on the quality of the legal analysis, but on how well the executive action is received by the public, after the fact. Had public opinion largely favored harsh methods of interrogation for terrorists, Yoo’s memos likely would not have been singled out as unsound legal advice.

¹¹⁰ Lund, *supra* note 31, at 501.

¹¹¹ See Memorandum from Barron, *supra* note 23, at 1–2.

¹¹² *Id.* at 1.

¹¹³ *Id.*

¹¹⁴ *Id.* at 2.

¹¹⁵ *Id.*

However, in the face of significant political pressure, such self-imposed and self-policing guidelines are difficult to uphold. Indeed, as my empirical results suggest, the OLC's internal commitments to impartiality yield to strong incentives for acting partially. Unfortunately, there are few external mechanisms that adequately monitor the OLC, and few internal incentives for the OLC to act otherwise. Without proper accountability or incentives, internal norms of impartiality "are unlikely to be self-sustaining."¹¹⁶

Below, I introduce and evaluate several informal and structural remedies scholars have suggested. I then propose what I believe to be the best option for making the OLC more independent and impartial.

A. Informal Remedies

Some scholars suggest that increased routine disclosure of OLC opinions would increase transparency and force OLC officials to be accountable to the public.¹¹⁷ Systematized disclosure would "protect[] against fringe views, since the author of an opinion knows that outside audiences will . . . quickly discover and critique views that distort the relevant law."¹¹⁸ Disclosure would also "allow[] Congress, professional peers, and the public to see distortions as they emerge and campaign to correct them."¹¹⁹ Indeed, the OLC seems to be making a concerted effort to do so. President Obama's 2009 memorandum encouraged agencies to "disclose information rapidly in forms that the public can readily find and use."¹²⁰

The problem is that the OLC does not possess a "monopoly over the provision of legal advice within the government"¹²¹—the White House may stop relying on the OLC for legal advice as disclosures increase, depending instead on agency lawyers. In recent years, the number of lawsuits demanding that the OLC disclose opinions has soared,¹²² which some say has

¹¹⁶ Shane, *supra* note 12, at 518.

¹¹⁷ See, e.g., Setty, *supra* note 13, at 602–05 (discussing the benefits of introducing mandatory OLC disclosures).

¹¹⁸ Margulies, *supra* note 36, at 844.

¹¹⁹ *Id.*

¹²⁰ Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009).

¹²¹ Lund, *supra* note 31, at 488.

¹²² See, e.g., *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Justice*, 846 F.3d 1235, 1238–39 (D.C. Cir. 2017) (suit brought to compel OLC to meet disclosure obligations under FOIA's "reading-room" provision, which requires agencies to make certain records, such as final opinions in adjudication of cases, available electronically); *Am. Civil Liberties Union v. U.S. Dep't of Justice*, 844 F.3d 126 (2d Cir. 2016) (suit under FOIA to compel OLC disclosure of documents setting forth

made the President reluctant to rely on OLC advice.¹²³ The rising frequency of OLC disclosures may be linked to the growing influence of the White House Counsel and the general counsels of agencies and departments during the Obama administration, while “OLC’s authority and influence . . . in general diminished by comparison to prior administrations.”¹²⁴ Rumors of the OLC’s decline circulated rapidly after it was disclosed that Obama did not consult with the Attorney General or the OLC—opting instead to rely on lawyers from the CIA, the National Security Council, the Joint Chiefs of Staff, and the Pentagon—in drafting memos that justified the Navy SEAL operation killing Osama bin Laden in 2011.¹²⁵

Others have suggested that the OLC create a regime of *stare decisis* for OLC opinions.¹²⁶ If “[t]he concern is that OLC

government’s reasoning on legality of targeted drone strikes on U.S. citizens); N.Y. Times Co. v. U.S. Dep’t of Justice, 806 F.3d 682, 683 (2d Cir. 2015) (suit under FOIA seeking disclosure of OLC documents related to targeted drone strikes on U.S. citizens); N.Y. Times Co. v. U.S. Dep’t of Justice, 756 F.3d 97, 100 (2d Cir. 2014) (same); Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep’t of Justice, 697 F.3d 184, 184 (2d Cir. 2012) (suit under FOIA to compel OLC to disclose documents relating to the enforcement of pledge requirements imposed by U.S. Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act and Trafficking Victims Protection Reauthorization Act); Am. Civil Liberties Union v. U.S. Dep’t of Justice, 681 F.3d 61, 65 (2d Cir. 2012) (suit under FOIA to compel OLC disclosure of documents relating to CIA detainees); Samahon v. U.S. Dep’t of Justice, No. 13-6462, 2015 WL 857358, at *2 (E.D. Pa. Feb. 27, 2015) (suit brought under FOIA seeking disclosure of OLC documents on presidential power to make recess appointments during pro forma sessions of the Senate); Elec. Privacy Info. Ctr. v. U.S. Dep’t of Justice, No. 1:06-CV-214 (RCL), 2014 WL 1279280, at *1 (D.D.C. Mar. 31, 2014) (suit under FOIA to compel disclosure of OLC memos relating to NSA’s post-9/11 warrantless wire-tapping program); N.Y. Times Co. v. U.S. Dep’t of Justice, No. 12 Civ. 3215 (JSR), 2013 WL 174222, at *1 (S.D.N.Y. Jan. 7, 2013) (suit under FOIA seeking disclosure of OLC documents on presidential power to make recess appointments during pro forma sessions of the Senate).

¹²³ See Goldsmith, *supra* note 91.

¹²⁴ See *id.*

¹²⁵ Charlie Savage, *How 4 Federal Lawyers Paved the Way to Kill Osama bin Laden*, N.Y. TIMES (Oct. 28, 2015), https://www.nytimes.com/2015/10/29/us/politics/obama-legal-authorization-osama-bin-laden-raid.html?_r=0 [<https://perma.cc/R5B4-QWQY>]. Professor Michael Dorf at Cornell Law School writes on this issue: “[I]t is to be expected that lawyers in particular departments or agencies will tend to take the perspective that the department or agency favors on policy grounds. If you go to lawyers for the military or the intelligence services, *ceteris paribus*, they will favor the conclusion that a proposed use of force is lawful. But it is precisely because of this kind of risk that, over time, OLC has come to be valued as a legal unit within the executive branch that tells it like it is.” Michael Dorf, *Why Didn’t Obama Ask OLC About the bin Laden Raid?*, DORF ON LAW (Nov. 4, 2015, 7:00 AM), <http://www.dorfonlaw.org/2015/11/why-didnt-obama-ask-olc-about-bin-laden.html> [<https://perma.cc/U94D-DLJN>].

¹²⁶ See, e.g., Morrison, *supra* note 10, at 1475–81 (discussing the role of precedent in the OLC).

might succumb to its clients' short-run policy interests by too readily answering 'yes' [and] overruling OLC precedent whenever it stands in the way of the client's current preferences,"¹²⁷ then a "commit[ment] to follow those precedents over the immediate policy preferences of its clients"¹²⁸ may help curtail such deference. However, some argue that "[s]tare decisis works because courts handle scores or hundreds of cases with similar facts."¹²⁹ Rather than resolve comparable disputes, most OLC work involves "little prospect for recurrence in exactly the same form. In this sparser decisional environment, stare decisis is not as useful."¹³⁰

Another idea is for the OLC to implement a "substantive test" when writing opinions: executive actions that "push[] the envelope" must not violate constitutional norms, must have a "compelling sovereignty- or human rights-centered rationale," and "must have a reasonable chance of ratification" by Congress.¹³¹ Despite Margulies's attempts to define such potential sovereignty and human rights rationales, the boundaries of what this constitutes can easily be construed in ways that render the benefits of such a test moot. The ratification requirement is even more problematic. Under the requirement, the OLC must have a "reasonable expectation that Congress would either specifically endorse the President's decision through an affirmative act or acquiesce in the decision, or a reasonable belief that Congress has already authorized the decision."¹³² In the context of a divided and polarized government, wherein Congress might oppose a presidential initiative not for lack of merit but for partisan reasons, such a requirement would be unprofitable and cumbersome.

Barring the aforementioned defects, the problem that arises in informal and internal codes is that of persistent self-enforcement. While adherence to such codes will vary with the individual head of the OLC and the context, internal commitments are likely to succumb to structural incentives when political pressures soar and incentives to resist are scant.

127 *Id.* at 1497.

128 *Id.*

129 Margulies, *supra* note 36, at 846.

130 *Id.*

131 *Id.* at 851.

132 *Id.* at 853.

B. Structural Modifications

1. *Supreme Executive Tribunal*

Formal structural modifications are necessary to remedy what appears to be primarily a structural issue involving the hierarchical institutions between the White House and the OLC.¹³³ If the informal solutions proposed above are surface-level remedies for what is inherently a problem of political pressure originating in the President's control over OLC appointments and tenure, then a more effective solution would be to modify this arrangement.

One such remedy, albeit one that seems particularly difficult to implement, is the creation of a "Supreme Executive Tribunal," an institution of nine members appointed by the President with Senate confirmation, who will serve as "judges for the executive branch" over staggered twelve-year terms and will assume the OLC's adjudicatory duties.¹³⁴ The OLC will function primarily as presidential "advocates," and its opinions "will have only provisional authority, subject to full-dress adjudication by the Executive Tribunal."¹³⁵ The OLC "will be preparing for the next case before the tribunal—and they will rightly fear that extreme positions will only serve to alienate the judges."¹³⁶

The list of potential objections to this proposal is lengthy.¹³⁷ However, the most conspicuous objection is that the Tribunal would greatly encumber the process of executive legislation, potentially drawing out pending proposals "for weeks or months," and having a "particularly deleterious impact on foreign policy matters, where a timely move may be necessary."¹³⁸ Other objections are more thought-provoking: the Tribunal would most likely adjudicate cases involving political questions that are nonjusticiable in the courts.¹³⁹ Whether this is desirable, however, is open to debate: Despite the lack of mechanisms to keep the executive accountable, "[c]ourts stay their hand in these matters to allow Congress and the Presi-

¹³³ See Katyal, *supra* note 102, at 2319–22, 2336 n.83. Katyal goes so far as to argue that the lapse of judgment shown by certain OLC lawyers in the wake of 9/11 cannot be entirely blamed on them, but rather on the "structural design of the modern executive branch." *Id.*

¹³⁴ See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 143 (2010).

¹³⁵ *Id.* at 144.

¹³⁶ *Id.* at 145.

¹³⁷ See Margulies, *supra* note 36, at 834–36.

¹³⁸ *Id.* at 836.

¹³⁹ See *id.* at 835.

dent to work out their differences on policy matters. Many of these matters may lack clear standards that facilitate judicial review or may address contexts such as foreign policy, where the nation should speak with one voice.”¹⁴⁰

2. *Director of Adjudication*

Yet another proposal suggests the creation of a “Director of Adjudication” position to assume the OLC’s adjudicatory functions.¹⁴¹ The OLC would function solely as an adviser, while the Director, reminiscent of the Tribunal, would act as an impartial judge. The Director “would not hold tenure for life, but rather for periods of four years that straddle presidential terms, subject only to removal for cause.”¹⁴² This proposal unnecessarily complicates procedures without bringing much advantage. The President is likely to bypass the Director rather than risk the possibility of an overrule being reported. He would, as Margulies notes, “secure advice elsewhere, such as from the White House Counsel” or the agencies.¹⁴³ Second, it is unclear whether creating such a position would have advantages beyond the benefits of non-removable tenure. The Director may be just as vulnerable to White House pressure as the head of the OLC—the only difference being that the former is subject to for-cause removal and straddles presidential terms. Instead of installing a new Director, why not make the OLC head subject to the same terms?

3. *For-Cause Removal for the OLC*

Another solution to OLC bias is to make OLC lawyers removable only for cause or to grant them tenure of office. Until its repeal in 1889, the Tenure of Office Act (requiring the consent of the Senate to fire some officers) encompassed many DOJ lawyers, protecting them from arbitrary removal.¹⁴⁴ There is reason to believe, in fact, that the creators of the DOJ did not include a tenure provision in the DOJ’s organic statute solely because of the Tenure of Office Act.¹⁴⁵ Considering contempo-

¹⁴⁰ *Id.*

¹⁴¹ Katyal, *supra* note 102, at 2337.

¹⁴² *Id.*

¹⁴³ Margulies, *supra* note 36, at 837–38.

¹⁴⁴ See Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 165, 169 (2014).

¹⁴⁵ See *id.* at 165.

rary bias within the OLC, it may be necessary to once again grant their lawyers tenure.¹⁴⁶

Does Congress have the power to grant tenure to the Office of Legal Counsel? It most likely does. Although the Supreme Court did initially seem to draw a distinction between “quasi-legislative” or “quasi-judicial” agencies and “purely executive officers,”¹⁴⁷ the Court has since abandoned this framework.¹⁴⁸ In *Morrison v. Olson*, the Court explained:

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” under Article II.¹⁴⁹

Thus, “[T]he 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 . . . in question must be analyzed in that light.”¹⁵⁰

Therefore, it is important to look at precedent to determine whether restricting removability of OLC lawyers—i.e., the Assistant Attorney General and other Department of Justice attorneys—will unduly impede the President in his or her exercise of executive power. The OLC lawyers provide counsel. They do not regulate rates on any good or service, like the postmaster in *Myers* did.¹⁵¹ Nor does the OLC enforce any law, like the independent counsel at issue in *Morrison*.¹⁵² Thus, although the OLC assists the President in performing his or her executive functions, the Office does not perform a specific executive function. In other words, a President would not be prevented from performing any executive power because of a noncompliant OLC.

¹⁴⁶ *But see id.* at 170 (“[T]he Department of Justice, over the long term, developed the norms of professional independence envisioned by Representative Jenckes and its congressional architects.”).

¹⁴⁷ *Compare Myers v. United States*, 272 U.S. 52, 132–34, 177 (1926) (holding that a restriction on removability of postmasters violated the Take Care clause), *with Humphrey’s Ex’r v. United States*, 295 U.S. 602, 628 (1935) (holding that a restriction on removability of a quasi-judicial and quasi-legislative agency did not violate the Take Care clause).

¹⁴⁸ *Morrison v. Olson*, 487 U.S. 654, 689 (1988).

¹⁴⁹ *Id.* at 689–90.

¹⁵⁰ *Id.* at 691.

¹⁵¹ *See Myers*, 272 U.S. at 177.

¹⁵² *See Morrison*, 487 U.S. at 691.

Moreover, precedent supports Congress's ability to restrict removability of OLC officers. In *Wiener v. United States*, the Court held that officers of the War Claims Commission could only be removed for cause, because Congress could not have intended the commissioners to exercise their duties while fearing "the Damocles' sword of removal by the President for no reason other than that he preferred to have . . . men of his own choosing."¹⁵³ Just as the officers of the War Claims Commission would function best when protected from removal, so could the OLC provide better advice when "the Damocles' sword of removal" is withdrawn from their necks.

Congress has broad discretion to decide how robustly to insulate an agency from the President. "A robust approach would specify that refusing to take a legally frivolous position is not cause for termination," whereas "[a] more modest approach would rely on the general for-cause standard approved in *Humphrey's Executor*."¹⁵⁴ A simple statute formally establishing the OLC as an agency and specifying the removability of OLC officers in conformity to *Humphrey's Executor* would be sufficient to make the OLC an independent agency.¹⁵⁵

Would tenure address the problem of bias within the OLC? At the very least, tenure or for-cause removal would make the OLC an independent agency as a matter of law. "Independence is a legal term of art in public law, referring to agencies headed by officials that the President may not remove without cause."¹⁵⁶ Similarly in practice, for-cause removal has the effect of insulating agencies from politics, because "a President who cannot remove the personnel of the agency for policy disagreements lacks a key method to impose administration views."¹⁵⁷ Agencies are thus able to act based on their expertise without bending wholly to the President's agenda. For this

¹⁵³ *Wiener v. United States*, 357 U.S. 349, 356 (1958).

¹⁵⁴ Spaulding, *supra* note 35, at 435.

¹⁵⁵ See *Morrison*, 487 U.S. at 687. There are, of course, limitations. Congress likely could not make the attorney general and the OLC removable for cause only. Such a dual for-cause limitation would likely run afoul of *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010).

¹⁵⁶ Jacob E. Gersen, *Designing Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 347 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

¹⁵⁷ See Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 611 (2010). Some scholars dispute this conclusion. See, e.g., Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 814 (2013) (asserting that the President's power of removal is an "imperfect tool" for imposing policy preferences); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1194 (2013) (applying a conventionalist perspective to removal).

reason, tenure has been traditionally viewed as the antecedent to professionalism.¹⁵⁸ For the same reason, limiting the President's removal power would encourage OLC attorneys to exhibit "dispassionate professional judgment."¹⁵⁹

Of course, completely isolating the OLC from the President will defeat the purpose of the OLC. If the OLC is filled with holdover tenured attorneys of the opposite party, the President is unlikely to seek their advice. Such an OLC would also oppose the agenda of the new President on ideological, rather than legal, grounds. This hypothetical OLC would be at stark odds with what the President requires of it, and according to Katyal:

[T]he political pressure on OLC officials is unavoidably immense. They are, after all, political appointees themselves—the head of the Office and all the deputies are politically appointed. They are expected not only to adjudicate disputes but also to advise the President, and they are regularly present at White House meetings. And in this climate, there is simply no way that OLC's aspiration to be a neutral decision-maker can play out in practice. Simply put, they are lawyers with a client to serve.¹⁶⁰

For-cause removal would not, however, alienate the OLC from the President because it preserves some political accountability of agency heads. After all, "The President appoints the heads of almost all independent agencies, the chairs of multimember agencies, and the administrators of single-head agencies."¹⁶¹ Even if the President could not remove the agency officials at will, he or she could still fill the agency with like-minded individuals who would, in general, support his or her agenda. Accordingly, the OLC would be encouraged to exercise their expertise without fear of reprisal while maintaining some level of allegiance to the President. Thus, the best method of remedying OLC bias is to protect OLC heads and lawyers from arbitrary removal.

CONCLUSION

This study has shown that the OLC does not offer "detached, apolitical legal advice" in practice. Rather, the OLC is deeply and systematically deferential to the President. The implications are grave considering the OLC's de facto lawmaking

¹⁵⁸ See Bressman & Thompson, *supra* note 157, at 611–12.

¹⁵⁹ *Id.* at 612.

¹⁶⁰ Katyal, *supra* note 102, at 2337 (footnote omitted).

¹⁶¹ Datla & Revesz, *supra* note 157, at 818.

power, a result of its position as legal adviser for the executive—“[t]he judgment of [the OLC] . . . becomes the law.”¹⁶² Moreover, the OLC “is frequently asked to opine on issues of first impression that are unlikely to be resolved by the courts—a circumstance in which OLC’s advice may effectively be the final word on the controlling law.”¹⁶³ Whether the OLC facilitates the extra-constitutional and extra-legal expansion of executive powers depends on the implementation of sufficient remedies for the problem of partiality.

The issue of OLC deference is particularly pertinent considering that numerous executive orders issued by the current President have been successfully challenged in federal courts.¹⁶⁴ As the OLC verifies the legality of all executive action,¹⁶⁵ excessive bias will only damage the administration. Given the recent scrutiny of presidential action, the OLC must commit to giving legal advice that ensures the legality and constitutionality of executive action.

¹⁶² *Cheney’s Law: Interview, Charlie Savage, supra* note 72.

¹⁶³ Memorandum from Barron, *supra* note 23, at 1.

¹⁶⁴ *See, e.g., Hawai’i v. Trump*, CV. NO. 17-00050 DKW-KSC, 2017 WL 1011673, at *17 (D. Haw. Mar. 15, 2017) (granting a temporary restraining order prohibiting the enforcement of President Trump’s executive order banning travel into the United States from various countries).

¹⁶⁵ *Office of Legal Counsel, supra* note 7.

APPENDIX 1 – “CRISIS” MEMOS

Notes on the table. “Date” is written in “Month, Year” format. “Memo” column includes the memo name, shortened for the sake of brevity. “Recipient” is the individual to whom the memo was addressed. “Author” is the name of the individual who composed the memo. “Topic” column designates whether a given memo discusses a matter of domestic concern (designated “D”) or of foreign concern (designated “F”). “Position” column designates whether a given memo argued for expansive view of presidential powers (designated “E”) or argued for limited presidential powers (designated “L”).

Date	Memo	Recipient	Author	Topic	Position
Apr., 11	Military Force in Libya	AG	Krass	F	E
July, 10	Lethal Operations Against Shaykh Anwar al-Aulaqi	AG	Barron	F	E
Feb., 10	Lethal Operations Against Shaykh Anwar al-Aulaqi	AG	Barron	F	E
May, 04	Review of Legality of STELLAR WIND	AG	Goldsmith	D	E
Mar., 04	“Protected Person” Status in Iraq Under Geneva Convention	President	Goldsmith	F	E
Mar., 04	Deployment of United States Armed Forces to Haiti	President	Goldsmith	F	E
Jan., 03	Authority to Protect National Security Information	President	Yoo	D	E
Dec., 02	Omissions in Iraq’s WMD Declaration	Vice President	Yoo	F	E
Nov., 02	U.N. Resolution, Int’l Law, and Force in Iraq	President	Yoo	F	E
Oct., 02	Military Force Against Iraq	President	Bybee	F	E
Aug., 02	Standards of Conduct for Interrogation	President	Bybee	F	E
Aug., 02	Legality of Interrogation for al Qaeda Operatives	President	Yoo	F	E
July, 02	Patriot Act & National Security Affairs	Deputy AG	Bybee	D	E
Feb., 02	Status of Taliban Forces Under Geneva Convention of 1949	President	Bybee	F	E
Jan., 02	Treaties and Laws to al Qaeda and Taliban Detainees	President	Bybee	F	E

Nov., 01	Suspend Certain Provisions of the ABM Treaty	President	Yoo, Delahunty	F	E
Nov., 01	Legality of the Use of Military Commissions to Try Terrorists	President	Philbin	F	E
Nov., 01	Persons Captured by US Armed Forces in Afghanistan	President	Yoo, Delahunty	F	E
Oct., 01	Force to Combat Terrorist Within the United States	President	Yoo, Delahunty	D	E
Sept., 01	Force Against Terrorists and Nations Supporting Them	President	Yoo	F	E
Sept., 01	Amending Foreign Intelligence Surveillance	Assoc. Dep. AG	Yoo	F	E
Dec., 00	Authorization for Continuing Hostilities in Kosovo	AG	Moss	F	E
May, 99	Military Operations in Kosovo	AG	Moss	F	E
June, 96	Legislative Provision Regarding ABM Treaty	President	Dellinger	F	E
May, 96	Placing of U.S. Armed Forces Under U.N. Control	President and NSC	Dellinger	F	E
Nov., 95	Proposed Deployment of U.S. Armed Forces into Bosnia	President	Dellinger	F	E
Nov., 95	Presidential Discretion & Chemical & Bio. Weapons	President and NSC	Dellinger	D	E
Sept., 94	Deployment of United States Armed Forces into Haiti	Four US Senators	Dellinger	F	E
Dec., 92	Authority to Use United States Military Forces in Somalia	President	Flanigan	F	E
Feb., 90	Issues Raised by Foreign Relations Authorization Bill	President	Barr	F	E
July, 89	Congressional Notification for Certain CIA Covert Actions	AG	Barr	F	E

APPENDIX 2 – PRESIDENTIAL MEMORANDA

Notes on the table. The “date” column is written in “month, year” format. The “memo” column includes the memo name, shortened for the sake of brevity. The “recipient” column refers to the individual to whom the memo was addressed. The “author” column refers to the name of the individual who composed the memo. The “topic” column designates whether a given memo discusses a matter of domestic concern (designated “D”) or of foreign concern (designated “F”). The “position” column designates whether a given memo argued for expansive view of presidential powers (designated “E”) or argued for limited presidential powers (designated “L”). The “Result” column expounds on whether a given memo was rejected in court (“O_c”), opposed in academia (“O_a”), opposed by a political body such as Congress (“O_p”), not opposed (“N”), supported by a political body (“S_p”), supported in academia (“S_a”), or upheld in court (“S_c”).

Date	Memo	Recipient	Author	Topic	Position	Result
Jan., 17	Anti-Nepotism	President	Koffsky	D	E	N
Aug., 16	National Emergency Act	President	Thompson	D	L	N
July, 14	Immunity from Subpoena	President	Thompson	D	E	S _p ¹⁶⁶
June, 12	Exec. Privilege: Congress on Fast and Furious	President	Holder	D	E	O _c ¹⁶⁷
Jan., 12	Recess Appointments Senate	President	Seitz	D	E	O _c ¹⁶⁸
May, 11	Bills Presented Electronically	President	Cedarbaum	D	E	N
Apr., 11	White House Employee Sick Leave.	President	Thompson	D	E	N
Apr., 11	Military Force in Libya	AG	Krass	F	E	O _p ¹⁶⁹
July, 10	Lethal Operations Against al-Aulaqi	AG	Barron	F	E	S _c ¹⁷⁰

¹⁶⁶ See Jennifer Bendery, *Darrell Issa Abruptly Ends Hearing Before Witness Can Debunk His White House Attacks*, HUFFINGTON POST (Jul. 17, 2014), http://www.huffingtonpost.com/2014/07/16/darrell-issa-hearing_n_5592009.html [<https://perma.cc/B79G-LWRD>].

¹⁶⁷ Comm. on Oversight & Gov’t Reform, U.S. House of Representatives v. Lynch, 156 F. Supp. 3d 101, 121 (D.D.C. 2016).

¹⁶⁸ NLRB v. Canning, 134 S. Ct. 2550, 2578 (2014).

¹⁶⁹ H.R. Res. 292, 112th Cong., 1st. Sess. (2011) (rebuking the decision). A court case challenging the decision failed, however it was due to mootness. *Whitney v. Obama*, 845 F. Supp. 2d 136, 140 (D.D.C. 2012).

¹⁷⁰ *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 80 (D.D.C. 2014).

Feb., 10	Re: Lethal Operation Against al-Aulaqi	AG	Barron	F	E	S _c ¹⁷¹
Dec., 09	President's Receipt of Nobel Prize	President	Barron	F	E	N
Oct., 09	Remove Fed. Coordinator for Alaska Natural Gas	President	Barron	D	E	N
July, 09	Retired Military Officer for Appointment in NASA	President	Koffsky	D	E	N
June, 09	Constitutionality of Foreign Appropriations Act	Dep't of State	Barron	F	E	N
July, 08	Exec. Privilege Special Counsel	President	Mukasey	D	E	O _c ¹⁷²
June, 08	Exec. Privilege EPA Ozone	President	Mukasey	D	E	N
Feb., 08	DOJ Prosecute White House	AG	Bradbury	D	E	O _c ¹⁷³
Sept., 07	President to name Acting AG	President	Bradbury	D	E	S _c ¹⁷⁴
Aug., 07	Is Office of Admin. an "Agency"	President	Engel	D	E	S _c ¹⁷⁵
July, 07	Presidential Records Act	President	Bradbury	D	L	N
July, 07	Immunity of Former Counsel from Congressional Testimony	President	Bradbury	D	E	O _c ¹⁷⁶
June, 07	Exec. Privilege in Dismissal of US Attorneys	President	Clement	D	E	O _p ¹⁷⁷
Sept., 05	Appointments to the Board of the Legal Services Corporation	President	Bradbury	D	E	N

¹⁷¹ *Id.*

¹⁷² Comm. on Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 108 (D.D.C. 2008).

¹⁷³ *Id.*

¹⁷⁴ United States v. Baldwin, 541 F. Supp. 2d 1184, 1186 (D.N.M. 2008).

¹⁷⁵ Citizens for Responsibility and Ethics in Wash. v. Office of Admin., 566 F.3d 219, 220 (D.C. Cir. 2009).

¹⁷⁶ *Miers*, 558 F. Supp. 2d at 104 ("Unlike the Olson and Cooper OLC opinions, which are exhaustive efforts of sophisticated legal reasoning, bolstered by extensive citation to judicial authority, the Reno and Bradbury OLC opinions are for the most part conclusory and recursive. Neither cites to a single judicial opinion recognizing the asserted absolute immunity. Indeed, the three-page Bradbury OLC opinion was hastily issued on the same day that the President instructed Ms. Miers to invoke absolute immunity, and it relies almost exclusively upon the conclusory Reno OLC opinion and a statement from a memorandum written by then-Assistant Attorney General William Rehnquist in 1971.").

¹⁷⁷ Preserving United States Attorney Independence Act of 2007, S. 214, 110th Cong., Pub. L. No. 110-34 (2007) (codified in 28 U.S.C. § 546).

July, 05	Sign a Bill by Directing That His Signature Be Affixed to It	President	Nielson, Jr.	D	E	N
Mar., 05	Emoluments Clause & Member of the Council on Bioethics	President	Francisco	D	E	N
Jan., 05	Status of Director of CIA Under the NSRA of 2004	President	Marshall	D	E	N
Dec., 04	Political Balance Requirement for the Civil Rights Comm'n	President	Levin	D	L	N
May, 04	Review of the Legality of Stellar Wind Program	AG	Goldsmith	D	E	O _p ¹⁷⁸
Mar., 04	Geneva Convection, Protected Person Status in Occupied Iraq	President	Goldsmith	F	E	O _c ¹⁷⁹
Mar., 04	Deployment of United States Armed Forces to Haiti	President	Goldsmith	F	E	N
Jan., 04	Privilege Over Reagan Administration Records	President	Goldsmith	D	E	S _c ¹⁸⁰
Sept., 03	Removal of Amtrak's Reform Board	President	Whelan	D	E	N
June, 03	Designation of Acting Director of the OMB	President	Whelan	D	E	N
May, 03	Contributions to the President's Re-Election Committee	President	Whelan	D	E	N
Feb., 03	Appointment of Member of Holocaust Memorial Council	President	Whelan	D	E	N
Jan., 03	Authority to Protect National Security Information	President	Yoo	D	E	O _a ¹⁸¹
Dec., 02	Omissions in Iraq's WMD Declaration	Vice President	Yoo	F	E	O _a ¹⁸²
Nov., 02	Designation of Acting Solicitor of Labor	President	Whelan	D	E	N

¹⁷⁸ Lichtblau & Risen, *supra* note 61, at A1 .

¹⁷⁹ *In re XE Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 583 (E.D. Va. 2009) (limiting the validity of the advice only to al-Qaeda members).

¹⁸⁰ *Am. Hist. Ass'n v. Nat'l Archives & Records Admin.*, 402 F. Supp. 2d 171, 184 (D.D.C. 2005).

¹⁸¹ Steven Aftergood, *OLC: President May Withhold WMD Info from Congress*, FED'N OF AM. SCIENTISTS (Aug. 26, 2015), <https://fas.org/blogs/secrecy/2015/08/olc-nsi/> [<https://perma.cc/Z3KV-TW67>].

¹⁸² See, e.g., J. Patrick Kelly, *The International Law of Force and the Fight Against Terrorism*, 21 DEL. LAW 18, 20 (2003) (recognizing logical and legal flaws in the memorandum).

Nov., 02	U.N. Resolution, Int'l Law, and Force in Iraq	President	Yoo	F	E	O _p ¹⁸³
Nov., 02	Signing of the H.J. Res. 124	President	Whelan	D	E	N
Oct., 02	Military Force Against Iraq	President	Bybee	F	E	N
Aug., 02	Standards of Conduct for Interrogation	President	Bybee	F	E	O _p ¹⁸⁴
Aug., 02	Legality of interrogation used for al Qaeda operatives	President	Yoo	F	E	O _p ¹⁸⁵
July, 02	Patriot Act & National Security Affairs	Deputy AG	Bybee	D	E	O _p ¹⁸⁶
May, 02	Applicability of Ineligibility Clause to Tony P. Hall	President	Bybee	D	E	N
Mar., 02	Border Control Policy Under the Attorney General	President	Yoo	D	L	N
Feb., 02	Status of Taliban Forces Under Geneva Convention of 1949	President	Bybee	F	E	O _c ¹⁸⁷
Jan., 02	Treaties and Laws to al Qaeda and Taliban Detainees	President	Bybee	F	E	O _c ¹⁸⁸

¹⁸³ Andru E. Wall, *Was the 2003 Invasion of Iraq Legal?*, 86 INT'L L. STUD. 69, *passim* (2010) (remarking on the international condemnation of the invasion as contrary to the U.N. resolution).

¹⁸⁴ Memorandum from Margolis, *supra* note 61, at 68 (condemning Bybee and Yoo's memoranda as exhibiting poor judgment). It is also important to note that Bybee and Yoo were initially charged with professional misconduct for composing the torture memoranda. OFF. OF PROF. RESPONSIBILITY, *supra* note 105, at 11.

¹⁸⁵ See *supra* note 19 and accompanying text.

¹⁸⁶ Rachel Levinson-Waldman, *Another Tortured Memo from Jay Bybee*, BRENNAN CTR. FOR JUSTICE (Sept. 26, 2012), <https://www.brennancenter.org/blog/another-tortured-memo-jay-bybee> [<https://perma.cc/AEF3-ZKK>] (challenging the memo as inconsistent, conclusory, and "tortured").

¹⁸⁷ In 2005, the District Court for the District of Columbia held that Taliban detainees counted as prisoners of war under the Geneva Convention. See *In re Guantanamo Detainees Cases*, 355 F. Supp. 2d 443, 479–80 (D.D.C. 2005). This decision was vacated, however, in 2009 in *Al Odah v. United States*, 559 F.3d 539, 548–49 (D.C. Cir. 2009), but only because of changes in habeas corpus law. The Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507, 553 (2004) (Souter, J., concurring), disagreed that captured Taliban combatants lacked any rights, finding that they could not be held indefinitely under the Geneva Convention and had due process rights to contest the factual basis for their detention. Then in *Boumediene v. Bush*, 553 U.S. 723, 771 (2008), the Supreme Court again held that enemy combatants could seek habeas corpus review. Congress, however, twice amended 28 U.S.C. § 2241 to deny Guantanamo detainees habeas review. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006); Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005).

¹⁸⁸ See *supra* note 187 and accompanying text.

Nov., 01	Constitutional Issues by Appropriations Bill	President	Yoo	F	E	N
Nov., 01	Suspend Certain Provisions of the ABM Treaty	President	Yoo, Delahunty	F	E	N ¹⁸⁹
Nov., 01	Legality of the Use of Military Commissions to Try Terrorists	President	Philbin	F	E	O _c ¹⁹⁰
Nov., 01	Persons Captured by US Armed Forces in Afghanistan	President	Yoo, Delahunty	F	E	O _c ¹⁹¹
Oct., 01	Force to Combat Terrorist Within the United States	President	Yoo, Delahunty	D	E	O _p ¹⁹²
Sept., 01	Force Against Terrorists and Nations Supporting Them	President	Yoo	F	E	N ¹⁹³
Aug., 01	Recess Appointment to the National Labor Relations Board	President	Koffsky	D	E	O _p ¹⁹⁴
Aug., 01	Designation of Acting Associate Attorney General	President	Bradshaw	D	E	N
July, 01	Constitutionality of the Rohrabacher Amendment	President	Bradshaw, Delahunty	F	E	N ¹⁹⁵
July, 01	Remove Chairman of Prod. Safety Comm'n	President	Yoo	D	E	N
June, 01	18 U.S.C. § 207 and Former Government Official	President	Koffsky	D	E	N
Mar., 01	Remove the Staff Director of the Civil Rights Comm'n	President	Koffsky	D	E	S _c ¹⁹⁶

¹⁸⁹ Kucinich v. Bush, 236 F. Supp. 2d 1, 17–18 (D.D.C. 2002) (holding the treaty termination issue to be a nonjusticiable political question).

¹⁹⁰ Hamdan v. Rumsfeld, 548 U.S. 557, 533 (2006).

¹⁹¹ *Id.*; see also *supra* note 190 and accompanying text.

¹⁹² Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., for the Files 1 (Oct. 6, 2008) (cautioning individuals not to rely on the OLC's memorandum). Two Supreme Court cases challenge the limits of its use domestically. See also *supra* note 190.

¹⁹³ Sadowski v. Bush, 293 F. Supp. 2d 15, 20–21 (D.D.C. 2003) (holding the question to be nonjusticiable).

¹⁹⁴ See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 698 (2010) (noting that the NLRB followed normal appointment procedure).

¹⁹⁵ The Rohrabacher Amendment seemed to have passed the House as part of an appropriations bill, H.R. 2799, 108th Cong. (2003), but it ultimately failed.

¹⁹⁶ President George W. Bush attempted to replace Victoria Wilson with Peter Kirsanow, but USCCR Commissioner Mary Frances Berry refused Kirsanow a seat. See *United States v. Wilson*, 290 F.3d 347, 350–53 (D.C. Cir. 2002). Kirsanow sued, claiming Wilson's tenure had expired and that he had been validly appointed. Wilson won in federal district court but ultimately lost on appeal in

Sept., 01	Amending Foreign Intelligence Surveillance	Assoc. Dep. AG	Yoo	F	E	O _p ¹⁹⁷
Dec., 00	Authorization for Continuing Hostilities in Kosovo	AG	Moss	F	E	N
Dec., 00	President's Access to Grand Jury Material and Pardons	President	Moss	D	E	N
Oct., 00	Coreligionists Exemption in Title VII	President	Moss	D	E	S _a ¹⁹⁸
Oct., 00	President's Amenability to Indictment and Prosecution	AG	Moss	D	E	N
Aug., 00	Former President Indictment for Crime Impeached by House	AG	Moss	D	L	N
Oct., 99	Appointment of a Senate-Confirmed Nominee	President	Koffsky	D	E	S _c ¹⁹⁹
Sept., 99	Executive Privilege With Respect To Clemency Decision	President	Reno	D	E	O _a ²⁰⁰
May, 99	Military Operations in Kosovo	AG	Moss	F	E	S _c ²⁰¹
July, 98	N.J. Transit Corp. Member Appointment to Amtrak Bd.	President	Nolan	D	L	N

2002, and the court ordered the seating of Kirsanow following this lengthy legal battle. *See id.* at 361–62.

¹⁹⁷ Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., for the Files 6 (Jan. 15, 2009) ("A number of classified OLC opinions issued in 2001–2002 relied upon a doubtful interpretation of the Foreign Intelligence Surveillance Act ("FISA"). As the Department has previously acknowledged, these opinions reasoned that unless Congress had made clear in FISA that it sought to restrict presidential authority to conduct warrantless surveillance activities in the national security area, FISA must be construed to avoid such a reading, and these opinions asserted that Congress had not included such a clear statement in FISA. All but one of these opinions have been withdrawn or superseded by later opinions of this Office." (citations omitted)).

¹⁹⁸ *See* Stuart J. Lark, *Religious Expression, Government Funds, and the First Amendment*, 105 W. VA. L. REV. 317, 332 (2003).

¹⁹⁹ *Dysart v. United States*, 369 F.3d 1303, 1311 (Fed. Cir. 2004).

²⁰⁰ *Comm. on Judiciary, U.S. H.R. v. Miers*, 558 F. Supp. 2d 53, 104 (D.D.C. 2008) ("[T]he Court is not at all persuaded by the Reno and Bradbury opinions. Unlike the Olson and Cooper OLC opinions, which are exhaustive efforts of sophisticated legal reasoning, bolstered by extensive citation to judicial authority, the Reno and Bradbury OLC opinions are for the most part conclusory and recursive. Neither cites to a single judicial opinion recognizing the asserted absolute immunity.").

²⁰¹ *Campbell v. Clinton*, 52 F. Supp. 2d 34, 45 (D.D.C. 1999), *aff'd*, 203 F.3d 19 (D.C. Cir. 2000).

June, 98	Vice Chair of Fed. Reserve Bd. to Serve Concurrently	President	Peterson	D	E	N
Apr., 98	Require Background Checks of Non-career SES Candidates	President	Nolan	D	L	N
Feb., 98	Reimbursement of Expenses Under 5 U.S.C. § 5503(a)	President	Johnsen	D	E	N
Dec., 97	Retired Judge to the Court of Federal Claims	Dep. Assist. AG	Nolan	D	E	N
Sept., 97	Funds for Payment of Natural Resource Damages	Assis. AG	Moss	D	E	N
Aug., 97	Removal of Holdover Officials on Fed. Housing and R.R. Bds.	President	Shiffrin	D	E	N
Aug., 97	3 U.S.C. § 112 to Detailees Supporting the President	Dep. Assist. AG	Shiffrin	D	E	N
Nov., 96	Cong.-Exec. Agreement Modifying Treaty obligation.	President and NSC	Schroeder	F	E	N
Sept., 96	Exec. Privilege for Memorandum to the President	President	Reno	D	E	O _p ²⁰²
Sept., 96	Exec. Privilege to Assertions of Privilege	President	Schroeder	D	E	O _c ²⁰³
Sept., 96	Immunity for Counsel from Compelled Testimony	President	Schroeder	D	E	O _c ²⁰⁴
July, 96	Sitting Member of Congress to be Ambassador to Vietnam	President	Schroeder	D	E	N

²⁰² Political pressure forced him to give the documents up. See Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. PA. J. CONST. L. 77, 143–44 (2011) (“President Clinton lost highly publicized battles in the courts to establish a temporary immunity to civil suit, a ‘protective function privilege’ for secret service agents, and an attorney/client privilege with respect to advice given to the President by White House lawyers. In addition, President Clinton lost some notable executive privilege battles with Congress.” (citing *Clinton v. Jones*, 520 U.S. 681, 692 (1997); *In re Sealed Case*, 148 F.3d 1073, 1079 (D.C. Cir. 1998) (per curiam); *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 38 (D.D.C. 1998)). Additionally, Janet Reno was cited for contempt of Congress. See Todd David Peterson, *Congressional Oversight of Open Criminal Investigation*, 77 NOTRE DAME L. REV. 1373, 1376 (2002).

²⁰³ *In re Grand Jury Proceedings*, 5 F. Supp. 2d at 38 (denying Deputy Counsel to the President, Bruce Lindsey, the right to assert the attorney-client privilege in connection with advice given to the President), *aff’d in part, rev’d in part sub nom.*, *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998).

²⁰⁴ *Id.*

July, 96	Statute Governing Appointment of U.S. Trade Representative	President	Schroeder	D	E	S _a ²⁰⁵
June, 96	Presidential Certification & Mexican Debt Disclosure Act	AG	Dellinger	F	E	N
June, 96	Legislative Provision Regarding ABM Treaty	President	Dellinger	F	E	N
May, 96	Placing of U.S. Armed Forces Under U.N. Control	President and NSC	Dellinger	F	E	O _a ²⁰⁶
May, 96	Exec. Privilege Regarding Counsel's Office Documents	President	Reno	D	E	O _p ²⁰⁷
Feb., 96	Conditions on the Certification of Drug Transit	AG	Shiffrin	F	E	O _p ²⁰⁸
Feb., 96	Authority of the President to Restrict Munitions	President and NSC	Dellinger	F	E	N
Dec., 95	28 U.S.C. § 458 to Presidential Appointments of Fed. Judges	President	Dellinger	D	E	O _p ²⁰⁹
Nov., 95	Proposed Deployment of U.S. Armed Forces into Bosnia	President	Dellinger	F	E	N ²¹⁰

²⁰⁵ Hanah Metchis Volokh, Note, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745, 753 (2008) ("It is uncontroversial that the President must have considerable discretion to choose a person he thinks will perform the duties of an office well.").

²⁰⁶ Richard Hartzman, *Congressional Control of the Military in a Multilateral Context: A Constitutional Analysis of Congress's Power to Restrict the President's Authority to Place United States Armed Forces under Foreign Commanders in United Nations Peace Operations*, 162 MIL. L. REV. 50, 68 *passim* (1999) (arguing that Congress does have such authority); Charles Tiefer, *Can Appropriation Riders Speed Our Exit from Iraq?*, 42 STAN. J. INT'L L. 291, 320-21 (2006).

²⁰⁷ See *supra* note 202 and accompanying text.

²⁰⁸ H.R. REP. NO. 105-10, at 1(1997).

²⁰⁹ Congress did not buy the argument, opting to amend the statute to make it applicable to Article III judges. For a summary, see Stras & W. Scott, *supra* note 63, at 469.

²¹⁰ "In late 1995, the issue of war powers and Bosnia was raised again as President Clinton sent more than 20,000 American combat troops to Bosnia as part of a NATO-led peacekeeping force. In December 1995, Congress considered and voted on a number of bills and resolutions, but the House and Senate could not come to consensus on any single measure. Subsequently, President Clinton in December 1996 agreed to provide up to 8,500 ground troops to participate in a NATO-led follow-on force in Bosnia termed the Stabilization Force (SFOR). On March 18, 1998, the House defeated by a vote of 193-225, H. Con. Res. 227, [150th Cong. (1998)] a resolution directing the President, pursuant to section 5(c) of the War Powers Resolution, to remove United States Armed Forces from the Republic of Bosnia and Herzegovina." KRISTIN E. BOON & DOUGLAS C. LOVELACE, JR., *TERRORISM: COMMENTARY ON SECURITY DOCUMENTS* 148 (2014).

Nov., 95	Presidential Discretion & Chemical & Bio. Weapons	President and NSC	Dellinger	D	E	S _a ²¹¹
Sept., 95	Appropriations Lapse & White House Office Employees	President	Dellinger	D	E	N
May, 95	Bill to Relocate United States Embassy from Tel Aviv to Jerusalem	President	Dellinger	F	E	N ²¹²
May, 95	18 U.S.C. § 603 & Exec. Employees' Contributions	President	Johnsen	D	E	N
Mar., 95	Authority to Issue Executive Order on Gov't Procurement	AG	Dellinger	D	E	O _c ²¹³
Nov., 94	Declining to Execute Unconstitutional Statutes	President	Dellinger	D	E	O _a ²¹⁴
Sept., 94	Deployment of United States Armed Forces into Haiti	Four US Senators	Dellinger	F	E	N ²¹⁵
Sept., 93	Status of NSC as an "Agency" under FOIA	President	Dellinger	D	E	S _c ²¹⁶

²¹¹ Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 382 n.265 (2008).

²¹² The Bill was tabled until 2002, when President Bush signed it, but refused to enforce the provision. George W. Bush, Press Release, Statement by the President (Sept. 30, 2002), <https://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020930-9.html> [<https://perma.cc/75T9-K5MS>].

²¹³ *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1336–39 (D.C. Cir. 1996) (holding that the order conflicted with the National Labor Relations Act, 29 U.S.C. § 151 et seq.).

²¹⁴ Matthew Steilen, *Judicial Review and Non-Enforcement at the Founding*, 17 U. PA. J. CONST. L. 479, *passim* (2014). Justice Scalia, however, used broad language when describing presidential authority to refuse to execute unconstitutional statutes. See *United States v. Windsor*, 133 S. Ct. 2675, 2702 (2013) (Scalia, J., dissenting).

²¹⁵ "U.S. forces entered Haiti on September 19, 1994. On September 21, President Clinton reported 'consistent with the War Powers Resolution' the deployment of 1,500 troops, to be increased by several thousand On October 3, 1994, the House Foreign Affairs Committee reported H.J. Res. 416 authorizing the forces in Haiti until March 1, 1995, and providing procedures for a joint resolution to withdraw the forces. On October 6, the House adopted an amended text introduced by Representative Ron Dellums. As passed, H.J. Res. 416 stated the sense of the Congress that the President should have sought congressional approval before deploying U.S. forces to Haiti, supported a prompt and orderly withdrawal as soon as possible, and required a monthly report on Haiti as well as other reports. This same language was also adopted by the Senate on October 6 as S.J. Res. 229, and on October 7 the House passed S.J. Res. 229. President Clinton signed it on October 25, 1994 (P.L. 103-423)." BOON & DOUGLAS, *supra* note 210, at 155.

²¹⁶ *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 559 (D.C. Cir. 1996).

Dec., 92	Authority to Use United States Military Forces in Somalia	President	Flanigan	F	E	S _p ²¹⁷
Jan., 92	Issues Raised by Provisions Directing Issuance of Passports	President	Flanigan	D	E	O _a ²¹⁸
Jan., 92	Recess Appointments During an Intrasession Recess	President	Flanigan	D	E	O _a ²¹⁹
Dec., 91	Recess Appointments to the Fed. Hous. Fin. Bd.	President	Flanigan	D	E	O _a ²²⁰
Dec., 90	Appointment to the Comm'n on Nat'l & Community Serv.	President	McGinnis	D	E	N
Oct., 90	White House Commc'ns Agency Expenses Incurred	President	Luttig	D	E	N
Apr., 90	Transportation for Spouses of Cabinet Members	President	Barr	D	E	N
Mar., 90	Extend Deadline for Emergency Bd. Report	President	McGinnis	D	L	N
Feb., 90	Issues Raised by Foreign Relations Authorization Bill	President	Barr	F	E	S _a ²²¹
Jan., 90	Encourage Contributions to a Nicaraguan Opposition Party	President	Barr	F	E	N
Dec., 89	Congressional Access to Presidential Communications	President	Luttig	D	E	N

²¹⁷ "In Somalia, the participation of U.S. military forces in a U.N. operation to protect humanitarian assistance, which began in December 1992, became increasingly controversial as fighting and casualties increased and objectives appeared to be expanding On February 4, 1993, the Senate passed S.J. Res. 45 ["Resolution Authorizing the Use of United States Armed Forces in Somalia"] to authorize the President to use U.S. Armed Forces pursuant to U.N. Security Council Resolution 794. S.J. Res. 45 stated it was intended to constitute the specific statutory authorization under Section 5(b) of the War Powers Resolution." BOON & DOUGLAS, *supra* note 210, at 156.

²¹⁸ See *supra* note 214 and accompanying text.

²¹⁹ See Michael A. Carrier, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2205–06 (1994). The Supreme Court, decades later, disagreed with the OLC's analysis, holding that what mattered was whether the recess requires the consent of the House. See *NLRB v. Canning*, 134 S. Ct. 2550 (2014).

²²⁰ See *supra* note 219 and accompanying text.

²²¹ John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS. 293, 309–15 (1993).

Aug., 89	Intrasection Recess Appointments	AG	Luttig	D	E	O _a ²²²
July, 89	Congressional Notification for Certain CIA Covert Actions	AG	Barr	F	E	N ²²³
July, 89	The President's Authority to Convene the Senate	President	Barr	D	E	N
June, 89	Authority of FBI To Override International Law	AG	Barr	F	E	S _c ²²⁴
June, 89	Vacancy Act & Designation of an Acting Special Counsel	President	Barr	D	E	N
Apr., 89	Nat'l Guard to Support Drug Interdiction Efforts in D.C.	Acting Assoc. AG	Kmiec	D	E	S _a ²²⁵
Feb., 89	Joint Resolution Disapproving Pay Raise	AG	Kmiec	D	E	N ²²⁶
Oct., 88	Proclamation To Extend the Territorial Sea	Department of State	Kmiec	D	E	S _c ²²⁷
July, 88	The President's Veto Power	AG	Cooper	D	L	S _c ²²⁸
Mar., 88	Statute Limiting President's Power to Supervise CDC	President	Cooper	D	E	N
Feb., 88	Legal Constraints on Lobbying Efforts and INF Treaty	President	Cooper	F	L	N
May, 87	Constitutionality of Proposed Budget Process Reform Legislation	President	Cooper	D	E	N

²²² See *supra* note 219 and accompanying text.

²²³ President George H.W. Bush disregarded the advice, however, and reported to Congress. See Stephen Engelberg, *Bush Agrees to Notify Congress on Covert Actions*, N.Y. TIMES, Oct. 27, 1989, at A9.

²²⁴ *United States v. Alvarez-Machain*, 504 U.S. 655, 669–70 (1992).

²²⁵ Ryan Wedlund, *Citizen Soldiers Fighting Terrorism: Reservists' Reemployment Rights*, 30 WM. MITCHELL L. REV. 797, 833 n.187 (2004).

²²⁶ President Reagan, however, signed the resolution. H.R.J. Res. 102, 100th Cong., Pub. L. No. 100-6, 101 Stat. 92 (1987).

²²⁷ *In re Air Crash off Long Island*, 1998 A.M.C. 1946, 1957 (S.D.N.Y. 1996).

²²⁸ President Clinton later decided to disregard this 1988 memorandum, and the Supreme Court sided with the OLC in *Clinton v. City of New York*, 524 U.S. 417, 449 (1998).

Feb., 87	Joint Resolution Disapproving the Pay Recommendations	President	Cooper	D	E	N ²²⁹
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²²⁹ President Reagan chose not to fight Congress over the joint resolution. *See* Statement on Signing the Emergency Food and Shelter Bill, 1 PUB. PAPERS 140 (Feb. 12, 1987) (“I recognize that the Congress has the legal authority to repeal the pay raise.”); *see also* H.R.J. Res. 102, 100th Cong., 101 Stat. 92 (1987) (“Making emergency additional funds available . . . for the Emergency Food and Shelter Program of the Federal Emergency Management Agency.”).

APPENDIX 3 – AGENCIES

Notes on the table. The “Date” column is written in “month, year” format. The “Memo” column includes the memo name, shortened for the sake of brevity. The “Recipient” column refers to the individual to whom the memo was addressed. The “Author” column is the name of the individual who composed the memo. The “Topic” column designates whether a given memo discusses a matter of domestic concern (designated “D”) or of foreign concern (designated “F”). The “Position” column designates whether a given memo argued for expansive view of agency powers (designated “E”) or argued for limited agency powers (designated “L”). The “Result” column expounds on whether a given memo was rejected in court (“O_c”), opposed in academia (“O_a”), opposed by a political body such as Congress (“O_p”), not opposed (“N”), supported by a political body (“S_p”), supported in academia (“S_a”), or upheld in court (“S_c”).

Date	Memo	Recipient	Author	Topic	Position	Result
Aug., 16	Application of Recommendations Clause to Medicare Drug	OMB	Thompson	D	E	N ²³⁰
Apr., 16	DOJ Disclosure to Inspector	Dep. AG	Thompson	D	L	N
Apr., 16	US-EU Air Transport Agreement	Dep’t of Transp. (DOT)	Thompson	F	L	N
Mar., 16	Military Officer Leave	Dep’t of Homeland Sec. (DHS)	Thompson	D	E	N ²³¹
Mar., 15	Part-Time Workweek	Principal Dep. Assis. AG	Boynton	D	E	N
July, 15	DOJ Inspector Access Wiretap Act	Dep. AG	Thompson	D	E	O _a ²³²

²³⁰ The President followed the advice of the OLC. See Christina S. Ho, *Budgeting on Autopilot: Do Sequestration and the Independent Payment Advisory Board Lock-in Status Quo Majority Advantage?*, 50 TULSA L. REV. 695, 742 (2015) (“The funding warnings were also rendered ineffective in the other instances in which they were triggered because on those occasions, the President invoked the Recommendations Clause of the Constitution to declare that Congress could only suggest, and not require, that he submit legislation.”).

²³¹ An individual tried by a military tribunal challenged the validity of the judgment on the grounds that the judges violated the statute; the Court of Appeals held the argument to be moot. See *Petition for Writ of Certiorari* at 5–8, 10, *Dalmazzi v. United States*, 2017 WL 475287 (Feb. 1, 2017) (No. 16-961).

²³² Paul J. Larkin, Jr. & John-Michael Seibler, *All Stick and No Carrot: The Yates Memorandum and Corporate Criminal Liability*, 46 STETSON L. REV. 7, 38 (2016) (“The latter, present approach risks the harmful consequences of eroding fundamental legal privileges: the attorney-client privilege, the attorney work-product doctrine, and the self-incrimination privilege.”).

May, 15	Authority to Disclose Performance of Employees	Defense Nuclear Facilities Safety Bd.	Thompson D	L	N
Sept., 14	Homeland Security Prioritize Removal Aliens (1)	DHS & President	Thompson D	E	S _c ²³³
Sept., 14	Homeland Security Prioritize Removal Aliens (2)	DHS & President	Thompson D	L	S _c ²³⁴
Aug., 14	Authority of Equal Employment Opportunity Commission	Soc. Sec. Admin. (SSA)	Bies D	L	N
Aug., 13	Competitive Bidding under Federal-Aid Highway Program	DOT	Seitz D	E	N
May, 13	Whether the Millennium Challenge Corp should be an "Agency"	VP & Millennium Challenge Corp.	Seitz D	E	N ²³⁵
Feb., 13	Availability of Appropriations for SSA Grant Programs	SSA	Seitz D	E	N
Jan., 13	Whether the Peace Corps Director May Certify Volunteers	Peace Corps	Seitz D	L	N
Nov., 12	Residence Requirement for Assistant US Attorneys	Executive Office for US Attorneys	Seitz D	L	N

²³³ *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 976 (9th Cir. 2017) (“[T]he INA is replete with provisions that confer prosecutorial discretion on the Executive to establish its own enforcement priorities.”).

²³⁴ A Texas district court issued a preliminary injunction on the DAPA program, and the Fifth Circuit along with the Supreme Court affirmed. *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *as revised* (Nov. 25, 2015), *cert. granted*, 136 S. Ct. 906, *aff’d mem.*, 136 S. Ct. 2271 (2016).

²³⁵ However, a D.C. district court applied FOIA’s disclosure requirements to Millennium Challenge Corporation. *See Lamb v. Millennium Challenge Corp.*, 228 F. Supp. 3d 28, 35–38 (D.D.C. 2017).

Nov., 12	Dept. Labor Authority to Control Disclosure of Employee Records	Dept. of Labor	Seitz	D	E	N
Aug., 12	Individuals Required to Provide Identifying Information (1)	Off. of Gov't Ethics	Seitz	D	E	N ²³⁶
Aug., 12	Individuals Required to Provide Identifying Information (2)	Off. of Gov't Ethics	Seitz	D	L	S _c ²³⁷
May, 12	Duty to Report Suspected Child Abuse	Dep't Veterans Affairs (DVA)	Seitz	D	L	N ²³⁸
Apr., 12	Reservists who Qualify for Leave Must Exhaust Available Leave	DVA	Seitz	D	E	N
Mar., 12	Anti-Deficiency Act Implications of Consent (1)	Dep't of Commerce (DOC)	Seitz	D	E	N
Mar., 12	Anti-Deficiency Act Implications of Consent (2)	DOC	Seitz	D	L	S _c ²³⁹
Mar., 12	Deputation of Federal Law Enforcement Officers	Alcohol, Tobacco, Firearms (ATF)	Seitz	D	E	S _c ²⁴⁰
Mar., 12	General Services Admin may Proceed with Acquisition	DVA	Seitz	D	E	N

²³⁶ Note that the Act was attacked as violating individuals' privacy rights. *Senior Execs. Ass'n v. United States*, No. 8:12-CV-02297-AW, 2013 WL 1316333, at *12 (D. Md. Mar. 27, 2013) (rejecting a motion to dismiss).

²³⁷ *Id.* at *8 ("Although the Act requires a login for downloading data contained in the reports, no such requirement attaches to viewing, searching, and sorting data contained in them.").

²³⁸ The proposed standard was adopted by other agencies. See DEP'T OF VETERANS AFFAIRS, REPORTING CASES OF ABUSE & NEGLECT, 2012 WL 4715102, at *2 (2012).

²³⁹ *DMS Imaging, Inc. v. United States*, 115 Fed. Cl. 794, 799 (2014) (accepting the government's argument that a broad indemnification clause would violate the Anti-Deficiency Act, but finding for the plaintiff on other grounds).

²⁴⁰ Cited favorably in *United States v. Jennings*, No. 14-cr-20240, 2014 WL 4410098, at *2 (E.D. Mich. Sept. 8, 2014).

Mar., 12	State Residence Requirements for Firearms Transfer	ATP	Seitz	D	L	O _p ²⁴¹
Mar., 12	Whether a Collective Bargaining Agreement May Require	United States Postal Serv. (USPS)	Powell	D	E	N
Nov., 11	Postal Employees Are Entitled To Receive Service Credit	Office of Personnel Management (OPM)	Seitz	D	L	N
Nov., 11	Whether postal employees are entitled to receive service credit	USPS	Seitz	D	E	N
Oct., 11	Nonimmigrant Aliens & Firearms Disabilities under Gun Control	ATF	Seitz	D	L	S _c ²⁴²
Sept., 11	Proposals to use Internet to Sell Lottery Tickets Violate Wire Act	Assist. AG of Criminal Division	Seitz	D	E	S _c ²⁴³
Sept., 11	Restrictions On Activities of the Office of Science & Technology	Off. of Science & Tech. Pol'y (OSTP)	Seitz	F	E	O _c ²⁴⁴

²⁴¹ Alcohol, Tobacco, Firearms, and Explosives (ATF) rejected the opinion. 77 Fed. Reg. 33630 (proposed June 7, 2012) (to be codified at 27 C.F.R. pt. 478).

²⁴² Many cases interpret 18 U.S.C. § 922(g)(5)(B) the same way the OLC did. *See, e.g.,* United States v. Mohammed Saleh, No. 3:15-cr-50-DCB-FKB, 2016 WL 7077874, at *1 (S.D. Miss. Dec. 5, 2016) (“The Court finds that Defendant’s belief that an alien admitted in the United States under a non-immigrant visa could possess a firearm is not relevant to the pending charge.”); *see also* United States v. Pacheco-Alvarez, No. 16-cr-140, 2016 WL 7475652, at *8 (S.D. Ohio Dec. 29, 2016) (noting that the statute “forbids illegal immigrants from possessing or receiving firearms or ammunition shipped in interstate commerce”).

²⁴³ United States v. DiCristina, 886 F. Supp. 2d 164, 215 (E.D.N.Y. 2012), *rev’d on other grounds*, 726 F.3d 92 (2d Cir. 2013) (“The [Wire] Act applies only to wagering on sporting events.”).

²⁴⁴ For an understanding of how the sections of the appropriations bill affected OSTP, see Hannah Kohler, Note, *The Eagle and the Hare: U.S.-Chinese Relations, the Wolf Amendment, and the Future of International Cooperation in Space*, 103 GEO. L.J. 1135, 1153 (2015) (“The GAO, however, was not persuaded. ‘It is not our role nor within our province to opine upon or adjudicate the constitutionality of duly enacted statutes such as section 1340,’ the opinion states, adding that legislation signed by the President after being passed by Congress ‘is entitled to a heavy presumption in favor of constitutionality.’ As a result, the GAO found the OSTP in violation of Section 1340 and thus the Antideficiency Act, which sets

Aug., 11	HHS May Provide the GAO Access to Information	Dep't of Health & Human Servs. (HHS)	Bies	D	L	N
June, 11	Foreign Intelligence Surveillance Act's notification	Access Review Comm.	Krass	F	L	S _c ²⁴⁵
Feb., 11	Reimbursement or payment obligation under Clean Water Act	EPA	Krass	D	E	N
Dec., 10	Disposition of proceeds from the sale of real property	SSA	Koffsky	D	L	N
Dec., 10	Availability of rights under the Crime Victims' Rights Act	Acting Dep. AG	Bies	D	L	S _c ²⁴⁶
Nov., 10	Whether the special master is a principal officer	Dep't of Treasury & Troubled Asset	Cedarbaum	D	E	N
Oct., 10	Emoluments clause and the Göteborg award	DOC	Koffsky	F	E	N
June, 10	Entitlement to reservist differential pay, 5 U.S.C. § 5538	OPM	Rhee	D	E	N
June, 10	Emoluments clause to ACUS	Admin. Conf. of the United States	Barron	F	E	N
May, 10	Tax levies under 26 U.S.C. 6334 to Thrift Savings Plan Accounts	Internal Revenue Service (IRS)	Koffsky	D	E	S _c ²⁴⁷

forth conditions and penalties for misuse of congressional appropriations." (citations omitted)).

²⁴⁵ Gill v. Dep't of Justice, No. 15-824 (RMC), 2016 WL 3982450, at *7 (D.D.C. July 22, 2016) (assuming that FISA applies to Access Review Committee proceedings).

²⁴⁶ Does v. United States, 817 F. Supp. 2d 1337, 1341 (S.D. Fla. 2011) ("The Court first addresses the threshold issue whether the CVRA attaches before the government brings formal charges against the defendant[.] The Court holds that it does because the statutory language clearly contemplates pre-charge proceedings.").

²⁴⁷ Blanchette v. SSA, No. 13-12655-RGS, 2014 WL 667514, at *1 (D. Mass. Feb. 21, 2014) (noting that "thrift savings plans and Social Security benefits are not [exempt from levy]" (alterations in original) (quoting Overton v. United States, 74 F. Supp. 2d 1034, 1045 (D.N.M.1999))).

Apr., 10	Constitutional Concerns in Proposed Orderly Liquidation	Treasury	Barron	D	L	N
Jan., 10	Census Confidentiality and the Patriot Act	DOC	Rhee	D	E	N
Dec., 09	Authority in Certifying a State for Capital Conviction Review	AG	Barron	D	E	N ²⁴⁸
Dec., 09	Whether Clean Air Act Permits the Receipt of Monetary Donations	EPA	Cedarbaum	D	L	N
Oct., 09	Payments in Satisfaction of Pre-existing Contractual Obligations	Dep't of Housing & Urban Dev. (HUD)	Barron	D	L	S _c ²⁴⁹
Oct., 09	Constitutionality of Mandatory Registration of Credit Rating	Treasury	Barron	D	E	N ²⁵⁰
Sept., 09	Authority of the Former Inspector General of the FHFB	Fed. Housing Fin. Auth. (FHFA)	Koffsky	D	L	N
Aug., 09	Permissibility of Regulations Implementing the Historically	Small Bus. Org. (SBO)	Rhee	D	E	S _a ²⁵¹

²⁴⁸ In 2013, a California District Court issued a preliminary injunction on the final rule. *Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, No. C 13-4517 CW, 2013 WL 6326618, at *7 (N.D. Cal. Dec. 4, 2013). In 2016, the Ninth Circuit reversed, holding that the organization lacked standing to challenge administrative action. *Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, 816 F.3d 1241, 1254 (9th Cir. 2016).

²⁴⁹ *Cf. ACORN v. United States*, 662 F. Supp. 2d 285, 299 (E.D.N.Y. 2009) (issuing a preliminary injunction against section 163). However, the same court later held that section 163 constituted a bill of attainder, *Ass'n of Cmty. Orgs. for Reform Now v. United States*, 692 F. Supp. 2d 260, 269–70 (E.D.N.Y. 2010), but the Second Circuit reversed that determination. *See* 618 F.3d 125, 136–37 (2d Cir. 2010).

²⁵⁰ *See* Julia Zukina, Note, *A Step Short of Change: Examining the Recent Regulation of Credit Rating Agencies and Its Shortcomings in a Global Market*, 13 J. BUS. & SEC. L. 259, 284–85 (2013).

²⁵¹ Garrison, *supra* note 35, at 236–37 (“[T]he OLC wields significant inter-branch power . . . to issue binding determinations of the law within the executive branch and adjudicate executive branch intra-agency legal disputes.”).

June, 09	Withdrawal of Office of Legal Counsel Opinion	AG	Barron	D	L	N
June, 09	Constitutionality of § 7054 of Foreign Appropriations Act	Dep't of State	Barron	D	E	N
May, 09	Validity of Statutory Rollbacks as a Means of Complying	AG	Barron	D	E	S _p ²⁵²
Apr., 09	Constitutionality of the Ronald Reagan Centennial Comm'n Act	Off. of Legislative Aff. (OLA)	Lederman	D	L	N
Apr., 09	Withdrawal of Office of Legal Counsel Interrogation Opinions	AG	Barron	F	L	N
Dec., 08	Meaning of "Temporary" Work under 8 U.S.C. § 1101	DHS	Elwood	D	E	S _c ²⁵³
Nov., 08	Requests under the Electronic Communications Privacy Act	Fed. Bureau of Investigation (FBI)	Koffsky	D	E	O _p ²⁵⁴
Sept., 08	Enforceability of Certain Agreements	Treasury	Bradbury	D	L	N
Aug., 08	Applicability of 18 U.S.C. § 207 to Public Relations Activities	DOC	Elwood	F	E	N
May, 08	Admissibility of Electronic Copies of Personnel Records	OPM	Elwood	D	E	N

²⁵² Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. REV. 1023, 1058 n.192 (2009) (noting that Congress passed the rollback to permit Senator Hillary Clinton to serve as the Secretary of State, which she thereafter did).

²⁵³ *In re Albert Einstein Med. Ctr.*, 2009-PER-00379 (Bd. Alien Lab. Cert. App. Nov. 21, 2011), *38–41 (applying the regulation).

²⁵⁴ After an individual challenged the constitutionality of the statute, the government withdrew the request, rendering the issue moot. See *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 869 (2d Cir. 2008).

May, 08	Authority of the EPA to Hold Employees Liable	EPA	Engel	D	E	N
Apr., 08	Promotions of Judge Advocates General under section 543	Dep't of Defense (Defense)	Bradbury	D	L	N
Feb., 08	Prosecute White House Officials for Contempt of Congress	AG	Bradbury	D	L	S _c ²⁵⁵
Feb., 08	Off. of Gov't Ethics Jurisdiction over the Smithsonian Institution	Off. of Gov't Ethics	Elwood	D	L	N
Feb., 08	Payment of Back Wages to Alien Physicians Hired under the H-1b	DVA	Engel	D	L	N
Feb., 08	Payment of Back Wages to Alien Physicians Hired under the H-1b	Dep't of Labor	Engel	D	E	N
Jan., 08	Constitutionality of the Direct Reporting Requirement	OMB & DHS	Bradbury	D	E	N
Nov., 07	Compliance of Interrogation Techniques (4)	Central Intelligence Agency (CIA)	Bradbury	F	E	O _p ²⁵⁶

²⁵⁵ However, note that Congress could file a civil action in Federal Court. Comm. on Judiciary, U.S. H.R. v. Miers, 558 F. Supp. 2d 53, 78 (D.D.C. 2008) (“To recap, the Committee has issued subpoenas to two high-ranking executive branch officials who have refused to comply, citing executive privilege. The Committee’s attempt to pursue criminal prosecution of its contempt of Congress citation was thwarted by the Executive. Exercise of Congress’s inherent contempt power through arrest and confinement of a senior executive official would provoke an unseemly constitutional confrontation that should be avoided. *Cf.* United States v. Nixon, 418 U.S. at 691–92, 94 S. Ct. 3090 (concluding that forcing the President to disobey a court order to obtain appellate review would create an unseemly, unnecessary constitutional confrontation between the branches). Thus, the Committee filed this suit to vindicate both its right to the information that is the subject of the subpoena and its institutional prerogative to compel compliance with its subpoenas. A harm to either interest satisfies the injury-in-fact standing requirement. Clear judicial precedent, along with persuasive reasoning in OLC opinions, establishes that the Committee has standing to pursue this action and, moreover, that this type of dispute is justiciable in federal court. Consequently, the Executive’s motion to dismiss for lack of standing will be denied.”).

²⁵⁶ Exec. Order No. 13,491 (2009).

Nov., 07	Compliance of Interrogation Techniques (3)	CIA	Bradbury	F	E	O _p ²⁵⁷
Oct., 07	Application of 18 U.S.C. § 207 to Former CIA Officials	CIA	Bradbury	D	L	N
Aug., 07	Compliance of Interrogation Techniques (2)	CIA	Bradbury	F	E	O _p ²⁵⁸
July, 07	Compliance of Interrogation Techniques (1)	CIA	Bradbury	F	E	O _p ²⁵⁹
July, 07	Application of the War Crimes Act, the Detainee Treatment Act	CIA	Bradbury	F	E	O _p ²⁶⁰
June, 07	Application of the Religious Freedom Restoration Act	Off. of Justice Programs	Elwood	D	E	N
June, 07	Application of the Emoluments Clause to a Member of the FBI	FBI	Elwood	D	E	N
May, 07	Eligibility of a Retired Army Officer to be Appointed	Defense	Marshall	D	E	N
Apr., 07	Use of Appropriated Funds to Provide Light Refreshments	EPA	Marshall	D	E	O _c ²⁶¹
Mar., 07	Status of the Public Company Accounting Oversight Board	Secs. & Exchange Comm'n (SEC)	Bradbury	D	L	N
Mar., 07	Legality of Alternative Organ Donation Practices	HHS	Marshall	D	E	S _c ²⁶²

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ Antideficiency Act—Applicability to Statutory Prohibitions on the Use of Appropriations, B-317450, at 3–4 (Comp. Gen. Mar. 23, 2009).

²⁶² *Flynn v. Holder*, 684 F.3d 852, 858 (9th Cir. 2012).

Jan., 07	Days of Service by Special Government Employees	Defense	Bradbury D	L	S _e ²⁶³
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²⁶³ Cf. *Lambert v. United States*, No. 3:15-CV-147-PLR-HBG, 2016 WL 632461, at *4–5 (E.D. Tenn. Feb. 17, 2016) (dismissing a case against a former senior official for an ethical violation).