



NOTE

## Indirect Constraints on the Office of Legal Counsel: Examining a Role for the Senate Judiciary Committee

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**Abstract.** As arbiter of the constitutionality of executive actions, the Department of Justice Office of Legal Counsel (OLC) possesses vast authority over the operation of the federal government and is one of the primary vessels for the articulation of executive power. It therefore is not surprising that the OLC has found itself at the center of controversy across Democratic and Republican administrations. OLC opinions have justified the obstruction of valid congressional investigations, the targeted killing of an American citizen overseas, repeated military incursions without congressional approval, and, most infamously, torture.

These episodes have generated a significant body of proposals to reform, constrain, or altogether eliminate the OLC. All of these proposals can be categorized as either direct or indirect constraints on how the OLC operates. Direct constraints target how the OLC actually creates its legal work product. Indirect constraints instead focus on the OLC's personnel or the public scrutiny the Office's opinions will face.

This Note expands on this existing body of research, focusing on how one institution unstudied in this context, the United States Senate Judiciary Committee, can operationalize meaningful indirect constraints on the OLC. Unlike the other actors that scholars have examined, the Committee's position outside the executive branch allows it to sidestep the President's ever-expanding reach within the federal bureaucracy. At the same time, the Committee's oversight powers and its central role in the nomination of both the OLC's leader and Article III judges give it important constitutional and statutory authority to constrain the Office.

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Even in an era of close cooperation between the White House and congressional leaders of the same party, this Note's proposal provides an avenue for Committee members to jealously guard their own constitutional prerogatives and nudge the OLC toward greater respect for the separation of powers and individual liberty.

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## Introduction

On September 27, 2019, Democratic members of the United States House of Representatives introduced House Bill 4556, the SUNLIGHT Act of 2019.<sup>1</sup> The bill would require the gradual publication of every opinion of the Department of Justice (DOJ) Office of Legal Counsel (OLC), with exceptions for national security and other limited purposes.<sup>2</sup> This transparency requirement would represent a dramatic change for an office whose work product has only episodically faced scrutiny from the courts and the general public.<sup>3</sup>

In the months leading up to the bill's introduction, the OLC repeatedly published opinions that placed then-President Donald Trump beyond the reach of congressional oversight. The OLC argued that senior advisors to the President are "absolutely immune" from being compelled to testify before Congress<sup>4</sup> and provided a legal justification for the Department of the Treasury to avoid complying with a House Ways and Means Committee request for the President's tax returns.<sup>5</sup> The OLC also supported the Director of National Intelligence's decision not to forward a whistleblower complaint regarding President Trump to Congress. The complaint detailed Trump's attempts to leverage military aid to Ukraine for damaging information about then-candidate Joe Biden's family; the OLC posited that the complaint did not involve an "urgent concern" that would implicate statutory reporting requirements.<sup>6</sup> When the House of Representatives responded by commencing an impeachment inquiry, the OLC said the executive branch did not have to

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1. Press Release, Rep. Mike Quigley, Quigley, Cartwright, Lofgren Introduce Bill to Increase Transparency in Government (Sept. 30, 2019), <https://perma.cc/9CU7-MRE3>; H.R. 4556, 116th Cong. (2019), <https://perma.cc/9FZW-46GN>.
  2. H.R. 4556. Senator Tammy Duckworth introduced an analogous bill, the DOJ OLC Transparency Act, on February 25, 2020. S. 3334, 116th Cong. (2020) <https://perma.cc/8XUC-V6HG>.
  3. For example, the Office's infamous memos justifying the use of so-called enhanced-interrogation techniques—torture—in the aftermath of the September 11, 2001, terrorist attacks did not face a public reckoning, *see infra* notes 48-50 and accompanying text, until one was leaked in 2004, *see* Jeffrey Rosen, *Conscience of a Conservative*, N.Y. TIMES MAG. (Sept. 9, 2007), <https://perma.cc/N73N-YUNK>.
  4. Testimonial Immunity Before Congress of the Assistant to the President and Senior Counselor to the President, 43 Op. O.L.C., 2019 WL 3383723, at \*1 (July 12, 2019).
  5. Congressional Committee's Request for the President's Tax Returns Under 26 U.S.C. § 6103(f), 43 Op. O.L.C., 2019 WL 2563046, at \*1, \*22 (June 13, 2019).
  6. "Urgent Concern" Determination by the Inspector General of the Intelligence Community, 43 Op. O.L.C., 2019 WL 5089447, at \*1-3 (Sept. 3, 2019) (quoting 50 U.S.C. § 3033(k)(5)(G)).

comply with any requests for documents or testimony until the full House had formally authorized the inquiry.<sup>7</sup>

The OLC's expansive view of President Trump's powers was evident in other contexts as well. In 2020, the Office approved the unilateral spending of \$44 billion from the Department of Homeland Security's Disaster Relief Fund to continue expanded unemployment-insurance payments.<sup>8</sup> It also appeared to buttress the Administration's deployment of federal law-enforcement officers to suppress protests in Portland, Oregon.<sup>9</sup>

As the substantive breadth of these opinions suggests, the OLC is one of the most powerful entities in the entire executive branch. It can tip the scales of legal authority between the political branches or stamp novel presidential action with constitutional imprimatur. And the Office's decisions can bear on deadly serious issues, such as the treatment of enemy combatants in United States custody<sup>10</sup> or the targeted killings of American citizens known to be inciting acts of terrorism overseas.<sup>11</sup> Indeed, reliance on OLC reasoning can be a powerful shield from liability—the DOJ generally declines to prosecute acts that are consistent with OLC guidance even if they otherwise would be criminal.<sup>12</sup> As one former head of the Office put it, OLC opinions are like “get-out-of-jail-free cards.”<sup>13</sup>

Because the OLC's power has proven prone to abuse, academics, legislators, and lawyers have proposed numerous reforms aimed at constraining its

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7. House Committees' Authority to Investigate for Impeachment, 44 Op. O.L.C., 2020 WL 502936, at \*1 (Jan. 19, 2020).

8. Heather Long, *Here's What Is Actually in Trump's Four Executive Orders*, WASH. POST (updated Aug. 17, 2020, 2:02 PM PDT), <https://perma.cc/64JM-QPMQ>; Talking Points Memo (@TPM), TWITTER (Aug. 9, 2020, 10:45 AM), <https://perma.cc/LP5M-NHU2> (linking to a television interview in which former Secretary of the Treasury Steven Mnuchin noted that the President's executive actions were “cleared with the Office of Legal Counsel”).

9. See Ryan Goodman & Danielle Schulkin, *Portland's Pretext: Barr's Long History Manipulating Law to Put Federal Forces on U.S. Streets*, JUST SEC. (July 19, 2020), <https://perma.cc/Z4R9-DLSW> (discussing former Attorney General William Barr's development, while serving as head of the OLC, of a legal basis for the deployment of federal forces to conduct general law-enforcement operations under the guise of protecting United States courthouses); Zolan Kanno-Youngs, *Were the Actions of Federal Agents in Portland Legal?*, N.Y. TIMES (updated July 24, 2020), <https://perma.cc/NXM9-4WXD> (noting that federal officers' presence in Portland followed President Trump's promulgation of an executive order to protect federal property).

10. See *infra* notes 46-47 and accompanying text.

11. See, e.g., Memorandum from David J. Barron, Acting Assistant Att'y Gen., Off. of Legal Couns., to Eric Holder, Att'y Gen. 12, 41 (July 16, 2010), <https://perma.cc/A667-CMUZ>.

12. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 96-97 (2007).

13. *Id.* at 97.

jurisdiction or reasoning. The Office's work product is subject to fewer legal checks than a bill or a court opinion, so it is natural that many have focused on transparency reforms like the SUNLIGHT Act. A formal publication system theoretically would temper the Office's most extreme legal positions, in turn engendering a greater respect for individual liberty and the separation of powers. Unfortunately, it is highly unlikely that a transparency bill will ever become law. Even in eras of greater cooperation between the President and Congress, it is difficult to imagine the executive branch signing away even a small portion of its ability to interpret the law or a veto-proof majority of Congress supporting the legislation. Indeed, a bill like the SUNLIGHT Act might even be unconstitutional according to adherents of the unitary executive theory because it would, in effect, unduly impinge on the President's obligation to take care that the nation's laws be enforced.<sup>14</sup>

Transparency is not the only approach that reformers have identified to constrain the OLC. Others would go much further, completely reimagining how the executive branch interacts with the law. But some of these proposals might require a constitutional amendment to implement—an even taller order than overcoming a presidential veto.<sup>15</sup> Taking a less ambitious approach, previous administrations have published internal lists of interpretive norms for OLC lawyers,<sup>16</sup> essentially relying on the Office policing itself. Even internally, however, Presidents of both major parties are reluctant to clip their own wings, especially in an era in which the executive branch plays such a crucial role in the development and enforcement of policy. The Trump Administration's maximalist approach to executive power through the OLC was nothing new, and it is clear that existing proposals to combat this approach to the law are unlikely to succeed in practice.

With that in mind, this Note puts forward an alternative set of constraints on the OLC. Instead of introducing yet another bill that has no chance of surviving the President's veto or issuing yet another eminently worthy set of interpretive norms that OLC lawyers will not always meet, we should focus on reforms that stand a real chance of mitigating the Office's abuses of authority. Instead of completely restructuring how the executive branch makes law and interprets the Constitution, we should take the OLC as it stands and focus on

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14. And a majority of the Supreme Court might agree. *See* *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020) (“Under our Constitution, the ‘executive Power’—all of it—is ‘vested in a President,’ who must ‘take Care that the Laws be faithfully executed.’” (first quoting U.S. CONST. art. II, § 1, cl. 1; and then quoting *id.* art. II, § 3)). For a more thorough discussion of *Seila Law*'s implications for the constraints this Note discusses, see notes 230-37 and the accompanying text below.

15. *See infra* notes 71-72.

16. *See, e.g.,* *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 126-28 (1996).

changing how the Office operates today. Though our inability to rely on the White House as a partner in this project largely prevents us from directly changing how the OLC actually interprets the law, plenty of reforms—focusing on, for example, the Office’s personnel and increased public scrutiny—remain available. These indirect constraints are less likely to require the President’s signature on a bill or buy-in from the President’s appointees.

The most effective indirect constraints rely on the existing institutional capacities of actors outside of the executive branch. Of the other possible standard-bearers for this approach, none possesses the power and constitutional prerogative of the United States Senate Judiciary Committee. The Committee’s privileged role in the confirmation of Article III judges, its oversight jurisdiction over the DOJ, and its position at the intersection of law and electoral politics combine to make it an especially compelling institution to constrain the OLC. These traits allow the Committee and its members to meaningfully alter how the Office operates while limiting obstruction from the executive branch.

The remainder of this Note proceeds as follows. In Part I, I briefly review the history of executive-branch legal interpretation, which dates to the beginning of the Republic. Though the OLC is a far more sophisticated, formal body than its predecessors, the historical development of executive interpretive power is a useful lens through which to understand how the Office operates. I then discuss some of the most infamous incidents in which the OLC’s work product strayed from the legal mainstream and prioritized the President’s agenda over individual rights or the separation of powers. These episodes—especially the OLC’s deeply strained justification for torture in the aftermath of the September 11, 2001, terrorist attacks—catalyzed much of the reform literature this Note analyzes, so it is important to understand to what exactly scholars were reacting.

Part II reviews the prior proposals that academics and OLC alumni have offered to constrain or otherwise restructure the executive branch’s political-legal apparatus. These proposals range from the truly radical—replacing the OLC with an executive-branch analogue to the Supreme Court to resolve interagency disputes—to the narrow, such as adopting a norm in favor of *stare decisis* in all OLC decisionmaking. I divide the proposals into direct and indirect constraints. As these terms suggest, direct constraints act specifically on the OLC’s operation rather than on some other process that influences how the Office’s lawyers work (by altering the incentive structure surrounding the writing process). They either limit the OLC’s jurisdiction or they alter the manner in which its lawyers actually write their opinions. These direct constraints include the many proposed interpretive norms that OLC alumni have developed in recent decades. Indirect constraints may have the same effects as direct constraints, but they involve an additional step in carrying out the policy. They may deprive the President of his or her desired personnel or

increase public scrutiny of OLC opinions, thereby incentivizing improved legal reasoning and greater respect for fundamental constitutional values. Indirect constraints are important policy prescriptions, but only some of them stand a realistic chance of actually limiting the OLC's worst excesses.

Part III then explains why the Senate Judiciary Committee is well positioned to reform the OLC by imposing three distinct indirect constraints. First, the Committee's jurisdiction allows it to contemporaneously dig into the merits of the OLC's opinions and its operations more generally. Second, the Committee's crucial role in judicial nominations allows it to provide a retrospective check when it vets the Office's many illustrious alumni for lifetime appointments to Article III courts. Finally, as elected officials, the Committee's members are more likely to jealously guard their own institutional role in constitutional lawmaking, and they have the visibility and democratic legitimacy to do so effectively. The Part concludes with an examination of some legitimate concerns about the efficacy of working through the Senate to constrain the OLC. I argue that the Committee faces fewer pragmatic headwinds than other actors and explain why its members could constrain the OLC without unnecessarily inflaming partisan tensions on Capitol Hill.

## **I. The President's Legal Advisors**

### **A. The Executive Branch and the Constitution**

To understand the need for effective constraints on the OLC, it is important to first review the bureaucratic ecosystem and legal framework in which the President makes and interprets the law. Executive legal interpretation is a longstanding practice: Presidents have always consulted their advisors about the extent of their constitutional authority, and it has been clear since the early Republic that the executive cannot simply turn to the courts for an advisory opinion.<sup>17</sup> George Washington engaged in an extended colloquy with his cabinet regarding the constitutionality of a national bank.<sup>18</sup> And Attorney General William Wirt, who served in the Monroe and Quincy Adams Administrations, provided his legal opinion on various issues, including

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17. See *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 409 (1792) (expressing doubt that the case could proceed without adversarial parties because allowing it to do so would result in an advisory opinion).

18. Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1317 (2000) (citing Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General's First Constitutional Law Opinions*, 44 DUKE L.J. 110, 112 (1994)).

the breadth of the appointments power.<sup>19</sup> This advisory authority has been codified by statute since the Judiciary Act of 1789.<sup>20</sup> The Attorney General is to “give his advice and opinion on questions of law when required by the President” and advise other executive-branch departments.<sup>21</sup>

But it was not until 1933 that Congress specifically delegated opinion-writing authority to the DOJ, and not until 1950 that it vested these powers in an office called the Executive Adjudications Division.<sup>22</sup> Three years later, that office became the OLC.<sup>23</sup> OLC lawyers originally prepared opinions for the Attorney General to publish, but the entire practice has been consolidated within the OLC since the 1960s.<sup>24</sup>

By 1969, the OLC had much of the authority that the Office currently possesses. It could draft formal opinions for the Attorney General, advise executive-branch agencies, review the legality of regulations and executive orders, provide feedback on legislation the President planned to introduce in Congress, and evaluate the Attorney General’s proposed orders.<sup>25</sup> The OLC’s authority is largely (but not completely) discretionary. The OLC must conduct its “Orders Practice,” as Cornelia Pillard called it, reviewing the constitutionality of all executive orders and Attorney General orders before their final approval.<sup>26</sup> Its “Bill Comments Practice”—constitutional scrutiny of all bills the DOJ believes “ha[ve] a significant chance” of congressional approval—engages attorneys in similar work on legislation.<sup>27</sup> The OLC’s adjudicative work and its less formal advisory work, on the other hand, are entirely discretionary functions, whereby outside actors request the Office’s

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19. Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1471-72 (2010); see also *NLRB v. Noel Canning*, 573 U.S. 513, 605-07 (2014) (Scalia, J., concurring in the judgment).

20. Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 819 (2017).

21. 28 U.S.C. §§ 511-513.

22. Renan, *supra* note 20, at 819 & n.44.

23. *Id.* at 819 n.44; see also Foreword, 1 Op. O.L.C. Supp., at vii (2013).

24. Renan, *supra* note 20, at 819.

25. See 34 Fed. Reg. 20,388, 20,390-91 (Dec. 31, 1969) (codified as amended at 28 C.F.R. § 0.25). These powers persist today, with minor additions, such as an admonition to respect federalism issues pursuant to a Reagan-era executive order updated during the Clinton Administration. See 28 C.F.R. § 0.25 (2020); Exec. Order No. 12,612, 3 C.F.R. 252 (1988); Exec. Order No. 13,132, 3 C.F.R. 206 (2000).

26. See Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 712 (2005); Morrison, *supra* note 19, at 1460 (noting that an exception to the discretionary rule “involves review of proposed executive orders for form and legality”).

27. Pillard, *supra* note 26, at 711-12, 712 n.110 (“OLC sought to review every bill introduced that, in the view of the Department of Justice’s Office of Legislative Affairs, had a significant chance of progressing through the legislative process to enactment.”).

intervention.<sup>28</sup> This creates a problematic incentive structure for the Office: If the OLC cannot provide a legal basis for a proposed executive action, it may find itself sidelined in pressing deliberations, with the President turning to other executive-branch offices willing to provide the necessary legal justification.<sup>29</sup>

The OLC's positionality thus forces its lawyers to occupy two very different roles: one as the arbiter of interagency disputes and other legal questions bearing on the executive branch, and another as a source of legal authority for presidential policy implementation on both executive orders and pending legislation. This unwieldy combination<sup>30</sup> has led to debate among scholars over how much deference the OLC is obligated to show the President throughout the interpretive process.<sup>31</sup> Proponents of a maximalist approach, often relying on the unitary executive theory,<sup>32</sup> argue that the Office has little authority to meaningfully dissent.<sup>33</sup> Legitimate constraints on the President, these maximalists believe, come from voters via the ballot box or from formal impeachment by Congress.<sup>34</sup> If an OLC lawyer believes a policy is unlawful,

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28. *Id.* at 713-14 (“Nobody is required to seek a legal opinion from OLC. Each potential client agency, department, or office has its own lawyers and they are free to resolve issues, including constitutional issues, on their own.”); Morrison, *supra* note 19, at 1460-61.

29. See, e.g., Adam Serwer, *Obama Disregarding OLC on Libya Is a Big Deal*, AM. PROSPECT (June 20, 2011), <https://perma.cc/C3UQ-788Q>.

30. Pillard, *supra* note 26, at 736 (“OLC stands in an ambiguous role between judge of and counsel to the executive, and the awkward coexistence of the client-driven and neutral-expositor models leads to confusion and inconsistency on the part of OLC lawyers about what role they properly play.”).

31. Compare Morrison, *supra* note 19, at 1502 (“OLC’s role is to provide *its* best view of the law, which is different from the job of an advocate but also need not carry the pretense of ‘true’ neutrality.”), and Moss, *supra* note 18, at 1305-06 (describing the “neutral expositor model” of OLC operations and arguing that the Office has an obligation to seek “the *best* view of the law” on a given issue with limited flexibility to incorporate White House policy), with Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 449 (1993) (“[T]here is no obvious reason for [the President] to have less freedom than private clients to require from his lawyers the kind of legal advice he thinks will be most useful to him.”).

32. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 570, 595-96 (1994) (identifying the Vesting Clause of Article II of the Constitution as the source of “a general grant of the ‘executive Power’” that belongs to “the President alone . . . because the Constitution establishes that the President *exclusively* controls the power to execute all federal laws”).

33. See GOLDSMITH, *supra* note 12, at 41. Goldsmith recounts an argument between himself and Vice President Dick Cheney’s advisor David Addington, who admonished the then-head of the OLC: “The President has already decided that terrorists do not receive Geneva Convention protections . . . . You cannot question his decision.” *Id.*

34. See *Trump v. Mazars USA, LLP*, 940 F.3d 710, 750-51 (D.C. Cir. 2019) (Rao, J., dissenting) (arguing that, in the related context of interbranch conflicts, “allegations of illegal  
*footnote continued on next page*”).

then the only legitimate course of action under this view is to (perhaps noisily) resign.

Critics of the maximalists have articulated various alternative approaches, including limitations on the President's ability to influence federal agencies' substantive policy decisions,<sup>35</sup> a renewed emphasis on lawyers' professional obligation to provide independent legal advice,<sup>36</sup> and a new "duty-based" theory designed to reinforce respect for the rule of law.<sup>37</sup> In the national-security context, these critics seek to depoliticize the policymaking process<sup>38</sup> or recommit the presidency to a "reciprocity model" of war powers shared between the executive branch and Congress.<sup>39</sup> Some argue that the OLC should not exist at all.<sup>40</sup> Other critics envision an Office that treads far more lightly where individual rights are implicated.<sup>41</sup>

## B. A History of Controversy

In practice, the theoretical debates discussed above appear to be moot. No matter the President's political party or their theory of executive power, the

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conduct against the President cannot be investigated by Congress except through impeachment"), *vacated*, 140 S. Ct. 2019 (2020); *see also* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1211 (2014) ("Removal also has a number of benefits for administration, including that it resolves lingering uncertainty about the constitutionality of independent agencies and promotes a kind of political accountability through the possibility of presidential control."); Lund, *supra* note 31, at 480 (explaining that the "OLC is presumed *not* to behave like a court, but rather as a servant of the policy concerns of the politically accountable President").

35. *See, e.g.*, Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 966 (2001) ("[A]lthough the president's ability to remove agency heads gives him enormous power to influence their decisions, it does not give him the authority to dictate substantive decisions entrusted to them by law.").
36. *See* Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1932-33 (2008) (discussing the value in having an Attorney General who adheres to the American Bar Association Model Rules of Professional Conduct, including rules requiring lawyers to provide "candid advice" (quoting MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 1983))). Spaulding goes on to identify the OLC as a key space in which to implement this professional-independence requirement. *Id.* at 1977-78.
37. *See generally* David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 82-83 (2009) ("The provisions [of the Constitution] most directly speaking to the relationship between the executive branch and lower government officials embrace duty and reject unilateral presidential control over the executive branch, a reading confirmed unequivocally by the pre-ratification history.").
38. BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 143-46 (2010).
39. *See* Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169, 1170-75 (2006).
40. Bruce Ackerman, *Abolish the White House Counsel*, SLATE (Apr. 22, 2019, 3:47 PM), <https://perma.cc/2UMT-4W9D>.
41. *See, e.g.*, Morrison, *supra* note 19, at 1521-24.

OLC has generally operated as an integral tool in the expansion of presidential authority.<sup>42</sup> Across administrations, the Office's opinions have prioritized the President's prerogatives over individual liberty and the separation of powers. The Trump OLC was far from a pioneer in this regard, and the criticism that the Trump Administration faced is not new. President Barack Obama sought and received authority from the OLC to kill American citizens like Anwar al-Awlaqi without the full benefit of due process and other constitutional rights.<sup>43</sup> The OLC gave presidential signing statements constitutional legitimacy during the Clinton Administration.<sup>44</sup> During the Reagan Administration, the OLC asserted broad authority for the President's agents—including Iran-Contra protagonist Lieutenant Colonel Oliver North—to make foreign policy without interference from Congress.<sup>45</sup>

Most infamously, the OLC provided President George W. Bush with the legal justification to engage in “enhanced interrogation techniques” like waterboarding and sleep deprivation to extract information from detainees.<sup>46</sup> The “torture memos,” which Deputy Assistant Attorney General John Yoo and Assistant Attorney General Jay Bybee drafted together, were part of a wave of documents giving unprecedented leeway to the President in the conduct of the so-called global war on terror.<sup>47</sup> Because the White House limited circulation of the memos, however, few were able to scrutinize the faulty reasoning behind them until years later.<sup>48</sup> Not only had Yoo and Bybee given the United States the green light to torture, but they had also papered over deep uncertainties in the law and employed strained statutory-interpretation

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42. This is especially true in the national-security context. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 712 (2008) (noting “an increased willingness on the part of modern Presidents to assert wartime prerogatives”).

43. Memorandum from David J. Barron, *supra* note 11, at 38-41.

44. ACKERMAN, *supra* note 38, at 90.

45. See Harold Hongju Koh, Comment, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 516-17 (1993) (noting with concern the Reagan OLC's willingness to defend North's conduct retroactively, increasing the risk that it would deliver “precooked” conclusions).

46. See generally Memorandum from Jay S. Bybee, Assistant Att'y Gen., Off. of Legal Couns., to Alberto R. Gonzales, Couns. to the President (Aug. 1, 2002), <https://perma.cc/3D8T-6PLE> (concluding that a statute criminalizing the torture of a person outside the United States would not apply to enemy combatants for both statutory and constitutional reasons). For further discussion of the methods that the CIA employed to torture detainees and the representations that it made to the OLC in seeking legal cover, see S. REP. NO. 113-288, at 33-44, 409-19 (2014).

47. Renan, *supra* note 20, at 833-34.

48. *Id.* at 834.

techniques to arrive at a pro-administration position.<sup>49</sup> The memos' disclosure led to international outcry.<sup>50</sup>

The Trump OLC continued this bipartisan trend. The Office's lawyers provided legal justification for the first, most radical iteration of the so-called travel ban.<sup>51</sup> The OLC also repeatedly excused the President and his senior advisors from compliance with basic congressional oversight.<sup>52</sup> OLC opinions have long aggrandized executive power at the expense of the legislative branch,<sup>53</sup> but the Office rarely has been so brazen in protecting the President from scrutiny.<sup>54</sup> Given the Office's persistent pliancy and the continued accumulation of presidential power, it is time to reexamine the reform literature through the lens of the Trump Administration's conduct. In doing so, it becomes clear that the most effective OLC constraints will come from outside the executive branch's political-legal apparatus and must, wherever possible, avoid requiring the President's approval of a specific policy.

## II. Attempts at Reform

The torture memos in particular spawned a wide range of recommendations for reforming the OLC's practices.<sup>55</sup> Academics and OLC alumni contributed to a vigorous debate about the appropriate way to, in Randolph Moss's words, push the Office's work product toward the "best view of the law."<sup>56</sup> This discourse persisted through the Obama Administration,

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49. *Id.* at 833 n.119 (citing OFF. OF PRO. RESP., U.S. DEP'T OF JUST., REPORT: 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 159-60 (2009)); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1568 (2007).

50. *See, e.g.*, Annie Lowrey, *Spain to Indict the "Bush Six" over Torture*, FOREIGN POL'Y (Apr. 14, 2009, 2:39 PM), <https://perma.cc/22H9-V6SX> (noting that Spanish prosecutors planned to indict six Bush Administration officials, including Bybee and Yoo, over allegations that five Spanish citizens had been tortured at Guantanamo Bay).

51. Memorandum from Curtis Gannon, Acting Assistant Att'y Gen., Off. of Legal Couns., to President Donald J. Trump 1-2 (Jan. 27, 2017), <https://perma.cc/L8EX-V64Q>.

52. *See supra* notes 4-7 and accompanying text.

53. *See supra* notes 42-46 and accompanying text.

54. In this respect, the OLC's work was not an outlier within the DOJ. *See* Kathleen Clark, *The Lawyers Who Mistook a President for Their Client*, 52 IND. L. REV. 271, 287-91 (2019) (explaining how DOJ lawyers adopted a novel, strained reinterpretation of the Emoluments Clause to protect President Trump once he took office).

55. *See, e.g.*, ACKERMAN, *supra* note 38; Johnsen, *supra* note 49; Morrison, *supra* note 19; Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn't Let the Terrorists Win*, 57 U. KAN. L. REV. 579 (2009).

56. Moss, *supra* note 18, at 1321.

especially regarding the al-Awlaqi memo<sup>57</sup> and the President's decision to ignore an informal OLC assessment concluding that continued military intervention in Libya was not authorized under the War Powers Resolution.<sup>58</sup>

Commentators have developed a diverse set of reform proposals that, as I explained above,<sup>59</sup> can be classified as either direct or indirect constraints on the OLC. But no matter how these reforms seek to influence the Office's work product, they tend to proceed from a common premise, which this Note also adopts: OLC opinions should reflect not just a colorable view on a legal issue, but the "best view of the law."<sup>60</sup> Contrary to the maximalists, these commentators argue that the President's policy goals are immaterial (or at least less relevant) to the legal advice the Office should be rendering.<sup>61</sup> In their view, the accountability that the ballot box offers in checking the President is simply insufficient to protect the rule of law, because permitting politics or policy considerations to "override the best view of the law" is "fundamentally inconsistent with the concept of law itself."<sup>62</sup>

The OLC is prone to overstepping its bounds on behalf of the President in cases involving individual liberty<sup>63</sup> and the separation of powers.<sup>64</sup> At the very least, when operating in areas where their opinions are unlikely to be tested by an Article III court, the Office's lawyers should work with an overriding respect for these values. If the OLC's advice is going to provide legal cover for the deprivation of individuals' fundamental rights,<sup>65</sup> and meaningful review of its legal conclusions is largely unavailable,<sup>66</sup> the Office should be more, not less, cautious in how it develops its legal conclusions.

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57. See *infra* note 186 and accompanying text.

58. See Renan, *supra* note 20, at 839-40; Jack Goldsmith, Response Essay, *Executive Branch Crisis Lawyering and the "Best View,"* 31 GEO. J. LEGAL ETHICS 261, 262-63, 273-76 (2018); see also CHARLIE SAVAGE, POWER WARS: INSIDE OBAMA'S POST-9/11 PRESIDENCY 641-45 (2015).

59. See *supra* Introduction.

60. See, e.g., Moss, *supra* note 18, at 1309-12.

61. *Id.* at 1305-06.

62. *Id.* at 1327.

63. Pillard, *supra* note 26, at 738 (noting the "likelihood that executive branch constitutional interpretation systematically underappreciates threats that the government's own conduct poses to constitutional rights and liberties").

64. Neil Kinkopf argues that the legal infirmities of the torture memos flow from separation-of-powers issues. See Kinkopf, *supra* note 39, at 1169-71.

65. See *supra* notes 12-13 and accompanying text; Renan, *supra* note 20, at 831-32 ("OLC review can provide effective immunity for government actors engaged in implementing high-risk (legally) operations by removing the risk of criminal prosecution.").

66. See Norman W. Spaulding, Essay, *Independence and Experimentalism in the Department of Justice*, 63 STAN. L. REV. 409, 437 (2011) ("More than with agencies, partisan  
*footnote continued on next page*

The remainder of this Part reviews different constraints on the OLC that scholars and practitioners have offered and assesses both their efficacy and their likelihood of being adopted. It concludes that a specific set of indirect constraints—those that come from outside the executive branch—appear to be the most fruitful in terms of reform. By circumventing the President’s pen and avoiding reliance on self-regulation, this set of constraints is poised to rein in the OLC’s worst abuses where other reforms have failed to do so.

## A. Direct Constraints

As I discussed above, direct constraints take aim at the foundation of the executive-branch legal apparatus.<sup>67</sup> Proponents of these sorts of constraints often argue that the problem is not just how the OLC operates, but also how the President makes law overall. With that in mind, these proponents would either replace the OLC with an entirely new interpretive body or would leave it in place but fundamentally alter its role in the executive-branch political-legal apparatus. In this way, direct constraints vary widely in their ambition but all suffer from the same flaw: They require that the executive—either the President or the lawyers who interpret the Constitution at the DOJ—be on board in order to make them a reality.

### 1. Reimagining the executive branch

More dramatic direct-constraint reforms would completely alter how the President interacts with the Constitution. Neal Katyal has identified the fundamental tension between the neutral-expositor and advocacy approaches in the OLC’s work as the source of many of the controversies the OLC has generated.<sup>68</sup> Katyal would formally eliminate the Office’s adjudicatory responsibilities, creating a new “Director of Adjudication” position subject to for-cause removal to referee interagency disputes.<sup>69</sup> This new structure would increase the adversarial nature of executive-branch legal proceedings,

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appointment and removal in the Department of Justice invite the subordination of the laws to presidential will. And where secrecy precludes meaningful public, congressional, and judicial oversight of executive actions, there is no effective check on this abuse of power.”).

67. See *supra* Introduction.

68. Neal Kumar Katyal, Essay, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2336-37 (2006) (“When [the OLC’s] high-ranking officials become advocates, however, the system breaks down. . . . They are expected not only to adjudicate disputes but also to advise the President . . . . And in this climate, there is simply no way that OLC’s aspiration to be a neutral decision-maker can play out in practice.”); see also *supra* note 31.

69. Katyal, *supra* note 68, at 2337.

presumably leading to better-supported legal conclusions.<sup>70</sup> A more radical version of this approach, which would presumably require a constitutional amendment, would move the OLC's opinion-writing practice to a "Supreme Executive Tribunal" that would serve as an executive-branch analogue to the Supreme Court.<sup>71</sup> This independent tribunal would be free to disagree with the President when necessary and would develop a body of public legal doctrine that would serve as a legitimate foundation for executive action.<sup>72</sup> Lastly, as one student note argues, Congress could create a similar degree of independence while preserving the OLC's current structure by allowing OLC attorneys' removal for cause only.<sup>73</sup>

Others have focused on ameliorating the risks to civil liberties that flow from the OLC's nonadversarial structure while leaving the Office in place. Trevor Morrison has noted that the OLC's tendency to receive a request from a single party on a given issue—rather than briefing from two adversaries—can warp its decisionmaking process.<sup>74</sup> Morrison offers multiple solutions, the most compelling of which is a "civil liberties ombudsman" placed within the DOJ but outside of the OLC itself.<sup>75</sup> This neutral arbiter would review draft opinions, offering comments on the civil liberties issues implicated in a manner analogous to the DOJ Inspector General's authority under the USA PATRIOT Act.<sup>76</sup> Making the OLC more like a court could force the Office's lawyers to focus on a broader spectrum of legal arguments, moderating their ultimate decisions. Employing an ombudsman could thus operate like a more moderate version of the proposals that Katyal and others have offered.

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70. *See id.* at 2339.

71. ACKERMAN, *supra* note 38, at 141-46.

72. *Id.* at 143-46.

73. *See* Adoree Kim, Note, *The Partiality Norm: Systematic Deference in the Office of Legal Counsel*, 103 CORNELL L. REV. 757, 788-91 (2018) (arguing that for-cause removal protections would incentivize OLC lawyers to use their independent judgment while still allowing the President the flexibility to seek necessary legal advice). Though the Supreme Court did not reach this issue in its most recent removal-powers decision, it is possible that this structure would not survive a legal challenge. *See* *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2199-200 (2020) (reading Congress's power to confer for-cause removal protections on inferior officers as only reaching individuals with narrowly defined, mostly ministerial powers); *see also infra* notes 230-37 and accompanying text.

74. Morrison, *supra* note 19, at 1521 ("[E]xcept when the issue involves a jurisdictional or other dispute between two or more agencies, the issue tends to come to OLC in rather one-sided fashion. . . . This is worrisome, especially in matters pitting executive power against individual rights.")

75. *Id.* at 1523.

76. *Id.*

But the relative moderation of Morrison’s proposal does not do away with the concerns that more dramatic reimaginations of the OLC’s structure bring up. Lawyers acting in good faith can come to different conclusions about a given legal issue, and the President must have some flexibility to choose one approach over the other. For those who have a robust view of presidential power, the DOJ’s ability to advance the President’s agenda is an essential ingredient of a maximally effective executive-branch legal policy.<sup>77</sup> Working without the same broad latitude to promulgate novel legal arguments is an especially significant sacrifice in the national-security context, where the President has the authority to “push the law.”<sup>78</sup> With the OLC reduced to a neutral expositor, the President would only have the White House Counsel and the Office of the Solicitor General (OSG) to develop opinion-style advocacy work product.<sup>79</sup> Many may consider these offices sufficient, but they lack the patina of neutrality—and, therefore, legitimacy—that the OLC provides.<sup>80</sup>

More pragmatically, all of these reforms are likely to face a presidential veto if they arrive in the form of a bill passed by Congress. Given the executive branch’s expansive view of existing legislative authorization under both President Obama<sup>81</sup> and President Trump,<sup>82</sup> future commanders in chief are unlikely to willingly shed or limit their power to interpret the law as expansively as is colorable.

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77. See, e.g., John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 431 (1993) (“[T]he structure of constitutional interpretation the President and his subordinates employ should analyze separation of powers issues from the standpoint of the executive branch’s institutional interest. . . . [T]he permanent interests of the executive branch are likely to generate a coherent and articulated jurisprudence that has substantial continuity between administrations.”).

78. See Katyal, *supra* note 68, at 2336.

79. See Pillard, *supra* note 26, at 713-14.

80. Compare Ackerman, *supra* note 40 (noting that White House Counsel attorneys are “selected for their loyalty to the president”), with Moss, *supra* note 18, at 1309-12 (collecting support for the proposition that OLC attorneys should provide the President with objective legal advice). Moss concedes that one flaw in his “neutral expositor” model for the OLC is that it sacrifices democratic accountability in the quest for objectivity. Moss, *supra* note 18, at 1326 (“Because the President and his senior advisers are most directly accountable to the People, the government lawyer should, if at all possible, leave them with discretion to decide how to proceed.”).

81. For discussion of President Obama’s decision to continue military intervention in Libya, see note 58 and the accompanying text below.

82. See, e.g., Matt Zapotosky & Josh Dawsey, *How President Trump Came to Declare a National Emergency to Fund His Border Wall*, WASH. POST (Feb. 15, 2019, 5:12 PM PST), <https://perma.cc/P2Z6-NYZ3> (noting that the OLC approved Trump’s emergency declaration).

## 2. Internal codes of conduct and interpretive norms

Scholars and OLC lawyers also have proposed a variety of statements of purpose and ethical codes to govern OLC attorneys' opinion writing. In 1996, Assistant Attorney General Walter Dellinger articulated a robust, civic-minded vision of executive-branch constitutional lawmaking: "Executive branch lawyers thus have a constitutional obligation, one grounded . . . in our fundamental duty to safeguard the liberty of the people, to assert and maintain the legitimate powers and privileges of the President against inadvertent or intentional congressional intrusion."<sup>83</sup>

The experience of the torture memos, however, led scholars to flesh out these goals. In 2004, a group of OLC alumni led by Dellinger and Dawn Johnsen issued a ten-point statement of principles that strongly endorsed Moss's "best view" approach to opinion writing.<sup>84</sup> While the statement acknowledged that the OLC's "responsibilities include facilitating the work of the executive branch and the objectives of the President," it especially disfavored this advocacy-focused model in situations where a court is unlikely to review the OLC's advice.<sup>85</sup>

The OLC's leaders also developed their own conception of a proper interpretive model in the aftermath of the torture memos. In 2005, Principal Deputy Assistant Attorney General Steven Bradbury published a short best-practices memorandum to that effect.<sup>86</sup> Bradbury's approach aligned with the 2004 alumni statement in many respects. The memorandum encouraged opinions to be narrow responses to discrete legal questions.<sup>87</sup> It established a robust drafting and editing process designed to "provide the correct answer on the law, taking into account all reasonable counterarguments."<sup>88</sup> Bradbury's guidelines also developed an involved review procedure that avoided the isolation in which Bybee and Yoo were able to operate when drafting the torture memos.<sup>89</sup>

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83. See *The Constitutional Separation of Powers Between the President and Congress*, 20 *Op. O.L.C.* 124, 126, 181 (1996).

84. WALTER E. DELLINGER ET AL., *PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL* (2004), reprinted in Johnsen, *supra* note 49, app. 2; Johnsen, *supra* note 49, app. 2, at 1604. Moss was a signatory of the statement as well. Johnsen, *supra* note 49, app. 2, at 1610.

85. Johnsen, *supra* note 49, app. 2, at 1605-06.

86. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Off. of Legal Couns., to Att'ys of the Off. (May 16, 2005), <https://perma.cc/UC33-NCNS>.

87. *Id.* at 1.

88. *Id.* at 2-3.

89. See *id.*

In 2010, David Barron updated Bradbury's guidelines. His memo aligned OLC interpretive practices with those that Article III judges would employ.<sup>90</sup> As Morrison observes, Barron's memo, like its predecessor, was vague about what weight to give preexisting OLC opinions.<sup>91</sup> It also did not provide clear guidance for resolving tensions between the President's prerogatives and the "best view" of the law, merely reserving the right to offer alternate paths to lawfully accomplish the same goals.<sup>92</sup> It did, however, echo and build on the collaborative review process that Bradbury expounded in his earlier memo.<sup>93</sup>

On top of these comprehensive guidelines, some scholars have proffered specific interpretive norms to maximize the legitimacy of the OLC's work. Harold Koh has proposed formalizing a presumption against the OLC offering legal advice after the President has "locked into" a policy.<sup>94</sup> Both Koh and Morrison have encouraged the OLC to adhere to an executive-branch equivalent to *stare decisis* to guide the overruling of prior opinions.<sup>95</sup> Though she stops short of importing the adversarial system wholesale into the OLC, Pillard argues that attorneys should "[s]upply[] the 'missing-plaintiff perspective'" in opinions both to "counteract the executive tendency to reflexively overprotect its own prerogatives" and to give appropriate weight to individual liberty.<sup>96</sup> And Peter Margulies has developed a substantive test to help OLC lawyers avoid violating constitutional norms. His test relies on expansive interpretations of executive power only where serious national-security or human-rights concerns are implicated.<sup>97</sup>

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90. See Memorandum from David J. Barron, Acting Assistant Att'y Gen., Off. of Legal Couns., to Att'ys of the Off. 2 (July 16, 2010) ("On any issue involving a constitutional question, OLC's analysis should focus on traditional sources of constitutional meaning, including the text of the Constitution, the historical record illuminating the text's meaning, the Constitution's structure and purpose, and judicial and Executive Branch precedents interpreting relevant constitutional provisions. Particularly where the question relates to the authorities of the President or other executive officers or the allocation of powers between the Branches of the Government, precedent and historical practice are often of special relevance.").

91. Morrison, *supra* note 19, at 1452-54.

92. Memorandum from David J. Barron, *supra* note 90, at 2.

93. *Id.* at 3-4.

94. See Koh, *supra* note 45, at 515, 523.

95. *Id.* at 516, 523; Morrison, *supra* note 19, at 1504-05.

96. Pillard, *supra* note 26, at 746. This approach flows from the same concern that leads Morrison to propose a civil liberties ombudsman. See *supra* notes 74-76 and accompanying text.

97. Peter Margulies, *Reforming Lawyers into Irrelevance?: Reconciling Crisis and Constraint at the Office of Legal Counsel*, 39 PEPP. L. REV. 809, 851 (2012) ("The substantive test has three requirements. First, action that pushes the envelope [on executive power] must have a compelling sovereignty- or human rights-centered rationale, defined respectively as the avoidance of irreparable harm to the nation or the promotion of  
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Scrupulous adherence to any of these norms would help safeguard individual liberty and respect the constitutional structure. No matter their precise phrasing, however, the repetition of these proposals and their sheer number may be signs of their inefficacy. They are purely self-executing, and there is no guarantee that the Assistant Attorney General and his or her subordinates will stand by norms in the face of serious pressure from the President.<sup>98</sup> Presidents from both parties have circumvented existing OLC safeguards when necessary to achieve their policy ends.<sup>99</sup> Indeed, it was Barron's OLC that laid the legal foundation for the targeted killing of al-Awlaqi.<sup>100</sup>

In any event, burdening individual lawyers with the task of remedying an institutional problem is a mistake for several reasons. First, the sheer political and bureaucratic force that the President can bring to bear on a legal issue is simply too much for one DOJ lawyer to overcome. One dissenting voice does not stand much of a chance when up against all of the President's allies inside and outside the executive branch. Second, these lawyers may rightfully believe that their job is to serve the democratically elected President. If critics have a problem with the work the OLC is doing, they should take it up with the President.<sup>101</sup> Third, and perhaps more cynically, many appointees to the Office are going to share a partisan affiliation with the President. One does not join the OLC to throw sand in the wheels of the President's policy agenda. As I discuss below, many OLC lawyers are at the beginning of illustrious careers, and they may be loath to jeopardize their chance at a future position on the federal bench.<sup>102</sup> Any one of these reasons may be sufficient to deter an OLC lawyer from hewing faithfully to Bradbury's or Barron's guidelines.

For now, the OLC does not appear likely to embrace direct constraints on its conduct. To implement the more dramatic reforms I discuss, scholars and activists would have to convince a President to help reverse a decades-long bipartisan trend of lawmaking authority flowing into the executive's hands.

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emerging norms of liberty or equality. Second, the action taken must have a reasonable chance of ratification. Third, the action cannot violate any other constitutional norms.”).

98. Cf. Spaulding, *supra* note 36, at 1977-78 (advocating for an enforceable version of Dellinger and Johnsen's guidelines).

99. See Jack Balkin, *George W. Obama and the OLC*, BALKINIZATION (June 18, 2011), <https://perma.cc/44SG-WBB4> (noting that President Obama “bypassed [the] same careful set of procedures” that President Bush had when developing the torture memos “by canvassing various lawyers until he found opinions he liked better than the OLC’s” regarding military intervention in Libya); *supra* notes 4-7 and accompanying text.

100. See Memorandum from David J. Barron, *supra* note 11, at 12, 38, 41.

101. See *supra* notes 30-34 and accompanying text.

102. See *infra* Part III.B.3.

Even less formal direct constraints appear to lack teeth in the hands of the OLC's lawyers because deference to the White House is fundamental to the Office's *modus operandi*.<sup>103</sup>

## B. Indirect Constraints

Though they do not directly impact the OLC's written work product, indirect constraints on the Office are no less potent. In addition, indirect constraints—which come from civil servants, members of Congress, and the public—present more opportunities to actually change how OLC lawyers operate by circumventing the President's pen.

### 1. Transparency

Several scholars support a presumption in favor of publishing OLC opinions to bolster executive action's legitimacy and allow outside parties to assess the validity of the opinions' reasoning.<sup>104</sup> While none of the measures proposed would mandate universal disclosure, they do address one of the primary sources of controversy in the OLC's recent past: The Office's most objectionable opinions rarely face contemporaneous scrutiny from Congress or the public. For example, the memo justifying the targeted killing of Anwar al-Awlaqi only came to light because of extensive Freedom of Information Act (FOIA) litigation, culminating in its publication three years after the United States had carried out the operation.<sup>105</sup>

Transparency reforms come in several flavors. Sudha Setty takes the most formal approach, proposing an act of Congress to force publication of almost every OLC opinion.<sup>106</sup> Koh also defines transparency broadly, stressing the importance of "prompt and full publication" of opinions, especially when they overrule prior legal interpretations, though he does not endorse a specific

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103. See Erica Newland, *I Worked in the Justice Department. I Hope Its Lawyers Won't Give Trump an Alibi*, WASH. POST. (Jan. 10, 2019), <https://perma.cc/6C9Q-HWDD> (arguing that OLC opinions too often defer to the President's factual findings and accept his facial neutrality, damaging the Office's legal judgment).

104. See, e.g., Koh, *supra* note 45, at 517 ("Publication serves at least three purposes: first, accessibility; second, unveiling the factual predicate upon which an opinion is based; and third and most important, to prevent the client . . . from stripping a carefully nuanced opinion of all its subtleties and thereby reducing it to the simplistic conclusion that 'OLC says we can do it.'").

105. See *N.Y. Times Co. v. U.S. Dep't of Just.*, 756 F.3d 100, 103-104 (2d Cir.) (ordering the publication of a redacted version of the memorandum), *amended on denial of reh'g*, 758 F.3d 436 (2d Cir.), *and supplemented*, 762 F.3d 233 (2d Cir. 2014).

106. Setty, *supra* note 55, at 601-02, 605 ("A new disclosure requirement should apply to almost all OLC opinions and result in a timely disclosure to the public whenever possible.").

enforcement mechanism.<sup>107</sup> Morrison takes a somewhat narrower view, focusing on the importance of disclosure when OLC opinions depart from prior executive-branch legal interpretations.<sup>108</sup> Pillard suggests a similar approach.<sup>109</sup>

The publication guidelines from heads of the OLC have incorporated similar transparency norms. Bradbury's 2005 memorandum provided several rationales for preserving the secrecy typical of the Office's opinions, but it did concede that opinions of "significant practical interest and benefit to lawyers outside the Executive Branch, or of broader interest to the general public" would be published when confidentiality was not a bar.<sup>110</sup> Barron's updated guidelines did call for a presumption in favor of publication for all significant OLC opinions,<sup>111</sup> but they offered OLC lawyers plenty of loopholes. The guidelines' gauzy commitment to "not withhold an opinion merely to avoid embarrassment to the Office or to individual officials"<sup>112</sup> still gave the OLC plenty of leeway to prevent publication. Embarrassment is a nebulous criterion for opinion publication, so it is not clear how much additional transparency was gained by doing away with this justification. More importantly, the guidelines did not disavow the use of the numerous exemptions to FOIA as a broad bar against opinion publication.<sup>113</sup>

Congress has tried to enter the fray as well. The SUNLIGHT Act would operate both prospectively and retrospectively, creating a timeline for the publication of every opinion that national security (and other limited constraints) would allow.<sup>114</sup> In addition, comprehensively enforcing existing laws—including FOIA—could improve opinions' accessibility. Indeed, since 2016, litigators have attempted to use FOIA to force publication of wide swaths of the OLC's work, albeit with mixed results.<sup>115</sup> The FOIA Improvement Act of

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107. Koh, *supra* note 45, at 523.

108. Morrison, *supra* note 19, at 1518.

109. Pillard, *supra* note 26, at 750-51 ("Much broader and more consistent publication would serve the public's interest in knowing and monitoring the government's constitutional views. Surely, when OLC overrules prior public opinions, it must publish its changed constitutional position. It also should do so when it takes a new position, departing from settled understandings of the law." (footnote omitted)).

110. Memorandum from Steven G. Bradbury, *supra* note 86, at 4.

111. Memorandum from David J. Barron, *supra* note 90, at 5.

112. *Id.* at 6.

113. *See id.* While Barron agreed that the OLC, like the rest of the executive branch, should not invoke all FOIA exemptions it legitimately could claim, the memorandum's language gave the Office plenty of space to invoke these exemptions where necessary.

114. H.R. 4556, 116th Cong. (2019), <https://perma.cc/9FZW-46GN>.

115. *See, e.g.,* Campaign for Accountability v. U.S. Dep't of Just., 486 F. Supp. 3d 424, 432 (D.D.C. 2020) (citing Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just., 922 F.3d  
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2016 included a sunset provision on the deliberative-process privilege for documents more than twenty-five years old,<sup>116</sup> but as of April 2021 the OLC had only released opinion titles through 1958.<sup>117</sup> While it appears the OLC may end up releasing up to 230 opinions through this litigation,<sup>118</sup> how recent or politically relevant those opinions will be remains an open question. Kel McClanahan has proposed declaring all OLC opinions legally binding, thus shedding them of attorney–client privilege for FOIA purposes,<sup>119</sup> but no such legislation has been enacted yet.<sup>120</sup> Thus, while litigators have had some luck obtaining OLC opinions through FOIA on an ad hoc basis,<sup>121</sup> it appears that universal publication via binding legislation or impact litigation is at best far off.

The deterrent effect that transparency would have on OLC lawyers is obvious. The possibility of review from OLC attorneys’ nongovernmental peers, journalists, and members of Congress could incentivize mainstream legal reasoning in opinions, tamping down on the OLC’s greatest interpretive

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480, 486–87 (D.C. Cir. 2019)) (declining to reconsider an earlier decision that OLC opinions are not automatically subject to the “reading-room provision” of FOIA).

116. Off. of Info. Pol’y, *OIP Summary of the FOIA Improvement Act of 2016*, U.S. DEP’T OF JUST., <https://perma.cc/6C6G-5YFH> (last updated Aug. 17, 2016). The deliberative-process privilege shields “advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966)). By its definition alone, one could imagine how easily OLC opinions fall within the privilege’s reach.
117. Seventh Joint Status Report at 2, *Francis v. U.S. Dep’t of Just.*, No. 19-cv-01317 (W.D. Wash. Apr. 16, 2021), ECF No. 26; *see also* Cristian Farias, *The Justice Department Can’t Keep Its Own Law Secret Forever*, POLITICO (Aug. 29, 2019), <https://perma.cc/X8SY-WTE4>.
118. *See* Fifth Joint Status Report at 3, *Francis*, No. 19-cv-01317, ECF No. 24.
119. Kel McClanahan, *How One Secretive Justice Department Office Can Sway the Whole Government*, WASH. POST (Sept. 26, 2019, 9:30 AM PDT), <https://perma.cc/KR8S-N92K> (“The executive branch treats the pronouncements of these lawyers as binding but then vigorously defends against their public release by claiming that they are just ‘advice’ from a lawyer to a client, except for opinions the office itself decides should be released . . . . The problem is, ‘controlling advice’ is an oxymoron, since advice is something the recipient is free to disregard, which is the opposite of controlling. The two competing interpretations given by executive branch lawyers, depending on the context, are completely irreconcilable . . .”).
120. The Transparency in Government Act of 2019, which included the SUNLIGHT Act as a component, contained FOIA reforms that might have reached OLC opinions, but the bill did not move forward in the House. *See* H.R. 5150, 116th Cong. §§ 611–618, 704 (2019), <https://perma.cc/WP62-HF2Q>; *Actions—H.R. 5150—116th Congress (2019–2020): Transparency in Government Act of 2019*, CONGRESS.GOV, <https://perma.cc/9874-P4SZ> (archived May 2, 2021).
121. *See, e.g., supra* note 105 and accompanying text.

excesses.<sup>122</sup> It is far less likely that a lawyer would rely on definitions of “severe pain” from completely unrelated statutes to justify certain interrogation techniques if he or she knew Congress was going to see that opinion in a few months.<sup>123</sup> In addition, transparency could create a virtuous cycle in which controversial published opinions could galvanize voters, who in turn could demand additional reforms. The public cannot demand changes to what it cannot scrutinize.<sup>124</sup> In this way, transparency satisfies a basic necessary condition of democratic legitimacy in executive action.

There are legitimate questions about how pragmatic or impactful any of these approaches would be. The President is likely to veto any legislative transparency mandate. And there is little incentive for an assistant attorney general or attorney general to self-regulate: Their goal is to position the OLC to provide the highest-quality, most-helpful advice to the President and executive-branch agencies and to maximize the success of executive policies. As history has shown, these values are sometimes incompatible with one another. Transparency faces legitimate criticism on its merits as well, even if safeguards are in place to protect classified information. If a novel legal approach in fact articulates the “best view” in a given circumstance, then transparency could have an undesirable chilling effect on the OLC’s lawyers if they fear public rebuke. Lastly, because the OLC often relies on prospective “clients” approaching it for advice, the possibility of publication could keep agencies from seeking the OLC’s opinion in the first place.<sup>125</sup> While there are clear benefits to democratic legitimacy to be found in transparency, it may not be the most realistic or effective primary strategy.

## 2. Mobilizing external actors

Reformers may find more success focusing on policies that require neither the President’s signature nor the implementation of a formal DOJ policy. Groups across the federal government and those outside of it altogether can mobilize to implement robust indirect constraints that would fundamentally

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122. Morrison, *supra* note 19, at 1519.

123. In the torture memos, Yoo and Bybee cited federal statutes that, in their own words, “define[ed] an emergency medical condition for the purpose of providing health benefits.” Memorandum from Jay S. Bybee, *supra* note 46, at 5-6.

124. See Pillard, *supra* note 26, at 750 (“The more the public understands what is at stake in executive constitutionalism, the more pressure it can bring to bear on the executive to do it fully and well.”).

125. *Id.* at 751. For a more detailed treatment of the drawbacks to applying a broad transparency regime to the OLC, see generally Eric Messinger, Note, *Transparency and the Office of Legal Counsel*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 239 (2014) (arguing that the costs of additional transparency outweigh the benefits because publication would limit the OLC’s effectiveness and would do little to strengthen the rule of law).

alter how the OLC operates. A few actors in particular merit mention, though for pragmatic reasons the constraints they could place on the OLC do not seem particularly actionable.

First, career lawyers within the executive branch could assert themselves and register their disagreement with the legal conclusions that the OLC has reached. Around 20,000 people work as lawyers in the federal government, and only a tiny fraction of them are “political lawyers” working in places like the White House Counsel’s Office and the OLC.<sup>126</sup> The vast majority of lawyers in the executive branch, then, are cut out of the political–legal debate. Pillard suggests changing this culture by including “vigilance about constitutional concerns” in executive-branch employees’ performance criteria.<sup>127</sup> Similarly, Katyal proposes importing the State Department’s “dissent channel” to the OLC to encourage government employees to seek answers to important constitutional questions.<sup>128</sup> In this way, the executive branch would have its own sort of internal separation of powers that constrains the OLC.<sup>129</sup>

Civil-service lawyers’ positions and professional identities, however, may limit their effectiveness in constraining the OLC. These career lawyers are bureaucrats committed to serving the public no matter who occupies the White House. In addition, recent events have made clear that there is a serious professional risk in speaking out. In the aftermath of the Senate’s refusal to convict President Trump of abuse of power, Trump fired multiple inspectors general whom he deemed disloyal.<sup>130</sup> Whatever the ethical or legal basis for these decisions, if even officials whose job description includes defending good governance can be fired without significant long-term political fallout,<sup>131</sup>

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126. David Fontana, Response, *Executive Branch Legalisms*, 126 HARV. L. REV. F. 21, 21–23 (2012) (distinguishing between missions of these offices and the “civil service legalism” that dominates the rest of the federal government’s legal apparatus).

127. Pillard, *supra* note 26, at 752.

128. See Katyal, *supra* note 68, at 2328–29, 2339 (“Like a court, the OLC has rules that enable aggrieved parties to bring their disputes to it. Those quasi-‘standing’ rules could be liberalized to permit more entities to seek the Director’s judgment. Bureaucratic overlap does this by creating more parties who can ‘sue.’ A legal dissent channel for employees, not only agencies, to refer legal questions could do even more.”).

129. See *id.* at 2324 (“Agency design can replicate some functional overlap of responsibilities among the branches.”).

130. See Melissa Quinn, *The Internal Watchdogs Trump Has Fired or Replaced*, CBS NEWS (updated May 19, 2020, 11:43 AM), <https://perma.cc/28SH-SDDP> (“In a span of six weeks, Mr. Trump has removed five officials from posts leading their respective agencies’ inspector general offices . . .”).

131. As I discuss below, one Republican senator did try to get President Trump to explain the firings by using his power to control the nominations process. See *infra* note 226 and accompanying text. But more aggressive responses did not materialize. See, e.g., Jack Goldsmith, *A Constitutional Response to Trump’s Firings of Inspectors General*, LAWFARE (June 10, 2020, 12:52 PM), <https://perma.cc/2CBU-TCJ7> (outlining more  
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bureaucrats with far less relevant purviews are unlikely to follow the example of the inspectors general. While it is true that the groups identified by Pillard and Katyal enjoy certain civil-service protections that the fired inspectors general did not, the firings raise serious questions about the likelihood that a DOJ dissent channel would see much use.

In addition, it is fair to wonder whether the modicum of democratic legitimacy that OLC lawyers possess—the current President appointed many of them—makes them better interpreters of the Constitution than the apolitical career lawyers whom Pillard and Katyal seek to empower. Indeed, many people may incorporate a presidential candidate’s views on the Constitution into their voting decisions.<sup>132</sup> Conservative support for President Trump derived in part from his commitment to nominate Article III judges who, for example, do not think the Due Process Clause of the Fourteenth Amendment guarantees the right to have an abortion.<sup>133</sup> The legal bureaucracy lacks even OLC’s somewhat-attenuated nexus with voters’ most recent preferences.

Second, the small, elite clique of lawyers to which the OLC’s attorneys belong could provide something of a social check on the Office. A position at the OLC often follows a clerkship for a Supreme Court Justice,<sup>134</sup> and the

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aggressive steps that Congress could have taken to protect the inspectors general); Kevin Breuninger, *House Democrats Introduce Inspector General Protection Bill After Trump Fires Several Watchdogs*, CNBC (updated May 22, 2020, 12:36 PM EDT), <https://perma.cc/8HPD-D385> (noting that Democratic members of the House Oversight Committee introduced a bill limiting the circumstances in which inspectors general can be fired); *Actions—H.R. 6984—116th Congress (2019-2020): Inspector General Independence Act*, CONGRESS.GOV <https://perma.cc/5JNT-WFB4> (archived May 2, 2021) (noting that Congress took no action on the bill beyond referring it to the Oversight Committee).

132. See Moss, *supra* note 18, at 1327 (“[T]he public may elect a President based, in part, on his view of the law, and that view should appropriately influence legal interpretation in that President’s administration.”).

133. See Michael Tackett, *Trump Fulfills His Promises on Abortion, and to Evangelicals*, N.Y. TIMES (May 16, 2019), <https://perma.cc/LM6N-F79C> (mentioning President Trump’s commitment to nominating pro-life judges); Philip Bump, *A Quarter of Republicans Voted for Trump to Get Supreme Court Picks—And It Paid Off*, WASH. POST (June 26, 2018, 12:23 PM PDT), <https://perma.cc/S735-WN53> (noting that 26% of Trump voters told pollsters that Supreme Court nominees were the “most important” reason they voted for Trump in 2016).

134. OLC political leadership during the Trump Administration was illustrative. Former Assistant Attorney General Steven Engel clerked for Justice Anthony Kennedy. Press Release, U.S. Dep’t of Just., Attorney General Sessions Welcomes Steven Engel as Assistant Attorney General for the Office of Legal Counsel (Nov. 7, 2017), <https://perma.cc/2UTH-F6Y3>. Other Trump political appointees to the OLC had equally illustrious resumes. For example, former Deputy Assistant Attorney General and Associate Deputy Attorney General Jennifer Mascott, currently a law professor, clerked for Justice Clarence Thomas. *Mascott, Jennifer*, GEO. MASON UNIV. ANTONIN SCALIA L. SCH., <https://perma.cc/LR42-VN37> (archived May 2, 2021). Judge Liam Hardy, who also clerked for Justice Thomas, served as Deputy Assistant Attorney

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Office's leaders often go on to illustrious careers in the judiciary, academia, or elsewhere.<sup>135</sup> OLC lawyers' ability to reap the fruits of their tenure in government depends in part on their fellow legal elites' desire to continue to work with them once they return to the private sector. Morrison's argument for increased transparency in OLC opinion publication relies in part on the power of this norm.<sup>136</sup> Though a skeptic of the OLC's place in a liberty-conscious executive branch, Bruce Ackerman also notes that peer criticism could play a meaningful role in checking the OLC's leaders.<sup>137</sup>

While such pushback surfaced occasionally in the Trump era<sup>138</sup> and intensified when President Trump tried to overturn his electoral defeat in the courts and in the halls of the Capitol,<sup>139</sup> galvanizing this group of elite lawyers does not seem like a particularly realistic long-term proposal. Of course, doing so would be socially uncomfortable because the OLC's attorneys are the group's law school classmates, fellow clerks, and former (or future) colleagues. And many might consider such scrutiny unseemly on the merits, analogizing to similar efforts to pressure Supreme Court Justices as they consider cases before them. Moreover, outside lawyers' ability to influence the OLC depends on the contemporaneous availability of the Office's opinions. One cannot check the

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General prior to his appointment to the United States Court of Appeals for the Armed Forces. *Hon. Liam Hardy*, UNIV. NOTRE DAME L. SCH., <https://perma.cc/NG9F-R5MK> (archived May 2, 2021). This dynamic has been present at the OLC since at least the late 1990s. *See* Pillard, *supra* note 26, at 736 n.194.

135. Heads of the OLC or its predecessors have become Supreme Court Justices (Chief Justice William Rehnquist and Justice Antonin Scalia), lower federal court judges (Judges Barron, Bybee, Moss, and Michael Luttig), attorneys general (Nicholas Katzenbach and William Barr), and solicitors general (Walter Dellinger and Ted Olson). A list of former OLC assistant attorneys general through 2013 is available at 1 Op. O.L.C. Supp., at iv-v (2013).
136. *See supra* note 122 and accompanying text.
137. *See* ACKERMAN, *supra* note 38, at 95-96 ("If opinion writers know that their words will be scrutinized by their professional peers, they will be less willing to engage in the doctrinal extremism displayed by the Yoo memos—or so it is hoped.")
138. For example, when President Trump fired Attorney General Jeff Sessions and appointed Matthew Whitaker as acting attorney general, Dellinger contested what would become the OLC's interpretation of a Supreme Court case that served as the basis for Whitaker's appointment. Walter Dellinger (@walterdellinger), TWITTER (Nov. 9, 2018, 2:12 PM), <https://perma.cc/3WNN-ZJLF> (discussing *United States v. Eaton*, 169 U.S. 331 (1898)); Designating an Acting Attorney General, 42 Op. O.L.C., 2018 WL 6131923, at \*1-2, \*12-14 (Nov. 14, 2018) (justifying the selection of Whitaker in reliance on *Eaton*).
139. *See, e.g.*, Jessica Silver-Greenberg, Rachel Abrams & David Enrich, *Growing Discomfort at Law Firms Representing Trump in Election Lawsuits*, N.Y. TIMES (updated Dec. 11, 2020), <https://perma.cc/82WY-PEAH>; Norman Eisen & Joanna Lydgate, *The Lawyers Who Pushed Trump's Falsehoods May Soon Be Done Lawyering*, WASH. POST (Feb. 3, 2021, 9:58 AM EST), <https://perma.cc/P5V7-NJ2W>.

strained legal reasoning of a classified opinion. Lastly, the democratic-legitimacy concerns inherent in relying on pressure from career lawyers are even greater in this context.<sup>140</sup> By influencing the Office's work product, legal elites—well-educated, largely affluent private citizens—arguably warp the will of the people who elected the President at whose pleasure many OLC lawyers serve.

Third, voters and special-interest groups could make their voices heard in response to OLC opinions just as they do on other legal issues. Groups from across the ideological spectrum, including the Federalist Society, the Judicial Crisis Network, Demand Justice, and Alliance for Justice, already employ pressure tactics to influence the judicial nomination and confirmation process.<sup>141</sup> It would take little additional effort for these groups to expand their focus to the OSG or the OLC. They also could push the Senate to spend more time scrutinizing nominees to these offices, exerting even greater pressure on the White House. And they could encourage the President to nominate (and the Senate to confirm) judges who, for example, have demonstrated a willingness to read FOIA to cover the OLC's written opinions, fortifying a transparency norm in the courts.

Yet mobilizing nonlawyers to focus on nominations to and the operation of an office within the DOJ may be even harder than shining the spotlight on Article III courts. First, the public may not be aware of how many people the executive branch's legal interpretations can affect.<sup>142</sup> Popular understandings of the law tend to place the ultimate power to interpret the Constitution in the hands of the Supreme Court alone.<sup>143</sup> Second, the subject matters the OLC often engages with may be a barrier to activating a broad base of voters. The Office often tackles national-security issues that, while cutting-edge, may not seem to have a direct impact on American lives. The OSG is far more likely to

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140. Cf. Morrison, *supra* note 19, at 1520 (recognizing that “it is ultimately the President’s democratic accountability that gives his constitutional views their authority and legitimacy”).

141. The nomination of Judge Justin Walker to the U.S. Court of Appeals for the District of Columbia Circuit is instructive. See ALL. FOR JUST., NOMINATION OF JUSTIN WALKER 1-2, <https://perma.cc/FD5Q-C65D> (archived May 2, 2021) (noting the organization’s strong opposition to Judge Walker’s nomination); Tyler Olson, *Trump Announces Justin Walker, Former Kavanaugh Clerk, as Pick for DC Circuit Court*, FOX NEWS (Apr. 3, 2020), <https://perma.cc/8BAB-88FD> (noting Federalist Society leader Leonard Leo’s support for Walker’s nomination).

142. Unless, of course, senators themselves use their platform to educate the public. See *infra* Parts III.B.1-2.

143. See LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 228 (2004) (“The acceptance of judicial authority is most apparent, however, in the all-but-complete disappearance of public challenges to the Justices’ supremacy over constitutional law. Apart from a few academic dissidents, everyone nowadays seems willing to accept the Court’s word . . .”).

tackle hot-button social issues (abortion or LGBTQ rights, for instance) through its practice before the Supreme Court than the OLC is in evaluating potential executive action. Third, voters remain in the same boat as the legal elite: Their ability to engage in such pressure campaigns is a function of the OLC's transparency.

### III. A Role for the Senate Judiciary Committee

Unlike the actors discussed above, the United States Senate Committee on the Judiciary could constrain the OLC almost immediately. Its position outside the executive branch and its significant constitutional and statutory authority to regulate the DOJ give it sufficient removal from the day-to-day operations of the Office while also distinguishing it from groups that can only exercise pressure campaigns. In this way, the Committee strikes a middle ground between career DOJ lawyers and voters far removed from the OLC: Its legal authority, historical practice, and institutional capacity have created an opportunity to seize for itself a role in checking the OLC's excesses. While the Committee may not have the opportunity to implement all of the indirect constraints I detail below in the near future, the constraints nonetheless combine to create a roadmap for how the legislative branch could reassert itself and demand that the executive's interpretation of the Constitution respect the separation of powers and individual liberty.

This Part has three Subparts. First, I briefly discuss the Committee's jurisdiction under the Constitution and the Senate's Standing Rules and explain the political incentives its members have to constrain the OLC. Second, I address three ways the Committee can use its authority to influence how the Office conducts its business, either contemporaneously or retroactively. Third, I discuss both pragmatic concerns about these approaches and the merits of the Judiciary Committee inserting itself into executive-branch lawmaking more generally.

#### A. The Committee's Powers and Prerogatives

The Judiciary Committee is one of the Senate's original standing committees, dating to 1816.<sup>144</sup> The Committee's current legislative purview is broad, including policy areas like "civil liberties," "constitutional amendments," "federal courts and judges," and "judicial proceedings, civil and criminal, generally."<sup>145</sup> Proposed legislation involving these and other topics within the

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144. *Committee History*, U.S. SENATE COMM. ON JUDICIARY, <https://perma.cc/W78M-WWMH> (archived May 2, 2021).

145. SENATE COMM. ON RULES & ADMIN., STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, at 25-26 (2013) (capitalization altered).

Committee's jurisdiction are generally referred to the Committee after being introduced on the Senate floor.<sup>146</sup> Like other standing committees, the Judiciary Committee has the authority to hold hearings, subpoena witnesses, and conduct investigations on any issue within its jurisdiction.<sup>147</sup> In addition, presidential nominations to Article III courts—along with nominations to DOJ leadership, the United States Sentencing Commission, and some other offices—first face scrutiny in the Judiciary Committee.<sup>148</sup> The Committee can report a nomination to the Senate floor with a positive recommendation, a negative recommendation, or no recommendation at all.<sup>149</sup> Lastly, the Committee exercises oversight jurisdiction over agencies including the DOJ and the Federal Bureau of Investigation (FBI).<sup>150</sup> Hearings can cover the state of an office within the Committee's oversight jurisdiction, or they can be more thematic in nature, discussing a policy issue that the Committee deals with.<sup>151</sup> Taken together, these practices give the Committee real power over the DOJ and its personnel.

In addition, senators are more likely than other actors to prize the very values that the OLC's work product so often disrespects. As legislators, they are the most immediate victims of separation-of-powers violations. It is their oversight and lawmaking power that the OLC has so often usurped. And unlike lawyers at the DOJ, senators must face their voters every six years. Reelection imbues senators with more than just added democratic legitimacy: Self-preservation demands that they stand up for their constituents' fundamental rights. Should they choose to use it, senators also have a political platform large enough to activate grassroots groups and train voters' focus on hearings that may not naturally show up on their radars. Because there are so few of them, senators can generate a brighter media spotlight on a given policy issue than members of the House of Representatives who may have similar oversight powers. And congressional hearings usually are open to the public;

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146. *See id.* at 9.

147. *Id.* at 31.

148. *Committee Jurisdiction*, U.S. SENATE COMM. ON JUDICIARY, <https://perma.cc/FWY8-3Z96> (archived May 2, 2021).

149. BARRY J. MCMILLON, CONG. RSCH. SERV., R44236, SUPREME COURT APPOINTMENT PROCESS: CONSIDERATION BY THE SENATE JUDICIARY COMMITTEE 18 (rev. 2020), <https://perma.cc/F39H-6FKP>.

150. *Committee Jurisdiction*, *supra* note 148.

151. *Compare Oversight of the Federal Bureau of Investigation: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2019), <https://perma.cc/FL3K-BW8S>, with *Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Antitrust, Competition Pol'y & Consumer Rts. of the S. Comm. on the Judiciary*, 115th Cong. (2018), <https://perma.cc/7EFA-CYWN>.

millions of people follow the most prominent ones on television.<sup>152</sup> Judiciary Committee hearings in particular have been integral in elevating the political profiles of the Committee's members.<sup>153</sup> In this way, Committee members can combine their significant jurisdictional powers with a large public platform to move the OLC and its lawyers toward the center of the national political conversation.

## B. Constraining the Office of Legal Counsel

Should the Committee choose to bring its powers to bear on the OLC, three specific constraints stand out. First, the Committee can conduct oversight of the OLC as it would any other part of the DOJ. It can do so in two distinct ways: It can either hold ordinary public oversight hearings, or it can convene private briefings like other Senate committees. Second, the Committee can conduct a more searching investigation of the President's nominees to be the Assistant Attorney General in charge of the Office, as the position requires the Senate's approval.<sup>154</sup> Third, the Committee can scrutinize the performance of OLC lawyers who often end up before it as nominees to Article III courts as a means of retroactive or contemporaneous oversight over the Office. As the conductors of the confirmation process for Supreme Court Justices, senators and their staffs are familiar with the searching scrutiny necessary to vet the most powerful interpreters of the Constitution. They need only use this existing institutional capacity to provide a meaningful check on the OLC.

### 1. Committee oversight hearings

The Committee's oversight powers provide perhaps the most immediate opportunity to check the OLC. The DOJ is at the core of the Committee's

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152. See Lisa Richwine & Helen Coster, *U.S. Impeachment Hearing TV Audience Less Than for Kavanaugh or Comey: Nielsen Data*, REUTERS (Nov. 14, 2019, 11:29 AM), <https://perma.cc/3WY8-B7W4> (noting that almost 20 million people watched former FBI Director James Comey's testimony before the Senate Intelligence Committee and 13 million people watched former Special Counsel Robert Mueller testify before Congress).

153. See, e.g., *A Historic V.P. Decision*, N.Y. TIMES: THE DAILY (Aug. 12, 2020), <https://perma.cc/7B5E-PA7Z> (acknowledging that the Committee was "a major source of" then-Senator Kamala Harris's "stature and popularity within the Democratic Party, because of how she handled moments like the Brett Kavanaugh confirmations," and discussing how that in turn influenced her selection as President Biden's running mate).

154. S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS., 114TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS 93 (Comm. Print 2016).

oversight jurisdiction.<sup>155</sup> As long as the OLC remains housed there, the Committee can summon the Assistant Attorney General to Capitol Hill to explain the OLC's reasoning in a given opinion or demand publication of a secret one. One could imagine how salutary a daylong hearing with Jay Bybee regarding the torture memos could have been. Indeed, the Committee already conducts similar oversight hearings with other assistant attorneys general.<sup>156</sup>

Oversight hearings could take numerous forms depending on the Committee's needs. A subcommittee might want to speak in general terms about the OLC's interpretive norms: What precedential weight is it applying to opinions from previous administrations? What does the Assistant Attorney General consider the appropriate response to congressional silence on a given issue? Or the Committee might be concerned about how the OLC is going to act with respect to an ongoing issue of great national importance. For example, as ISIS rapidly spread across the Middle East, the Committee may have wanted to know just how broadly the Office was construing the 2001 Authorization for Use of Military Force (AUMF).<sup>157</sup> Finally, the Committee may have questions or concerns about a specific published opinion, like the one that placed the hiring of President Trump's son-in-law Jared Kushner beyond the reach of federal anti-nepotism laws.<sup>158</sup>

That being said, public oversight of the OLC obviously could implicate greater national-security concerns than oversight of the DOJ's antitrust or civil rights divisions, especially if the Committee is interested in a granular discussion of a specific case. Therefore, the Committee could consider borrowing procedures from the Senate Intelligence Committee to conduct closed sessions with the Assistant Attorney General. These sessions would allow for a more searching discussion of OLC opinions relating to the President's war powers while respecting legitimate national-security imperatives. Of course, this format does little to further the Office's transparency, one of scholars' primary objectives in reforming the OLC. However, there is nothing dissonant in advocating for transparency while

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155. See *Committee Jurisdiction*, *supra* note 148.

156. See, e.g., *Oversight of the U.S. Department of Justice, Civil Rights Division: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2010), <https://perma.cc/R3Z3-Y2FX>; *Oversight of the Department of Justice—Civil Rights Division: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002), <https://perma.cc/PF6H-VUBF>.

157. Cf. THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 5-7 (2016), <https://perma.cc/48DQ-KUDL> (discussing the Obama Administration's application of the AUMF to ISIS).

158. See *Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Office*, 41 Op. O.L.C., 2017 WL 5653623, at \*1-2 (Jan. 20, 2017) (“[T]he President may appoint relatives as employees in the White House Office ‘without regard to’ the anti-nepotism statute.”).

providing for classified briefings on more sensitive issues. Even long-shot attempts to require opinion publication like the DOJ OLC Transparency Act allow for the redaction of classified information.<sup>159</sup>

No matter how “indispensable” oversight proceedings are to Congress’s ability to exercise its legislative powers,<sup>160</sup> they lack the same textual constitutional grounding that, for example, judicial confirmation hearings possess. The Trump Administration sometimes proved unwilling to send top officials to the Capitol,<sup>161</sup> at times forcing congressional Democrats to go to court to preserve their oversight authority.<sup>162</sup> The exact breadth of Congress’s subpoena power against the executive branch remains a live legal issue,<sup>163</sup> but even if the Committee can ably show it needs limited testimony from the Assistant Attorney General, subpoenaing an uncooperative head of the OLC could take months. It is entirely possible that the Trump Administration’s recalcitrance will prove unique, but it also may provide a roadmap for future administrations that want to escape congressional oversight. While I do not believe that even fiercely pugnacious administrations would stonewall the Committee given the potential for political damage and the OLC’s relatively low profile, this approach could vitiate some of the oversight techniques detailed here.

In addition, once in the committee room, the Assistant Attorney General has little incentive to change his or her substantive conclusions in the face of questioning from senators. Nevertheless, these public hearings provide an additional avenue for a different sort of transparency than full-blown

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159. S. 3334, 116th Cong. § 2 (2020), <https://perma.cc/8XUC-V6HG> (providing for the redaction of classified material from all OLC opinions otherwise subject to publication).

160. *See* *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (quoting *Watkins v. United States*, 354 U.S. 178, 215 (1957)).

161. *See, e.g.*, Harold Hongju Koh, Rosa Hayes, Annie Himes, Dana Khabbaz, Michael Loughlin & Mark Stevens, *Executive Privilege Cannot Block Bolton’s Testimony*, JUST SEC. (Jan. 27, 2020), <https://perma.cc/26MX-ZQD6> (criticizing President Trump’s possible invocation of executive privilege to prevent former National Security Advisor John Bolton from testifying before the Senate); Evan Perez & Veronica Stracqualursi, *DOJ Says It Won’t Send Officials to Testify Because Democrats Were “Scolding and Insulting” to Barr*, CNN (updated Sept. 23, 2020, 7:08 AM ET), <https://perma.cc/YRW2-SFRR> (noting that the DOJ declined to make Assistant Attorney General for the Civil Rights Division Eric Dreiband available for an oversight hearing).

162. *See, e.g.*, *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 973 F.3d 121, 122-25 (D.C. Cir. 2020), *vacated pending reh’g en banc*, No. 19-5331 (D.C. Cir. Oct. 15, 2020); *Mazars*, 140 S. Ct. 2019.

163. *See* *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 968 F.3d 755, 770, 772-73 (D.C. Cir. 2020) (en banc) (distinguishing the House’s subpoena of White House Counsel Don McGahn from an improper “limitless” subpoena of the President (quoting *Mazars*, 140 S. Ct. at 2034)).

publication. Even an entirely noncompliant witness can generate publicity at a congressional hearing.<sup>164</sup> Senators' questions can direct the general public's attention to the legal issues underlying the proceedings even if they never receive a straight answer. And even if the Assistant Attorney General cannot discuss the specifics of an opinion without revealing classified information, he or she can review the legal theories the Office's lawyers have employed.<sup>165</sup> In turn, Committee members—the vast majority of them trained lawyers<sup>166</sup>—can provide a check on the most outlandish legal reasoning the Office may employ. This sort of retroactive legal oversight would go far beyond any power the Senate could exercise over the Supreme Court and could be a uniquely effective tool to constrain the OLC.

## 2. Assistant attorney general confirmation processes

Assistant attorney general nominations have generally been sleepy affairs considering the power the position involves, particularly compared with the all-consuming battles over potential circuit court judges or Supreme Court Justices. While Trump Assistant Attorney General Steven Engel was confirmed on an almost entirely partisan vote—Democratic Senator Joe Manchin supported him, while Republican Senator John McCain voted against the nomination, citing Engel's links to the torture memos<sup>167</sup>—the Committee asked little of him during his confirmation hearing. He shared a single hour of questioning with Solicitor General Designate Noel Francisco and Assistant Attorney General Designate for the Antitrust Division Makan Delrahim.<sup>168</sup> The hour-long hearing began with twenty minutes of introductions and a

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164. See Margaret Taylor, *Just How Outrageous Was the Lewandowski Hearing?*, LAWFARE (Sept. 23, 2019, 2:27 PM), <https://perma.cc/67G9-AVUK> (discussing President Trump's former campaign manager Corey Lewandowski's appearance before the House Judiciary Committee, in which he repeatedly refused to answer members' questions and asserted executive privilege despite never having served in the White House).

165. For example, the Assistant Attorney General could disclose whether the OLC is regularly employing the seminal framework for analyzing the legality of executive power from *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

166. As of the 117th Congress, fifteen of the Committee's twenty-two members are law school graduates. For a list of committee members, see *Members*, U.S. SENATE COMM. ON JUDICIARY, <https://perma.cc/AK2L-2SAZ> (archived May 2, 2021). Committee members' biographies are available at BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS: 1774-PRESENT, <https://perma.cc/3RSX-LBTR> (archived May 2, 2021).

167. 163 CONG. REC. S7053-54 (2017); Seung Min Kim, *McCain Opposes Trump Nominee over Torture Memos*, POLITICO (Nov. 8, 2017, 4:02 PM EST), <https://perma.cc/K3ZN-TLL6>.

168. *Nominations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2017), <https://perma.cc/8LZ9-TB4U>; see also *Justice Department Nominations*, C-SPAN (May 10, 2017), <https://perma.cc/NR76-N8AN>.

preliminary speech by Senator Dianne Feinstein condemning the recent firing of former FBI Director James Comey.<sup>169</sup> In the remaining forty minutes, Engel delivered a five-minute opening statement and faced just three questions, the last of which was about the scholarship he received to study history at Cambridge.<sup>170</sup> Just five of the twenty-two committee members asked questions of the nominees, and no Democrats asked Engel a question.<sup>171</sup> At the executive business meeting at which the Committee advanced Engel's nomination to the Senate floor on a party-line vote, five senators were absent and voted by proxy.<sup>172</sup> The attention and concern senators of both parties paid to Assistant Attorney General Engel's nomination is not commensurate to the lawmaking power the OLC wields.

Earlier confirmation hearings paint a similar picture. Assistant Attorney General Virginia Seitz split her 2011 hearing with Solicitor General Designate Donald Verrilli, Jr., and Denise O'Donnell, whom President Obama had nominated to serve as director of the Bureau of Justice Assistance.<sup>173</sup> Eleven of the Committee's eighteen members were present.<sup>174</sup> Seitz faced four questions from three Democratic senators. Senator Patrick Leahy expressed his hope that she would review all OLC opinions and withdraw any that took as extreme a view on civil liberties as the torture memos.<sup>175</sup> Senator Amy Klobuchar wanted to learn more about her priorities for the Office.<sup>176</sup> Senator Al Franken asked for an explanation of her amicus brief on behalf of senior members of the military in the affirmative-action case *Grutter v. Bollinger*.<sup>177</sup> The Committee favorably reported Seitz's nomination to the Senate floor by a voice vote.<sup>178</sup> The whole Senate followed suit and confirmed her.<sup>179</sup> This is not to say that

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169. *Justice Department Nominations*, *supra* note 168, at 0:40-21:55.

170. *Id.* at 32:22-59:40.

171. *Id.*

172. U.S. Senate Comm. on the Judiciary, Results of Executive Business Meeting—June 8, 2017, at 1 (2017), <https://perma.cc/CQD9-BGCS>.

173. *Confirmation Hearing on Donald B. Verrilli, Jr., of Connecticut, Nominee to Be Solicitor General of the United States; Virginia A. Seitz, of Virginia, Nominee to be Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice; and Denise E. O'Donnell, of New York, Nominee to be Director, Bureau of Justice Assistance, U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 1 (2011), <https://perma.cc/U4ZP-3J2J>.

174. *Id.* at ii, 1.

175. *Id.* at 210-11.

176. *Id.* at 213.

177. *Id.* at 217; *see Grutter v. Bollinger*, 539 U.S. 306 (2003).

178. U.S. Senate Comm. on the Judiciary, Results of May 5, 2011 Executive Business Meeting (Continued on May 9, 2011), at 1 (2011), <https://perma.cc/4MFU-RDF2>.

179. *Monaco and Seitz Nominations Confirmed by Voice Vote*, U.S. SENATE DEMOCRATS (June 28, 2011, 2:07 PM), <https://perma.cc/8M6G-BWM4>.

OLC nominations have been free from controversy. Seitz was not the first person whom President Obama had nominated for the position. Dawn Johnsen had to withdraw her name from consideration for assistant attorney general after sustained concern from Republicans regarding her advocacy for abortion rights decades earlier.<sup>180</sup>

The Committee could make a few simple changes to fully harness its institutional capacity in the confirmation process for assistant attorneys general nominated to lead the OLC. First, and most importantly, the confirmation hearings should be far longer than those in recent experience. I do not expect that the four-day national political event that then-Judge Brett Kavanaugh faced for his Supreme Court confirmation hearing will be necessary,<sup>181</sup> but just an hour-long public job interview is not commensurate with the Office's importance in the executive branch and beyond. As I discuss below, many senators might be wary of conducting more searching questioning for the same reasons that they think probing questions into the record of a Supreme Court nominee are inappropriate.<sup>182</sup> That being said, it is entirely appropriate to ask potential heads of the OLC about their conception of the position, their appreciation for the separation of powers, and whatever prior experience they may have had in the Office.

Second, the nominee to head the OLC should not share the hearing room. While the Solicitor General and other division heads of course hold very important jobs, the OLC merits special consideration because of its often-unchecked adjudicative authority. The types of questions senators should ask a potential assistant attorney general for the OLC are therefore different than those that a solicitor general designate ought to face. In addition, face-to-face questioning is more important for the head of the OLC than, say, the head of the DOJ's Antitrust Division, whose qualifications for the job may be more obvious from a resume and a private interview. Unlike these subject-matter divisions, the problems that the OLC confronts are as much questions of good independent judgment and careful thinking as they are matters of legal expertise. Evaluating these traits is only really possible in a searching confirmation hearing. Splitting future hearings would both give each office the

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180. Charlie Savage, *Obama Nominee to Legal Office Withdraws*, N.Y. TIMES (Apr. 9, 2010), <https://perma.cc/CX23-L77T>; *Confirmation Hearings on Federal Appointees Before the S. Comm. on the Judiciary*, 111th Cong. 345-46 (2009) [hereinafter *Johnsen Confirmation Hearing*], <https://perma.cc/6A8B-QYVQ>; *Senate GOP Considers Filibuster of Obama Judicial Nominee Who Compared Pregnancy to Slavery*, FOX NEWS (updated Dec. 24, 2015), <https://perma.cc/PZB3-A5CA> (noting that over forty-five House Republicans had asked President Obama to withdraw his nomination of Johnsen for the same reason).

181. See Mahlia Posey, Lora Strum & Dan Cooney, *4 days of Brett Kavanaugh's Supreme Court Hearing in Less than 15 Minutes*, PBS (Sept. 7, 2018, 5:30 PM EDT), <https://perma.cc/YZ2Z-MD7Z>.

182. See *infra* Part III.C.

respect and due care it deserves and allow Committee members to focus on the unique qualifications a nominee ought to have for each position.

Third, the Committee's Chairperson and Ranking Member should encourage their parties' respective senators to attend hearings in full. They should encourage senators to ask questions that go to the nominee's judgment, conception of the Office, and philosophies on executive power, even if the senators are reluctant to press him or her on specific substantive legal matters. If senators are willing to stake their votes on answers to these questions, they will be able to extract meaningful changes to how the President structures and operates the OLC. Of course, senators often miss hearings because of their busy schedules, but the Senate's embrace of teleworking technologies in response to the COVID-19 pandemic may make attendance an easier ask going forward.<sup>183</sup> If senators are able to appear at hearings remotely, it will be easier to schedule confirmation hearings to maximize attendance.

### 3. Future confirmation processes for Office of Legal Counsel alumni

The confirmation process for Article III judges provides an additional opportunity for the committee to check OLC decisionmaking, if only retroactively. Given the Office's power and prestige, it should not be surprising that many OLC alumni have been nominated to lifetime federal judgeships and other positions requiring Senate confirmation. OLC heads count among their ranks two Supreme Court Justices, former attorneys general, and multiple current and former circuit court judges.<sup>184</sup> From the Nixon Administration through the end of the Trump Administration, 58% of former OLC heads have been nominated to an additional position requiring Senate confirmation.<sup>185</sup> This process, including the confirmation hearing itself, provides Committee

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183. The Senate Health, Education, Labor and Pensions Committee conducted a hearing on May 12, 2020, with leaders of the federal government's pandemic-response team. The four witnesses and Chairman Lamar Alexander all appeared remotely while they were self-isolating. John Wagner, Mike DeBonis, Yasmeen Abutaleb & Laurie McGinley, *Fauci Warns Senate That Reopening U.S. Too Quickly Could Lead to Avoidable "Suffering and Death,"* WASH. POST (May 12, 2020, 12:36 PM PDT), <https://perma.cc/Q7CJ-U9UJ>.

184. *See supra* note 135.

185. This number includes all former acting or confirmed assistant attorneys general who are not currently serving in the OLC. OLC alumni have faced Senate confirmation for positions ranging from the Chairman of the Legal Services Corporation (Roger Cramton) to Chief Justice of the United States Supreme Court (William Rehnquist). *See supra* note 135; *In Memoriam: Roger C. Cramton*, A.L.I. (Feb. 8, 2017), <https://perma.cc/7XQF-3DFY>. To the list available in the foreword of the Supplemental Opinions of the Office of Legal Counsel, I added Karl Thompson, Curtis Gannon, and Steven Engel, the three confirmed or acting heads of the Office who have served and left the OLC since that list was published. I calculated the percentage of these individuals who required additional Senate confirmation by examining their biographies from various sources.

members with two possible avenues for extracting concessions from the OLC. The first, more dramatic option would be to oppose nominees whose OLC work product insufficiently respects individual rights (or at least withhold support for a nominee until the DOJ declassifies a relevant OLC opinion). The second, perhaps more moderate option would be to question a nominee about his or her time in the OLC throughout the confirmation process without explicitly conditioning one's vote on how (or if) they answer. Added pressure from senators could both induce compliance from the OLC at the same time that an Office alum is facing confirmation and deter OLC lawyers while they are with the Office: If they know their possible confirmation to the federal courts or a more senior DOJ position could be at risk if they put their name on work product as far outside the legal mainstream as the torture memos, they likely will think twice before offering such extreme legal reasoning.

On the more radical approach, Judge David Barron's nomination to the First Circuit is instructive. A bipartisan pair of senators, Rand Paul and Mark Udall, pressured the White House to allow the release of the controversial OLC memo authorizing the targeted killing of United States citizen Anwar al-Awlaqi.<sup>186</sup> They promised to oppose Barron's nomination unless the White House complied with a lower court order requiring the memo's release under FOIA.<sup>187</sup> That pressure, combined with the efforts of groups like the ACLU,<sup>188</sup> was enough to push the White House to allow every senator to view the memo in question.<sup>189</sup> Though the Senate was unable to compel public disclosure, the memos still became a vital input in the Senate's consideration and eventual approval of Judge Barron's nomination. That this battle took place in a Democratic-majority body over a Democratic President's judicial nomination is encouraging: A bipartisan group in the Senate nonetheless used its advice-and-consent prerogative in the name of individual liberty and arrived at a satisfactory negotiated resolution.

Other recent nominations of OLC alumni to the bench did not result in as pointed standoffs as Judge Barron's did, but they still provide helpful guides for a second, milder approach to scrutinizing these nominees. When President Bush nominated then-Assistant Attorney General Jay Bybee to the Ninth Circuit in 2002, Senator Leahy registered his concern about the lack of

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186. Jeremy W. Peters, *Judicial Nominee's Memos on Drones Stirring Bipartisan Concern in the Senate*, N.Y. TIMES (May 5, 2014), <https://perma.cc/GN55-FHVA>.

187. *Id.*

188. *Id.*

189. Josh Gerstein, *White House Offers Drone Memo to Whole Senate*, POLITICO: UNDER THE RADAR (May 6, 2014, 1:49 PM EDT), <https://perma.cc/79U8-UVVX>.

transparency the DOJ had operationalized regarding OLC opinions.<sup>190</sup> The Office had not responded to Judiciary Committee requests for opinions from members of either party,<sup>191</sup> and, of course, the torture memos remained secret at the time.<sup>192</sup> Senator Leahy also noted that the OLC had waded into particularly contentious areas of national-security law, such as the use of military tribunals to try suspected terrorists and the refusal to declare detainees captured during military operations in Afghanistan and other countries prisoners of war under the Geneva Conventions.<sup>193</sup> At least in form, Senator Leahy's questions served as both a contemporaneous oversight mechanism and a signal to lawyers still working at the OLC about what sort of scrutiny they might receive in the future.

The written questions for Bybee, however, demonstrate a weakness in this more moderate approach. Then-Senator Biden and Senators Russ Feingold, John Edwards, and Ted Kennedy joined Leahy in pressing Bybee on his involvement in different OLC opinions. These opinions involved issues surrounding the Violence Against Women Act, the definition of an "enemy combatant," the surveillance of mosques in the United States, and partnerships with state and local law-enforcement agencies to arrest individuals suspected of having violated immigration laws.<sup>194</sup> To each of these questions, Bybee responded with some version of the following: "As an attorney at the Department of Justice, I am obligated to keep confidential the legal advice that I provide to others in the executive branch. I cannot comment on whether or not I have provided any such advice and, if so, the substance of that advice."<sup>195</sup> Without the threat of a senator withholding a vote for a favorable recommendation on a nomination, there is little bite behind his or her request for answers on these important questions during the confirmation process.

The Committee may have another opportunity to implement the more radical approach in the near future. Former Assistant Attorney General Engel has a resume that might point toward a nomination to the bench from the next Republican President. He clerked on the Supreme Court, has spent years at the OLC across multiple Republican administrations, and fits the trend set by President Trump of nominating younger lawyers to the bench.<sup>196</sup> Engel's

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190. *Confirmation Hearings on Federal Appointments: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 11-12 (2003) [hereinafter *Bybee Confirmation Hearing*], <https://perma.cc/83MQ-M8QE>.

191. *Id.* at 12.

192. *See supra* note 3.

193. *Bybee Confirmation Hearing*, *supra* note 190, at 11.

194. *Id.* at 157, 162, 165-66, 169-70.

195. *Id.* at 165-66; *see also id.* at 157, 162, 169-70.

196. *See* Russell Wheeler, *Judicial Appointments in Trump's First Three Years: Myths and Realities*, BROOKINGS (Jan. 28, 2020), <https://perma.cc/RP3Z-M62U> (comparing the  
*footnote continued on next page*

former deputies have similar backgrounds.<sup>197</sup> These possible nominations could provide a meaningful opportunity to probe the reasoning behind, for example, the OLC's authorization of a Trump military operation. Engel's likely bright future points to a deterrent effect that an active Judiciary Committee could have on the OLC. If the specter of what Senators Udall and Paul did with Judge Barron's nomination persists as a meaningful possibility, future assistant attorneys general may hesitate before putting their signature on an opinion that may compromise their place on the bench.

Committee members need not limit their advocacy on Article III nominations to the Capitol either. The nomination and confirmation process also presents an opportunity for Committee members to galvanize the public to support efforts to constrain the OLC. Due to the heightened focus on the makeup of the courts on both sides of the aisle, senators are likely to find that voters will be receptive to these measures. While the increased politicization of the judicial nomination and confirmation process surely is problematic in some respects, voters' increased activation in this area points to an opening for Committee members to check the OLC.

### C. The Limits of Institutional Capacity

While the Judiciary Committee clearly has the jurisdictional authority and institutional wherewithal to raise the pressure on the OLC, there are valid reasons why it may be loath to do so. Two in particular present legitimate concerns about how worthwhile or realistic it is to enlist the Committee in efforts to check the President. Both merit a response here.

First, the Supreme Court confirmation process has become deeply partisan.<sup>198</sup> For those who believe this poses a challenge to the Court's

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median age of President Trump's circuit court nominees as of late January in the fourth year of his first term (48.2 years old) to that of President Obama (57.2), President Bush (51.0), and their predecessors at the same point in their first terms). Engel, who is forty-six at the time of this writing, certainly fits the mold. Indeed, President Trump may have had Engel in mind for an even higher office. During his reelection campaign, the former President included Engel in a new shortlist of potential Supreme Court nominees. See Adam Liptak, *Trump's Supreme Court Nominees List Gets New Scrutiny*, N.Y. TIMES (Sept. 18, 2020), <https://perma.cc/KZ9C-PQFN>.

197. See *supra* note 134.

198. See, e.g., Amelia Thomson-DeVeaux, *Why the Supreme Court's Reputation Is at Stake*, FIVE THIRTYEIGHT (Oct. 12, 2020, 6:00 AM), <https://perma.cc/BL34-BKAM> (noting the increasingly tight margins in confirmation votes for Justices from 1975 through 2018). Justice Barrett, in turn, became the first member of the Court to be confirmed without a single vote from the President's opposing party since the Reconstruction. Sarah Binder, *Barrett Is the First Supreme Court Justice Confirmed Without Opposition Support Since 1869*, WASH. POST (Oct. 27, 2020, 4:45 AM PDT), <https://perma.cc/PUZ3-SZPY>.

legitimacy<sup>199</sup> or to the healthy operation of the Senate, allowing that acrimony to spread to confirmations to (what some might consider) midlevel positions in the DOJ or lower court judgeships to which OLC alumni are often nominated would do more harm than good. In an era when many are looking to restore the Senate to its civil, deliberative heritage,<sup>200</sup> increased scrutiny of OLC nominees would be yet another opportunity for partisan political theater. In addition, some commentators believe asking nominees to Article III courts pointed questions about interpretive theories and constitutional law inappropriately constrains them before they sit on the bench.<sup>201</sup> According to this view, asking OLC alumni whether they agreed with an opinion they signed could limit their ability to faithfully apply the law if they were to adjudicate a future separation-of-powers issue by inappropriately binding them to their work in the executive branch or incentivizing them to stake out politically advantageous positions to win confirmation.

In many respects, these concerns are inapposite when discussing the OLC. For the same reasons that hearings to confirm assistant attorneys general can be somewhat quiet events, they are unlikely ever to become so caustic. Voters and interest groups are simply less likely to be activated by the President's view of the scope of his or her war powers than they are by the social issues that come before the Supreme Court. Even if a nominee to head the OLC were to face more scrutiny from the Committee, the hearing might remain somewhat technical and esoteric, focused on legal theories and bureaucratic intricacies that would not make for particularly good television.<sup>202</sup> The same reason everyday voters are ill-equipped to take on the OLC shields the Committee from concerns about partisan acrimony in these confirmation hearings. Senators could raise plenty more awareness about these hearings without generating anywhere near the same level of hostility that Justice Kavanaugh's or Justice Barrett's nominations engendered. In other words, there is more than enough distance between the relative calm that attends the vetting of the OLC's leadership and what is increasingly becoming standard fare for Supreme Court confirmation battles to allow for greater scrutiny of the former group.

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199. See, e.g., Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 153-66 (2019).

200. See *infra* note 222 and accompanying text.

201. See, e.g., CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* 166-68 (2007) (noting that while nominees are not bound to their answers before the Committee, direct responses regarding legal doctrine do bear on their perceived impartiality once they take the bench).

202. The OLC's recent conduct does increase the chance that the spotlight will be on future nominees. See *supra* notes 4-9. Nevertheless, while the underlying subject matter may be compelling, the questions senators would ask—for example, how a nominee would approach similar issues, or why an old opinion should be followed or not—may not be so easily digestible.

In addition, the sorts of questions that senators should ask nominees for assistant attorney general are different than the ones that can be controversial when put to prospective judges. For example, during the Trump Administration, some Democratic senators took to asking judicial nominees whether *Brown v. Board of Education*<sup>203</sup> was correctly decided.<sup>204</sup> Whatever the merits of nominees' refusal to answer that question, the answers a prospective assistant attorney general would give are even less helpful to a senator deciding how to vote. Whether or not they should, a circuit court judge at least theoretically could ignore or dramatically limit binding precedent. Given that *stare decisis* currently carries relatively little weight within the OLC, it does not make much sense to press nominees to that office on the merits of old opinions. The Assistant Attorney General may be involved in policymaking at times, but she is not supposed to make her own policy. Senators would learn more asking nominees about their decisionmaking process, their understanding of the breadth of executive power, and their conception of the role the OLC ought to play in actualizing that power.

Here, Dawn Johnsen's failed OLC nomination is instructive. As mentioned above, Republicans were concerned about Johnsen's previous efforts to defend and expand access to abortion, and she faced pressing questions about that work at her confirmation hearing.<sup>205</sup> For reasons I have explained, this area of questioning does not seem appropriate for a prospective head of the OLC. Other questions from skeptics of Johnsen's nomination may be a better guide: Senator Jeff Sessions, for example, asked her how she would balance the need to get to the best view of the law with the safety of military and law-enforcement personnel in the field.<sup>206</sup> He also expressed his concern that Johnsen's prior advocacy work could impact her ability to carry out her adjudicative duties.<sup>207</sup> Whether or not these concerns were fair given

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203. 347 U.S. 483 (1954).

204. See Dahlia Lithwick, *Trump's Nominees Won't Say If Brown v. Board of Education Was Decided Correctly*, SLATE (Apr. 11, 2019, 6:40 PM), <https://perma.cc/F27S-LRZ5> (noting that Judge Wendy Vitter and Judge Neomi Rao declined to answer Democrats' questions regarding the merits of the *Brown* decision). Republicans have asked nominees similar questions in the past. For example, Senator Ted Cruz asked Judge Randolph Moss whether he agreed with the Supreme Court's understanding of federalism in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). See *Confirmation Hearings on Federal Appointments: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 2348-49 (2014), <https://perma.cc/ATW6-VVH5>.

205. See *supra* note 180 and accompanying text; *Johnsen Confirmation Hearing*, *supra* note 180, at 345-46.

206. *Johnsen Confirmation Hearing*, *supra* note 180, at 351-52.

207. *Id.* at 353.

Johnsen's prior experience in the OLC is a separate question,<sup>208</sup> but the general approach of Senator Sessions' colloquy would have served the Committee well during Engel's confirmation hearing. At least on their face, Senator Sessions' questions probed whether Johnsen was the right person to approach thorny legal issues in the specific ways that the OLC's leader ought to, not necessarily the substance of her previous work. Senators can ask searching questions of a potential assistant attorney general without triggering a pointless political battle designed simply to deprive a President of the opposite party of their chosen personnel.

Lastly, while particularly contentious confirmation battles like Justice Kavanaugh's and Justice Barrett's nominations may damage the court system's legitimacy over time, these concerns do not map well onto additional scrutiny of nominees within the DOJ. As part of the executive branch, the OLC is supposed to be accountable to the people in an ongoing manner—both directly and through Congress—in a way that Article III judges are not. If the voters are not happy with the President, they can elect a new one every four years. If Congress believes the President is guilty of “high Crimes and Misdemeanors,” it can impeach and remove him or her.<sup>209</sup> This closer link to the democratic process should allow the legislative branch flexibility to increase *ex ante* scrutiny of the Office's personnel beyond what might be appropriate for the Supreme Court. Though the Office's opinions carry great legal import, their authors do not have the same charge to deal impartially with all who come before them. OLC's interpretations of the law may legitimately incorporate or further the policy prerogatives of the President. In other words, because OLC nominations and opinions are inherently political, scrutinizing OLC nominees comes with far less risk of delegitimizing the Office.

There is a second, more global concern to address. Recent history contains few examples of senators checking the power of a President from their own party. Why would they start to do so now? It seems as if the Committee would only entertain enacting these constraints when different parties controlled the Senate and the White House. Judge Bybee's and Assistant Attorney General Engel's confirmation hearings show that one-party government can effectively stifle efforts at congressional oversight: Pro forma nonresponses may be sufficient to sidestep senators' concerns, should such concerns even arise.<sup>210</sup>

Closing the door on intense vetting of OLC appointees and alumni based on just these experiences would be a mistake. First, some Democrats were loath to criticize Bybee because they were interested in giving bipartisan cover to the

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208. It is hard to divorce Senator Sessions' concerns from conservatives' opposition to abortion generally.

209. See U.S. CONST. art. II, § 4.

210. See *supra* notes 170-71, 194-195 and accompanying text.

still left-leaning Ninth Circuit.<sup>211</sup> Second, for very different reasons, Democrats were unlikely to expend limited political capital on Bybee and Engel. In Bybee's case, President Bush was uniquely popular in the aftermath of the September 11, 2001, terrorist attacks.<sup>212</sup> A substantive attack on the Bush Administration's legal foundation for its military campaigns and intelligence-gathering operations may have backfired.<sup>213</sup> In Engel's case, the opposite dynamic may have swamped the Democrats. The beginning of the Trump presidency was replete with opportunities to resist the new Administration, most notably the first iteration of the ban on Muslims entering the United States<sup>214</sup> and the developing investigation into the President's campaign's ties to Russia.<sup>215</sup> The Assistant Attorney General for the OLC may have simply flown below the Democrats' radar.

Of course, many of the constraints that I discussed in Part II face a similar partisan dilemma. At some point, actors in the same party as the President (up to and including the President himself) must be willing to sign away some modicum of political power to change how the OLC operates. There will be no veto-proof SUNLIGHT Act without bipartisan support from members of Congress. Any internal guidelines like the ones David Barron laid out by definition must come from a political appointee.<sup>216</sup> Only private citizens—legal elites and everyday voters—can be considered free of these political strictures, and, for reasons I have discussed, their contributions to the effort to constrain the OLC may be limited.<sup>217</sup>

But there is reason to believe that the dynamic on Capitol Hill is changing. We may be on the cusp of a new era of robust congressional oversight of the President. The House of Representatives in particular has become much more muscular in its attempts to get testimony and documents from the White

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211. *See User Clip: Chuck Schumer Lends Support to the Nomination of Jay Bybee to the Ninth Circuit Court of Appeals and Patrick Leahy Talks About Torture*, C-SPAN, at 01:58-02:49 (Mar. 13, 2003), <https://perma.cc/7H3N-DGQA>.

212. In May 2002, the same month that he announced Bybee's nomination to the Ninth Circuit, President Bush enjoyed a 76% approval rating. *Presidential Approval Ratings—George W. Bush*, GALLUP, <https://perma.cc/89MR-2PEN> (archived May 2, 2021); *Presidential Nomination: Jay Scott Bybee*, THE WHITE HOUSE: PRESIDENT GEORGE W. BUSH, <https://perma.cc/KND5-72SU> (archived June 6, 2021).

213. Recall that the torture memos were not yet public. *See supra* note 3.

214. *See supra* note 51 and accompanying text.

215. President Trump fired James Comey on May 9, 2017, the day before Engel's confirmation hearing. *See supra* note 169 and accompanying text. Two days later, Trump admitted he did so with "this Russia thing" on his mind. Devlin Barrett & Philip Rucker, *Trump Said He Was Thinking of Russia Controversy when He Decided to Fire Comey*, WASH. POST (May 11, 2017), <https://perma.cc/486J-UBWJ>.

216. *See supra* Part II.A.2.

217. *See supra* Part II.B.2.

House,<sup>218</sup> and a bipartisan group of lawyers and scholars is beginning to recognize the importance of reforming the DOJ under the Biden Administration.<sup>219</sup> Participation in the democratic process is as robust as it has been in recent memory,<sup>220</sup> and Democratic politicians are focused on the conduct of the Attorney General and the DOJ more broadly.<sup>221</sup> As of this writing, President Biden enjoys narrow majorities in both houses of Congress, and a majority-making portion of the Democratic Senate caucus has called for a return to bipartisan comity.<sup>222</sup> Good-faith oversight of the executive branch is one of the easier areas in which to make this a reality.

And there are reasons to think that the Senate Judiciary Committee is the single best-positioned institution to impose constraints on the OLC. Unlike other political actors this Note discusses, the Committee is part of a coequal branch of government with enumerated constitutional authority. It is not a novel part of the executive-branch bureaucracy. It is not a mere special-interest group. It is unique among the actors I have discussed in its deep constitutional roots and its ability to garner sustained public focus on a policy issue. Even

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218. See *supra* note 162 and accompanying text.

219. See, e.g., BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* 133-35 (2020); Crim. Just. Team, *Restoring Integrity and Independence at the U.S. Justice Department*, CTR. FOR AM. PROGRESS (Aug. 13, 2020, 9:01 AM), <https://perma.cc/R875-VF3S>; ANNIE L. OWENS, AM. CONST. SOC'Y, *REFORMING THE OFFICE OF LEGAL COUNSEL: LIVING UP TO ITS BEST PRACTICES* 1-2, 13-15 (2020), <https://perma.cc/7A63-XBP8>.

220. See, e.g., Russell Berman, *The November Surprise*, ATLANTIC (Oct. 7, 2020), <https://perma.cc/SKF9-9YAU> ("Polling data and early-voting levels, along with turnout and registration numbers during the Trump era, all point to a surge at the polls unseen in decades, election experts say."); see also Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://perma.cc/UHQ2-ZY8B>. Though imperfect measurements, voter turnout and participation in protests are at least proxies for overall democratic engagement.

221. President Biden discussed reforming the DOJ on the campaign trail. See Adam Edelman, *"The Department of Trump": Biden Bashes Trump, Barr for DOJ Interference*, NBC NEWS (Sept. 23, 2020, 12:34 PM PDT), <https://perma.cc/L6MQ-SHM4>.

222. For example, Senator Joe Manchin, perhaps the furthest right-leaning Democratic senator, has called for a new era of bipartisanship in Washington. Press Release, Sen. Joe Manchin, Manchin Statement on the Future of the 117th Congress (Jan. 6, 2021), <https://perma.cc/N43N-FSHV> ("With tight margins in the House and the Senate, Democrats and Republicans are faced with a decision to either work together to put the priorities of our nation before partisan politics or double down on the dysfunctional tribalism."). Senator Chris Coons has promised that President Biden will work to satisfy Manchin's wishes. See Russell Berman, *The Biden Presidency Now Stands a Chance*, ATLANTIC (updated Jan. 6, 2021, 4:51 PM ET), <https://perma.cc/R7WA-7TND> ("If there is anyone who can succeed in bringing the Senate back towards functionality and bipartisanship, it's a President Joe Biden," Senator Chris Coons of Delaware, a close ally of Biden's who is likely to be central to the new administration's efforts to engage Republicans, told me.).

senators from the President's party can frame their resistance to the White House's agenda in terms of preserving Congress's constitutional prerogative. This approach comes in both conventionally liberal and conservative flavors. Depending on their ideological bent, senators either can use their power to protect the vulnerable from the national-security state's overreach (liberal) or demand that the executive branch respect the separation of powers (conservative). Thus, they can check the OLC with sufficient political cover from criticism by members of their own party without compromising oversight efforts. Doing so would represent a return to the norm, not a break with long-standing Senate practice. Between Watergate and the beginning of our modern era of polarization in the mid-1990s, both houses of Congress worked to assert their rights against the President without regard for his party.<sup>223</sup> This is not ancient history; this is an era in which multiple current members of the Judiciary Committee participated.<sup>224</sup>

Indeed, even in these acrimonious times, senators from both parties do take a stand when they believe the President deserves rebuke. Importantly, they already do so in ways that could constrain the OLC. As I discussed above, Democrats raised substantive concerns about the nominations of both David Barron to the bench (Senator Mark Udall) and Dawn Johnsen to the OLC (Senator Ben Nelson).<sup>225</sup> More recently, Republican Senator Chuck Grassley placed a hold on two executive-branch nominations after President Trump fired two inspectors general. Grassley would not allow either nomination to go forward until the White House provided further explanation for the firings.<sup>226</sup> Senator Grassley framed his concern with the firings in terms of affirming Congress's oversight powers.<sup>227</sup> It is simplistic to dismiss these constraints

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223. Cf. Neal Devins, *Why Congress Does Not Challenge Judicial Supremacy*, 58 WM. & MARY L. REV. 1495, 1539-41 (2017) (arguing that the Senate no longer has such capacity due to significant partisan polarization).

224. For example, Senator Leahy entered office in 1975. *Leahy, Patrick Joseph*, BIOGRAPHICAL DIRECTORY U.S. CONG.: 1774-PRESENT, <https://perma.cc/7JU8-LDVL> (archived May 2, 2021). Senator Chuck Grassley entered office in 1981. *Grassley, Charles Ernest*, BIOGRAPHICAL DIRECTORY U.S. CONG.: 1774-PRESENT, <https://perma.cc/F7T9-LQNE> (archived May 2, 2021). Senator Feinstein joined the Senate in 1992. *Feinstein, Dianne*, BIOGRAPHICAL DIRECTORY U.S. CONG.: 1774-PRESENT, <https://perma.cc/64N9-AT4P> (archived May 2, 2021).

225. See *supra* note 186 and accompanying text (discussing the opposition to Barron's nomination); *supra* note 180 and accompanying text (discussing the opposition to Johnsen's nomination).

226. Marianne Levine, *Grassley Puts Hold on Two Trump Nominees Until He Gets Answers on IG Firings*, POLITICO (June 4, 2020, 3:08 PM EDT), <https://perma.cc/LS8W-KR83>.

227. Press Release, Sen. Chuck Grassley, *Grassley Statement on Termination of State Dept. Inspector General* (May 16, 2020), <https://perma.cc/PY8P-N5AX> ("As I've said before, Congress requires written reasons justifying an IG's removal. A general lack of confidence simply is not sufficient detail to satisfy Congress . . .").

because of the close relationship between the Judiciary Committee majority and the President during the Trump Administration.<sup>228</sup>

This is not to downplay the ways in which senators often fail to live up to their obligations to oversee Presidents from their party. The Republican Senate Caucus's close ties to President Trump during the 116th Congress may be a particularly extreme example, but those ties were far from novel.<sup>229</sup> Nevertheless, it is far easier for the Judiciary Committee to use its existing legal authority to constrain the OLC—and do so consistent with recent practice—than it is to pass the SUNLIGHT Act or spark a popular constitutional awakening in the legal bureaucracy.

Ultimately, this Note is as much a call to action for the Senate as it is a warning about the excesses of executive power. The Committee's institutional strengths in constraining the OLC represent more than just a hypothetical toolbox: They are a series of constitutional and political responsibilities. Only the Committee can subject an assistant attorney general to meaningful scrutiny before he or she takes the position. Only the Committee can vet the OLC's illustrious alumni before they take lifetime appointments on the bench. Only the Committee can demand answers from the DOJ's leaders. Simply put, the Senate must choose whether to take up its constitutional charge, both for itself and for the American people. While it can only check the OLC indirectly, the Senate Committee on the Judiciary has many tools at its disposal to conduct meaningful oversight of the Office, making it an essential player in any effort to constrain the OLC.

And the stakes are only rising. Not only does the OLC continue to step beyond the legal mainstream and improperly expand executive power, but soon the judiciary may make the Senate one of the only actors available in oversight efforts. The Supreme Court's full-throated endorsement of a unitary executive may leave the Committee truly alone in meaningfully altering how the executive branch makes law. In *Seila Law LLC v. Consumer Financial Protection Bureau*, the Court endorsed a sweeping view of the powers that Article II of the Constitution vests in the President<sup>230</sup> based on the same clauses that form the basis for the unitary executive theory.<sup>231</sup> The President that *Seila*

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228. Senator Lindsey Graham's actions as the chair of the Judiciary Committee are illustrative of the majority's approach to dealing with President Trump. See Mark Leibovich, *How Lindsey Graham Went from Trump Skeptic to Trump Sidekick*, N.Y. TIMES MAG. (Feb. 25, 2019), <https://perma.cc/7J5F-4B5X>.

229. During the Bush Administration, for example, Republicans were not the ones pressing Bybee on his conduct at the OLC. See *supra* notes 190-95 and accompanying text.

230. 140 S. Ct. 2183, 2203 (2020) (contrasting the diffusion of legislative power between two chambers and many lawmakers and the concentration of power in a single President).

231. Compare *id.* at 2191 ("Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" (first quoting U.S. CONST. art. II, § 1, cl. 1; and then quoting *id.* art. II, § 3)), with Steven G. *footnote continued on next page*

*Law* describes reigns absolutely supreme over the executive branch.<sup>232</sup> The administrative state, it appears, only exists because there are a finite number of hours in the President's day.<sup>233</sup>

In this way, Chief Justice Roberts's opinion in *Seila Law* might end up doing more than sweep away for-cause removal protections for single directors of independent executive-branch agencies.<sup>234</sup> Beyond the facts of the controversy before the Court, *Seila Law*'s reasoning provides little in the way of limiting principles. Thus, it casts at least some doubt on the viability of intrabranched constraints on presidential authority. Though the opinion only has occasion to endorse what Steven Calabresi and Kevin Rhodes call the "weakest model" of the unitary executive theory,<sup>235</sup> any slippage toward one of the more robust unitary theories might preclude limitations on the interpretive approaches or legal conclusions used by the OLC.<sup>236</sup> If for-cause removal can only constrain the President's obligation to enforce the law in extremely limited contexts, it is not a stretch to apply the Take Care Clause to his or her authority to make or interpret the same law.<sup>237</sup>

Indeed, now that the Court has given the Take Care Clause this much doctrinal heft, its text seems to make slippage rather easy: To ensure "that the Laws be faithfully executed,"<sup>238</sup> the President *must* monopolize the executive branch's lawmaking and law-interpreting powers. Under this view, not only

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Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992) (identifying the Vesting and Take Care Clauses of Article II as the basis for the unitary executive theory).

232. *Seila Law*, 140 S. Ct. at 2197 ("The entire 'executive Power' belongs to the President alone.").

233. *Id.* (noting that executive-branch officials must exist "because it would be 'impossib[le]' for 'one man' to 'perform all the great business of the State'" (alteration in original) (quoting 30 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES: 1745-1799, at 334 (John C. Fitzpatrick ed., 1939))); *see also* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483 (2010) (using the same quotation).

234. *See Seila Law*, 140 S. Ct. at 2197.

235. Calabresi & Rhodes, *supra* note 231, at 1166 ("The third and weakest model of the unitary executive contends that the President has unlimited power to remove at will any principal officers (and perhaps certain inferior officers) who exercise executive power.").

236. *See id.* (observing that the strongest version of the unitary executive theory would give the President "the direct power to supplant any discretionary executive action taken by a subordinate with which he disagrees, notwithstanding any statute"). Presumably, this would include unsatisfactory conclusions or reasoning from the OLC.

237. Nelson Lund and Judge Neomi Rao appear to have provided a basis for extending the unitary executive theory this far, rooting this especially broad view of presidential power in the President's democratic legitimacy. *See supra* note 34.

238. U.S. CONST. art. II, § 3.

would Ackerman's "Supreme Executive Tribunal"<sup>239</sup> face a clear constitutional challenge, but DOJ lawyers also might lack the authority to check the President by, for example, opening a dissent channel<sup>240</sup> or implementing a stare decisis norm.<sup>241</sup> With the unitary executive theory ascendant, the Judiciary Committee may feel especially obligated to take up the cause of constraining the OLC as one of the only bodies legally able to do so.

Many of the indirect constraints discussed in this Note require striking a difficult balance: There appears to be a direct relationship between the amount of institutional buy-in necessary to enact a constraint and its efficacy. On one end of the spectrum lies the "Supreme Executive Tribunal."<sup>242</sup> There is no question this proposal would force the President to respect individual liberty and the separation of powers, but it might require a constitutional amendment to implement. On the other end lies groups of concerned citizens armed with nothing but their activism and the right to vote. They can register their displeasure with how the OLC gave Trump Administration officials cover to obstruct Congress,<sup>243</sup> but it is not clear who will be listening. Only the Senate Judiciary Committee can combine, without anyone else's permission, real power over the executive branch with a safe distance from the President's increasingly unchecked power over the federal bureaucracy.

### **Conclusion**

Despite bitter partisan divisions on Capitol Hill and the likelihood of a recalcitrant White House no matter the occupant, there is plenty of work the Senate Judiciary Committee can undertake right now to constrain the OLC. The senators on the Committee need no additional authorization to begin this work. The President will not feel the impact of this Note's proposals overnight, but the proposals present a meaningful opportunity to reinvigorate one of the three coequal branches of government. In this way, the work to check the OLC can usher in a new era of constitutional governance within both political branches: Not only will the legislature have redoubled its efforts to protect individual Americans and respect the separation of powers, but those norms will also have spread to the executive branch. To begin this project, the Committee need only pick up tools already at its disposal.

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239. *See supra* note 71 and accompanying text.

240. *See supra* note 128 and accompanying text.

241. *See supra* note 95 and accompanying text.

242. *See supra* note 71 and accompanying text.

243. *See supra* notes 4-7 and accompanying text.