The Office of Legal Counsel: Law, Politics, Ethics, and Structure

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In 2001, I rejoined my law firm after spending seven years as a law teacher and administrator and was soon asked to consult on a litigated matter involving a corporate client. I reviewed the relevant materials and met with the litigation team. I told them that I did not find one of their arguments to be persuasive, and that I did not think that a judge would be persuaded either. I suggested an alternative line of argument that seemed more promising to me. After the meeting, a young lawyer who exuded self-confidence took me aside. He thought I should know that the world of law practice had changed during the years I was away, that the theory I found unpersuasive had been developed by in-house counsel, and that our job, in this new world of law practice, was just to make the arguments we were told to make. Quoting Marshall Field, the young lawyer pronounced that our job was to "give the lady what she wants."[1] I doubt that his perspective was shared by most of my colleagues, but it was a viewpoint that clearly had traction for some, even if few would have presented it so baldly.[2]

I recalled that conversation recently, when I read about the oral argument in *Kareem v. Haspel*.[3] In *Kareem*, a United States citizen who works as a journalist in Syria brought suit in federal court to ascertain whether the government had targeted him for summary execution by drone strike under an Obama-era Presidential Policy Guidance.[4] The government's argument on appeal did not

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[1] *See* LLOYD WENDT & HERMAN KOGAN, GIVE THE LADY WHAT SHE WANTS! THE STORY OF MARSHALL FIELD & COMPANY 223 (1952). Anthony Trollope describes a male character's view of lawyering in similar terms: "Bold … merely wanted a man who knew the forms of law, and who would do what he was told for his money. He had no idea of putting himself in the hands of a lawyer. He wanted law from a lawyer as he did a coat from a tailor, because he could not make it so well himself." ANTHONY TROLLOPE, THE WARDEN 28 (Everyman's Library ed. 1907). The sexism of Marshall Field's remark would be amplified by later generations of marketers. *See* LIZABETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 314 (2003) ("Behavioral differences between the sexes had origins, they argued, that extended beyond the social and cultural to psychological and even physiological. In 1958, for example, Janet Wolff claimed … that women were marked as shoppers by biology – reproductive systems and sexual characteristics, size and muscular power, proportions and acute senses – mediated by distinctive personality traits like intuition, compassion, loyalty, and irrationality. … While marketers subjected female customers to this kind of psychological analysis, often aimed at their insecurities, they credited men as a market segment with authority and financial resources, but spared them the same mental probing.").

[2] *See* MODEL RULES OF PROF'L CONDUCT R. 2.1. If the argument had been frivolous (which it was not), that would have raised a different issue for the litigation team. *See id*., R. 3.1.

[3] *See* Kareem v. Haspel, No. 19-5328 (D.C. Cir.).

[4] *See* PROCEDURES FOR APPROVING DIRECT ACTION AGAINST TERRORIST TARGETS LOCATED OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES, May 22, 2013, https://www.justice.gov/oip/foialibrary/procedures_for_approving_direct_action_against_terrorist_targets/download . The 2013 Policy Guidance was originally classified "Top Secret," but was finally made public, pursuant to a court order, in 2016; it was based on a 2010 Office of Legal Counsel opinion. *See* Karen DeYoung, *Newly declassified document sheds light on how president approves drone strikes*, WASH. POST, Aug. 6, 2016,

address the merits. Instead, the government argued that Kareem lacked standing to sue, and that his claims were barred by the political question doctrine and the state secrets privilege. At oral argument in the District of Columbia Circuit, at least one judge expressed incredulity at the government's position: "Judge Patricia Millett characterized the DOJ's argument as giving the government the ability to 'unilaterally decide to kill U.S. citizens,' according to coverage of the argument by Courthouse News Service. 'Do you appreciate how extraordinary that proposition is?'"[5]

If the government's assertion of non-reviewability seemed new, the underlying, substantive policy was not. The Presidential Policy Guidance involved in *Kareem* was based on a classified memorandum, which was prepared in 2010 by the Office of Legal Counsel ("OLC"), the division of the Justice Department tasked with giving legal advice to the executive branch,[6] and endorsed the President's authority to target U.S. citizens believed to be terrorists.[7] Neither the legality nor the wisdom of that policy was initially opened to debate outside the executive branch.[8] Like much of OLC's work product, the memorandum was not intended for public consumption, and its conclusions were not likely to be tested in court.[9] Indeed, the government made every effort to

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https://www.washingtonpost.com/world/national-security/newly-declassified-document-sheds-light-on-how-president-approves-drone-strikes/2016/08/06/f424fe50-5be0-11e6-831d-0324760ca856_story.html ("The document's dry, bureaucratic language seems in stark contrast to the presumably dire consequences of the actions it outlines, and it leaves a number of questions unanswered. What appears to be a description of information to be included in the profile of an individual target is blacked out.") An earlier version of the 2010 OLC memorandum was prepared in late 2009. *See* Charlie Savage, *Court Releases Large Parts of Memo Approving Killing of American in Yemen,* N.Y. TIMES, June 23, 2014, https://www.nytimes.com/2014/06/24/us/justice-department-found-it-lawful-to-target-anwar-al-awlaki.html.

[5] *See* Debra Cassens Weiss, *US can kill its own citizens without review when state secrets are involved, DOJ lawyer argues*, ABA JOURNAL, Nov. 18, 2020, https://www.abajournal.com/news/article/doj-lawyer-argues-us-can-kill-its-own-citizens-without-review-when-state-secrets-are-involved. Kareem's lawyer argued that, "Whether that's in a parking lot in the United States or abroad in Syria, the government has claimed—for the first time ever in this case—that it has unfettered and unreviewable discretion to kill US citizens at will." *Id*.

[6] *See* 28 U.S.C. § 510; 28 C.F.R. § 0.25.

[7] *See* Office of Legal Counsel, *Memorandum for the Attorney General Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi*, July 16, 2010, https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16_-_olc_aaga_barron_-_al-aulaqi.pdf. For a thoughtful defense of the government's policy (if not its reasoning), *see* H. JEFFERSON POWELL, TARGETING AMERICANS: THE CONSTITUTIONALITY OF THE U.S. DRONE WAR 145-46 (2016) ("[T]he Obama administration turned to an antiseptic language about a 'balancing of interests' that lacks even the basic candor without which law becomes a meaningless charade: The administration was not trying to respect or take into account al-Awlaki's interests but to destroy them. The killing was constitutional, and it may have been wise, but we should not pretend that it was something it was not."). President Obama gave a full-throated defense of the policy at the University of Chicago Law School in April 2016. *See* CNN*, Clip of President Obama Town Hall Meeting on the Supreme Court,* April 7, 2016, https://www.c-span.org/video/?c4587864/user-clip-drone-response.

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

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

ensure that the memorandum would remain secret.[10] Why was the government so reluctant to have the extent of the President's legal power debated in public? Was this legitimate legal advice or an example of what one commentator has called "a jurisprudence of mere political expedience, engaging in … opportunistic, situational constitutionalism through which lawyers advance whatever arguments support the president's immediate agenda"?[11] In other words, was it simply a case of "giving the lady what she wants"?

As a legal strategy, "giving the lady what she wants" is dubious enough when it comes to representing a corporate client in private law litigation that will eventually be decided by an impartial decisionmaker after an adversary proceeding.[12] The strategy is even more dubious, however, when one is a public official charged with providing legal advice that is not likely to be made public, let alone scrutinized by a disinterested adjudicator.[13]

## Introduction

OLC does not have the final word concerning any government policy. Nor does it directly enforce any law. Its sole function is to provide legal advice to the executive branch.[14] But the advice it provides addresses some of the most important questions of war and peace, the separation of powers, civil rights, and civil liberties. OLC is staffed by an Assistant Attorney General and five deputies, four of whom are political appointees, and by a cohort of attorney-advisors, most of whom are ambitious, young lawyers who typically serve for a relatively short term.[15] All are

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[10] *See* Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 8, 2011, https://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html. The Second Circuit finally ordered release of the OLC opinion in 2014. *See* Greg Miller, *Legal memo backing drone strike that killed American Anwar at-Awlaki is released*, WASH. POST, June 23, 2014, https://www.washingtonpost.com/world/national-security/legal-memo-backing-drone-strike-is-released/2014/06/23/1f48dd16-faec-11e3-8176-f2c941cf35f1_story.html; Charlie Savage, *Court Releases Large Parts of Memo Approving Killing of American in Yemen,* N.Y. TIMES, June 23, 2014, https://www.nytimes.com/2014/06/24/us/justice-department-found-it-lawful-to-target-anwar-al-awlaki.html.

[11] *See* Cornelia T. L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 717 (2005). *See also* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 37 (2007) ("The Clinton OLC tended to invoke aggressive military powers primarily for humanitarian rather than security ends, and its arguments for presidential power were more cautious than in the Bush II OLC and relied more on congressional authorization. But these differences do not mask the fact that the Clinton lawyers – like all OLC lawyers and Attorneys General over many decades – were driven by the outlook and the exigencies of the presidency to assert more robust presidential powers, especially during a war or crisis, than had been officially approved by the Supreme Court or than is generally accepted in the legal academy or by Congress.").

[12] As Brad Wendel suggests, "[L]itigation is a special case, in which lawyers share responsibility [with] other institutional actors for getting the law right. In counseling and transactional representation, by contrast, the lawyer is frequently the only actor who has any power to render a judgment about what the law permits." W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 54 (2010).

[13] *See, e.g.*, Cristian Farias, *The Justice Department Can't Keep Its Own Secret Law Forever*, POLITICO, Aug. 29, 2019, https://www.politico.com/magazine/story/2019/08/29/the-justice-department-cant-keep-its-own-law-secret-forever-227984.

[14] *See* Cornelia T. L. Pillard, 103 MICH. L. REV. at 710. Executive branch officials are required to follow OLC opinions, and they may receive immunity if they break the law in reliance on an OLC opinion. *See* Note, *The Immunity-Conferring Power of the Office of Legal Counsel*, 121 HARV. L. REV. 2086 (2008).

[15] *See* Annie L. Owens, *Reforming the Office of Legal Counsel: Living Up to Its Best Practices*, ACS ISSUE BRIEF, Oct. 2020, https://www.acslaw.org/wp-content/uploads/2020/12/Owens-Reforming-OLC-Final.pdf.

appropriately interested in the success of the administration for which they work.[16] And OLC's client – the modern executive – is powerful beyond measure, unbounded unless by law.[17]

Much of OLC's advice will never be made public or be reviewed by the courts. Some will come to light eventually, but only long after they have ceased to be salient. Practically speaking, the law will be whatever OLC pronounces it to be. It is critical, therefore, that OLC provide honest legal advice to the executive branch. OLC must be sympathetic to the goals of its client, but it should not engage in "opportunistic, situational constitutionalism." OLC prides itself on its independence and professionalism,[18] but not all of its work product incarnates those values. Some important opinions have contained highly aggressive – and sometimes spurious – advice; those opinions seem more interested in pleasing the executive than in rigorously analyzing relevant legal principles. The infamous torture memorandum[19] comes immediately to mind, but there are others.[20] OLC's performance, like that of the Justice Department as a whole, has provided the

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

[17] *See, e.g.*, GARY WILLS, BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE 2-3 (2010) ("[S]ce the inception of World War II we have had a continuous state of impending or partial war, with retained constitutional restrictions. World War II faded into the Cold War, and the Cold War into the war on terror, giving us over two-thirds of a century of war in peace, with growing security measures, increased governmental secrecy, broad classification of information, procedural clearance of those citizens able to know what rulers were doing in secret. The requirements became more stringent, not less, after World War II and then again after the Cold War. Normality never returned and the executive power increased decade by decade, reaching a new high in the twenty-first century – a continuous story of unidirectional increase in the executive power.").

[18] *See, e.g.*, Dawn Johnsen*, Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1582-83 (2007) ("Virtually all [former and current OLC lawyers, congressional staffers and others had worked with OLC], regardless of party or institutional affiliation, described the primary function of OLC as ensuring the legality of executive action, and they ranked the ability to say no to the President as an essential qualification for the job of heading OLC."); *Memorandum from David Barron, Acting Assistant Attorney General, Office of Legal Counsel, to Attorneys of the Office*, (July 16, 2010) https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf.

[19] *See* Office of Legal Counsel, *Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees,* May 30, 2005, https://www.justice.gov/sites/default/files/olc/legacy/2013/10/21/memo-bradbury2005.pdf; *see also,* Office of Legal Counsel, *Memorandum for John Rizzo Acting General Counsel of the Central Intelligence Agency: Interrogation of al Qaeda Operative,* August 1, 2002, https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf; Office of Legal Counsel, *Application of 18 U.S.C. §§2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee*, May 10, 2005, https://fas.org/irp/agency/doj/olc/techniques.pdf.

[20] *See, e.g.*, THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 3, 38 (Karen J. Greenberg & Joshua I. Dratel eds., 2005) (reproducing OLC Memoranda dated September 25, 2001, and January 9, 2002, asserting unilateral presidential power to wage war); Rachel Ward Saltzman, *Executive Power and the Office of Legal Counsel*, 28 YALE L. & POL'Y REV. 493 (2010).

occasion for much soul-searching. How can OLC better perform its critical role? That question has recently received much attention,[21] and this essay seeks to advance that discussion.

First, this essay situates OLC within the context of a political system in which the executive has grown in power far beyond anything that the framers could have foreseen. As the chief legal advisor to the executive branch, OLC performs a critically important function in protecting our constitutional system and the rule of law. Second, the essay reviews the recent recommendations of the American Constitution Society ("ACS") concerning the reform of OLC. Among other things, those recommendations include a systematic review of existing opinions and greater transparency going forward. This essay concurs in those recommendations, but also recommends that OLC should be afforded greater structural independence, that the head of OLC should be the only political appointee in the Office, and that OLC should focus on recruiting more experienced lawyers to fill its other positions. Third, the essay reviews the relevant case law and evaluates the possibility of a more fundamental reform, namely, that OLC be given greater independence by providing the head of OLC with a fixed term coterminous with that of the President. Finally, the essay concludes that this reform is worthy of serious consideration, whether as a matter of statute or administrative regulation.

## Constitutional Democracy, the Executive Branch, and OLC

Our system of limited government is based on principles of separation of powers, checks and balances, and the rule of law.[22] In such a government, policy must be rooted in law – which means that the executive must have access to legal advice that is both rigorous and honest. The executive is now the colossus of American government, and there is little that the executive cannot do,

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

[22] *See, e.g.*, Phillip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers,* 85 MICH. L. REV, 592, 593 (1986) ("The original constitutional notions of division of powers and functions were based not only on 'separation of powers,' but on a concept of 'balanced government' and of 'checks and balances' as well."); *see also,* Jeremy Waldron, *Separation of Powers in Thought and Practice,* 54 B.C. L. REV 433, 433 (2013) ("What is this principle [of separation of powers] and why is it important? The question takes us in interesting directions if we distinguish the separation of powers from two other important principles that are commonly associated, if not identified with it. These other principles are, first, the principle of the division of power-counseling us to avoid excessive concentrations of political power in the hands of any one person, group, or agency; and, second, the principle of checks and balances-holding that the exercise of power by any one power-holder needs to be balanced and checked by the exercise of power by other power-holders.").

especially when fortified by compliant legal advice. But the founders intended to create a balanced government, not one in which the President was unbounded by law.[23] As Abner Greene has argued,

> [T]he framers were overwhelmingly concerned with either political branch aggrandizing its own power without sufficient checks. To the extent that there is any "original understanding" of the division of power between the President and Congress, it is that both are to be feared, neither is to be trusted, and if one grows too strong we might be in trouble. The framers' support for a strong, unitary executive cannot be understood apart from the limited powers they gave to the executive, nor apart from their need to create an executive strong enough to counteract overreaching legislatures.
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> In the post-New Deal world, however, the framers' factual assumptions have been displaced. Now, it is the President whose power has expanded and who therefore needs to be checked.[24]

As Professor Greene further notes, the modern Congress has delegated substantial lawmaking authority to the President,[25] contrary to the founders' expectation that each branch would jealously guard its own power.[26] In addition, the President increasingly has chosen to govern through unilateral presidential directives, even in the absence of delegated power.[27] In recent years, Congress has proved to be barely functional, and that also has favored the executive branch.[28]

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[23] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) ("The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image."); *but see* GARY WILLS, BOMB POWER, *supra* note __ at 241 ("Few people even consider, anymore, Madison's lapidary pronouncement, 'In republican government the legislative authority, necessarily, predominates' (*The Federalist* 51). Instead, we are all, as citizens, asked to salute our Commander in Chief.").

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

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

[26] *See* Federalist 51 ("But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. … Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.").

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

[28] *See, e.g*., LEE H. HAMILTON, STRENGTHENING CONGRESS 3-4 (2009) ("Congress sometimes cannot get its act together well enough to be a strong, effective, and sustained counterbalance to the power of the presidency."); THOMAS E. MANN & NORMAN J. ORENSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK 158 (2006) ("The passivity and indifference of Congress and its leaders to their independent and assertive role fit perfectly with the [George W.] Bush administration's assertive and protective attitude toward executive power and its aversion to sharing information with Congress and the public."). *See also* Julian E. Zelizer, BURNING DOWN THE HOUSE: NEWT GINGRICH, THE FALL OF A SPEAKER, AND THE RISE OF THE NEW REPUBLICAN PARTY 293-94 (2020) ("Over the next decade, the [congressional] scandal wars [initiated by Newt Gingrich] escalated to create one of the most contentious periods in the government's history as the needs of governance and legislating

Modern conditions have even allowed the President to circumvent Congress's constitutionally fundamental spending power,[29] diverting billions of dollars in funds from the purposes for which they were appropriated to projects that Congress had declined to fund.[30] The Supreme Court has added to the President's power by embracing (at least in part) the "unitary executive" theory, which holds that the President, by virtue of his "accountability" to the people, must have ultimate authority over all those who exercise "executive" authority on behalf of the United States.[31] In addition, the pardon power can be used to thwart investigations into executive wrongdoing.[32] Finally, the President derives great, extraconstitutional power from his position as head of party,[33] something that the founders did not anticipate.[34] Indeed, one might be tempted to conclude from

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took a back seat to the imperatives of intense partisan warfare where compromise was considered toxic and where almost any threat to destroy another politician's career or hijack the legislative process was permissible if it was legal.").

[29] *See* U.S. CONST. art I, § 8.

[30] *See* Sierra Club v. Trump, 963 F.3d 874 (9th Cir. 2020); California v. Trump, 963 F.3d 926 (9th Cir. 2020). Petitions for certiorari in both cases were granted on October 19, 2020. *See* Trump v. Sierra Club, No. 20-138, pet. for cert. granted, Oct. 19, 2020 (U.S.). The Supreme Court previously had stayed an injunction entered by the district court and thereby permitted the continued diversion of funds. *See* Trump v. Sierra Club, No. 19A60 (U.S., July 26, 2019).

[31] *See, e.g*., Seila Law LLC v. CFPB, 140 S.Ct. 2183 (2020) (holding that CFPB's single-administrator for-cause-removal feature violated the separation of powers); Free Enterprise Fund v. Public Company Oversight Board, 561 U.S. 477 (2010) (holding that the provision of the Sarbanes-Oxley Act that made PCOB members removable only for cause to be determined by the members of the SEC, who were also removable only for cause, violated the separation of powers). *But see* U.S. Const., art. II, §2, cl.2 (providing that Congress may vest the appointment of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments."). *See also* Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981-2000*, 89 DENVER U. L. REV. 197 (2011).

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

[33] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring) ("Moreover, rise of the party system has made a significant extraconstitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system, as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own, and he often may win, as a political leader, what he cannot command under the Constitution. Indeed, Woodrow Wilson, commenting on the President as leader both of his party and of the Nation, observed, 'If he rightly interpret the national thought and boldly insist upon it, he is irresistible. … His office is anything he has the sagacity and force to make it.'").

[34] *See, e.g*., Daryl J. Levinson & Richard Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006) ("As competition between the legislative and executive branches was [quickly] displaced by competition between two major parties, the machine that was supposed to go of itself stopped running. … To this day, [however,] Madison's account of rivalrous, self-interested branches is embraced as an accurate depiction of political reality and a firm foundation for the constitutional law of separation of powers.").

recent events that the presidency is effectively unbounded by law, so long as the President's political party controls the Senate.[35]

Much recent criticism of the Department of Justice in general – and of OLC in particular – has focused on the perceived shortcomings of the Department's political leadership during the Trump administration.[36] That emphasis is not surprising, given that the egregious actions of the Trump administration are still so recent.[37] One is hard-pressed, for example, to think of another recent administration that has so consistently thwarted Congress's efforts to exercise its constitutional oversight authority.[38] But the line between the institutional interests of the presidency and the political and personal interests of a current incumbent is not always clear; nor is there any consensus about just how independent the Department of Justice should be. The Department is situated in the executive branch, and law enforcement is an important executive function. Surely the President's general views on antitrust enforcement should be taken into account, for example, but what if the President urges enforcement against only a few firms, all or most of whom he considers to be his political enemies?[39] Similarly, the Department should be responsive to the President's views when it sets criminal law enforcement priorities, but should the President be able to dictate the prosecution (or non-prosecution) of particular individuals?[40] And what role should the Department play when advising the President concerning the extent and limits of his power?[41]

[35] *See, e.g.*, Michael D. Shear & Nicholas Fandos, *Republicans Block Impeachment Witnesses, Clearing Path for Trump Acquittal,* N. Y. TIMES, Jan. 31, 2020, https://www.nytimes.com/2020/01/31/us/politics/trump-impeachment-trial.html; Igor Derysh, *Senate juror Mitch McConnell brags that he's coordinating Trump's impeachment trial with White House*, SALON, Dec. 13, 2019, https://www.salon.com/2019/12/13/senate-juror-mitch-mcconnell-brags-that-hes-coordinating-trumps-impeachment-trial-with-white-house/.

[36] *See, e.g.*, Katie Benner, *Barr Leaves a Legacy Defined by Trump*, N.Y. TIMES, DEC. 28, 2020, HTTPS://WWW.NYTIMES.COM/2020/12/28/US/POLITICS/WILLIAM-BARR-TRUMP.HTML?SEARCHRESULTPOSITION=1; Katie Benner, *Barr's Approach Closes Gap Between Justice Dept. and White House*, N.Y. TIMES, Sept. 25, 2020, https://www.nytimes.com/2020/09/25/us/politics/william-barr-justice-department.html?searchResultPosition=1; Michael S. Schmidt & Nick Corasaniti, *Justice Dept. Aids Trump's False Narrative on Voting,* N.Y. TIMES, Sept. 25, 2020, https://www.nytimes.com/2020/09/25/us/politics/mail-ballots-pennsylvania-justice-department.html?searchResultPosition=1; Aaron Blake, *A GOP-appointed judge's scathing review of William Barr's "candor" and "credibility," annotated*, WASH. POST, Mar. 5, 2020, https://www.washingtonpost.com/politics/2020/03/05/gop-appointed-judges-scathing-review-william-barrs-candor-credibility-annotated/; Natasha Bertrand, *The Crucial Part of Mueller's Report That Barr Didn't Mention*, THE ATLANTIC, Mar. 26, 2019, https://www.theatlantic.com/politics/archive/2019/03/barrs-summary-omits-key-aspect-muellers-report/585703/.

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

[38] *See, e.g.*, *Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Testimony, Memorandum Opinion for the Attorney General and Counsel for the President*, https://www.justice.gov/olc/file/1215056/download (2019).

[39] *See, e.g.*, Spencer Weber Waller & Jacob E. Morse, *The Political Misuse of Antitrust: Doing the Right Thing for the Wrong Reason,* COMPETITION POLICY INTERNATIONAL, July 16, 2020, https://www.competitionpolicyinternational.com/the-political-misuse-of-antitrust-doing-the-right-thing-for-the-wrong-reason/.

[40] *See, e.g.*, Bruce A. Green & Rebecca Roiphe, *May Federal Prosecutors Take Direction from the President?*, 87 FORDHAM L. REV. 1817 (2019); Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1 (2018).

[41] Attorney General Caleb Cushing famously observed that the Attorney General was "not a counsel giving advice to the Government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and of legal obligation." *See* Caleb Cushing, *Office and Duties of Attorney General*, 6 Op. Att'y Gen. 326 (1854). A

Should OLC approve the executive's preferred course of action whenever defending it in litigation would not violate Rule 11?[42] In short, the problems that concern us did not arise only in the Trump administration. They are longstanding and deep-seated; they reflect the necessarily ambiguous relationship of the Department of Justice and the President. They touch on the proper meaning and sweep of the "vesting clause,"[43] and on a proper understanding of the President's duty "to take care that the laws be faithfully executed."[44]

## The ACS Proposal

ACS recently offered several recommendations designed to "reposition OLC around its core tradition of providing independent legal advice that offers its attorneys' best view of the law to the president and executive branch actors."[45] "It is vital," ACS wrote, "that an office within government perform this function to help ensure ongoing respect for a basic principle of our constitutional system – that executive action is constrained by law."[46]

ACS offered three guiding principles, followed by three specific recommendations. The three guiding principles were that OLC should explicate and defend the separation of powers "through careful consideration of the authorities and interests of the different branches of government;" that it must "strive[] to provide independent legal advice … that makes clear the limits the Constitution and statutes place on the executive's authority to act;" and that it "must help promote accountability for the executive branch, which requires demonstrating a good-faith and robust commitment to transparency."[47]

ACS's first specific recommendation was that OLC's new leadership should survey its recent work product "to identify opinions or advice that fail to promote a legitimate interpretation of the relevant law, or that advance a conception of the separation of powers that unduly shields the president or the executive branch from scrutiny and accountability;" that those opinions and advice should be subjected to vigorous review; and that those that fail the test should be rescinded.[48] ACS's second specific recommendation was that OLC's new leadership should "articulate its rule-of-law values as principles and practices to bind its interpretation and analysis" in two ways: (1) by articulating "a set of best practices tied to Office traditions and reflective of the changing structure and distribution of authority within the executive branch," and (2) by "draft[ing] a new

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more recent commentator suggests that the Attorney General's role is indistinguishable from that of a private lawyer representing a private client. *See* Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 449 (1993).

[42] *See* Fed. R. Civ. P. 11.

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

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

[45] *See* American Constitution Society, *Statement: The Office of Legal Counsel and the Rule of Law* at 8 (Oct. 2020), https://www.acslaw.org/wp-content/uploads/2020/10/OLC-ROL-Doc-103020.pdf.

[46] *Id*.

[47] *Id*. at 2-3.

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

charter of powers that takes account of developments over the last quarter century in the law and politics of the separation of powers."[49]

OLC's new statement of "best practices" should contain three commitments: (1) to provide the President and the executive branch "with [OLC's] best view of what the law requires, rather than with advice that gives [OLC's] imprimatur … to legal justifications that are merely colorable or arguably defensible," (2) "to articulate structural and substantive strategies for insuring that its advice remains independent from partisan political pressures," and (3) to "articulat[e] a strong presumption in favor of publishing its final formal opinions."[50]

With respect to the new "charter of powers," ACS recommends that OLC's new leadership make "a serious study of the separation of powers jurisprudence that has emerged since 1996 [when OLC prepared the memorandum on which currently relies], as well as a study of the major separation of powers conflicts between Congress and the executive branch that never reached the courts, or as they played out before the Supreme Court intervened, including the [OLC] opinions … that have been part of that conflict." OLC's objective should be to chart an approach to separation of powers that is "less combative, more functional and [more] consistent."[51]

ACS's third specific recommendation was that OLC should adopt a strong presumption in favor of timely publication of its final opinions. "[T]here will be exceptions for classified, privileged, or sensitive material. But the value of transparency in promoting accountability should guide OLC's decision-making."[52]

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

## The Constitutional Background

The founders recognized the need for executive offices in addition to those of President and Vice-President. We know that because, among other things, the Constitution specifically empowers the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[53] But the founders left the structure and design of the executive branch to Congress. Under the "necessary

[49] *Id*. at 5.
[50] *Id*.
[51] *Id*.
[52] *Id*. at 7-8.
[53] *See* U.S. Const., art. II, § 2, cl. 1. But the Constitution creates no such departments.

and proper" clause,[54] Congress may create and abolish executive departments, as well as the offices within the departments; prescribe the duties that attach to such offices and departments; transfer duties from one office or department to another; and prescribe qualifications for service in those offices.[55] The founders also specifically provided that principal officers must be appointed by the President, with the advice and consent of the Senate, but left Congress to decide whether the power to appoint "inferior Officers" should be vested "in the President alone, in the Courts of Law, or in the Heads of Departments."[56] Since the Court's decision in *Marbury v. Madison*, it has also been clear that Congress may impose on executive officials specific duties that must be fulfilled, without regard to the President's wishes.[57]

The precise degree to which Congress may exercise its power without infringing on the constitutional powers of the executive has long been contested.[58] During the Watergate scandal, for example, Senator Sam Ervin, who was generally considered to be the Senate's preeminent constitutional lawyer, proposed freeing the Justice Department from direct presidential control; his proposed legislation would have transformed the Department into an independent agency, with the Attorney General and two other key officials being appointed by the President with the advice and consent of the Senate, serving set terms that did not coincide with the President's, and being removable only "for cause."[59] The bill was widely opposed by constitutional law scholars and

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[54] *See id*., art. I, § 8, cl.18.

[55] *See* Mary M. Cheh, *When Congress Commands a Thing to Be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 53, 259 (2003) ("Thus, *Marbury* makes plain that it is Congress's job to create the executive offices of the United States, to set the terms of those offices, and to identify the bases for removal. Finally, *Marbury* established that Congress may prescribe the duties to be performed by executive officials and that, if they are commanded to perform certain acts, they are accountable to the law only. Their acts may not be controlled by the President and, should they fail in their duty, the laws of the country will afford a remedy to any person injured as a result.").

[56] *See* U.S. Const., art. II, § 2, cl. 2.

[57] *See* Marbury v. Marshall, 5 U.S. (1 Cranch) 137, 158 (1803) ("It is the duty of the Secretary of State to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.").

[58] *See, e.g.,* Myers v. United States, 272 U.S. 52, 106 (1926) (Taft, C.J.) ("[T]he reasonable implication, even in the absence of express words was that he should select those who were to act for him under his direction in the execution of the laws. The further implication must be … that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.") Justices McReynolds, Holmes, and Brandeis dissented. Justice Holmes wrote that, "The arguments drawn from the executive power of the President, and from his duty to appoint officers of the United States (when Congress does not vest the appointment elsewhere), to take care that the laws be faithfully executed, and to commission all officers of the United States, seem to me spider's webs inadequate to control the dominant facts. ... The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." *Id.* at 177.

[59] *See* S. 2803, 93d Cong., 1st Sess. The bill provided that the President would appoint the Attorney General, the Deputy Attorney General, and the Solicitor General, with the advice and consent of the Senate, to six-year terms. Senator Ervin explained, in introducing the bill, that, "All subordinate officers in the Department, including the Director of the [FBI], would be appointed by the Attorney General. The officers appointed by the President would be removable by the Chief Executive only for neglect of duty or malfeasance in office. They, accordingly, would be protected under the doctrine of the Humphrey's Executor and Wiener cases." *See* Removing Politics from the Administration of Justice: Hearings Before the Committee on the Judiciary, Subcommittee on Separation of Powers, United States Senate, 93d Cong., 2d Sess., at 4 (1974) (Opening Statement of Sen. Ervin), https://www.ebooksread.com/authors-eng/united-states-congress-senate-committee-on-the/removing-politics-from-

failed to advance.[60] While the bill was criticized on numerous grounds, "one study found constitutional infirmity in the attempt … to transfer the total Department rather than specific Department functions."[61] According to that study, removal of the entire Department from presidential oversight would have interfered with the President's duties to see that the laws are faithfully executed, to recommend legislation to Congress, and to approve or veto legislation.[62] How could the President "take care that the laws be faithfully executed" if his entire legal team were not answerable to him?

In his opening statement at the Senate hearing on S. 2803, Senator Ervin did not focus on the possible objections to transferring *all* law enforcement responsibilities to an entity beyond the immediate control of the President. Senator Ervin invoked two Supreme Court cases in support of his proposed legislation – *Wiener v. United States*[63] and *Humphrey's Executor v. United States*.[64] But he made no mention of the Court's earlier decision in *Myers v. United States*,[65] which has now become the standard against which the Supreme Court evaluates the constitutionality of all structural innovations. In 1974, however, *Myers* did not cast such a long shadow, and Senator Ervin understandably may have thought that the case was not relevant to his project; he intended to create an independent agency, and, as *Wiener* and *Humphrey's Executor* made clear, fixed terms and "for cause" removal provisions were constitutionally permissible in that context. Moreover, Senator Ervin doubtless understood that the narrow legal question in *Myers* was not whether Congress could constitutionally create an executive position with a fixed term, but whether Congress could empower the Senate to override a presidential decision to remove a particular executive official.

In addition, in 1974, the latest word from the Supreme Court was Justice Frankfurter's opinion for a unanimous Court in *Wiener*, which viewed much of the *Myers* opinion as unnecessary (and

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the-administration-of-justice--hearings-before-the-subco-tin/1-removing-politics-from-the-administration-of-justice--hearings-before-the-subco-tin.shtml.

[60] *See* Watergate Reorganization and Reform Act of 1975: Hearings Before the Committee on Government Operations, United States Senate, 94th Cong., 1st Sess. 288-95 (1976), https://play.google.com/books/reader?id=GsdEAQAAMAAJ&hl=en&pg=GBS.PA288.

[61] *Id*. at 288.

[62] *Id*. In 2008, Senators Russ Feingold and Diane Feinstein introduced a more limited bill, entitled the OLC Reporting Act of 2008, which would have required the Attorney General to report to Congress whenever the Department issued certain kinds of "authoritative legal interpretation[s]" of "Federal statute[s]." *See* S. 3501, 110th Cong., 2d Sess., https://www.congress.gov/bill/110th-congress/senate-bill/3501. According to the Senate Committee Report, "The purpose of the [the bill was] to provide a targeted response to a particularly problematic manifestation of 'secret law'—secret legal opinions issued by the Department of Justice (DOJ) that effectively exempt the executive branch from compliance with federal statutes." *See* S. Rep. No. 110-528 (Dec. 11, 2008), https://www.congress.gov/110/crpt/srpt528/CRPT-110srpt528.pdf. The Bush administration strongly opposed the legislation, which was not enacted. *See, e.g., Letter of Michael B. Mukasey, Attorney General, to Hon. Harry Reid, Majority Leader, United States Senate*, Nov. 14, 2008, https://www.justice.gov/archive/ola/views-letters/110-2/11-14-08-ag-ltr-re-s3501-olc-reporting-act.pdf. *See also* Kel McClanahan, *How one secretive Justice Department office can sway the whole government*, WASH. POST, Sept. 26, 2019, https://www.washingtonpost.com/outlook/2019/09/26/how-one-secretive-justice-department-office-can-sway-whole-government/.

[63] 357 U.S. 349 (1958).

[64] 295 U.S. 602 (1935).

[65] 272 U.S. 52 (1926).

unwarranted) dicta and reaffirmed Congress's power to specify the conditions for removing members of independent agencies.[66] In *Wiener*, Justice Frankfurter parsed the earlier decisions:

> Speaking through a Chief Justice who himself had been President, the Court [in *Myers*] did not restrict itself to the immediate issue before it, the President's inherent power to remove a postmaster, obviously an executive official. As of set purpose and not by way of parenthetic casualness, the Court announced that the President had inherent constitutional power of removal also of officials who have "duties of a quasi-judicial character * * * whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control." …
>
> Within less than ten years a unanimous Court, in *Humphrey's Executor v. United States*, … narrowly confined the scope of the *Myers* decision to include only "all purely executive officers." The Court explicitly "disapproved" the expressions in *Myers* supporting the President's inherent constitutional power to remove members of quasi-judicial bodies. …
>
> And what is the essence of the decision in Humphrey's case? It drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are members of a body "to exercise its judgment without the leave or hindrance of any other official or any department of the government," as to whom a power of removal exists only if Congress may fairly be said to have conferred it.[67]

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

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

[67] *Id*. at 351-53. Many contemporary admirers of *Myers* view the opinion as an example of originalism. As Robert Post has recently shown, however, Chief Justice Taft "was unwilling to rest his conclusion entirely on evidence of original meaning," and the opinion relies as much on the Chief Justice's policy judgments about effective presidential leadership as on original meaning. *See* Robert Post, *Tension in the Unitary Executive: How Taft Constructed the Epochal Opinion of* Myers v. United States, J. SUP. CT. HIST (forthcoming 2020). Likewise, Professor Post shows that Chief Justice Taft's acknowledgment of Congress's constitutional authority with respect to determining the removal rules for inferior officers "is surely not an argument that would be embraced by contemporary advocates of a powerful "unitary executive," who argue for "a hierarchical, unified executive department under the direct control of the President." *Id*. at 12.

power. *Wiener* made clear that Congress could grant tenure of employment to the members of at least some independent agencies,[68] but the *Wiener* Court had no reason to decide whether all executive officials must be subject to at-will removal by the President. The Court finally addressed that question in 1988 in *Morrison v. Olson*.[69]

In *Morrison*, the Court was asked to determine the constitutionality of the independent counsel provisions of the post-Watergate Ethics in Government Act.[70] The provisions, which authorized the appointment of an independent counsel "to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws," placed the appointment power in a specially designated court,[71] and the removal power in the Attorney General; but the Attorney General was required to exercise the power personally and "only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."[72] The provision relating to the appointment of the independent counsel was challenged under the appointments clause and Article III, while the removal provision and the Act as a whole were challenged as a violation of separation of powers.[73] In an opinion by Chief Justice Rehnquist, the Court rejected each of these contentions.[74] The Court described the two separation of powers issues as follows:

> The first is whether the provision of the Act restricting the Attorney General's power to remove the independent counsel to only those instances in which he can show "good cause," taken by itself, impermissibly interferes with the President's exercise of his constitutionally appointed functions. The second is whether, taken as a whole, the Act violates the separation of powers by reducing the President's ability to control the prosecutorial powers wielded by the independent counsel.[75]

The *Morrison* Court began its analysis of the separation of powers issues by reaffirming the explanation of *Myers* that the Court had given two years before in *Bowsher v. Synar*,[76] namely, that "the essence of … *Myers* was the judgment that the Constitution prevents Congress from 'draw[ing] to itself … the power to remove or the right to participate in the exercise of that power. To do this would go beyond the words and implications of the [Appointments Clause] and to infringe the constitutional principle of the separation of powers.'"[77] That was not the case with the removal provision at issue in *Morrison*, which "puts the removal power squarely in the hands of the Executive Branch."[78] "In our view," the Court said, "the removal provisions of the Act make

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[68] In *Humphrey's Executor*, the Court emphasize the "quasi-judicial" and "quasi-legislative" nature of the Commission's work. *See Humphrey's Executor*, 295 U.S. at 871.
[69] 487 U.S. 654 (1988).
[70] 28 U.S.C. §§ 49, 591 *et seq*. The provisions lapsed in 1999. *See* Helen Dewar, *Independent Counsel Law is Set to Lapse,* WASH. POST, June 5, 1999, https://www.washingtonpost.com/wp-srv/politics/special/counsels/stories/counsel060599.htm.
[71] *Morrison*, 487 U.S. at 661, citing 28 U.S.C. § 593(b).
[72] *Morrison*, 487 U.S. at 663, quoting 28 U.S.C. § 596(a)(1).
[73] *Morrison*, 487 U.S. at
[74] *Id*. at 660. Justice Scalia dissented. *Id*. at 697.
[75] *Id.* at 685.
[76] 478 U.S. 714 (1986).
[77] *Morrison*, 487 U.S. at 686.
[78] *Id*.

this case more analogous to *Humphrey's Executor* … and *Wiener* … than to *Myers* or *Bowsher*."[79] The Court then rejected the argument that "*Humphrey's Executor* rests on a distinction between 'purely executive' officials and officials who exercise 'quasi-legislative' and 'quasi-judicial' powers," as well as the argument that, "under *Myers*, the President must have absolute discretion to discharge 'purely executive' officials at will."[80] The Court continued: "The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to insure 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.'"[81] "[T]he real question," the Court said, "is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the function of the officials in question must be analyzed in that light."[82]

After concluding that the removal provision did not by itself violate the separation of powers, the Court proceeded to consider whether "the Act, taken as a whole, violates the … separation of powers by unduly interfering with the role of the Executive Branch."[83] The Court again noted that the Act was not an attempt by Congress to increase its own powers at the expense of the Executive's, nor did it work any judicial usurpation of properly executive functions.[84]

Finally, the Court held that although"[i]t is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and supervision of a certain class of alleged criminal activity," the Act did not impermissibly undermine the powers of the Executive Branch or disrupt the proper balance between the branches by preventing the Executive from performing its constitutionally assigned functions.[85] The Court observed that the Attorney General's authority was limited in that he could not appoint the individual of his choice, determine the counsel's jurisdiction, or remove her without cause,[86] but the Court found that these limitations were balanced by provisions that gave the Attorney General the exclusive power to request the appointment of an independent counsel, provided for "for cause" removal (which preserved the Executive's "substantial ability to ensure that the laws are 'faithfully executed' by the independent counsel"), and made the independent counsel's jurisdiction dependent on the facts submitted by the Attorney General and its exercise subject to general Department of Justice policy.[87] The Court concluded: "Notwithstanding the fact that the counsel is to some degree 'independent' and free from executive supervision to a greater extent than other federal prosecutors, in our view these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties."[88]

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[79] *Id*.
[80] *Id*. at 688-89.
[81] *Id*. at 689-90.
[82] *Id*. at 691.
[83] *Id*. at 693.
[84] *Id*. at 694-95.
[85] *Id*. at 695.
[86] *Id*. at 695-96.
[87] *Id*. at 696.
[88] *Id*. Justice Scalia dissented. *Id*. at 697. Justice Scalia started from the proposition that Article II, Section 1, clause 1 vests in the President "not … *some* of the executive power, but *all* of the executive power." *Id* at 705. The statute therefore required invalidation "on fundamental separation-of-powers principles if two questions are answered affirmatively: (1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the

More recently, the Court has returned to removal in the context of independent agencies. In 2010, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[89] the Court invalidated a provision of the Sarbanes-Oxley Act that protected the members of the Public Company Accounting Oversight Board ("PCAOB") from removal by the members of the Securities and Exchange Commission ("SEC") except "for good cause shown."[90] Citing *Myers*, Chief Justice Roberts noted "that the Constitution has been understood [since 1789] to empower the President to keep these officers accountable—by removing them from office, if necessary," but that the Court has nonetheless held that the removal power is "not without limit."[91] Thus, in *Humphrey's Executor*, "we held that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause."[92] Further, "the Court [has] sustained similar restrictions on the power of principal executive [branch] officers—themselves responsible to the President—to remove their own inferiors."[93]

According to the Chief Justice, *Free Enterprise* presented a novel question, namely, whether Congress violates the Constitution when it provides for more than one level of "for cause" removal protection. The Chief Justice stated the question: "[W]hether these separate layers of protection may be combined. May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?"[94] That issue was presented in *Free Enterprise* because the members of the PCAOB were removable only for cause by the members of the SEC, who were themselves assumed to be removable only for cause.[95] In a 5 to 4 vote, the Court held that "such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President."[96] According to the majority,

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exercise of purely executive power? (2) Does the statute deprive the President of the United States of exclusive control over the exercise of that power?" *Id*. Since he answered both questions in the affirmative, he would have invalidated the statute. *Id*. In a particularly thoughtful essay, Alfred Aman and Carol Greenhouse have noted that, notwithstanding the current influence of the unitary executive theory, "the durability of *Humphrey's Executor* is impressive." Alfred C. Aman, Jr. & Carol Greenhouse, *Fire Power: Constitutional Limits and Institutional Norms Governing the United States President's Power of Removal* in PENSER LE DROIT A PARTIR DE L'INDIVIDU: MELANGES EN L'HONNEUR D'ELISABETH ZOLLER (2018). Aman and Greenhouse emphasize the importance of norms, which limit the President's removal power, regardless of the absence of "for cause" protection. "Certain rule of law norms would, for example, militate against firing a prosecutor engaged in an ongoing criminal investigation of an individual close to the President, or quite possibly the President himself." *Id*.

[89] 561 U.S. 477 (2010).

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

[91] *Free Enterprise*, 561 U.S. at 3143.

[92] *Id*.

[93] *Id*. The Court observed that, "The parties do not ask us to reexamine any of these precedents, and we do not do so." *Id.* at 3147.

[94] *Id*. at 3147.

[95] *Id*. at 3142. The parties and the majority assumed that to be the case. *Id*. Justice Breyer's dissent provided substantial grounds for doubting the accuracy of that assumption. *Id*. at 3164.

[96] *Id.* at 3147.

> The President cannot "take Care that the Laws be faithfully executed" if he cannot oversee the faithfulness of the officers who execute them. Here the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President's determination, and whom the President cannot remove simply because that officer disagrees with him. This contravenes the President's "constitutional obligation to ensure the faithful execution of the laws."[97]

Finally, in *Seila Law v. Consumer Financial Protection Bureau*,[98] the Court considered the constitutionality of the Consumer Financial Protection Bureau ("CFPB"), which was organized under the control of a single administrator appointed for a five-year term and removable only for "inefficiency, neglect of duty, or malfeasance in office."[99] As in *Free Enterprise*, the Court viewed this structure as an anomaly that could be upheld only if the Court were willing to extend its prior precedents, which the Court , by a 5-4 vote, again declined to do.[100] Echoing Justice Scalia's dissent in *Morrison*, Chief Justice Roberts observed that, "Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'"[101] Excavating the facts of prior cases, he then went on to explain that that there were only two exceptions to the President's unrestricted removal power:

> In *Humphrey's Executor* …, we held that Congress could create expert agencies led by a group of principal officers removable by the President only for good cause. And in … *Morrison v. Olson*, … we held that Congress could provide tenure protections to certain inferior officers with narrowly defined duties. We are now asked to extend these precedents to a new configuration: an independent agency that wields significant executive power and is run by a single individual who cannot be removed by the President unless certain statutory criteria are met. … [T]here are compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director. Such an agency lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control.[102]

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[97] *Id*. at 3147. The Chief Justice further noted that, "The added layer of tenure protection makes a difference. Without a layer of insulation between the Commission and the Board, the Commission could remove a Board member at any time, and therefore would be fully responsible for what the Board does. The President could then hold the Commission to account for its supervision of the Board, to the same extent that he may hold the Commission to account for everything else it does." *Id*. at 3153. However, as Justice Breyer pointed out in dissent, the President's power to hold the SEC responsible "for everything else it does" is limited by the first layer of "for cause" removal protection in any event. *See id*. at 3154.

[98] Seila Law v. Consumer Financial Protection Bureau, 140 S. Ct. 2183 (2020).

[99] See 12 U.S.C. §§ 5491(b)(1), (b)(2), (c)(1), (c)(3).

[100] *Seila*, 140 S.Ct. at 2188.

[101] *Id*. at 2191.

[102] *Id*. at 2192. Rather than strike down the statute, the Court severed the removal provision – a result in which the dissenters concurred (*see id*. at 2217), but from which Justice Thomas and Justice Gorsuch dissented. *See id*. 2211. Justice Thomas filed a separate opinion in which, among other things, he commended the Court for restricting *Humphrey's Executor*, but suggesting that it should be overruled in a future case. *Id*. at 2211. Writing for the dissenters, Justice Kagan noted that the Court traditionally had left most decisions about the structure of the Executive Branch

At the most general level, *Free Enterprise* and *Seila* may be seen to reflect an embrace of the unitary executive theory and a lack of sympathy for the administrative state. Taken at face value, they also seem to reflect a somewhat naïve view of presidential accountability.[103] Those attitudes are manifested in the Court's technique, namely excavating and attributing constitutional significance to the facts of its earlier precedents as a way of creating narrowing distinctions that bear only the slightest relationship to the Court's reasoning in those earlier cases. For now, however, *Humphrey's Executor* and *Morrison* remain good law on their own terms, and it is difficult to see how much further the Court can go in hollowing out these precedents without bringing down such fundamental, indispensable aspects of our current constitutional order as the independence of the Federal Reserve Board.[104] Justices Thomas and Gorsuch might be willing to go to that extreme, but it would be surprising if others were not ultimately persuaded by Justice Kagan's warnings in *Seila*.[105]

## The Possibilities for Reform

Given the state of the law, what might be done to ensure a greater degree of independence and professionalism for OLC? First, as ACS has suggested, OLC should be as transparent as possible, consistent with the true necessities of governing, and it should be committed to understanding the separation of powers from the perspectives of each of the branches of government, not simply from that of the executive. Second, the presence of four politically appointed deputies sends a strong message that OLC's primary mission is political rather than legal.[106] That is unfortunate and unnecessary. Until the Reagan administration, the Solicitor General had no political deputies, and

"to Congress and the President, acting through legislation they both agree to." *Id*. at 2224. That included creating "zones of administrative" through "for cause" limitations on the President's removal power for the Federal Reserve, the Federal Trade Commission, and the National Labor Relations Board. "Those statutes, whose language the Court repeatedly has approved, provide the model for the removal restriction before us today. If precedent were any guide, that provision would have survived its encounter with this Court – and so would the intended independence of the [CFPB]." *Id*. at 2224.

[103] *See, e.g*., PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 161-62 (2009) ("The incentives of our one-person chief executive to follow the polls in any close way are also not as strong as is often assumed. After all, despite common references to a presidential candidate's unique 'national constituency,' a presidential candidate is subject to election only twice – and only once after the country has actually witnessed the President's performance. … During both an initial campaign and another for reelection, a presidential candidate knows that his detailed stances on matters of policy are not likely to make decisive differences in his political fortunes. And, of course, following a successful reelection campaign, there is no further prospect of confronting the electorate to discipline a President's policy judgments.").

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

[105] *See supra* page __, n.101.

[106] *See, e.g*., Bradley Lipton, *A Call for Institutional Reform of the Office of Legal Counsel*, 4 HARV L. & POL. REV. 250, 254-55 (2010).

even now there is only one.[107] There is no need for all of the OLC deputies to be political appointees, and there is little danger that fewer political deputies will result in a failure to promote the executive's viewpoint within appropriate bounds. As Trevor Morrison has argued, "the generally pro-executive tenor in OLC's opinions simply reflects that OLC is part of the Executive Branch."[108] That will continue whether or not all four deputies are political appointees. What might not continue are "assertions of executive authority, no matter how audacious."[109] Third, as Bradley Lipton has suggested, the recruitment of more experienced lawyers to staff OLC would also be helpful.[110] Newly minted, politically ambitious lawyers are more likely than experienced career lawyers to be receptive to political suggestion, regardless of how far-fetched an argument might be necessary to justify the executive's position.[111]

Serious consideration should also be given to endowing OLC with greater structural independence by providing the head of OLC with a fixed term coterminous with that of the President, during which time the head of OLC could be removed only for cause. Under such a scheme, the head of OLC would remain someone of the President's choosing, who would presumably share the President's goals and be committed to the President's policies. Providing him or her with a fixed term, however, would ensure some degree of institutional independence that would strengthen his or her position when confronted with unreasonable pressures. As the Court observed in *Humphreys' Executor*, "one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."[112] Here, of course, the goal is something far less than complete independence. Moreover, removal for cause need not be the anemic remedy that the Court has recently conceived it to be. In *Bowsher v. Synar*,[113] for example, a key consideration in the Court's determination that Congress had improperly retained control over the Comptroller General was the fact that Congress could remove him for "inefficiency," "neglect of duty," or "malfeasance."[114] According to the *Bowsher* Court, "These terms are very broad and, as interpreted by Congress, could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will." [115] So construed, they should provide the President with an appropriate degree of control over an official

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[107] *See, e.g., Rex E. Lee Conference on the Office of the Solicitor General of the United States*, 2003 BYU L. REV. 1, 44 (2003) (remarks of Andrew L. Frey), *id*. at 54 (remarks of Michael McConnell). As Donald Ayer noted, the politically appointed deputy position came about after no senior member of the Solicitor General's Office was willing to sign the government's brief in a case in which the Solicitor General was recused. *Id*. at 87-89 (remarks of Donald Ayer). *See* Bob Jones University v. United States, 461 U.S. 547 (1983); Olatunde C. Johnson, *The Story of Bob Jones University v. United States: Race, Religion, and Congress' Extraordinary Acquiescence*, in STATUTORY INTERPRETATION STORIES 126, 144-48 (William Eskridge, et al., eds, 2011).

[108] *See* Trevor W. Morrison, Stare Decisis *in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1502 (2010).

[109] *Id*.

[110] Lipton, *supra* note 15, at 255.

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

[112] *Humphrey's Executor*, 295 U.S. at 629.

[113] 478 U.S. 714 (1986).

[114] *Id*. at 729.

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

of his own choosing, without interfering with the President's duty to "take Care that the Laws be faithfully executed."

The role of OLC is important but limited. OLC does not directly enforce any law. Nor does it have the final word concerning any government policy. Its sole function is to provide legal advice to the executive branch. Moreover, any legal determination that OLC might make is subject to revision by the Attorney General or the President, and any such determination with which the Attorney General or the President might disagree necessarily must give way to their superior authority. Although the Attorney General does not typically review the advice given by OLC, that need not be the case. For these reasons, the head of OLC would qualify as an "inferior Officer," and, under *Morrison*, Congress could structure OLC in a way that provided the limited degree of independence that we have considered. Alternatively, the Attorney General could so provide by regulation, as is currently the case with the special counsel.[116] There seems, therefore, to be no legal obstacle to such a reform. That suggests the need for a robust discussion of the relevant policy arguments.

Finally, it is essential to our form of government that OLC succeed in "providing independent legal advice that offers its attorneys' best view of the law to the president and executive branch actors."[117] That will require certain structural and other reforms, but, as others have noted, it will also require the development of a particular institutional ethos and sense of mission within OLC. The development of that ethos will not be easy because we live in a world in which there are many mutually reinforcing forces that create strong incentives simply to "give the lady what she wants."

[116] *See* 28 C.F.R. § 600.1 *et seq*.; *see also* U.S. Department of Justice, Office of the Attorney General, *Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters*, Order No. 3915-2017, May 7, 2017, https://www.justice.gov/opa/press-release/file/967231/download.

[117] *See* American Constitution Society, *Statement: The Office of Legal Counsel and the Rule of Law* at 8 (Oct. 2020), https://www.acslaw.org/wp-content/uploads/2020/10/OLC-ROL-Doc-103020.pdf.