

STARE DECISIS IN THE OFFICE OF LEGAL COUNSEL

Trevor W. Morrison*

Legal interpretation within the Executive Branch has attracted increased interest in recent years, much of it focused on the Justice Department's Office of Legal Counsel (OLC). The most significant centralized source of legal advice within the Executive Branch, OLC has also been plagued by charges of undue politicization—especially in connection with various issues relating to the “war on terror.” Yet there has been little consideration of the role in OLC of one of the main devices thought to constrain political and ideological preferences within the Judicial Branch—stare decisis.

This Article provides the first sustained descriptive and normative examination of the role of stare decisis in OLC. Descriptively, it analyzes all of OLC's publicly available legal opinions from the beginning of the Carter Administration through the end of the first year of the Obama Administration. The data show that OLC rarely openly departs from its prior opinions, but that an express request for overruling from the executive entity most affected by the opinion is a good predictor of such a departure. Normatively, the Article considers whether OLC should employ something like a rule of stare decisis with respect to its prior opinions, and, if so, in what circumstances it is justified in departing from those precedents. It argues that stare decisis has a legitimate place in OLC, but that OLC's location within the Executive Branch affects both the weight it should accord its precedents and the circumstances in which it should depart from them.

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INTRODUCTION

The doctrine of precedent, or stare decisis,¹ is a staple of American law. In barest form, it holds that a prior authoritative decision to resolve an issue in a particular way provides a reason to continue resolving the issue that way, without regard to the apparent correctness of the prior decision.² There is a vast academic literature on the topic, almost all of which focuses on the courts.³ Yet just as legal interpretation in general is not the exclusive province of the judiciary, so too do questions of precedent extend beyond the courts.

This point is underappreciated. To be sure, there is a substantial literature—generally pitting “judicial supremacy” against “departmentalism”—on the extent to which judicial interpretations of the Constitution

1. In full, “stare decisis et non quieta movere”—“[t]o stand by things decided, and not to disturb settled points.” Black’s Law Dictionary 1443 (8th ed. 2004).

2. This is a version of Frederick Schauer’s account: “The previous treatment of occurrence *X* in manner *Y* constitutes, *solely because of its historical pedigree*, a reason for treating *X* in manner *Y* if and when *X* again occurs.” Frederick Schauer, Precedent, 39 Stan. L. Rev. 571, 571 (1987) [hereinafter Schauer, Precedent].

3. See, e.g., Saul Brenner & Harold J. Spaeth, *Stare Indecisis: The Alteration of Precedent on the Supreme Court, 1946–1992* (1995); Thomas G. Hansford & James F. Spriggs II, *The Politics of Precedent on the U.S. Supreme Court* (2006); Larry Alexander, *Constrained by Precedent*, 63 S. Cal. L. Rev. 3 (1989); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. Rev. 570 (2001); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723 (1988); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1 (2001); Schauer, Precedent, *supra* note 2; Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 Am. J. Pol. Sci. 971 (1996).

ought to bind the other branches, and, conversely, on the weight courts should give to the constitutional judgments of those branches.⁴ But those questions all focus one way or another on the courts. What about the role of *nonjudicial* precedent in *nonjudicial* legal interpretation, constitutional and otherwise?⁵ Do nonjudicial actors called upon to answer legal questions employ anything like a *stare decisis* rule with respect to their own prior decisions? Should they?

Neither the descriptive nor the normative answer is likely to be uniform across all domains.⁶ What is true in Congress may not be true in the Executive Branch. And even within the latter, differences in function, power, and accountability mean that not only the content but also the

4. See, e.g., *Congress and the Constitution* (Neal Devins & Keith E. Whittington eds., 2005); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004); Mark Tushnet, *Taking the Constitution Away from the Courts* (1999); Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 *Const. Comment.* 455 (2000); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 *Harv. L. Rev.* 1359 (1997); Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 *Sup. Ct. Rev.* 61; Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 *UCLA L. Rev.* 1559 (2007); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 *Geo. L.J.* 373 (1994); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 *Yale L.J.* 969 (1992); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of *Roe* and *Casey*?*, 109 *Yale L.J.* 1535 (2000) [hereinafter Paulsen, *Abrogating Stare Decisis by Statute*]; Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 *Notre Dame L. Rev.* 1227 (2008); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *Geo. L.J.* 217 (1994); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 *Mich. L. Rev.* 676 (2005); Kermit Roosevelt III, *Polyphonic Stare Decisis: Listening to Non-Article III Actors*, 83 *Notre Dame L. Rev.* 1303 (2008); Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 *Calif. L. Rev.* 1045 (2004); Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?* 118 *Harv. L. Rev.* 1594 (2005) (reviewing Kramer, *supra*); David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, *Law & Contemp. Probs.*, Winter/Spring 2000, at 61. My own contributions include Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 *Colum. L. Rev.* 1533 (2007) [hereinafter Morrison, *Suspension*] and Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 *Colum. L. Rev.* 1189 (2006) [hereinafter Morrison, *Avoidance*].

5. The very few academic treatments of this question include a chapter on "Nonjudicial Precedent" in Michael J. Gerhardt, *The Power of Precedent* 111 (2008); Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 *Cardozo L. Rev.* 513, 515–16 (1993); and Mark Tushnet, *Legislative and Executive Stare Decisis*, 83 *Notre Dame L. Rev.* 1339 (2008) [hereinafter Tushnet, *Stare Decisis*].

6. See Schauer, *Precedent*, *supra* note 2, at 603 ("When Congress considers a private bill, precedent is rarely mentioned, but when Congress impeaches and tries a president or a judge, precedent rightfully comes into play. . . . [T]he Department of Justice may rely less on precedent when establishing prosecutorial priorities than when giving advice to the president with respect to constitutional responsibilities." (footnote omitted)); Philip Bobbitt, *War Powers: An Essay on John Hart Ely's *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath**, 92 *Mich. L. Rev.* 1364, 1383–84 (1994) (book review) ("[T]here are as many kinds of precedent as there are constitutional institutions creating them.").

role of precedent may (and likely should) vary from one executive component and function to the next. Thus, the study of nonjudicial precedent should be context-sensitive. Proceeding from that premise, this Article focuses on the role of precedent in the provision of legal advice by the Justice Department's Office of Legal Counsel (OLC).

Of course, OLC is not just any executive office. For decades, it has been the most significant centralized source of legal advice within the Executive Branch.⁷ Exercising authority delegated by the Attorney General, it provides legal advice to the President and other executive components. The questions OLC addresses are often among the most vexing in the Executive Branch. Its answers sometimes take the form of written legal opinions which, together with the legal opinions issued directly by Attorneys General themselves, "comprise the largest body of official interpretation of the Constitution and statutes outside the volumes of the federal court reporters."⁸ And because many of the issues addressed by OLC are unlikely ever to come before a court in justiciable form, OLC's opinions often represent the final word in those areas unless later overruled by OLC itself, the Attorney General, or the President.

The role of precedent at OLC has become a matter of increased interest in recent years, spurred in part by the leak in 2004 of an OLC opinion concluding that the federal anti-torture statute only minimally constrained the government's use of "enhanced interrogation techniques" on suspected terrorists.⁹ Known colloquially as the "Torture Memorandum," it became the target of withering public criticism and was soon disavowed by the Justice Department.¹⁰ Some critics saw in the

7. See Pillard, *supra* note 4, at 710 ("[T]he head of the Office of Legal Counsel is the executive branch's chief legal advisor."). Other executive offices with important legal advisory roles extending beyond their own departments or agencies include the Office of the Legal Adviser in the State Department.

8. John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 *Cardozo L. Rev.* 375, 376 (1993) [hereinafter McGinnis, *Attorney General*]. Although Attorneys General still do occasionally issue legal opinions under their own name, "[a]s a matter of practice, since the beginning of the 1960s the Assistant Attorney General for OLC, or on occasion a deputy assistant attorney general, has signed all but a tiny percentage of the Justice Department's legal opinions." H. Jefferson Powell, *The Constitution and the Attorneys General*, at xv n.2 (1999).

9. See Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A, at 34 (Aug. 1, 2002) [hereinafter *Torture Memorandum*], available at http://www.washingtonpost.com/wp-srv/politics/documents/cheney/torture_memo_aug2002.pdf (on file with the *Columbia Law Review*), subsequently withdrawn and replaced by Memorandum from Daniel Levin, Acting Assistant Att'y Gen., Office of Legal Counsel, to James B. Comey, Deputy Att'y Gen., Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004), available at <http://www.justice.gov/olc/18usc23402340a2.htm> (on file with the *Columbia Law Review*).

10. See Office of Prof'l Responsibility, U.S. Dep't of Justice, *Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected*

opinions an abandonment of what they viewed as OLC's proper role, replaced by a willingness to adopt implausible and even professionally irresponsible legal positions in order to please the client—in that case, the White House Counsel.¹¹ That in turn prompted broader discussion of the procedures OLC should follow when providing legal advice, including the weight it should accord to its own precedents.

Current and past members of OLC have made three noteworthy contributions to the dialogue. The first, called “Principles to Guide the Office of Legal Counsel” (which I will call the Guidelines), was issued in late 2004 by a group of former OLC lawyers in their personal capacities.¹² The second is an official OLC memorandum from May 2005, entitled

Terrorists 121–23 (July 29, 2009) [hereinafter OPR Report], available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf> (on file with the *Columbia Law Review*). For a collection of criticisms of the Torture Memorandum, see Morrison, *Avoidance*, supra note 4, at 1231 n.182.

11. Whether any of the underlying legal advice constituted professional misconduct became the subject of a five-year formal investigation by the Justice Department's Office of Professional Responsibility (OPR). OPR Report, supra note 10. OPR ultimately concluded that former Assistant Attorney General Jay Bybee and former Deputy Assistant Attorney General John Yoo had committed “professional misconduct” (Bybee recklessly and Yoo intentionally) in connection with their work on the Torture Memorandum and related opinions. *Id.* at 11. In response to objections lodged by Bybee and Yoo, Associate Deputy Attorney General David Margolis reviewed the OPR Report and advised the Attorney General that he did not adopt the professional misconduct findings and would not authorize OPR to refer its findings to relevant state bar authorities. Memorandum from David Margolis, Assoc. Deputy Att’y Gen., to Eric Holder, Att’y Gen., Re: Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of 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 2 (Jan. 5, 2010) [hereinafter Margolis Memorandum], available at <http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf> (on file with the *Columbia Law Review*). Of course, whether these attorneys committed professional misconduct is not the same as whether they followed what anyone would call best practices for OLC. As to the latter, Margolis called the Torture Memorandum and related opinions “an unfortunate chapter in the history of the Office of Legal Counsel.” *Id.* at 67. He suggested that Yoo allowed his “loyalty to his own ideology and convictions [to] clou[d] his view of his obligation to his client and [lead] him to author opinions that reflected his own extreme, albeit sincerely held, views of executive power while speaking for an institutional client.” *Id.* at 67.

12. Walter Dellinger, et al., *Principles to Guide the Office of Legal Counsel* (2004) [hereinafter OLC Guidelines], reprinted in Dawn E. Johnsen, supra note 4, 1603 app. 2 (2007). The nineteen signatories to the Guidelines all served in OLC during the Clinton Administration. Some also served in previous Republican administrations or held over into the George W. Bush Administration. Five now serve or have served in the Obama Administration, including two in OLC. I note that I have worked with some of the signatories on related projects, including congressional testimony endorsing the Guidelines. See *Restoring the Rule of Law: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 110th Cong. 180* (2008) [hereinafter *Hearing, Restoring the Rule of Law*] (joint statement of David J. Barron, Walter E. Dellinger, Dawn E. Johnsen, Neil J. Kinkopf, Martin S. Lederman, Trevor W. Morrison, and Christopher H. Schroeder). I also worked with several of the signatories during my time at OLC in 2000–2001 and the White House Counsel's Office in 2009.

“Best Practices for OLC Opinions.”¹³ And the third, issued when this Article was in final editing, is a July 2010 OLC memorandum that “updates” the one from 2005, entitled “Best Practices for OLC Legal Advice and Written Opinions.”¹⁴ All three are in substantial agreement on a number of points,¹⁵ including general statements about the importance of precedent. As the 2010 Best Practices Memorandum puts it, “OLC opinions should consider and ordinarily give great weight to any relevant past opinions of Attorneys General and the Office. The Office should not lightly depart from such past decisions, particularly where they directly address and decide a point in question”¹⁶ Similarly, the Guidelines call for “due respect for the precedential value of OLC opinions from administrations of both parties,” and urge “careful consideration and detailed explanation” of any decision to overrule a prior opinion.¹⁷

But a general acknowledgement of “due respect” for precedent leaves many important questions unresolved. First, does OLC in fact treat its past decisions as presumptively binding without regard to whether it now deems them correct? Or does OLC instead see its precedents as

13. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, to Attorneys of the Office, Re: Best Practices for OLC Opinions (May 16, 2005) [hereinafter 2005 OLC Best Practices Memorandum], available at <http://www.justice.gov/olc/best-practices-memo.pdf> (on file with the *Columbia Law Review*).

14. Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, to Attorneys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions 1 n.* (Jul. 16, 2010) [hereinafter 2010 OLC Best Practices Memorandum], available at <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf> (on file with the *Columbia Law Review*) (“This memorandum updates a prior memorandum, ‘Best Practices for OLC Opinions,’ issued May 16, 2005.”).

15. The author of the 2005 OLC Best Practices Memorandum, Steven Bradbury, expressed substantial agreement with the Guidelines during the Senate hearings on his nomination to head OLC. See Confirmation Hearings on Federal Appointments: Hearings Before the S. Comm. on the Judiciary, 109th Cong. 766 (2005) (written responses of Steven Bradbury, nominee to the position of Assistant Attorney General for OLC, to questions from Senator Leahy) (“The [Guidelines] generally reflect operating principles that have long guided OLC in both Republican and Democratic administrations.”). Other lawyers who occupied senior positions in the Bush Administration have expressed similar agreement. See, e.g., Confirmation Hearing on the Nomination of Timothy Elliott Flanigan to be Deputy Att’y Gen.: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 120 (2005) (written responses of Timothy Flanigan to questions from Senator Kennedy) (“I have reviewed generally the [Guidelines] and agree with much of the document. I believe that the document reflects operating principles that have long guided OLC in both Republican and Democratic administrations.”); Jack Goldsmith, *The Terror Presidency* 33–34 (2007) (expressing agreement with the Guidelines’ statement of OLC’s basic institutional posture).

16. 2010 OLC Best Practices Memorandum, *supra* note 14, at 2. The 2010 Memorandum here follows the position marked out in the 2005 Memorandum, which provides that “OLC opinions should . . . consider and apply the past opinions of Attorneys General and this Office, which are ordinarily given great weight. The Office will not lightly depart from such past decisions, particularly where they directly address and decide a point in question.” 2005 OLC Best Practices Memorandum, *supra* note 13, at 2.

17. OLC Guidelines, *supra* note 12, at 1608–09.

merely helpful resources worth consulting, on the theory that past occupants of the office were thoughtful lawyers whose work is liable to be illuminating even though not binding?¹⁸ If the answer lies somewhere in between, where on the continuum between presumptive bindingness and mere illumination does it fall? And moving from the descriptive to the normative, to what extent should OLC treat its precedents as binding?

A second and related question also has both descriptive and normative components: How strong is OLC's tendency to follow precedent, and how strong should it be? The 2010 Best Practices Memorandum says that, "as with any system of precedent, past decisions may be subject to reconsideration and withdrawal in appropriate cases and through appropriate processes."¹⁹ But what are the appropriate cases? When are the values supporting OLC's adherence to precedent outweighed by other considerations, and when should they be? The classic competing consideration is a belief that the precedent is wrong. If mere error in a precedent were always sufficient to overrule, OLC would have no operative doctrine of *stare decisis*.²⁰ But does that mean error should *never* be sufficient to overrule? The Guidelines do not take that position, suggesting instead that "OLC's current best view of the law sometimes will require repudiation of OLC precedent."²¹ On this point the drafters likely had in mind the Torture Memorandum. We now know that shortly after Jack Goldsmith became head of OLC in late 2003, he reviewed both the Torture Memorandum and a follow-on opinion²² and concluded that both were so "deeply flawed," "sloppily reasoned, overbroad, and incautious" that they had to be withdrawn.²³ Goldsmith reached that conclusion even though he supported OLC's "powerful tradition of adhering to

18. The latter circumstance involves treating a past decision as a source of what Frederick Schauer calls experience, not precedent. With arguments from experience, "a present array of facts similar to some previous array leads a decisionmaker to draw on experience in reaching a conclusion," as where "a physician sees a certain array of symptoms that in the past have indicated typhoid," and on the basis of that experience "diagnose[s] typhoid when those symptoms again appear." Schauer, *Precedent*, *supra* note 2, at 575. Experience, in other words, is consulted on the theory that it is likely to reveal something helpful to the resolution of the present issue. It has no independent weight beyond what it can teach about the present.

19. 2010 OLC Best Practices Memorandum, *supra* note 14, at 2.

20. See *United States ex rel. Fong Foo v. Shaughnessy*, 234 F.2d 715, 719 (2d Cir. 1955) ("Stare decisis has no bite when it means merely that a court adheres to a precedent it considers correct."); Schauer, *Precedent*, *supra* note 2, at 575 ("[I]f we are truly arguing from precedent, then the fact that something was decided before gives it present value despite our current belief that the previous decision was erroneous.").

21. OLC Guidelines, *supra* note 12, at 1609.

22. Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def., Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003), available at <http://www.justice.gov/olc/docs/memo-combatantsoutsideunitedstates.pdf> (on file with the *Columbia Law Review*).

23. Goldsmith, *supra* note 15, at 10; see also OPR Report, *supra* note 10, at 112–13 (describing withdrawal of Yoo Memorandum).

its past opinions, even when a head of the office concludes that they are wrong.”²⁴ Thus the question: How grave must an error be to warrant departing from this tradition? Should error *alone* ever be enough?

Another competing consideration warrants special mention, and will receive extended attention in this Article: the views of the President.²⁵ The Guidelines state that OLC’s work should “reflect the institutional traditions and competencies of the executive branch as well as the views of the President who currently holds office.”²⁶ But what happens when these factors do not align—when OLC precedent is at odds with the views of the current President? The Guidelines recognize but do not resolve this potential tension, stating merely that OLC “serves both the institution of the presidency and a particular incumbent, democratically elected President in whom the Constitution vests the Executive power.”²⁷ In a similar vein, Goldsmith has noted that “OLC is not entirely neutral to the President’s agenda,” and has suggested OLC should keep “the political dimension in view” when providing legal advice.²⁸ How should OLC do this? We can fairly predict that OLC will face great pressure to conform its views to those of the President, and it is worth attending to those pressures.²⁹ But as a matter of best practice, should OLC ever overrule itself in deference to the President’s views?

This Article addresses the descriptive and the normative questions posed above. Descriptively, it provides the first empirical survey of OLC’s published opinions to determine how often and in what circumstances it departs from its prior opinions. Normatively, it considers whether and to what extent OLC ought to follow a rule of stare decisis. There is a wide range of potential answers to the normative question. At one end of the spectrum, granting “due respect”³⁰ to OLC’s precedents might mean considering them in each case, but following them only to the extent they now appear correct on the merits. At the other end, “due respect” might mean treating past opinions as binding in all cases, even when they conflict with the views of the President—thus requiring him to reverse OLC if he insists on another course. I ultimately defend a middle position. Stare decisis, I argue, has a legitimate place in OLC, but OLC’s location within the Executive Branch affects both the weight it should accord its precedents and the circumstances in which it should depart from them.

In elaborating and defending that position, I proceed from two distinct but equally critical premises: that OLC’s legal advice is treated as binding within the Executive Branch unless “overruled” by the Attorney General or the President, and that OLC provides advice based on its best

24. Goldsmith, *supra* note 15, at 145.

25. See *infra* Part III.B.2.

26. OLC Guidelines, *supra* note 12, at 1606.

27. *Id.*

28. Goldsmith, *supra* note 15, at 35.

29. See *infra* Part I.B.

30. OLC Guidelines, *supra* note 12, at 1608–09.

view of the law. OLC has consistently embraced both premises when describing its role,³¹ and I accept them here. Yet in doing so, I do not mean to suggest there is anything constitutionally inevitable about them. At least in theory, OLC's job could be defined in very different terms.³² Rather than considering those potential differences here, I take OLC roughly as I find it—or at least as OLC presents itself—and ask what role OLC's precedents should play in its work, accepting that its job is to provide binding legal advice based on its best view of the law.³³ As I explain later in the Article,³⁴ it is also critical that the formulation here is OLC's best view of the law, not *the* best view.³⁵ This reflects the idea that, as an office within the Executive Branch, OLC views the law through a particular lens, and thus that its best view of the law might legitimately differ on some issues from that of a differently situated actor. With these points in

31. See 2010 OLC Best Practices Memorandum, *supra* note 14, at 1 (“OLC’s core function . . . is to provide controlling advice to Executive Branch officials on questions of law . . .”); 2005 OLC Best Practices Memorandum, *supra* note 13, at 1 (“[S]ubject to the President’s authority under the Constitution, OLC opinions are controlling on questions of law within the Executive Branch.”); *id.* at 3 (“OLC’s interest is simply to provide the correct answer on the law . . .”); OLC Guidelines, *supra* note 12, at 1603 (“OLC’s legal determinations are considered binding on the executive branch, subject to the supervision of the Attorney General and the ultimate authority of the President.”); *id.* at 1604 (“OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration’s pursuit of desired policies.”). As I describe below in Part I.B.2, there is actually some uncertainty whether OLC’s opinions are truly binding within the Executive Branch as a technical matter. But there is a longstanding practice of *treating* them as binding. That practice is the premise on which I rely here.

32. Many other offices in the Justice Department operate in an advocacy mode. Their job is to provide the best defense before a court of an already-passed law or an already-determined position. See generally Seth P. Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073 (2001) (describing role of Solicitor General in defending laws passed by Congress). OLC could conceivably operate in a similar mode. See, e.g., McGinnis, *Attorney General*, *supra* note 8, at 377, 402 (identifying three “plausible” models for Attorney General and OLC opinions, including “situational model” in which opinions would be written “in the situational interest of [the] client without any obligation to preserve legal principles whether autonomous or court-centered”). But that is not how OLC has depicted its role. My focus here is on how the actual OLC operates or purports to operate; I do not take up the situational or any other more advocacy-focused model not espoused by OLC itself.

33. I thus do not consider the extent of Congress’s power to change OLC’s role—by, for example, requiring OLC to provide legal advice based on something other than its best view of the law, or requiring OLC to ignore certain factors (like the views of the President) when providing legal advice, or limiting the power of even the Attorney General or President to overrule OLC’s advice. I leave questions of that order for another day. Full consideration of them would require examination of the line of Supreme Court decisions culminating in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 130 S. Ct. 3138 (2010), as well as competing claims about the constitutional contours of presidential law-interpreting authority tracing as far back as the Pacificus-Helvidius debates.

34. See *infra* Part III.

35. See 2010 OLC Best Practices Memorandum, *supra* note 14, at 1 (“OLC must provide advice based on its best understanding of what the law requires . . .”).

mind, my goal is to elaborate a realistic best practice for OLC's treatment of its precedents.³⁶

The Article proceeds in three parts. Part I situates OLC and its work in institutional context, looking in particular at the incentives and constraints OLC faces in its work. The recent history of the Torture Memorandum and other "war on terror" opinions notwithstanding, administrations of both political parties have recognized the instrumental value of ensuring OLC is broadly perceived as reasonably independent and credible. An OLC that too readily answers "yes" to its clients is an OLC whose advice is not worth seeking. To that end, OLC has developed a number of procedural and other tools to preserve its reputation for independence, some of which harness political forces to help insulate OLC rather than to threaten it. In the end, though, those tools are only as reliable as the OLC personnel employing them.

Against that background, Part II provides a historical and empirical account. After surveying statements by early Attorneys General describing their views of the deference due to the legal opinions of their predecessors, I then undertake to provide a descriptive account of precedent—or, more precisely, the limits of precedent—in OLC. I examine all publicly available, written OLC opinions from the start of the Carter Administration to the end of the Obama Administration's first year, 1,191 opinions in all, to determine how frequently OLC overrules or substan-

36. To be clear, it is a premise of this Article that although it may be difficult for OLC to follow its best view of the law, it is not impossible. I thus reject the idea that OLC is so completely beholden to the policy or ideological agenda of the incumbent presidential administration that its advice is best viewed as "invariably and exclusively lawyers' rationalizations for the policy preferences of the President." Powell, *supra* note 8, at xvi (describing and rejecting this view). Throughout its history, OLC has opposed the President on nontrivial matters. Jack Goldsmith's withdrawal of the Torture Memorandum is one dramatic example. Others include OLC's conclusion during the Nixon Administration that the President lacks the inherent authority to impound funds appropriated by Congress, see Memorandum from William H. Rehnquist, Assistant Att'y Gen., Office of Legal Counsel, Re: Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools (Dec. 1, 1969), reprinted in *Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary, 92d Cong. 279* (1971), its conclusion during the Reagan Administration that the President lacks inherent line-item veto authority, see *The President's Veto Power*, 12 Op. O.L.C. 128, 128 (1988), and its conclusion near the end of the Clinton Administration that a former President can be prosecuted for the same offenses that had been the focus of an unsuccessful impeachment proceeding against him, see Memorandum from Randolph D. Moss, Assistant Att'y Gen., Office of Legal Counsel, to the Att'y Gen., Re: Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate (Aug. 18, 2000), available at <http://www.justice.gov/olc/expresident.htm> (on file with the *Columbia Law Review*). I do not mean to infer too much from anecdotal evidence like this, but it does show the *possibility* of opposing the President on important issues. Moreover, as I discuss in Part I.B, OLC has developed a number of practices that help protect it in situations where its best view of the law departs from the President's (or any other client's) initially preferred position, so that it can both adhere to that best view and avoid direct, outcome-determinative confrontations with the President.

tially amends its precedents, and to identify the factors that correlate with overruling. The data suggest that OLC does not often overrule itself and that it is most likely to do so when urged by the executive department or agency most directly affected by the precedent in question.

Moving from the descriptive to the normative, Part III considers the extent to which OLC should follow a rule of *stare decisis*. I show that most of the values associated with judicial *stare decisis*—including consistency, predictability, reliance, efficiency, and credibility—are also important in OLC's work. There is thus good reason for OLC to maintain at least a strong presumption in favor of its precedents. I also suggest that OLC's location within the Executive Branch gives it a special reason to grant added weight to its precedents on issues of executive power. Moreover, consideration of that factor helps illuminate what it means for OLC to provide legal advice based on *its* best view of the law.

Part III then turns to the factors OLC should consider when deciding whether to overrule itself. Part of the answer lies in the factors considered by courts, which turn out to be generally applicable in OLC as well. Those factors support, for example, Goldsmith's decision to withdraw the Torture Memorandum. But I also argue that OLC's institutional location introduces an additional legitimate basis for dispensing with the constraints imposed by an earlier opinion: the views of the President. I suggest that although the fact that the current head of OLC disagrees with a precedent is not sufficient to warrant overruling it, in at least some instances the settled and publicly expressed views of the President can be enough. This factor is admittedly difficult to manage; there is a risk that the President's preferences could become dispositive in a way that rendered OLC legal advice no longer truly *its* advice. I offer some thoughts for how to protect against that risk while according appropriate weight to the President's views.

I. THE SUPPLY AND DEMAND OF OLC LEGAL ADVICE

OLC's work should be viewed in its institutional context. In this Part, I describe the structural, procedural, and other features of that work and discuss some of the incentives created by those features. The goal is to provide a picture of OLC in its institutional context, as a backdrop for the precedent-focused discussions to follow.

A. *Background*

OLC's core function is to provide "formal advice through written opinions."³⁷ Its clients range across the Executive Branch, though the White House and the Attorney General are the most frequent.³⁸ The

37. 2005 OLC Best Practices Memorandum, *supra* note 13, at 1.

38. Pillard, *supra* note 4, at 711. OLC is authorized to provide legal advice only to the Executive Branch and "do[es] not advise Congress, the Judiciary, foreign governments, private parties, or any other person or entity outside the Executive Branch." 2005 OLC

responsibility to advise such clients is assigned by statute to the Attorney General, but is delegated to OLC by regulation.³⁹ That delegation is a relatively recent phenomenon. Indeed, from the earliest days of the Union until the mid-twentieth century, Attorneys General themselves regularly provided legal advice to the President and others in the Executive Branch.⁴⁰

Best Practices Memorandum, *supra* note 13, at 1. However, OLC lawyers do occasionally testify before congressional committees to explain legal positions or practices of the office or other elements of the Executive Branch. See, e.g., *The Use of Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 98–108 (2006)* (statement of Michelle E. Boardman, Deputy Assistant Att’y. Gen., Office of Legal Counsel); *Federalism Accountability Act of 1999: Hearing on S. 1214 Before the S. Comm. on Governmental Affairs, 106th Cong. 296–305 (1999)* (prepared statement of Randolph D. Moss, Acting Assistant Att’y Gen., Office of Legal Counsel). From time to time, OLC lawyers also communicate with congressional staffers in more informal ways to discuss constitutional or other legal issues raised by proposed legislation.

39. See 28 U.S.C. § 511 (2006) (“The Attorney General shall give his advice and opinion on questions of law when required by the President.”); *id.* § 512 (“The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department.”); *id.* § 513 (“When a question of law arises in the administration of [one of the military departments] . . . , the cognizance of which is not given by statute to some other officer . . . , the Secretary of the military department shall send it to the Attorney General for disposition.”); 28 C.F.R. § 0.25(a) (2009) (assigning to Assistant Attorney General for OLC the task of “[p]reparing the formal opinions of the Attorney General; rendering informal opinions and legal advice to the various agencies of the Government; and assisting the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet”); *id.* § 0.25(c) (tasking Assistant Attorney General for OLC with “[r]endering opinions to the Attorney General and to the heads of the various organizational units of the Department on questions of law arising in the administration of the Department”); see also 2010 OLC Best Practices Memorandum, *supra* note 14, at 1 (“By delegation, [OLC] exercises the Attorney General’s authority under the Judiciary Act of 1789 to provide the President and executive agencies with advice on questions of law.”); 4A *Opinions of the Office of Legal Counsel of the United States Department of Justice Consisting of Selected Memorandum Opinions Advising the President of the United States, the Attorney General, and Other Executive Officers of the Federal Government in Relation to Their Official Duties, at v (Margaret Colgate Love ed., 1980) [hereinafter Opinions of the Office of Legal Counsel]* (summarizing history of vesting of this responsibility in OLC).

40. When section 35 of the Judiciary Act of 1789 created the office of Attorney General of the United States, one of the two duties it imposed on that officer was “to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments.” Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93. Perhaps the most important early exercises of that authority came in 1791, when Attorney General Randolph issued two opinions to President Washington on the constitutionality of the bill to incorporate a Bank of the United States. Powell, *supra* note 8, at 3–10. Randolph concluded that the bill exceeded Congress’s authority. The competing opinions of Secretary of the Treasury Hamilton and Secretary of State Jefferson on the issue are relatively well known; Randolph’s analysis has received less attention, but in many ways may be “closer in terms of method and approach to the mainstream of contemporaneous legal thought than the ideologically charged opinions of either Jefferson or Hamilton.” *Id.* at 10. In the end Washington was persuaded by Hamilton’s

In 1870, Congress created the position of Solicitor General and included among his responsibilities the provision of legal opinions on matters referred by the Attorney General.⁴¹ Starting in the 1920s, that function was performed by a specialized Assistant Solicitor General.⁴² In 1933, Congress made that Assistant subject to presidential nomination and Senate confirmation.⁴³ It was not until 1950 that Congress replaced that position with a separate office (first known as the Executive Adjudications Division and then renamed the Office of Legal Counsel in 1953) led by its own presidentially nominated and Senate confirmed Assistant Attorney General.⁴⁴

Today, OLC is a fairly small office of about two dozen lawyers. In addition to the Assistant Attorney General who heads the office, there are also several politically appointed (but not Senate confirmed) Deputy Assistant Attorneys General along with one Deputy who is not politically appointed. The rest of the lawyers in the office are “career” civil service lawyers. Most are called Attorney-Advisers; a few are members of the elite Senior Executive Service with the title Senior Counsel.⁴⁵ Many Attorney-Advisers serve in the office for only a few years, although some remain for much longer.

B. *Particular Features of OLC’s Work*

OLC’s legal advisory function is not subject to the justiciability constraints applicable to courts, but neither is it the self-directed work of an academic. Its perspective is not that of a life-tenured judge, but neither is it that of an avowedly partial advocate. And its opinions are not backstopped by a court’s contempt power, but neither are they merely precatory. In short, its work “is something inevitably, and uncomfortably, in between.”⁴⁶ Here I describe some aspects of that in-between space.

1. *Formally Nonmandatory Jurisdiction.* — With a few exceptions, there is no formal requirement that legal questions within the Executive Branch be submitted to OLC. One exception is for certain questions arising within the military, another is for jurisdictional or other disputes between agencies or departments, and a third involves review of proposed executive orders for form and legality. In those circumstances, statutes or regulations either require or strongly encourage the submission of the

arguments defending the bill, and signed it into law. And of course the Supreme Court ultimately upheld Congress’s power to charter a national bank in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

41. Act of June 22, 1870, ch. 150, §§ 1–2, 16 Stat. 162.

42. See Pillard, *supra* note 4, at 710.

43. Fourth Deficiency Act, Fiscal Year 1933, Pub. L. No. 73-78, § 16, 48 Stat. 283, 307–08; Pillard, *supra* note 4, at 710.

44. Reorganization Plan No. 2 of 1950, § 4, 15 Fed. Reg. 3173, 3173–74, reprinted in 64 Stat. 1261, 1261 (1950); see also *Opinions of the Office of Legal Counsel*, *supra* note 39, at v; Pillard, *supra* note 4, at 710.

45. Pillard, *supra* note 4, at 716 n.125.

46. Goldsmith, *supra* note 15, at 35.

matter to OLC.⁴⁷ But otherwise, as a formal matter OLC's involvement is a function of client choice.

That discretionary function gives OLC an incentive to provide legal advice in a way that encourages its clients to return with more requests in the future.⁴⁸ And that, in turn, creates a risk that OLC may be tempted to say "yes" too readily—concluding on dubious grounds that the client possesses the legal authority to take the action in question, or that it does not have certain legal obligations it would like to avoid. Clients like good news, and may be more likely to return if OLC is perceived as a reliable source of such news.

On the other hand, an OLC that says "yes" too often is not in the client's long-run interest.⁴⁹ Virtually all of OLC's clients have their own legal staffs, including the White House Counsel's Office in the White House and the general counsel's offices in other departments and agencies. Those offices are capable of answering many of the day-to-day issues that arise in those components. They typically turn to OLC when the issue is sufficiently controversial or complex (especially on constitutional questions) that some external validation holds special value.⁵⁰ For example, when a department confronts a difficult or delicate constitutional question in the course of preparing to embark upon a new program or course of action that raises difficult or politically sensitive legal questions, it has an interest in being able to point to a credible source affirming the

47. See 28 U.S.C. § 513 (2006) ("When a question of law arises in the administration of [one of the military departments] . . . , the cognizance of which is not given by statute to some other officer . . . , the Secretary of the military department shall send it to the Attorney General for disposition."); Management of Federal Legal Resources, Exec. Order No. 12,146, 3 C.F.R. 409, 411 (1980), reprinted in 28 U.S.C. § 509 (1982) (providing that "[w]henver two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular program or to regulate a particular activity, each agency is *encouraged* to submit the dispute to the Attorney General," and that "[w]henver two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies *shall* submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere" (emphasis added)). The power to resolve all these is part of the power delegated by the Attorney General to OLC. See 28 C.F.R. § 0.25(b) (2009) (delegating to OLC the task of "[p]reparing and making necessary revisions of proposed Executive orders and proclamations, and advising as to their form and legality prior to their transmission to the President").

48. Cf. Pillard, *supra* note 4, at 716–17 ("Because it lacks mandatory jurisdiction, OLC decides only those issues that the [P]resident, the Attorney General, or the heads of agencies . . . decide to bring to it. . . . [T]he more critically OLC examines executive conduct, the more cautious its clients are likely to be in some cases about seeking its advice.").

49. See Goldsmith, *supra* note 15, at 38 (quoting Walter Dellinger, former head of OLC during the Clinton Administration, as saying: "You won't be doing your job well, and you won't be serving your client's interests, if you rubber-stamp everything the client wants to do.").

50. See Pillard, *supra* note 4, at 714 (describing reasons why OLC's advice might be sought).

legality of its actions.⁵¹ The in-house legal advice of the agency's general counsel is unlikely to carry the same weight.⁵² Thus, even though those offices might possess the expertise necessary to answer at least many of the questions they currently send to OLC, in some contexts they will not take that course because a "yes" from the in-house legal staff is not as valuable as a "yes" from OLC. But that value depends on OLC maintaining its reputation for serious, evenhanded analysis, not mere advocacy.⁵³

The risk, however, is that OLC's clients will not internalize the long-run costs of taxing OLC's integrity. This is in part because the full measure of those costs will be spread across all of OLC's clients, not just the client agency now before it. The program whose legality the client wants OLC to review, in contrast, is likely to be something in which the client has an immediate and palpable stake. Moreover, the very fact that the agency has come to OLC for legal advice will often mean it thinks there is

51. This might happen when a representative of the agency or department is called to testify before Congress, or when its actions are scrutinized by the press, or, on litigable issues, when it is defending its position in court.

52. There are countervailing considerations, however. On statutory issues that are likely to be litigated, an agency's request for advice from OLC might cause the courts to be less inclined to defer to the agency's ultimate position under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The theory of *Chevron* is that statutory ambiguity constitutes an implicit congressional delegation to the agency responsible for administering the statute to resolve matters implicating that ambiguity on the basis of their particular expertise. By seeking OLC's advice on a legal issue and agreeing to be bound by it, an agency arguably does not exercise the expertise that *Chevron* contemplates, and thus may be ineligible for deference from the courts. Thus, on statutory questions involving the statute(s) an agency administers, the decision whether to seek OLC's advice can be somewhat more complicated. I thank Gillian Metzger for emphasizing this point to me. Cf. *New Process Steel v. NLRB*, 130 S. Ct. 2635, 2638–40 (2010) (holding delegate group of NLRB could not continue to exercise its delegated authority once its and NLRB's membership fell to two and rejecting (with no mention of *Chevron*) NLRB's argument to the contrary, which was based on an OLC opinion to which NLRB had agreed to be bound).

53. As explained by Randolph Moss, head of OLC at the end of the Clinton Administration:

[T]he legal opinions of the Attorney General and the Office of Legal Counsel will likely be valued only to the extent they are viewed by others in the executive branch, the courts, the Congress, and the public as fair, neutral, and well-reasoned . . . For similar reasons, there is little reason for clients of the Office of Legal Counsel to ask whether a proposed action is legally colorable, as opposed to whether the action is authorized under the best view of the law. While posing the question in the former fashion might increase the likelihood of obtaining a favorable response, such a response will do little to assist the client in the face of subsequent criticism.

Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective From the Office of Legal Counsel*, 52 *Admin. L. Rev.* 1303, 1311 (2000); see also Tushnet, *Stare Decisis*, *supra* note 5, at 1352 (noting OLC's agency clients "are under no obligation to seek the views of OLC about the lawfulness of their policy initiatives," and that they therefore "will seek out OLC's advice only if they believe that OLC will provide them with a more disinterested view of the law's content than they received from within").

at least a plausible argument that the program is lawful. In that circumstance, the agency is unlikely to see any problem in a “yes” from OLC.

Still, it would be an overstatement to say that OLC risks losing its client base every time it contemplates saying “no.” One reason is custom. In some areas, there is a longstanding tradition—rising to the level of an expectation—that certain executive actions or decisions will not be taken without seeking OLC’s advice. One example is OLC’s bill comment practice, in which it reviews legislation pending in Congress for potential constitutional concerns. If it finds any serious problems, it writes them up and forwards them to the Office of Management and Budget, which combines OLC’s comments with other offices’ policy reactions to the legislation and generates a coordinated administration position on the legislation.⁵⁴ That position is then typically communicated to Congress, either formally or informally. While no statute or regulation mandates OLC’s part in this process, it is a deeply entrenched, broadly accepted practice. Thus, although some within the Executive Branch might find it frustrating when OLC raises constitutional concerns in bills the administration wants to support as a policy matter, and although the precise terms in which OLC’s constitutional concerns are passed along to Congress are not entirely in OLC’s control, there is no realistic prospect that OLC would ever be cut out of the bill comment process entirely. Entrenched practice, then, provides OLC with some measure of protection from the pressure to please its clients.

But there are limits to that protection. Most formal OLC opinions do not arise out of its bill comment practice, which means most are the product of a more truly voluntary choice by the client to seek OLC’s advice. And as suggested above, although the Executive Branch at large has an interest in OLC’s credibility and integrity, the preservation of those virtues generally falls to OLC itself. OLC’s nonlitigating function makes this all the more true. Whereas, for example, the Solicitor General’s aim of prevailing before the Supreme Court limits the extent to which she can profitably pursue an extreme agenda inconsistent with current doctrine, OLC faces no such immediate constraint. Whether OLC honors its oft-asserted commitment to legal advice based on its best view of the law depends largely on its own self-restraint.

2. *Formal Requests, Binding Answers, and Lawful Alternatives.* — Over time, OLC has developed practices and policies that help maintain its independence and credibility. First, before it provides a written opinion,⁵⁵ OLC typically requires that the request be in writing from the head or general counsel of the requesting agency, that the request be as specific and concrete as possible, and that the agency provide its own written

54. See Morrison, *Avoidance*, supra note 4, at 1244–45 (describing bill comment process); Pillard, supra note 4, at 711–12 (same).

55. See infra Part I.B.3 for a discussion of oral versus written advice.

views on the issue as part of its request.⁵⁶ These requirements help constrain the requesting agency. Asking a high-ranking member of the agency to commit the agency's views to writing, and to present legal arguments in favor of those views, makes it more difficult for the agency to press extreme positions.

Second, as noted in the Introduction,⁵⁷ OLC's legal advice is treated as binding within the Executive Branch until withdrawn or overruled.⁵⁸ As a formal matter, the bindingness of the Attorney General's (or, in the modern era, OLC's) legal advice has long been uncertain.⁵⁹ The issue has never required formal resolution, however, because by longstanding tradition the advice is *treated* as binding.⁶⁰ OLC protects that tradition today by generally refusing to provide advice if there is any doubt about whether the requesting entity will follow it.⁶¹ This guards against "advice-shopping by entities willing to abide only by advice they like."⁶² More broadly, it helps ensure that OLC's answers matter. An agency displeased with OLC's advice cannot simply ignore the advice. The agency might

56. See OLC Guidelines, *supra* note 12, at 1608; Pillard, *supra* note 4, at 711. There are exceptions, especially when OLC's advice is needed quickly and the client seeks only an oral response. In addition, OLC does not require a detailed written analysis accompanying requests from the White House Counsel, the Attorney General, or the heads of other senior management offices within the Justice Department. See 2005 OLC Best Practices Memorandum, *supra* note 13, at 2.

57. See *supra* text accompanying note 31.

58. See 2010 OLC Best Practices Memorandum, *supra* note 14, at 1 ("OLC's core function . . . is to provide controlling advice to Executive Branch officials on questions of law . . ."); 2005 OLC Best Practices Memorandum, *supra* note 13, at 1 ("[S]ubject to the President's authority under the Constitution, OLC opinions are controlling on questions of law within the Executive Branch."); OLC Guidelines, *supra* note 12, at 1603 ("OLC's legal determinations are considered binding on the executive branch, subject to the supervision of the Attorney General and the ultimate authority of the President."); OPR Report, *supra* note 10, at 15 ("OLC opinions are binding on the Executive Branch."); see also Pillard, *supra* note 4, at 727 (quoting former OLC head Ted Olson as stating "it is not our function to prepare an advocate's brief or simply to find support for what we or our clients might like the law to be," but instead to produce "the clearest statement of what we believe the law provides").

59. See Moss, *supra* note 53, at 1318–19 ("Although subject to almost two hundred years of debate and consideration, the question of whether (and in what sense) the opinions of the Attorney General, and, more recently, the Office of Legal Counsel, are *legally* binding within the executive branch remains somewhat unsettled."); Peter L. Strauss, *Overseer, or "The Decider"?* The President in Administrative Law, 75 *Geo. Wash. L. Rev.* 696, 739–41 (2007) [hereinafter Strauss, *Overseer*] (collecting early Attorney General statements that their opinions were "advisory, not legally binding").

60. See Moss, *supra* note 53, at 1318–20 ("[W]e have been able to go for over two hundred years without conclusively determining whether the law demands adherence to Attorney General Opinions because agencies have in practice treated these opinions as binding."). As Moss notes, the regulations that provide for the submission of interdepartmental and interagency disputes to OLC for "resolution" imply that OLC's answer will constitute a "binding determination, absent which the dispute would almost certainly continue." *Id.* at 1320 n.67.

61. See Pillard, *supra* note 4, at 711; Strauss, *Overseer*, *supra* note 59, at 742–43.

62. Pillard, *supra* note 4, at 711.

construe any ambiguity in OLC's advice to its liking, and in some cases might even ask OLC to reconsider its advice.⁶³ But the settled practice of treating OLC's advice as binding ensures it is not simply ignored.

In theory, the very bindingness of OLC's opinions creates a risk that agencies will avoid going to OLC in the first place, relying either on their general counsels or even other executive branch offices to the extent they are perceived as more likely to provide welcome answers. This is only a modest risk in practice, however. As noted above, legal advice obtained from an office other than OLC—especially an agency's own general counsel—is unlikely to command the same respect as OLC advice.⁶⁴ Indeed, because OLC is widely viewed as “the executive branch's chief legal advisor,”⁶⁵ an agency's decision *not* to seek OLC's advice is likely to be viewed by outside observers with skepticism, especially if the in-house advice approves a program or initiative of doubtful legality.

OLC has also developed certain practices to soften the blow of legal advice not to a client's liking. Most significantly, after concluding that a client's proposed course of action is unlawful, OLC frequently works with the client to find a lawful way to pursue its desired ends.⁶⁶ As the OLC Guidelines put it, “when OLC concludes that an administration proposal is impermissible, it is appropriate for OLC to go on to suggest modifications that would cure the defect, and OLC should stand ready to work with the administration to craft lawful alternatives.”⁶⁷ This is a critical component of OLC's work, and distinguishes it sharply from the courts. In addition to “provid[ing] a means by which the executive branch lawyer can contribute to the ability of the popularly-elected President and his administration to achieve important policy goals,”⁶⁸ in more instrumental terms the practice can also reduce the risk of gaming by OLC's clients. And that, in turn, helps preserve the bindingness of OLC's opinions.⁶⁹

63. See *infra* Part II.B.2.d.

64. See *supra* notes 51–53 and accompanying text.

65. Pillard, *supra* note 4, at 710.

66. See 2010 OLC Best Practices Memorandum, *supra* note 14, at 2 (“[U]nlike a court, OLC will, where possible and appropriate, seek to recommend lawful alternatives to Executive Branch proposals that it decides would be unlawful.”); Moss, *supra* note 53, at 1329 (“On an almost daily basis, the Office of Legal Counsel works with its clients to refine and reconceptualize proposed executive branch initiatives in the face of legal constraints.”).

67. OLC Guidelines, *supra* note 12, at 1609.

68. Moss, *supra* note 53, at 1330.

69. In the course of its investigation into whether the OLC attorneys responsible for the 2002 Torture Memorandum and related opinions committed professional misconduct, the Justice Department's Office of Professional Responsibility considered as a “threshold matter . . . whether the attorneys were aware of the result that the client wanted”—the suggestion being that such awareness would compromise the integrity of OLC's legal analysis. Margolis Memorandum, *supra* note 11, at 14 (discussing OPR's treatment of this issue) (internal quotation marks omitted). But as both John Yoo and Jay Bybee (the subjects of the investigation) pointed out in their objections to the draft report, OLC lawyers virtually always know what the client wants, and there is nothing untoward about that. *Id.* at 14–15. Indeed, as noted *supra* at notes 66–68 and accompanying text, both the

To be sure, OLC's opinions are treated as binding only to the extent they are not displaced by a higher authority. A subsequent judicial decision directly on point will generally be taken to supersede OLC's work, and always if it is from the Supreme Court. OLC's opinions are also subject to "reversal" by the President or the Attorney General.⁷⁰ Such reversals are rare, however. As a formal matter, Dawn Johnsen has argued that "[t]he President or attorney general could lawfully override OLC only pursuant to a good faith determination that OLC erred in its legal analysis. The President would violate his constitutional obligation if he were to reject OLC's advice solely on policy grounds."⁷¹ *Solely* is a key word here, especially for the President. Although his oath of office obliges him to uphold the Constitution,⁷² it is not obvious he would violate that oath by pursuing policies that he thinks are plausibly constitutional even if he has not concluded they fit his best view of the law. It is not clear, in other words, that the President's oath commits him to seeking and adhering to a single best view of the law, as opposed to any reasonable or plausible view held in good faith. Yet even assuming the President has some space here, it is hard to see how his oath permits him to reject OLC's advice *solely* on policy grounds if he concludes that doing so is indefensible as a legal matter.⁷³ So the President needs at least a plausible legal basis for

2010 OLC Best Practices Memorandum and the 2004 Guidelines endorse working with the client to find lawful ways to achieve the client's desired ends. In light of the widespread endorsement of this practice, the final version of OPR's report omitted any criticism of Yoo and Bybee on this particular point. Margolis Memorandum, *supra* note 11, at 14–15.

70. See Goldsmith, *supra* note 15, at 79 ("[T]he President [stands] atop the executive branch and [can] in theory reverse any OLC decision and set legal policy for the executive branch."); Johnsen, *supra* note 4, at 1577 ("OLC's legal interpretations typically are considered binding within the executive branch, unless overruled by the attorney general or the President (an exceedingly rare occurrence)."). I think it is best to refer to this action as a reversal, not an overruling, as it is more analogous to an appellate court reversing a lower court in the same proceeding than to a later-in-time determination in some other context to overrule the earlier decision.

71. Johnsen, *supra* note 4, at 1577.

72. See U.S. Const. art. II, § 1, cl. 8 ("Before . . . enter[ing] on the Execution of his Office, [the President] shall . . . swear (or affirm) that [he] will faithfully execute the Office of President of the United States, and will to the best of [his] Ability, preserve, protect and defend the Constitution of the United States.").

73. Of course, even in those circumstances there would remain the theoretical possibility of extralegal action—of defying legal constraints during an emergency and later seeking approval of, or at least forgiveness for, the violation. As Jefferson famously observed: "A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation." Letter from Thomas Jefferson to J.B. Colvin (Sept. 20, 1810), in 12 *The Writings of Thomas Jefferson* 418 (Andrew A. Lipscomb ed., 1904). But this is not a theory of *lawful* authority; it is instead an assertion of a "need, if not [a] right, to act *contra legem*, at least in an emergency." Henry P. Monaghan, *The Protective Power of the Presidency*, 93 *Colum. L. Rev.* 1, 24 (1993); see also *id.* at 25 ("[E]mergency conduct, either not authorized by statute or contrary to statute, is extra-constitutional in nature."). The idea of a presidential prerogative to act extralegally is thus not a theory of the President's *lawful* authority.

disagreeing with OLC's advice, which itself would likely require some other source of legal advice for him to rely upon.

The White House Counsel's Office might seem like an obvious candidate. But despite recent speculation that the size of that office during the Obama Administration might reflect an intention to use it in this fashion,⁷⁴ it continues to be virtually unheard of for the White House to reverse OLC's legal analysis. For one thing, even a deeply staffed White House Counsel's Office typically does not have the time to perform the kind of research and analysis necessary to produce a credible basis for reversing an OLC opinion.⁷⁵ For another, as with attempts to rely in the first place on in-house advice in lieu of OLC, any reversal of OLC by the White House Counsel is likely to be viewed with great skepticism by outside observers. If, for example, a congressional committee demands to know why the Executive Branch thinks a particular program is lawful, a response that relies on the conclusions of the White House Counsel is unlikely to suffice if the committee knows that OLC had earlier concluded otherwise. Rightly or wrongly, the White House Counsel's analysis is likely to be treated as an exercise of political will, not dispassionate legal analysis. Put another way, the same reasons that lead the White House to seek OLC's legal advice in the first place—its reputation for

There is also the related idea, often associated with Lincoln, that “measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.” Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), in 7 *The Collected Works of Abraham Lincoln* 281 (Roy P. Basler ed., 1953); cf. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 6 *A Compilation of the Messages and Papers of the Presidents 1789–1897*, at 20, 25 (James D. Richardson ed., 1897) (“Are all the laws *but one* to go unexecuted, and the Government itself go to pieces lest that one be violated?”). Although the merits and limits of that idea have seen extensive and important debate, I do not address them here. For present purposes, it suffices to note that a President pursuing this tack would not be defending a policy or action he acknowledged was illegal but would instead be insisting on its legality in virtue of the needs of the moment.

74. See, e.g., Jon Ward, *White House Beefs up Legal Staff; Officials Cite Need to Tackle ‘Nightmare’ Vetting Process*, Wash. Times, July 21, 2009, at B1 (reporting that White House Counsel's Office in the first year of the Obama Administration contained more than forty lawyers). This number is misleading, as it includes a number of lawyers who, though formally deemed to be part of the White House Counsel's Office, are actually part of a separate sub-office focused exclusively on vetting presidential nominees for positions within the Executive Branch. The core attorneys in the White House Counsel's Office number in the low twenties. See Press Release, The White House Office of the Press Sec'y, President Obama Announces Key Additions to the Office of the White House Counsel (Jan. 28, 2009), at http://www.whitehouse.gov/the_press_office/ObamaAnnouncesKeyAdditionstotheOfficeoftheWhiteHouseCounsel (on file with the *Columbia Law Review*) (announcing appointment of twenty-two attorneys to positions in White House Counsel's office).

75. See Goldsmith, *supra* note 15, at 79–80 (noting challenges President would face if he overruled an OLC opinion).

providing candid, independent legal advice based on its best view of the law—make an outright reversal highly unlikely.⁷⁶

Of course, the White House Counsel's Office may well be in frequent contact with OLC on an issue OLC has been asked to analyze, and in many cases is likely to make it abundantly clear what outcome the White House prefers.⁷⁷ But that is a matter of presenting arguments to OLC in support of a particular position, not discarding OLC's conclusion when it comes out the other way.⁷⁸ The White House is not just any other client, and so the nature of—and risks posed by—communications between it and OLC on issues OLC is analyzing deserve special attention. I take that up in Part III.⁷⁹ My point at this stage is simply that the prospect of literal reversal by the White House is remote and does not meaningfully threaten the effective bindingness of OLC's decisions.

3. *Written versus Oral Advice.* — A final point concerns the form of OLC's advice. Not all of it is memorialized in a formal opinion; some of it is oral, and some is communicated by email.⁸⁰ At least in theory, this variation presents gaming opportunities. An agency seeking OLC's advice on the legality of a proposed program might first seek oral advice. If

76. The same point holds for the Attorney General. Early in the Obama Administration, the press reported that after seeing a preliminary opinion from OLC concluding that a bill giving the District of Columbia a voting member in the House of Representatives was unconstitutional, the Attorney General "ordered up a second opinion from other lawyers in his department and determined that the legislation would pass muster." Carrie Johnson, *A Split at Justice on D.C. Vote Bill; Holder Overrode Ruling that Measure is Unconstitutional*, Wash. Post, Apr. 1, 2009, at A1. Although no one doubted the Attorney General's formal authority to overrule OLC, press reports of his actions in this matter triggered substantial criticism of the way he had exercised his authority, including charges that he had engaged in "a sham review" that "abused OLC for partisan political purposes." Edward Whelan, *Op-Ed., Look Who's Politicizing Justice Now*, Wash. Post, Apr. 5, 2009, at B3; see also John McGinnis, *An End Run Around the Rule of Law, Executive Watch: A Weblog of the Duke Law Program in Public Law* (Apr. 6, 2009, 12:52 PM), at <http://executivewatch.net/2009/04/06/an-end-run-around-the-rule-of-law> (on file with the *Columbia Law Review*). The heat of that criticism—whether justified or not—helps explain why the Attorney General so rarely exercises his reversal authority. But see William R. Dailey, *Who is the Attorney General's Client? A Model for Understanding the Attorney General's Role* 48–49 (unpublished manuscript) (on file with the *Columbia Law Review*) (defending idea of such Attorney General interventions).

77. See Bruce Ackerman, *The Decline and Fall of the American Republic* (forthcoming 2010) (manuscript at 173 n.43) (on file with author) (reporting Elena Kagan's and Walter Dellinger's recollections of "lengthy phone calls in which Kagan, then in the White House Counsel's Office, tried to convince Dellinger, the head of OLC, to change his mind about legal issues").

78. Thus, when Jack Goldsmith informed White House Counsel Alberto Gonzales and Counsel to the Vice President David Addington that he could not support the legality of an important counterterrorism program, there was no real prospect that the White House would reverse him. See Goldsmith, *supra* note 15, at 79. Goldsmith recounts that Addington was furious with his decision and told him that "the blood of the hundred thousand people who die in the next attack will be on *your* hands," *id.* at 71, but that simply underscores the fact that reversal by the White House was not a realistic possibility.

79. See *infra* Part III.B.2.

80. Pillard, *supra* note 4, at 713.

OLC advises that the program is lawful, the agency could then ask for a written opinion memorializing the advice. But if OLC returns with a negative answer, the agency might want to minimize the damage by not asking for a written opinion.

There are at least two reasons why the agency might respond this way. The first is both the most brazen and the least likely: If the program in question is important to the agency, it might choose to ignore OLC's advice and press forward anyway. If OLC's advice is merely oral, there will be less of a paper trail on the issue, making it less likely that an external monitor like Congress will know about the agency's defiance of OLC. This risk is more theoretical than real, however. As discussed above, there is a longstanding and robust norm in favor of treating OLC's advice as binding, and OLC has a strong interest in the preservation of that norm.⁸¹ If OLC learned that its oral advice was being ignored, it could take a number of countermeasures: alerting the Attorney General, who might raise an objection at the Cabinet level or even with the President; refusing to provide future advice to the agency without its advance express agreement to be bound; and insisting that any future advice to the agency be in writing. These are powerful tools. Because virtually all of OLC's clients are repeat customers, outright defiance of even oral advice is highly unlikely.

There is a second, more plausible reason why an agency might seek oral advice first and ask for a written version only when it likes the answer: precedent. Oral advice is typically more cursory and less far-reaching than written advice. The very act of writing often exposes side issues that need addressing, and justifying a position in writing may require a fuller articulation of the principle supporting the outcome. Thus, an agency willing to adhere to OLC's negative advice in the matter immediately at hand may worry that the written version of that advice could impose a broader set of constraints going forward. The agency in this scenario treats the advice it receives from OLC as binding, and precisely for that reason it desires to receive relatively less rather than more advice.

This sort of gaming can go together with OLC's well-established practice, discussed above, of working with its clients to find lawful ways to achieve their aims.⁸² OLC's initial advice that the proposed program is unlawful could be oral, but if OLC is able to work with the client to find a lawful alternative way to pursue its desired ends, that conclusion might then be memorialized as a formal written opinion. If this mechanism is at work, the body of OLC's written precedents could become weighted more toward client-friendly conclusions than the totality of all its legal advice, oral and written combined.

81. See *supra* text accompanying notes 57–62.

82. See *supra* notes 66–69 and accompanying text.

* * *

The picture of OLC that emerges here is of an office that is not immune to various external pressures, but that can also rely on a range of well-established procedural devices to deflect or at least lessen those pressures. What those devices cannot do, however, is guarantee OLC's own commitment to integrity, independence, and excellence in its work. Although that commitment is critical to OLC's value within the Executive Branch, it ultimately depends upon what Jack Goldsmith has called "the cultural norms in the office."⁸³

This suggests a point to which I return in Part III: Publicity may be the best means of motivating OLC's lawyers to preserve the independence and integrity of the office. With publicity comes the possibility of public scrutiny, and with that comes an incentive for OLC's lawyers to uphold the stated standards of the office lest they tarnish their own professional reputations. And if this is true of OLC's work in general, it should also be true of its treatment of precedent in particular. Publicity, then, may be the best way to ensure OLC takes proper account of its precedents—whatever we ultimately determine "proper" to mean.

Of course, it remains to be seen just how OLC treats its precedents, and how it should treat them. Those questions are the preoccupation of Parts II and III.

II. A HISTORICAL AND EMPIRICAL PICTURE OF OLC PRECEDENT

This Part examines the question of OLC precedent from a historical and empirical perspective. I begin by discussing how early Attorneys General described the role of precedent in their legal advisory work. The early Attorneys General frequently described that work in quasi-judicial terms, and thought adherence to precedent was appropriate in their work just as it was appropriate in the courts. With that history as a backdrop, I seek to provide an empirical picture of precedent in the modern OLC. Specifically, I look at the frequency with which OLC explicitly overrules or modifies its prior opinions, and I attempt to identify the kinds of cases in which it is most likely to do so. The focus is on outcomes: Without regard to how OLC justifies its decisions, when does it overrule itself?

A. *Early Attorney General Accounts of Precedent*

The modern OLC is the inheritor of a legal advisory function originally performed by the Attorney General. And although OLC today operates in a very different institutional context from that of the virtually solo-practitioner Attorneys General of the early nineteenth century, heads of OLC often look to statements by those Attorneys General to describe

83. Goldsmith, *supra* note 15, at 37.

their present role.⁸⁴ Such statements thus form part of the intellectual history of OLC today.

That history is especially rich on the issue of precedent. Indeed, the opinions of nineteenth century Attorneys General contain far more detailed discussions of the issue than do the opinions of OLC. This is perhaps not surprising. The role of the Attorney General was very much in flux during much of that century, as evidenced in part by a number of lengthy opinions devoted to delineating and elaborating the various functions of the office.⁸⁵ Those opinions, in turn, provided occasions to consider the role of precedent in the Attorney General's legal advisory work.

As Jerry Mashaw and Avi Perry have observed, Attorneys General in the Antebellum period frequently adhered to the opinions of their predecessors.⁸⁶ A key figure in this early practice was William Wirt, who served as Attorney General from 1817 to 1829 and is often credited with cementing the influence and authority of the office.⁸⁷ Wirt described his legal advisory function in quasi-judicial terms,⁸⁸ and implemented a number of measures to enhance his capacity to operate in that mode. One was a regularized process for recording and preserving the opinions of the Attorney General.⁸⁹ The point of doing so was to provide a means of

84. See, e.g., Moss, *supra* note 53, at 1309–10, 1330 (discussing Caleb Cushing's 1854 description of the Attorney General's role as informing contemporary understandings of OLC's role).

85. See, e.g., Office and Duties of Att'y Gen., 6 Op. Att'y Gen. 326, 334 (1854); Duties of the Att'y Gen., 5 Op. Att'y Gen. 720 (1820); Duties of the Att'y Gen., 1 Op. Att'y Gen. 335 (1820).

86. Jerry L. Mashaw & Avi Perry, *Administrative Statutory Interpretation in the Antebellum Republic*, 2009 Mich. St. L. Rev. 7, 44 (“[R]eliance on past precedent may have been the only interpretive rule about which every Attorney General [in the Antebellum period] appears to have been equally dogmatic. . . . [R]espect for past precedent was most similar to the use of stare decisis in judicial proceedings.”). For an exception to this general approach, see *infra* note 106.

87. See Homer Cummings & Carl McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive 78–92* (1937) (discussing Wirt's influence on office); Powell, *supra* note 8, at 13–14 (same).

88. Cummings & McFarland, *supra* note 87, at 90 (“I do not consider myself as the advocate of the government . . . but as a judge, called to decide a question of law with the impartiality and integrity which characterizes the judician.” (quoting Letter from William Wirt, U.S. Att'y Gen., to John C. Calhoun, U.S. Sec'y of War (Feb. 3, 1820))). The comparison to the judicial function did not originate with Wirt. The first U.S. Attorney General, Edmund Randolph, understood his legal advisory function to entail an obligation “to decide in accord with the law,” which “was a duty not unlike that of the judges.” Philip Hamburger, *Law and Judicial Duty* 320–21 (2008). And that understanding drew on the earlier role of attorneys and solicitors general in England. *Id.* at 320 (“[I]n England, the king's serjeants took an oath to ‘Administer the *Kings* matters, after the course of the Law,’ and attorneys and solicitors general thus acquired an administrative version of the duty to decide in accord with the law.” (quoting *The Book of Oaths and the Several Forms Thereof*, both Ancient and Modern 138 (London, 1689))).

89. Henry Barrett Learned, *The Attorney-General and the Cabinet*, 24 Pol. Sci. Q. 444, 449 (1909); Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 Stan. L. Rev. 1931, 1956 (2008).

ensuring “[c]onsistency and uniformity in the Attorney General’s interpretation of law” both during Wirt’s own tenure and in the longer term, which he saw as “essential if the government hoped to escape the confusion attending an unsteady and contradictory course.”⁹⁰ And that, in turn, led Wirt explicitly to embrace a principle of *stare decisis* for Attorney General opinions.⁹¹

Wirt’s successors professed a similar commitment to that principle. In 1854, Caleb Cushing observed that “the opinions of successive Attorneys General, possessed of greater or less amount of legal acumen, acquirement, and experience, have come to constitute a body of legal precedents and exposition, having authority the same in kind, if not the same in degree, with decisions of the courts of justice.”⁹² This is an important statement, as it reflects the growing status of Attorney General opinions as true precedents, in Frederick Schauer’s terms, not just sources of experience.⁹³ Whatever the “legal acumen” of an individual opinion, its very existence provided a reason to resolve future matters consistently with it. Departing from such precedents was still permissible in some circumstances, but the standard for doing so “was quite high.”⁹⁴

Similarly, John Crittenden explained in 1851 that although the doctrine of *stare decisis* “belongs more particularly to courts of law[,] . . . in its reasons and principles it has some application to all official public transactions, and tends to give stability, uniformity, and certainty to the administration of law by the executive department of government.”⁹⁵ In that opinion, Crittenden addressed a question posed by the Secretary of the Treasury regarding the Secretary’s authority, under an 1823 statute implementing part of the 1819 peace treaty between the United States and Spain, to adjudicate claims against the government for damage to property and other injuries sustained by Spanish officers and inhabitants in Florida.⁹⁶ Given the passage of time since the conduct in question, one critical question was whether the claimants were entitled to interest on their awards. Although Crittenden claimed that, “[c]onsidered . . . as a general question,” he was “strongly inclined” to think interest was ap-

90. Cummings & McFarland, *supra* note 87, at 79.

91. *Id.* at 84 (explaining Wirt “first recorded the proposition[] . . . that so far as is possible, the judicial principles of *stare decisis* and *res judicata* ought to govern the Attorney General,” and although “[h]e was ready to reinterpret the law where a predecessor was in error, . . . he felt that it would be laborious, indecent, and unsettling to review the previous decisions of the executive”).

92. Office and Duties of Att’y Gen., 6 Op. Att’y Gen. 326, 334 (1854).

93. See Schauer, Precedent, *supra* note 2, at 575.

94. Mashaw & Perry, *supra* note 86, at 45.

95. Power of the Sec’y of the Treasury Respecting Certain Fla. Claims, 5 Op. Att’y Gen. 333, 352 (1851) [hereinafter Power of the Sec’y of the Treasury]; see also The Executive and the Choctaw Land Claims, 4 Op. Att’y Gen. 341, 341 (1844) (describing “the rule of *stare decisis* as not only sound in itself, but as most salutary of observance in the action of the executive department of the government”).

96. See Power of the Sec’y of the Treasury, *supra* note 95, at 334–35.

propriate, he did not reach that conclusion.⁹⁷ Instead, he stressed two things. First, every Treasury Secretary to have addressed the issue over the previous quarter century had denied interest.⁹⁸ Second, the earlier opinions of “several Attorneys General who were officially called on for their advice” all agreed that interest was not allowed.⁹⁹ Whatever Crittenden might have concluded had he been writing on a blank slate, the matter was thus settled:

Some years ago, Mr. Attorney General Nelson, in an opinion given by him on this very subject, declared this question of interest not open for discussion. He considered it then as settled, by previous decisions and practice, that no interest was to be allowed.

In that opinion I concur. It has ever since been followed; and, if any number of decisions by your predecessors, with any sanction of time and practice, can establish a ruling precedent, or settle a legal question of construction, such a precedent and construction must be considered as established and settled in this instance. And it seems to me, sir, that the rule of deciding, which has been so often repeated and so firmly established, ought to be regarded by you as a binding authority.¹⁰⁰

As Crittenden’s opinion highlights, in at least some cases the precedential weight of a past Attorney General opinion was based not just on the opinion itself but also on the fact that other executive officials had acted in conformity with it.¹⁰¹ In 1878, for example, Attorney General Charles Devens issued an opinion addressing the President’s power to dismiss officers from the United States military.¹⁰² Conceding that the Constitution does not address the issue in terms, Devens nevertheless stressed the same two points that had been decisive for Crittenden. First, “[t]he power to dismiss officers from the military service of the United States . . . was repeatedly and frequently exercised [by Presidents] from the time of the adoption of the Constitution.”¹⁰³ Second, it had been “repeatedly held by the Attorneys-General, when the question was submitted to them, or was incidentally necessary to be decided, that the author-

97. *Id.* at 351.

98. *Id.* at 352.

99. *Id.* at 352–53.

100. *Id.* at 353.

101. Indeed, as Mashaw and Perry point out, such reliance even occasionally led an Attorney General to withdraw an opinion of his own after discovering that—unbeknownst to him, and owing to continuing imperfections in the process of recording opinions in the first decades after Wirt’s tenure—one of his predecessors had resolved the same issue differently, and agencies had relied upon those different resolutions. See Mashaw & Perry, *supra* note 86, at 45 (citing *Pre-emptions*, 3 Op. Att’y Gen. 182, 186 (1837); *Pensions to Widows*, 3 Op. Att’y Gen. 68, 69 (1836)).

102. *Dismissal of Officer in the Marine Corps*, 15 Op. Att’y Gen. 421 (1878).

103. *Id.* at 421.

ity thus to dismiss was possessed by the President.”¹⁰⁴ Devens thus concluded “that as a question of law, *upon both the expression of legal opinion and the practice of the Government*, it must be deemed and taken to have been fully adjudged that the President possessed this power.”¹⁰⁵

The early Attorney General opinions thus reveal two key points. First, by the mid to late nineteenth century, Attorneys General typically looked to the opinions of their predecessors not just as sources of useful experience but as authoritative precedents.¹⁰⁶ Second, the precedential weight of those opinions was a function not just of the opinions themselves but also of the extent to which relevant executive officials acted in conformity with them. This second point relates to something of which OLC remains acutely aware: To have any credibility, legal advice of this kind must be followed. But the corollary is that *when* the advice is followed, it comes to embody not just the thinking of the lawyer who wrote it but also the common understanding of the Executive Branch.

When modern heads of OLC speak of the office’s “powerful tradition of adhering to its past opinions, even when a head of the office concludes that they are wrong,” they are drawing on the practices not just of OLC itself but also these earlier Attorneys General.¹⁰⁷

104. *Id.* at 421–22. Note that to say the President possesses an inherent dismissal authority is not necessarily to say that the authority is immune to congressional regulation or limitation. Devens himself acknowledged legislation passed after the particular dismissal there at issue, “by which the power of the President to dismiss ha[d] been limited.” *Id.* at 422. To the extent such legislation was deemed constitutional, it reflected an acknowledgment that the President’s dismissal authority, although constitutionally based, was not “preclusive” of congressional regulation. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 *Harv. L. Rev.* 941, 1017, 1022 n.325, and accompanying text (2008) (discussing post-Civil War statutes limiting President’s discretion in dismissing military officers).

105. Dismissal of Officer in the Marine Corps, *supra* note 102, at 422 (emphasis added).

106. There were exceptions, however. When Edward Bates concluded in 1862 that free Blacks were citizens of the United States and thus competent to command American vessels, he “examined” an 1821 opinion by Wirt reaching the opposite conclusion “with . . . great care because of the writer’s reputation for learning, and his known and varied excellencies as a man.” *Citizenship*, 10 *Op. Att’y Gen.* 382, 400 (1862). But in rejecting Wirt’s position, Bates does not appear to have accorded it the presumptively binding force that a doctrine of *stare decisis* would ordinarily require. See *id.* (stating he “adhere[s] to [his] own” views even though they conflict with other authorities, including Wirt). That is perhaps understandable, given the profoundly important and deeply contested nature of the issue he was confronting. But it appears that such treatments of precedent were the exception and not the rule. And in any event, as discussed in the text, the early Attorneys General quite consistently claimed to follow something akin to *stare decisis*, which itself constitutes a recognition of the norm even if they did not always follow it in practice.

107. Goldsmith, *supra* note 15, at 145; see *id.* at 34–39 (referring to both Attorney General and OLC when discussing legal advisory role); *id.* at 168 (discussing nineteenth and mid-twentieth century Attorney General opinions in the course of evaluating OLC’s Torture Memorandum).

B. *The Practice of Precedent at OLC*

With this history as a backdrop, I now turn to the modern OLC. As noted in the Introduction,¹⁰⁸ OLC's Best Practices Memorandum raises more questions than it answers regarding the role of precedent in its work. Moreover, unlike those of the early Attorneys General, OLC's actual opinions contain virtually no sustained discussion of the issue. In part for that reason, the inquiry here focuses not on claims but on practice: Looking at outcomes, does OLC appear to follow anything like a doctrine of stare decisis?

Having put the question that way, I should emphasize at the outset that the data I draw on here do not provide any direct answers. The data show how often and in what kinds of cases OLC publicly overrules or modifies one of its own precedents. Yet one cannot assume that every time OLC does *not* overrule itself, it is actively relying upon and binding itself to precedent. In some instances there may be no OLC precedent on point. And in others, OLC may cite precedent in support of a conclusion it has already decided to reach. The real question, when assessing the impact of precedent, is how often OLC follows a precedent despite disagreeing (or, at least, being unsure whether it agrees) with its outcome.¹⁰⁹ Positive citations to precedent alone do not answer that question. Accordingly, this empirical study does not provide a complete picture of the true influence of OLC precedent in OLC's work. Instead, it tells us more about the kinds of cases in which OLC is most likely to acknowledge that it is *not* following precedent.

The above formulation—cases in which OLC is most likely to *acknowledge* a departure from precedent—highlights another important point. I make no attempt here to identify circumstances where OLC might be deemed to have implicitly overruled or modified its precedents, even though it claims explicitly to abide by them. Such implicit departures no doubt occur at OLC, just as they do in the courts.¹¹⁰ Indeed, any norm of stare decisis creates incentives to distinguish away precedents the decisionmaker finds disagreeable, thus avoiding the need to contend directly with the norm by explicitly overruling. The problem, of course, is that any attempt to identify implicit overrulings is especially subjective and likely to yield unreliable results. In part for that reason, the inquiry here is confined to OLC opinions that expressly and publicly acknowledge a departure from or modification of precedent.

108. See *supra* text accompanying notes 18–29.

109. Cf. Thomas Healy, *Stare Decisis and the Constitution: Four Questions and Answers*, 83 *Notre Dame L. Rev.* 1173, 1181 (2008) (noting presence of legal citations in early Supreme Court opinions “do[es] not establish that the Supreme Court felt bound, even presumptively, by decisions it disagreed with”).

110. See *United States v. Hollingsworth*, 27 F.3d 1196, 1198 (7th Cir. 1994) (en banc) (Posner, C.J.) (“[I]t is not unusual for a court to change the law without emphasizing its departures from or reinterpretation of precedent; emphasis on continuity is characteristic of common law lawmaking even when innovative . . .”).

1. *The Data.* — The data are drawn from 1,191 written, publicly available OLC opinions issued between the beginning of the Carter Administration and the end of the first year of the Obama Administration.¹¹¹ But they do not include all OLC opinions during the years in question. There are two notable limitations.

First, some of OLC's advice is conveyed orally or by email.¹¹² Unless later memorialized in a formal written opinion or memorandum to the file, that advice is not included here.¹¹³ I have already discussed some of the gaming risks entailed in the possibility of oral advice.¹¹⁴ For data-gathering purposes, however, it is not clear that looking only at written opinions leaves out many instances of explicit OLC overruling, as it seems unlikely OLC would overrule or significantly modify an earlier written opinion in mere oral advice. The decision to overrule is sufficiently weighty that each such decision is likely to be reflected in a written opinion.¹¹⁵

A second limitation is more significant: The dataset includes only publicly available opinions. OLC maintains an internal database that contains all of its unclassified written opinions,¹¹⁶ but that database is not publicly available. Instead, I have relied principally upon the Westlaw electronic database and OLC's own website to access the opinions, checking each against the other for completeness.¹¹⁷ Yet those sources do not pick up the many OLC opinions that are not publicly released. Although "[t]he Attorney General has directed [OLC] to publish selected opinions on an annual basis for the convenience of the executive, legislative, and

111. The 1,191 total represents all opinions from the relevant date range as of June 1, 2010. It is likely that additional opinions from that date range will be released later. I start with the Carter Administration because it was in 1977 that OLC, at the direction of the Attorney General, began publishing selected opinions. Opinions of the Office of Legal Counsel, *supra* note 39, at v.

112. See *supra* note 80 and accompanying text.

113. See Pillard, *supra* note 4, at 712–13.

114. See *supra* text accompanying notes 80–82.

115. This could mean that the rate of adherence to precedent is higher in oral advice than written advice, which in turn would mean that the overruling rate in OLC's written advice somewhat overstates the *overall* overruling rate in all of OLC's advice, oral and written combined. Moreover, although this is admittedly a matter of mere speculation, it may be that oral advice is where OLC most actively relies on its precedents in providing the advice.

116. 2010 OLC Best Practices Memorandum, *supra* note 14, at 4.

117. Westlaw collects OLC opinions in its "USAG" database. OLC's website is <http://www.justice.gov/olc>. OLC posts some opinions released in response to FOIA litigation separately from the bulk of its publicly released opinions. My dataset includes both. It also includes a small number of opinions released pursuant to FOIA requests or otherwise leaked to the public that do not appear in Westlaw or anywhere on the OLC website. There appear to be very few such opinions, though the fact that they are not officially collected in any single place makes it difficult to ensure comprehensiveness. Finally, I have also consulted the bound volumes of the *Opinions of the Office of Legal Counsel*, which date back to 1977 but are not up to date. As of this writing, the most recently published volumes appeared in 2002 and cover opinions from 1995 and 1996.

judicial branches of the government, and for the convenience of the professional bar and the general public,”¹¹⁸ OLC declines to publish many of its opinions. It makes publication decisions on a case-by-case basis, taking into account not only whether publication “would interfere with federal law enforcement efforts or is prohibited by law,” but also whether non-publication is “necessary to preserve internal Executive Branch deliberative processes or protect the confidentiality of information covered by the attorney-client relationship between OLC and other executive offices.”¹¹⁹ Before making a final decision, OLC seeks the views of the requesting agency and any other executive office or agency whose interests might be affected by publication, including the White House.¹²⁰ And although OLC does not warrant it will always honor the requesting agency’s wishes not to publish, as a practical matter “it cannot force the issue, and would lose the trust of its client base if it did.”¹²¹ The result is that OLC’s published opinions are only a fraction of all its written opinions. Publicly available information does not provide a basis for confidently estimating even the size of the fraction.

Even among the opinions OLC does release, there is a large variation in the interval between the date of signing and the date of release. On the high end, the interval is often several years.¹²² Thus, for the period covered in this study, the current dataset is likely smaller than if the same study were conducted some years from now. Moreover, an examination of the pattern of release dates suggests that strategic behavior is sometimes at work. The most striking feature is the unusually large volume of releases immediately before the end of the last presidential administration. During the last month of the Bush Administration, OLC publicly released twenty-four opinions—eleven on a single day less than a week

118. Opinions of the Office of Legal Counsel, *supra* note 39, at v.

119. 2010 OLC Best Practices Memorandum, *supra* note 14, at 5–6; see 2005 OLC Best Practices Memorandum, *supra* note 13, at 4 (“Maintaining the confidentiality of OLC opinions is often necessary to preserve the deliberative process of decisionmaking within the Executive Branch and attorney-client relationships between OLC and other executive offices; in some cases, the disclosure of OLC advice also may interfere with federal law enforcement efforts.”); Letter from Michael B. Mukasey, U.S. Att’y Gen., to the Majority Leader, U.S. Senate, Re: Constitutionality of the OLC Reporting Act of 2008, at 3 (Nov. 14, 2008) [hereinafter Mukasey Letter], available at <http://www.justice.gov/olc/2008/olc-reporting-act.pdf> (on file with the *Columbia Law Review*) (“OLC opinions belong to a category of Executive Branch documents protected by executive privilege. They fall within the scope of the deliberative process, attorney-client, and, to the extent they are generated or used to assist in presidential decisionmaking, presidential communications components of executive privilege.”).

120. 2010 OLC Best Practices Memorandum, *supra* note 14, at 5; 2005 OLC Best Practices Memorandum, *supra* note 13, at 4.

121. Pillard, *supra* note 4, at 712 n.113.

122. On August 5, 2010, the interval for the thirty opinions most recently added to OLC’s website ranged from one day to ten years. See What’s New at OLC, U.S. Dep’t of Justice, at <http://www.justice.gov/olc/whatsnew.htm> (on file with the *Columbia Law Review*).

before President Obama's inauguration.¹²³ (This was not simply a matter of OLC rushing to finish writing the opinions; some of the opinions released in that last week were many years old.) Yet OLC released only thirteen opinions in all of 2006, and fourteen in 2007.¹²⁴ This may reflect an attempt by the political appointees in OLC to "lock in" certain of their opinions by publishing them before they leave office, on the theory that it will be more difficult for the new heads of the office to withdraw those opinions once they have been made public. In effect, this would amount to using the device of publication to enhance the precedential force of OLC's opinions across presidential administrations.¹²⁵ If one reached the conclusion—as I do by the end of this Article—that OLC should accord its precedents a kind of *stare decisis* effect, this sort of behavior would not necessarily be objectionable. But what it does underscore is the nonrandom quality of OLC's publication decisions, which means its published opinions are unlikely to be perfectly representative of all its opinions.

This selection bias problem is a real limitation. Not only is it difficult to know what fraction of all OLC opinions are publicly available, but, as just noted, there are reasons to suspect it is not a representative sample. Opinions in certain substantive areas—especially those involving classified information or other matters of national security—are likely to be kept secret, and opinions on politically controversial or otherwise delicate issues might also tend not to be released. On the other hand, as suggested in the prior paragraph, it may be that certain politically or otherwise controversial opinions are particularly likely to be publicly released at certain points, like the end of an administration hoping to bind its successor. And although I think it unlikely that the decision to adhere to or overrule a particular precedent would *itself* be the driving force behind a determination to keep a particular opinion secret, it may be that there is a difference between OLC's treatment of precedents in the areas just described and its treatment of precedents more broadly. Opinions in the substantive areas most likely to be kept secret, in other words, may be especially correlated to certain treatments of precedent. Publicly available data cannot confirm or rule out that possibility.

There have been numerous calls over the years for OLC to publish more of its opinions (subject to legitimate national security and other constraints¹²⁶), and to do so promptly after the opinions are issued.¹²⁷

123. *Id.*

124. *Id.*

125. Cf. Pillard, *supra* note 4, at 751 (“[T]he prospect of more and stronger precedent highlights the specter of one administration writing its version of the constitutional canon in order to impose it on the next.”).

126. If concerns about classified information preclude full public release of some opinions, limited congressional reporting in closed session could still be possible.

127. See, e.g., Koh, *supra* note 5, at 517 (identifying “pressing need to publish OLC opinions promptly and to make them widely available”); Pillard, *supra* note 4, at 749–51 (noting transparency virtues would be served by greater publication but also discussing

Some of those calls came from people who went on to assume leadership positions at OLC during the first eighteen months of the Obama Administration.¹²⁸ Thus, there is reason to suspect that OLC's opinion publication rate may increase even without legislative compulsion. Indeed, at least in tone, OLC's recently released 2010 Best Practices Memorandum seems more open to publication than does its 2005 Best Practices Memorandum.¹²⁹ But unless and until that yields a substantial and sustained increase in the actual publication rate, any study of OLC's publicly available opinions must concede that the available sample might not accurately represent the full body of OLC's work. Here, the best that can be done may be to acknowledge and underscore that this study focuses on OLC's *public* treatment of its precedents—or, more precisely, on the circumstances in which OLC is most likely to acknowledge a departure from precedent in public.

2. *Findings.* — I have categorized every opinion in the dataset based on its treatment of OLC precedent, as follows:

costs of such reforms); 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, 580 (2009) (“[I]t is feasible, desirable, and realistic to expect the timely disclosure of most Office of Legal Counsel opinions.”).

128. Near the end of the George W. Bush Administration, legislation was proposed that would mandate significant disclosure. See OLC Reporting Act of 2008, S. 3501, 110th Cong. § 2 (as reported by S. Comm. on the Judiciary, Sept. 25, 2008) (requiring report to Congress when OLC issues legal interpretations holding federal statutes unconstitutional, superseded sub silentio, or inapplicable to executive branch officers). Supporters of that legislation included David Barron (who served in the Obama Administration as principal deputy and acting head of OLC), Martin Lederman (who served in the Obama Administration as a deputy at OLC), and Dawn Johnsen (President Obama's original nominee to head OLC, who withdrew after her nomination was held up in the Senate for over a year). I was also among them. See Hearing, Restoring the Rule of Law, supra note 12, at 186 (joint statement of David J. Barron, Walter E. Dellinger, Dawn E. Johnsen, Neil J. Kinkopf, Martin S. Lederman, Trevor W. Morrison, and Christopher H. Schroeder) (“We would particularly commend to Congress's consideration ‘The OLC Reporting Act of 2008,’ to be introduced by Senator Feingold.”). Late in the Bush Administration, however, Attorney General Mukasey advised Congress that the Justice Department (evidently on the basis of OLC advice) had concluded the bill was unconstitutional. Mukasey Letter, supra note 119, at 1–4. Nevertheless, some in Congress continue to push for it. See, e.g., The Office of Professional Responsibility Investigation into the Office of Legal Counsel Memoranda: Hearing before the S. Comm. on the Judiciary, 111th Cong. (2010) (statement of Sen. Feingold), available at <http://feingold.senate.gov/record.cfm?id=322587> (on file with the *Columbia Law Review*) (“I have pushed for more congressional reporting to Congress on OLC opinions, including the bill that Senator Feinstein and I introduced last Congress, the OLC Reporting Act.”). The legislation has been reintroduced in the 111th Congress. See OLC Reporting Act of 2009, H.R. 278, 111th Cong. (2009). If it moves during the Obama Administration, OLC may face a stare decisis question on this very issue.

129. Compare 2010 OLC Best Practices Memorandum, supra note 14, at 5 (“[T]he Office operates from the presumption that it should make its significant opinions fully and promptly available to the public.”), with 2005 OLC Best Practices Memorandum, supra note 13, at 4 (acknowledging no comparable presumption and stressing instead the general importance of “[m]aintaining the confidentiality of OLC opinions”).

Neutral—The opinion either cites no OLC precedents or cites all such precedents favorably;

Distinguishing—The opinion expressly distinguishes at least one OLC precedent, and does not expressly treat any other OLC precedent more negatively;

Recognizing—The opinion acknowledges that at least one OLC precedent has been modified or overruled by an intervening OLC opinion or other authoritative event, and does not expressly treat any other OLC precedent more negatively;

Modifying—The opinion expressly amends the rule, analysis, or test articulated in at least one OLC precedent but does not abandon the precedent entirely, and does not expressly treat any other OLC precedent more negatively; and

Overruling—The opinion expressly overrules at least one OLC precedent.

For the reasons discussed above,¹³⁰ I focus on opinions qualifying as modifying or overruling (which I group together as “negative treatment” opinions) and not on opinions qualifying as neutral.

a. *Overall Treatment.* — Table 1 summarizes the overall treatment of OLC precedent across all 1,191 opinions in the dataset. Twenty-nine of the opinions, or 2.43%, qualify as overruling. As a point of comparison, empirical studies of Supreme Court precedent reveal similar overruling rates. One study, for example, found that the overruling rates during the Hughes, Warren, and Burger Courts—which were the most actively overruling Courts in its history, at least up until 1991—were 1.25%, 2.54%, and 2.00%, respectively.¹³¹ Of course, OLC and the Court are different institutions, and so facially similar overruling rates may be misleading.¹³²

130. See *supra* text accompanying notes 109–110.

131. Christopher P. Banks, *The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends*, 75 *Judicature* 262, 264 (1992) (“Out of a total of 13 Courts in which precedents were reversed, only three overturned cases in any significant number. These were the Hughes Court (21 overturns during 11 terms), the Warren Court (45 overturns during 16 terms), and the Burger Court (52 overturns during 17 terms).”). The Banks article reports the Court’s overruling rate the way I am presenting OLC’s rate—number of overruling decisions over total number of decisions. For another study of Supreme Court precedent that provides a different perspective on the data (but which does not contradict Banks), see Brenner & Spaeth, *supra* note 3, at 23 (reporting Court overruled about 2.5 cases per Term between 1946 and 1992).

132. For example, justiciability doctrines of standing, ripeness, and mootness, as well as the general rule against advisory opinions, limit the circumstances in which the Supreme Court is able to reach out and disturb a settled precedent even if it is inclined to do so. Those limits do not apply to OLC as a constitutional matter. And although OLC tends, as a prudential matter, to address questions in concrete factual contexts, see 2010 OLC Best Practices Memorandum, *supra* note 14, at 3 (“The legal question presented should be focused and concrete . . .”), it does have somewhat greater latitude than the Court to define the scope of the issues it addresses in its opinions—and thus to decide whether and when to revisit a precedent not squarely implicated by the core of the issue now before it.

Thus, I do not place great weight on this similarity. But at least as a general point of reference, it is worth observing that OLC does not appear to be a radically more overruling-prone institution than the Court.¹³³

Returning to the OLC data, an additional thirty-eight opinions, or 3.19% of the total, qualify as modifying. As noted above, it is useful to group the overruling and modifying opinions together to get a fuller picture of the rate at which OLC treats its precedents in some negative way. Reported as “M + O” in Table 1, those two categories amount to sixty-seven opinions, or 5.63% of the total.

TABLE 1: OVERALL TREATMENT OF OLC PRECEDENT

Neutral	Distinguishing	Recognizing	Modifying	Overruling	M + O	Total
1,050 (88.16%)	61 (5.12%)	13 (1.09%)	38 (3.19%)	29 (2.43%)	67 (5.63%)	1,191

b. *Statutory versus Constitutional Precedent.* — I have looked at a number of factors to see which are correlated with negative treatment of OLC precedent. One concerns the nature of the legal instrument being interpreted—constitutional, statutory, or something else. The Supreme Court generally claims to follow a stronger rule of stare decisis in statutory cases than in constitutional ones, the idea (however sound) being that Congress can correct errors in the Court’s statutory holdings but that the Court’s constitutional mistakes are much more difficult to fix.¹³⁴ OLC might take the same approach.

There is no great difference, however, in how OLC treats its constitutional and statutory precedents. As Table 2 shows, the overruling rates are quite close (3.07% for constitutional cases; 1.93% for statutory), as are the rates of modifying plus overruling (6.51% and 4.82%, respectively). Although the negative treatment rate for constitutional precedents is slightly higher, the difference is not statistically significant ($p > 0.1$).

133. Of course, whether OLC’s overruling rate *ought* to mirror the Court’s depends in part on the normative case for a rule of stare decisis in OLC. That is the preoccupation of Part III. Here and elsewhere in this empirical section, comparisons to judicial stare decisis are presented simply to give some context to the data.

134. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989) (“[S]tare decisis [has] special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, . . . Congress remains free to alter what we have done.”). This distinction should not be overread. First, the fact that Congress can in theory correct the Court’s statutory errors does not mean it is easy to do so as a practical matter. Second, to the extent Congress does have the political will and capacity to pass “fixing” legislation, it can respond to many Supreme Court decisions denying claims of constitutional right with legislation granting the right as a statutory matter.

TABLE 2: TREATMENT OF STATUTORY V. CONSTITUTIONAL PRECEDENT

	Neutral	Distinguishing	Recognizing	Modifying	Overruling	M+0	Total
Constitutional	229 (87.74%) ¹³⁵	10 (3.83%)	5 (1.92%)	9 (3.45%)	8 (3.07%)	17 (6.51%)	261
Statutory	646 (88.98%)	41 (5.65%)	4 (0.55%)	21 (2.89%)	14 (1.93%)	35 (4.82%)	726
Both	137 (85.09%)	8 (4.97%)	4 (2.48%)	6 (3.73%)	6 (3.73%)	12 (7.45%)	161
Neither	38 (88.37%)	2 (4.65%)	0	2 (4.65%)	1 (2.33%)	3 (6.98%)	43

One explanation could be the nonpublic nature of many OLC opinions. The premise of the Supreme Court’s “super strong” stare decisis rule in statutory cases is that Congress knows and, when needed, can correct what the Court has done with its statutes.¹³⁶ Yet much of OLC’s legal work is not public, so Congress is often in no position to correct OLC’s statutory work.

Consider the Torture Memorandum of August 2002.¹³⁷ It was both a statutory and a constitutional decision—statutory in its conclusion that the federal anti-torture statute did not apply to actions ordered by the President in his capacity as Commander in Chief,¹³⁸ and constitutional in its further conclusion that the statute would be unconstitutional if it did so apply.¹³⁹ If members of Congress had known about the opinion when it was issued, some might have tried to eliminate the statutory ground by amending the law to expressly cover presidentially ordered conduct.¹⁴⁰ But when Jack Goldsmith assumed the leadership of OLC in late 2003, none of his doubts about the Memorandum could be assuaged by the idea that Congress could correct any errors in the statutory part of the analysis. Congress simply did not know about it. Thus, while there may have been some stare decisis-based arguments cutting against Goldsmith’s ultimate decision to disavow and withdraw the Memorandum.

135. Percentages refer to the fraction within each substantive category (constitutional, statutory, etc.) of each treatment (neutral, distinguishing, etc.). So 87.74% represents the percentage of constitutional opinions with neutral treatments of OLC precedent.

136. This is true of a number of judicially developed rules of statutory construction, including the canon of constitutional avoidance. See Morrison, *Avoidance*, *supra* note 4, at 1237–38 (“Congress knows . . . when a law has been narrowed by way of avoidance [and] can contemplate enacting new legislation that more clearly expresses the meaning foreclosed by avoidance.”).

137. See *supra* text accompanying notes 9–10.

138. Torture Memorandum, *supra* note 9, at 34–35.

139. *Id.* at 36–39.

140. Indeed, a year and a half after the Memorandum was finally leaked to the public, Congress passed the McCain Amendment, which provides that “[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.” Detainee Treatment Act of 2005, Pub. L. No. 109-148, tit. X, § 1003(a), 119 Stat. 2680, 2739 (2005) (codified at 42 U.S.C. § 2000dd-0(1) (2006)). For an account of President Bush’s use of a signing statement to limit the reach and force of the Amendment, see Morrison, *Avoidance*, *supra* note 4, at 1247–50.

dum, leaving the matter to Congress was not one of them.¹⁴¹ In short, the secrecy of much of OLC's work undermines any notion that Congress can fix an opinion's errors.

Of course, all of the OLC opinions studied here *are* public, which means their statutory interpretations are now reviewable by Congress if it wishes. But OLC lawyers do not always know at the time they are writing an opinion whether (or when) it will ultimately be made public.¹⁴² Put another way, virtually all OLC opinions are nonpublic when first signed. Thus, it is understandable that OLC would not treat its statutory precedents in a way that assumes the public reviewability of its work.¹⁴³

Another explanation for the lack of a stark difference in OLC's treatment of its statutory and constitutional precedents might be that for some of the statutory issues addressed by OLC, the main stakeholders are all within the Executive Branch. For example, in October 1995 OLC took up a request from the U.S. Postal Service (USPS) to "reconsider and rescind" a 1993 opinion that addressed "the statutory relationship between the USPS and [the] Treasury [Department] with respect to USPS financing initiatives."¹⁴⁴ OLC's 1993 opinion was quite favorable to Treasury with respect to the USPS's obligation to negotiate with Treasury over the sale of USPS bonds. The USPS's 1995 request was an attempt to persuade OLC to limit that obligation.¹⁴⁵ After receiving the request, OLC notified Treasury so it would have an opportunity to respond.¹⁴⁶ This enabled OLC to learn about the impact and workability of its 1993 opinion from the two entities with the most direct stake in it. In that respect, it was relatively easy for OLC to gather the information necessary to evaluate the practical implications of its 1993 opinion, and to determine whether any modifications were in order. In such cases, even though the issue is statutory, OLC may be better situated than the relevant congressional

141. I am referring here to Goldsmith's consideration of the issue before the Torture Memorandum was leaked to the public in June 2004. Although the Memorandum was not formally withdrawn until after the leak, Goldsmith reports that he had decided as early as December 2003 that it "must be withdrawn, corrected, and replaced." Goldsmith, *supra* note 15, at 146.

142. See 2010 OLC Best Practices Memorandum, *supra* note 14, at 5–6 (describing publication review process as occurring after opinion has been finalized).

143. Understandable, but regrettable. As I have argued elsewhere, the ultimate legitimacy of much of OLC's statutory work—especially its use of interpretive devices like the canon of constitutional avoidance—depends upon adequate notice (or at least constructive notice) to Congress. See Morrison, *Avoidance*, *supra* note 4, at 1237–39. To the extent OLC's statutory interpretations seem premised on an assumption of *nonpublication* even to Congress, the legitimacy problem in this area is all the more acute.

144. Scope of Treasury Dep't Purchase Rights with Respect to Fin. Initiatives of the U.S. Postal Serv., 19 Op. O.L.C. 238, 238 (1995) [hereinafter *Scope of Treasury Dep't Purchase Rights*].

145. *Id.* at 239 n.2.

146. This column reports opinions that modify or overrule more than one OLC precedent, where at least one precedent is from a Democratic administration and at least one other is from a Republican administration.

committee to know when one of its statutory precedents needs to be revisited.

c. Party Affiliation and Presidential Administration. — The status of OLC precedent does appear to vary somewhat with presidential administration and party affiliation. There is only a small, statistically insignificant ($p > 0.1$) difference in OLC's overall negative treatment rate during Democratic versus Republican administrations.

TABLE 3: TREATMENT OF PRECEDENT BY PARTY AFFILIATION AT TIME OF NEW DECISION

	Neutral	Distinguishing	Recognizing	Modifying	Overruling	M+O	Total
Democratic	548 (87.26%)	31 (4.94%)	9 (1.43%)	22 (3.50%)	18 (2.87%)	40 (6.37%)	628
Republican	502 (89.17%)	30 (5.33%)	4 (0.71%)	16 (2.84%)	11 (1.95%)	27 (4.80%)	563

But as Table 4 reveals, dividing the data by individual administration (and by term, for two-term administrations) reveals greater disparities.

TABLE 4: TREATMENT OF PRECEDENT BY ADMINISTRATION AT TIME OF NEW DECISION

	Neutral	Distinguishing	Recognizing	Modifying	Overruling	M+O	Total
Carter	347 (94.29%)	9 (2.45%)	4 (1.09%)	5 (1.36%)	3 (0.82%)	8 (2.17%)	368
Reagan1	177 (91.71%)	8 (4.15%)	2 (1.04%)	4 (2.07%)	2 (1.04%)	6 (3.11%)	193
Reagan2	81 (91.01%)	6 (6.74%)	0	1 (1.12%)	1 (1.12%)	2 (2.25%)	89
GHW Bush	94 (88.68%)	6 (5.66%)	1 (0.94%)	4 (3.77%)	1 (0.94%)	5 (4.72%)	106
Clinton1	95 (75.40%)	8 (6.35%)	2 (1.59%)	11 (8.73%)	10 (7.94%)	21 (16.67%)	126
Clinton2	93 (78.81%)	14 (11.86%)	3 (2.54%)	6 (5.08%)	2 (1.69%)	8 (6.78%)	118
GW Bush1	101 (88.60%)	4 (3.51%)	0	4 (3.51%)	5 (4.39%)	9 (7.89%)	114
GW Bush2	49 (80.33%)	6 (9.84%)	1 (1.64%)	3 (4.92%)	2 (3.28%)	5 (8.20%)	61
Obama	13 (81.25%)	0	0	0	3 (18.75%)	3 (18.75%)	16

Table 5 slices the data one step further. Looking at negative treatment opinions by administration (and term, for two-term administrations), it identifies the party affiliation of the administration that produced the precedent OLC is now treating negatively. The shaded cells show the number of negative treatments of precedents issued during an administration of the other party, with the percentages representing the

fraction of all negative treatments issued in that administration that are negative treatments of opposite-party precedents.

TABLE 5: NEGATIVE TREATMENT BY ADMINISTRATION AT TIME OF NEW DECISION AND PARTY AFFILIATION AT TIME OF EARLIER PRECEDENT

	M + O Democratic	M + O Republican	M + O Both ¹⁴⁷	Total ¹⁴⁸
Carter	3 (50.00%)	3 (50.00%)	0	6
Reagan1	3 (60.00%)	1 (20.00%)	1 (20.00%)	5
Reagan2	0	2 (100.00%)	0	2
GHW Bush	2 (40.00%)	3 (60.00%)	0	5
Clinton1	3 (14.29%)	17 (80.95%)	1 (4.76%)	21
Clinton2	3 (37.50%)	5 (62.50%)	0	8
GW Bush1	5 (55.56%)	4 (44.44%)	0	9
GW Bush2	1 (20.00%)	4 (80.00%)	0	5
Obama	0	3 (100.00%)	0	3

Four points bear emphasizing. First, although I present the Obama results here for completeness, they cannot support any large conclusions. At the end of the Obama Administration's first year, the total number of publicly released OLC opinions was so small that any seeming pattern in their distribution could easily disappear by January 2013. Moreover, as discussed more fully in Part III,¹⁴⁹ two of the three overruling opinions from that year implement an unusual Executive Order signed by President Obama two days after taking office, which effectively removed the precedential effect of a whole range of OLC opinions from his predecessor's administration. Thus, the negative treatment rate in the first year of the Obama Administration is very likely not predictive of the overall rate by the end of the administration.

Second, even setting the Obama results aside, Table 4 shows a general increase in the negative treatment rate (M + O) from one administra-

147. Where an administration's total number of modifying and overruling opinions as reported in this Table does not equal the total reported in Table 4, the disparity is caused by the fact that sometimes an opinion overrules a precedent whose date has not yet been identified, in which case it is not included in this Table. I also exclude here opinions addressing nineteenth-century precedents, where the ascription of "Democratic" or "Republican" status would be anachronistic.

148. *Id.* at 239.

149. See *infra* text accompanying notes 260–265.

tion to the next. The rate spiked in the first term of the Clinton Administration and then went down during Clinton's second term and George W. Bush's two terms, but still the overall pattern from Carter through the end of Bush's second term is a statistically significant upward trend.¹⁵⁰ This might be the product of decreased respect for precedent over time, but several alternative explanations are also available. One might be the gradual accumulation of OLC precedents. It was not until the 1950s that OLC became the principal source of centralized legal advice in the Executive Branch.¹⁵¹ This means that at the start of the Carter Administration there were far fewer precedents for OLC to contend with than at the beginning of more recent administrations. The larger the volume of precedents, the more OLC is likely to confront a precedent on point, and thus the more its fidelity to precedent is likely to be tested.¹⁵² In this way, increased confrontations with precedent (on issues that previously would have been matters of first impression) could lead to an increased negative treatment rate even if OLC's basic attitude toward precedent remained unchanged.

A related alternative explanation might be improvements in the accessibility and searchability of OLC precedents. As recently as 1993, OLC's internal library of opinions was a series of filing cabinets.¹⁵³ Today, physical files are supplemented with a searchable internal electronic database.¹⁵⁴ One result of these changes is an ability to search past opinions more efficiently and comprehensively. That ability, in turn, may have made OLC more aware of its own precedents, including those with which it is now inclined to disagree. In this way, the increased negative treatment rate may be best described as an increase in *knowing* negative treatments, resulting in large part from greater knowledge of the full corpus of OLC's past decisions. Of course, any normative assessment of such a phenomenon requires a determination of the proper role of precedent in OLC's work. Holding that issue aside until Part III, the point here is that an increase in the negative treatment rate might say more about improvements in information than about decreased respect for precedent.

150. The increase in negative treatment rate from Carter through George W. Bush's second term is statistically significant at $p=0.01$.

151. See *supra* text accompanying note 44.

152. Michael Gerhardt suggests a similar explanation for the fact that the Supreme Court overruled far more precedents in the twentieth century than in the nineteenth. See Gerhardt, *supra* note 5, at 10 ("These statistics raise the possibility that the Court may have had more room for maneuvering around possibly conflicting precedent in the 19th century than it did in the 20th century.").

153. See McGinnis, Attorney General, *supra* note 8, at 376 (stating, in 1993, that "[i]n OLC's library sit at least five filing cabinets of largely unpublished opinions dating from the time of OLC's creation in 1932").

154. 2010 OLC Best Practices Memorandum, *supra* note 14, at 4; Pillard, *supra* note 4, at 712-13.

Third, Tables 4 and 5 reveal two distinctive things about the Clinton Administration, especially in its first term. Excluding the Obama data, the first term of the Clinton Administration has a much higher negative treatment rate than any other administration,¹⁵⁵ and the percentage of its negative treatments that involve precedents from an opposite-party administration is also significantly higher. Critics of the Clinton-era OLC might see this as evidence of a diminished respect for OLC precedent during those years.

That is one potential explanation, but here again there are other possibilities. One alternative—which could account for the difference between Clinton and the earlier Republican administrations, though not necessarily for the difference between it and the second Bush Administration—might be that the Clinton Administration simply faced far more precedents with which it disagreed than did its predecessors.¹⁵⁶ As noted above, during earlier administrations OLC precedents were both relatively less voluminous and relatively less accessible than in the Clinton years. Moreover, at least by the latter part of the Reagan Administration as well as the first Bush Administration, the body of OLC precedent produced by a succession of relatively like-minded OLC heads would have been fairly large, especially in comparison to the body of pre-Reagan OLC precedent. OLC during that period may thus have been marginally less likely to disagree with its own precedents. In contrast, the leaders of the OLC at the beginning of Clinton's first term inherited twelve years' worth of Reagan and Bush-era precedents, often at odds with their own legal views.¹⁵⁷ Again, whether that disagreement *should* have led OLC to overrule its earlier precedent depends on the weight OLC should give to its precedents, and on the kind of circumstances that ought to warrant overruling. I take that up in Part III. For present purposes, the point is simply that neither the higher negative treatment rate nor the seemingly more "politicized" nature of the negative treatments during the first term of the Clinton Administration necessarily reflects a different attitude toward precedent. Instead, they may suggest that the Clinton-era OLC's

155. The difference between the Clinton negative treatment rate and the negative treatment rate for all other administrations is statistically significant at $p < 0.0001$.

156. For the reasons noted *infra* at text accompanying note 158, comparisons to the George W. Bush Administration are unreliable at this point.

157. During the Reagan Administration, the Justice Department explicitly laid out an overarching approach to constitutional interpretation—characterized by a commitment to "originalism" in constitutional interpretation—that it hoped to see advanced going forward. See generally Office of Legal Policy, U.S. Dep't of Justice, Report to the Attorney General, *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation* (1988); see also Jamal Greene, *On the Origins of Originalism*, 88 *Tex. L. Rev.* 1, 86 (2009) ("The document proclaimed itself designed to identify the stakes of the 'judicial philosophies' of the judges appointed to the Supreme Court. The claimed results dictated by an originalist view of the Constitution aligned nicely with the Republican political program of the 1980s . . .").

fidelity to precedent was *tested* more often than in previous administrations.

This alternative explanation is arguably supported by the fact that it was during the first term of the Clinton Administration—in the immediate aftermath of twelve years of Republican control—that the negative treatment rate spiked so unusually high, while the rate decreased substantially during the second term. But this explanation does not account for the much lower negative treatment rate during the first term of the George W. Bush Administration, compared to during Clinton’s first term. In fact, the negative treatment rate during both terms of the second Bush Administration are only marginally higher than the negative treatment rate during Clinton’s second term, thus making the first Clinton term appear all the more anomalous. However, given the above-referenced delays in publication of some OLC opinions,¹⁵⁸ there is reason to suspect that the second Bush Administration’s numbers remain more incomplete than Clinton’s, and thus that Bush’s negative treatment rate might look different a few years from now.

Fourth, the rightmost column in Table 4 underscores the potential for selection bias discussed above. The total number of opinions made public per four-year term varies greatly, from a high of 368 during the Carter Administration to less than one-sixth that number during the second Bush Administration’s second term. And even assuming the Bush numbers will increase over the next few years as more opinions are released, substantial variation will remain. During the Reagan years alone, the number of opinions released from the first term is more than double the number released from the second. Such large fluctuations suggest that OLC has had widely divergent publication policies over the years. And that at least raises questions about whether changes in publication policy might obscure (by over- or understating) any trends in OLC’s treatment of precedent over time.

In sum, although presidential administration and party affiliation do appear to affect the likelihood of negative treatment, the precise magnitude of the effect and the best explanation for it is far from certain. That politics might influence OLC’s work in some measure is neither surprising nor necessarily undesirable. Precisely *how* it operates in this context remains unclear.

d. *Requests for Reconsideration.* — Of the variables I have examined, by far the best predictor of an overruling or modification is the presence of a “request for reconsideration.” These cases involve formal requests from a client, asking OLC to reexamine one or more of its precedents. As Table 6 shows, the dataset includes thirty requests for reconsideration, eighteen of which led to negative treatments (M + O in the Table). Recall that the total number of negative treatments in the entire dataset is

158. See *supra* text accompanying notes 122–125.

sixty-seven.¹⁵⁹ This means that 26.87% of all negative treatments are written in response to a request for reconsideration. Yet the total number of opinions responding to a request for reconsideration, thirty, is only 2.52% of the overall total of 1,191. So those opinions' share of all negative treatments is more than ten times their share of the overall total. Put another way, Table 6 shows that 60% of all requests for reconsideration yielded a negative treatment, which is fourteen times the negative treatment rate of 4.22% for all opinions not responding to a request for reconsideration.¹⁶⁰

TABLE 6: RESPONSES TO CLIENT REQUESTS FOR RECONSIDERATION

Affirming ¹⁶¹	Distinguishing	Recognizing	Modifying	Overruling	M + O	Total
11 (36.67%)	0	1 (3.33%)	9 (30.00%)	9 (30.00%)	18 (60.00%)	30

In fact, the 60% negative treatment rate understates the influence of a request for reconsideration. The reason is that not every request is submitted in the hope that OLC will overrule itself, though sometimes the requesting agency clearly does seek an overruling. One example is the request from USPS, discussed above, that OLC reconsider an earlier opinion addressing USPS's obligation to negotiate with the Treasury Department over the sale of its bonds.¹⁶² The earlier opinion was written in response to a request from Treasury, and described USPS's negotiation obligations in a way that was quite favorable to Treasury.¹⁶³ USPS's subsequent request was an attempt to persuade OLC to relax those obligations.¹⁶⁴ This kind of request for reconsideration seems roughly analogous to a losing litigant's motion to reopen a trial or rehear an appeal.

In contrast, some requests come from clients that clearly hope OLC will *reaffirm* its earlier opinion. In May 2003, for example, the Counsel to

159. See *supra* Table 1.

160. Subtracting the Table 6 data from the Table 1 data, there are 1,161 opinions not responding to a request for reconsideration, forty-nine of which contain negative treatments of precedent. The difference between that negative treatment rate of 4.22% and the 60% negative treatment rate in request for reconsideration opinions is statistically significant at $p < 0.0001$.

161. I use "affirming" here rather than "neutral" because it is in the nature of these responsive opinions that all of them cite and consider past precedent. Of course, as noted above in the text, to say that an opinion affirms a precedent is not necessarily to say that the existence of the precedent itself was decisive in the analysis. An affirmance might simply reflect that the current OLC agrees with the conclusions of the precedent opinion, without having placed any independent weight on the existence of the precedent itself.

162. See *supra* text accompanying notes 144–146.

163. See Auth. of the Sec'y of the Treasury Regarding Postal Serv. Bond Offerings, 17 Op. O.L.C. 6 (1993).

164. OLC ultimately modified but did not entirely rescind its 1993 opinion, concluding that "USPS is not required to postpone the market sale indefinitely" but rather is "only obligated to negotiate with Treasury in good faith for a *commercially reasonable period of time*." Scope of Treasury Dep't Purchase Rights, *supra* note 144, at 239.

the President asked OLC whether it stood by a 1995 opinion that a federal criminal statute did not bar civilian employees of the Executive Branch from making contributions to a President's reelection campaign.¹⁶⁵ The impetus for the request was a decision of the U.S. Court of Appeals for the D.C. Circuit that, although not directly on point, contained reasoning that arguably conflicted with OLC's 1995 opinion.¹⁶⁶ But with the 2004 presidential election on the horizon and the incumbent seeking reelection, the White House surely did not hope OLC would overrule itself on this issue. Rather, in the wake of the D.C. Circuit decision, the White House was undoubtedly looking for confirmation that OLC's earlier advice remained intact. OLC provided that very confirmation.¹⁶⁷

Similarly, in December 1995, the White House Counsel asked OLC whether it stood by an opinion it had issued earlier that year, concluding that an antinepotism statute did not apply to the presidential appointment of federal judges in a way that would bar members of the same family from serving on the same court.¹⁶⁸ The statute provided that "[n]o person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to any justice or judge of such court."¹⁶⁹ The question arose because President Clinton had nominated William Fletcher to a seat on the U.S. Court of Appeals for the Ninth Circuit, where his mother, Betty Fletcher, had been sitting since 1979.¹⁷⁰ Before the President made the nomination, OLC issued an opinion concluding that the anti-nepotism statute did not apply to judicial appointments.¹⁷¹ After the nomination was announced, however, Senator Hatch, the chairman of the Senate Judiciary Committee, objected on the ground that the appointment would violate the statute. The White House responded by asking OLC

165. Memorandum from M. Edward Whelan III, Acting Assistant Att'y Gen., to Alberto Gonzalez, Counsel to the President, Re: Application of 18 U.S.C. § 603 to Contributions to the President's Re-Election Committee (May 23, 2003) [hereinafter Application of 18 U.S.C. § 603], available at <http://www.justice.gov/olc/2003/18usc603.pdf> (on file with the *Columbia Law Review*). The 1995 opinion is: Whether 18 U.S.C. § 603 Bars Civilian Exec. Branch Employees and Officers from Making Contributions to a President's Authorized Re-Election Campaign Comm., 19 Op. O.L.C. 103 (1995).

166. *Haddon v. Walters*, 43 F.3d 1488 (D.C. Cir. 1995).

167. Application of 18 U.S.C. § 603, *supra* note 165, at 2.

168. Application of 28 U.S.C. § 458 to Presidential Appointments of Fed. Judges, 19 Op. O.L.C. 350, 350 (1995).

169. 28 U.S.C. § 458 (1994) (current version at 28 U.S.C. § 458(a)(1) (2006)).

170. 19 Op. O.L.C. at 350.

171. *Id.* (citing Memorandum from Richard L. Shiffirin, Deputy Assistant Att'y Gen., Office of Legal Counsel, to Eleanor D. Acheson, Assistant Att'y Gen., Office of Policy Dev., Re: Applicability of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges (Mar. 13, 1995)).

“whether [it] adhere[d] to th[e] position” it had earlier expressed.¹⁷² OLC said that it did, which was surely the hoped-for answer.

The requesting client’s motivation is not always so easily discerned, which is why I have not divided all requests for reconsideration into “requests to affirm” and “requests to overrule.” But the “request for reconsideration” category clearly includes *some* requests to affirm, and so the 60% negative treatment rate reported in Table 6 understates the correlation between a client’s desire to see a precedent overruled or amended and an OLC opinion reaching that result. OLC’s written opinions, in other words, are even more responsive to requests to overrule or modify than Table 6 would suggest.

It is worth noting, however, that part of this very high negative treatment rate might be attributable to a kind of screening effect. If a client is dissatisfied with an OLC opinion and wishes to see it overruled, the client might first contact OLC informally to gauge OLC’s likely reaction to a formal request for reconsideration.¹⁷³ If OLC’s leaders are sure they would reaffirm the precedent, they could convey that orally, which would likely end the matter. If this pattern is followed, formal requests for reconsideration will be submitted only when the client has reason to believe that OLC’s answer might be favorable to the client—or at least that OLC is not certain to provide an unfavorable answer. And that, in turn, will both depress the overall number of formal requests for reconsideration and contribute to the high negative treatment rate among them.

Because there is no public record of all initial informal communications between clients and OLC, there is no reliable way to determine the magnitude of this screening effect. I am inclined to think there is some such effect, but I doubt it is responsible for anything approaching the full difference between the overall negative treatment rate and the much higher rate in this category. Agency clients are likely sophisticated enough to know that OLC will be inclined to stand by most of its precedents unless there are strong legal (not just policy) arguments to the contrary. Thus, clients are likely to do a fair amount of self-screening before even reaching out to OLC to raise the reconsideration issue, which would help keep the total number of formal reconsideration requests low (and the total negative treatment rate high), without OLC itself playing any direct role in the screening.

* * *

There is more work to be done on the practice of precedent in OLC. As I have noted, the data presented here do not tell us what role OLC’s

172. *Id.*

173. OLC’s 2010 Best Practices Memorandum acknowledges the existence of preliminary discussions of this sort. 2010 OLC Best Practices Memorandum, *supra* note 14, at 3 (“[I]n many cases, we will have preliminary discussions with the requesting agency before it submits a formal opinion request to OLC . . .”).

precedents play when OLC resolves an issue consistent with those precedents. We do not know, in other words, whether OLC reaches a particular conclusion *because* its precedents point in that direction. That sort of causal question is notoriously hard to answer with empirical analysis, but perhaps future studies could provide some clues.

In the meantime, the results presented here do shed some light on the frequency with which OLC openly departs from its precedents, and on the cases in which it is most likely to do so. Of the factors I have examined, by far the most significant is the presence of a formal request to reconsider a precedent. The status of an OLC precedent, then, depends in substantial part on its acceptance within the Executive Branch. As I suggest in the next Part, this lends a kind of contingent quality to OLC's precedents that, in the right measure, is not only acceptable but desirable.

III. TOWARD A THEORY OF PRECEDENT IN OLC

This Part turns from outcomes to reasons. It begins by examining and evaluating the reasons supporting OLC's adherence to its own precedents, and then considers the reasons why OLC may legitimately overrule itself. This discussion proceeds from the premise that OLC is not constitutionally bound to adopt any particular rule of stare decisis.¹⁷⁴ Although constitutionally salient values may be at stake, whether OLC should follow a rule of stare decisis (and what precisely that rule should be) is a matter of prudence.¹⁷⁵ Thus, in advocating a particular approach by OLC to its

174. In the judicial context, I agree with Richard Fallon that: Article III's grant of "the judicial Power" authorizes the Supreme Court to elaborate and rely on a principle of stare decisis [in constitutional cases] and, more generally, to treat precedent as a constituent element of constitutional adjudication. That constitutional authorization is itself part of "the supreme Law of the Land."

Fallon, *supra* note 3, at 577–78 (footnote omitted). Stare decisis on this view is "a doctrine of constitutional magnitude" and thus is not subject to abrogation by Congress. *Id.* at 572. Fallon's argument responds to Michael Stokes Paulsen's claim that judicial stare decisis is congressionally abrogable. See Paulsen, *Abrogating Stare Decisis by Statute*, *supra* note 4, at 1540. But to say that stare decisis is "constitutionally authorized" is not necessarily to say that it is "constitutionally mandated." Fallon, *supra* note 3, at 591 (noting "[i]f stare decisis is constitutionally valid at all, it must be constitutionally mandated or at least constitutionally authorized," and concluding "stare decisis merits recognition as constitutionally authorized," without concluding whether it is so mandated); see also Healy, *supra* note 109, at 1178–83, 1196–1207 (arguing stare decisis is not constitutionally required but Congress cannot abrogate it). But see Monaghan, *supra* note 3, at 754 (raising possibility that "stare decisis is a part of the judicial power of article III" and therefore "is an inaliena[ble] command binding the Court"). The judiciary's decision to follow a rule of stare decisis may be insusceptible to congressional abrogation without the rule itself being constitutionally obligatory; the decision whether to adopt the rule may simply be part of "the judicial Power" that lies beyond Congress's power to regulate.

175. This approach is reflected in the Supreme Court's own discussions of stare decisis, which tend to emphasize prudential considerations. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) ("[W]hen this Court reexamines a prior

precedents, I am not claiming that the role is constitutionally mandatory. I am instead arguing for an approach that I think OLC should adopt as a matter of discretion, the better to advance certain institutionally relevant values.¹⁷⁶

Importantly, my argument in this Part is contingent on two points discussed in the Introduction and Part I—that OLC seeks to provide legal advice based on its best view of the law, and that its advice is treated as binding within the Executive Branch (unless reversed by the Attorney General or President, or later overruled by OLC itself).¹⁷⁷ Together, these two points mean that OLC’s legal advice is itself a source of law (by which I mean binding rules) within the Executive Branch. That fundamentally distinguishes OLC’s advice from other private and public lawyers’ advice to their clients, which is not typically viewed as a source of law in itself.

The fact that OLC’s advice is treated as binding within the Executive Branch also makes the judicial doctrine of *stare decisis* a sensible place to look when thinking about the status of OLC precedent. But judicial *stare decisis* is not the only conceptually possible analogy, and some might think it is not the best one. Certainly there are differences between the contexts in which courts and OLC operate. Judicial *stare decisis* applies to the holdings in concrete cases presented in adversarial fashion; OLC rarely has the benefit of true adversarial testing, and operates in more of an advisory mode. For that reason, one might argue that even within the judicial domain, the best analogy is not the adjudication of concrete cases but the practice in some states of providing more abstract advisory opinions. Yet nearly all of the states that authorize their high courts to issue advisory opinions regard them as nonbinding.¹⁷⁸ That difference weighs

holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.”).

176. In doing so, I also do not address whether Congress could dictate any particular approach to *stare decisis* within OLC. I tend to think it could not, as such a law would in effect instruct the President how to honor his own oath of fidelity to the Constitution, see U.S. Const. art. II, § 1, and might also entail an impermissible intrusion on his authority to “take Care that the Laws be faithfully executed,” *id.* § 3. But my thoughts on this point are tentative. It might turn out that there are persuasive arguments supporting the position that although legislation abrogating judicial *stare decisis* would intrude on the judicial power, legislation doing likewise for the Executive Branch would pass constitutional muster. Ultimate resolution of that issue lies beyond the scope of this Article.

177. See *supra* text accompanying notes 31–36. As noted above, I take no position here on the extent of Congress’s power to dictate a different role for OLC. In the absence of any such direction, OLC’s role has come to be widely understood to include these two features. My argument operates within that understanding.

178. See Mel A. Topf, *State Supreme Court Advisory Opinions as Illegitimate Judicial Review*, 2001 L. Rev. M.S.U.-D.C.L. 101, 106 n.21 (collecting cases to that effect from Alabama, Delaware, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island, and South Dakota); Note, *Advisory Opinions on the Constitutionality of Statutes*, 69 Harv. L. Rev. 1302, 1303–04 (1956) (“[A]dvisory opinions lack the force of binding precedent.”).

more heavily, I think, than any points of similarity between such advisory opinions and OLC's work. Just as the judicial doctrine of stare decisis is linked intimately to the legally binding force of the holdings in concrete cases, the functional bindingness of OLC's opinions within the Executive Branch makes judicial stare decisis an apt analogy for thinking about the weight and role of OLC precedent.

Proceeding from these premises, the first set of claims in this Part are fairly conventional: The factors generally thought to support stare decisis in the courts tend to support it in OLC as well, and the factors the Supreme Court claims to weigh when deciding whether to overrule itself are also applicable in OLC. But there is also a more novel component: OLC's location in the Executive Branch, I contend, provides both an additional reason to accord added weight to its precedents on issues of executive power and a reason for OLC to take into account the settled constitutional views of the President when deciding whether to depart from its precedents. Moreover, especially with respect to the role of the President's views, I stress one point above all else: Except where inconsistent with the needs of national security, public notice of the decision to overrule is critical to its legitimacy.

A. *Reasons for Following Precedent*

As the historical discussion in Part II revealed, a rule of stare decisis similar to the one followed by courts has long been believed to inhere in the legal advisory function originally discharged by the Attorney General and later delegated to OLC. So there is a historical basis for stare decisis in OLC. Here I explore two additional sets of reasons justifying that practice.

1. *The Standard Stare Decisis Values.* — Many of the standard values associated with stare decisis in the courts resonate in this context as well. Those values include consistency and predictability in the law, efficiency in decisionmaking, and credibility of the decisionmaker.¹⁷⁹ The basic arguments on behalf of these values are familiar, and I do not propose to rehash them here. But it is worth observing their relevance to OLC in particular.

Then-United States Attorney for the District of Rhode Island (now United States Senator) Sheldon Whitehouse's description of the status of an advisory opinion by the Justices of the Rhode Island Supreme Court is typical: "An advisory opinion . . . does not constitute a decision of the court, does not finally determine any question, and has no binding effect on any person whose legal rights are involved." Sheldon Whitehouse, *Appointments by the Legislature Under the Rhode Island Separation of Powers Doctrine: The Hazards of the Road Less Traveled*, 1 *Roger Williams U. L. Rev.* 1, 16 n.83 (1996). But see Topf, *supra*, at 102–03 ("In spite of the frequency with which advisory justices invoke and rely upon the doctrine [that advisory opinions are nonbinding], it is insufficient to its purposes. Advisory opinions are in effect and in fact a binding constitutional intervention and they are perceived and responded to as such.").

179. See Schauer, *Precedent*, *supra* note 2, at 597–602 (discussing these three justifications for precedential constraint).

Consider first the values of consistency and predictability, as well as the related value of protecting reliance interests.¹⁸⁰ OLC's clients across the Executive Branch clearly have an interest in the consistency, predictability, and hence reliability of OLC's legal advice.¹⁸¹ This interest was already apparent to early Attorneys General like Wirt, who stressed the need for "[c]onsistency and uniformity in the Attorney General's interpretation of law."¹⁸² That need is all the more acute today, given OLC's relatively small staff compared to the vast scope of the modern Executive Branch. As Cornelia Pillard puts it, "[n]o amount of decisions that OLC could feasibly make could begin to fulfill directly the executive branch's actual need for constitutional guidance, making it all the more important that OLC foster constitutional self-monitoring within the executive by openly giving reasons for those decisions it does make."¹⁸³ Part of OLC's task is to provide legal advice that its clients can internalize and apply to future matters without constantly returning to OLC for further advice, so predictability in its advice is critical.¹⁸⁴

The interest in efficiency is also relevant in OLC. Arguments from efficiency focus on circumstances where, if the current decisionmaker addressed the issue as a matter of first impression, it would very likely reach the same resolution as the one embodied in precedent. If that likelihood is sufficiently high across the board, it will be efficient for the "decisionmaker [to] simply take what others have concluded as a predicate for the decision at hand."¹⁸⁵ As Mark Tushnet suggests, these sorts of efficiency gains would seem to be just as beneficial to an executive office like OLC as to a court.¹⁸⁶

Adherence to OLC precedent can also provide efficiency gains in a different set of cases—those in which resolving the issue would be very difficult in the absence of accrued precedent. Many of the issues OLC

180. The Court has suggested that judicial adherence to precedent protects not just individual but also governmental reliance interests. See *Hubbard v. United States*, 514 U.S. 695, 714 (1995) ("Stare decisis has special force when legislators or citizens 'have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.'" (quoting *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991))); *Citizens United v. FEC*, 130 S. Ct. 876, 940 (2010) (Stevens, J., dissenting) ("*Stare decisis* protects not only personal rights involving property or contract but also the ability of the elected branches to shape their laws in an effective and coherent fashion."). Such governmental reliance interests—though dominantly within the Executive, not Legislative, Branch—are principally at stake here.

181. See Goldsmith, *supra* note 15, at 146 ("Constant reevaluation of prior OLC decisions would make it hard for OLC's many clients to rely on its decisions.").

182. Cummings & McFarland, *supra* note 87, at 79.

183. Pillard, *supra* note 4, at 739 n.199.

184. Cf. Benjamin N. Cardozo, *The Nature of the Judicial Process* 149 (1921) ("[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.").

185. Tushnet, *Stare Decisis*, *supra* note 5, at 1340.

186. *Id.* at 1340–41.

faces, especially in constitutional law, are highly complex. For OLC to treat each such issue as a matter of first impression would inevitably render it slower and less responsive to the sometimes urgent needs of its clients. Moreover, especially on issues of the constitutional separation of powers, to ignore OLC's settled precedents on an issue could be to ignore a crucial means of resolving the issue. OLC's precedents can function for OLC like settled Executive Branch practice functioned for Justice Frankfurter in the *Steel Seizure* case: as a "gloss" on constitutional provisions that are both textually spare and under-addressed by judicial doctrine.¹⁸⁷ In short, where OLC has generated its own precedents in an area, relying on those precedents may be the simplest and least labor intensive means of resolving the issue.¹⁸⁸

Finally, adhering to precedent can contribute to OLC's own institutional credibility.¹⁸⁹ Recall that, as discussed in Part I, the primary threats to OLC's credibility and integrity are likely to be its own clients—the White House, the Attorney General, and the various departments and

187. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

188. One recent example is an April 2009 OLC opinion addressing constitutional concerns raised by a bill to establish the Ronald Reagan Centennial Commission. Memorandum from Martin S. Lederman, Deputy Assistant Att'y Gen., Office of Legal Counsel, to the Acting Assistant Att'y Gen. for the Office of Legislative Affairs, Re: Constitutionality of the Ronald Reagan Centennial Commission Act of 2009 (Apr. 21, 2009), available at <http://www.justice.gov/olc/2009/reagancentennialcommission.pdf> (on file with the *Columbia Law Review*). The bill gave the Commission responsibility to plan and execute various activities honoring Ronald Reagan and provided that six of the eleven prescribed Commissioners would be members of Congress, appointed by other members of Congress. *Id.* at 1. This raised the question whether the Commissioners would be Officers of the United States within the meaning of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. The closest Supreme Court precedent OLC could find was *Morrison v. Olson*, 487 U.S. 654 (1987), addressing the independent counsel statute—hardly on all fours with the issue before it. The memorandum noted, however, that OLC "ha[d] previously indicated that carrying out a limited number of commemorative events and projects is a clearly executive function and that the planning and development of commemorative events constitutes significant authority for Appointments Clause purposes if the plans are final (i.e., not just advisory)." Lederman, *supra*, at 4 (internal quotation marks omitted). Thus, "[i]n light of these precedents, [OLC] conclude[d] the Commissioners would be Officers of the United States. Therefore the bill's prescription that members of Congress shall appoint certain of the Commissioners would violate the Appointments Clause." *Id.* In light of OLC's precedents, the issue was easy; without them, it would have been much more difficult. (Because Congress did not amend the bill to fix the constitutional problem OLC identified, President Obama issued a statement upon signing the legislation into law that the congressionally appointed members of the Commission "will be able to participate only in ceremonial or advisory functions of [the] Commission, and not in matters involving the administration of the act." Statement on Signing the Ronald Reagan Centennial Commission Act, 2009 Daily Comp. Pres. Doc. 424 (Jun. 2, 2009) (citation omitted). This saving construction avoided the constitutional concern raised in OLC's opinion, and in so doing followed the lead of President Reagan himself, who issued a similar statement when signing comparable legislation into law. *Id.*)

189. See Tushnet, *Stare Decisis*, *supra* note 5, at 1352 (discussing credibility argument for stare decisis in this context).

agencies that seek its advice. The concern is that OLC might succumb to its clients' short-run policy interests by too readily answering "yes" when the best view of the law suggests otherwise. That could include overruling OLC precedent whenever it stands in the way of the client's current preferences. But as Goldsmith puts it, "[i]f OLC overruled every prior decision that its new leader disagreed with, its decisions would be more the whim of individuals than the command of impersonal laws."¹⁹⁰

In important respects, the threat to credibility here is about appearances. Because OLC understands and advertises its job as providing legal advice consistent with its best view of the law, its credibility depends on its appearing to conduct itself in that manner. Adhering to precedent—and in particular, *advertising* that it adheres to precedent—can contribute to that appearance. If OLC claims to treat its precedents as at least presumptively binding, it thereby commits to follow those precedents over the immediate policy preferences of its clients. For this to work in the long run, however, actual practice must conform with OLC's claims. If OLC regularly bent to the will of its clients at the expense of its settled precedents, over time its claims to be seeking its best view of the law would become just so much hollow rhetoric. Actually *employing* a rule of stare decisis can protect against that by providing a robust basis for saying "no" to its clients.¹⁹¹ And that, in turn, helps safeguard OLC's credibility and integrity, which is where its ultimate value to its clients resides.¹⁹²

As I have argued elsewhere, deciding whether any given judicially developed approach to legal interpretation should be employed outside the courts requires careful consideration of the values it is meant to serve.¹⁹³ Here, that inquiry reveals that the values advanced by judicial stare decisis are portable to OLC. But as the next subpart reveals, there are also more Executive Branch-specific arguments in favor of stare decisis in OLC.

2. *Stare Decisis and Executive Power.* — If the argument in the previous subpart was relatively conventional in its embrace of the standard values of judicial stare decisis, the argument here is more novel: OLC prece-

190. Goldsmith, *supra* note 15, at 146.

191. Cf. Peter L. Strauss, *When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 *Chi.-Kent L. Rev.* 321, 331–33 (1990) (explaining how agencies' recourse to legislative history when interpreting their statutes provides a means of resisting blandishments of congressional committees to produce interpretations that most advance their current policy goals).

192. See Tushnet, *Stare Decisis*, *supra* note 5, at 1352 ("[OLC's clients] will seek out OLC's advice only if they believe that OLC will provide them with a more disinterested view of the law's content than they receive from within. Executive stare decisis can provide the required assurance of disinterestedness.").

193. See generally Morrison, *Avoidance*, *supra* note 4 (examining whether judicially developed canon of constitutional avoidance is appropriate in Executive Branch).

dents on executive power and the separation of powers merit especially great deference.¹⁹⁴

OLC articulated the core of this idea in a 1996 opinion written to “provide[] an overview of the constitutional issues that periodically arise concerning the relationship between the executive and legislative branches.”¹⁹⁵ Known as the Dellinger Memorandum (after its signatory Walter Dellinger, then the head of OLC), it began with some general observations about OLC’s approach to issues in this area. It stressed in particular that “the executive branch has an independent constitutional obligation to interpret and apply the Constitution,” which is “of particular importance in the area of separation of powers, where the issues often do not give rise to cases or controversies that can be resolved by the courts.”¹⁹⁶ The Memorandum then pointed to history:

The Attorneys General and this Office have a long tradition of carrying out this constitutional responsibility. . . . We believe therefore that it is important in addressing separation of powers matters to give careful consideration to the views of our predecessors and to what seems to us to be the import of the Constitution’s text, history, and structure.¹⁹⁷

This approach builds on Justice Frankfurter’s point about the role of history, especially on issues of executive power. As he put it in his *Steel Seizure* concurrence, “[d]eeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.”¹⁹⁸ Consistent with that general point, the idea here is that within OLC, its own body of executive power precedents is a critical piece of the broader historical practice informing its understanding of the law in this area. And that, in turn, provides a special reason for OLC to give added weight to those precedents.

194. OLC gestured in this direction in its 2010 and 2005 Best Practices Memoranda, but did not develop the idea in any detail. See 2010 OLC Best Practices Memorandum, *supra* note 14, at 2 (“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.”); 2005 OLC Best Practices Memorandum, *supra* note 13, at 2 (“Where the question relates to the authorities of the President or other executive officers or the separation of powers between the Branches of the Government, past precedents and historical practice are often highly relevant.”); see also OLC Guidelines, *supra* note 12, at 1606 (“OLC routinely, and appropriately, considers sources and understandings of law and fact that the courts often ignore, such as previous Attorney General and OLC opinions that themselves reflect the traditions, knowledge and expertise of the executive branch.”).

195. The Constitutional Separation of Powers Between the President and Cong., 20 Op. O.L.C. 124, 124 (1996) [hereinafter Dellinger Memorandum].

196. *Id.* at 128.

197. *Id.*

198. *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*), 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring); see also *id.* (“It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”).

Two points bear emphasizing here, however. First, for OLC's executive power precedents to carry special weight as I have suggested, it is important that they align with the actual practice of the Executive Branch. The early Attorneys General appreciated this point. The weight of their predecessors' opinions was a function not only of the opinions themselves, but of consistent executive branch action in conformity with the opinions.¹⁹⁹ It is that consistent executive practice, incorporating and relying on OLC or Attorney General legal advice, that helps supply the meaning of the constitutional provisions in question.

Second, the special precedential force of prior opinions in this area also requires disclosure, especially to Congress. This is entailed in the Madisonian model of the separation of powers, which continues to dominate separation of powers doctrine today—both in OLC and elsewhere.²⁰⁰ “[T]he great security against a gradual concentration of the several powers in the same department,” Madison explained, “consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”²⁰¹ Assertions of executive power that are kept secret from

199. See *supra* text accompanying notes 101–105.

200. See generally *The Federalist* No. 51 (James Madison). For examples of the Madisonian model's continued vitality, see, e.g., *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) (stating purpose of separation of powers is to “ensure the ability of each branch to be vigorous in asserting its proper authority”); Louis Fisher, *Constitutional Conflicts Between Congress and the President* 10 (4th ed. 1997) (“Without the power to resist encroachments by another branch, a department might find its powers drained to the point of extinction.”); Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* 105 (2007) (“The Constitution gave members of Congress and the [P]resident political interests that would be served by preserving the power of their respective institutions, setting the institutions and their members at political odds over the distribution of power within the national government.”). But see Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 *Harv. L. Rev.* 915, 920 (2005) [hereinafter Levinson, *Empire-Building*] (arguing government officials more often act on basis of personal and political incentives that do not entail defending institutional powers and prerogatives of branch that employs them). Professor Levinson does not reject the Madisonian vision outright, but instead argues that it describes some parts of government more accurately than others. With respect to the political branches, he contends that “the picture that emerges [is] of somewhat imperial modern presidents and stubbornly passive Congresses.” *Id.* at 957. Assessing the overall accuracy of that claim, and particularly its assertion of congressional passivity, is beyond this Article's scope. Whether or not Congress has lived up to the role Madison envisaged for it, as an office within the Executive Branch OLC is surely justified in continuing the decades-long legal interpretive tradition, established by the early Attorneys General, of paying special heed to matters of executive power. Underlying that special concern is the assumption that such self-help, not aggressive judicial policing or other external constraints, will remain the principal mechanism for protecting executive power. For a discussion of the Madisonian model as applied to other aspects of legal interpretation in the Executive Branch, see Morrison, *Avoidance*, *supra* note 4, at 1232 (placing Executive Branch's “self-protective” use of the canon of constitutional avoidance in this context).

201. *The Federalist* No. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961).

Congress constitute evasions of this checking mechanism, and for that reason cannot claim special precedential weight on Madisonian terms. In contrast, assertions of executive power known to and acquiesced in by Congress are at the opposite end of the spectrum. To return to Justice Frankfurter's *Steel Seizure* concurrence, courts should treat historical patterns of executive practice "as a gloss on 'executive Power' vested in the President" when they are "long pursued to the knowledge of the Congress and never before questioned."²⁰² This theory of acquiescence obviously requires notice.

But to stress the importance of legislative notice in this context is not to say that OLC should accord extra weight to its executive power precedents *only* when Congress has long acquiesced in them. In the context of a litigated controversy, it is sensible for the judiciary to require such acquiescence before relying on it to uphold the executive action in question. But in many areas the Executive and Legislative Branches have con-

202. *Steel Seizure*, 343 U.S. at 610–11 (Frankfurter, J., concurring); see also *Medellin v. Texas*, 128 S. Ct. 1346, 1371 (2008) (“[I]f pervasive enough, a history of congressional acquiescence can be treated as a ‘gloss on “Executive Power” vested in the President by § 1 of Art. II.’” (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981))); *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915) (stating longstanding executive practice known and not objected to by Congress “raise[s] a presumption that the [action] had been [taken] in pursuance of its consent”).

The Court's willingness to uphold assertions of executive power in which Congress has long acquiesced cuts against Daryl Levinson's claim that “[t]he Court has made clear that the consent of the ‘losing’ branch does nothing to validate a shift in power between the legislative and executive branches.” Levinson, *Empire-Building*, *supra* note 200, at 958. Professor Levinson here has in mind cases like the Line Item Veto Act, where the mere fact that Congress has been willing to cede certain authority to the President by legislative delegation is not enough for the Court to uphold its constitutionality. *Id.* at 958 n.179 (citing *Pub. L. No. 104-130*, 110 Stat. 1200 (1996), invalidated by *Clinton v. City of New York*, 524 U.S. 417 (1998)). Generalizing from such an example is problematic, however. First, its decision in *Clinton* notwithstanding, the Court has shown little interest in policing more general limits on the delegation of legislative or quasi-legislative power to the Executive Branch. See Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 *U. Chi. L. Rev.* 1613, 1630 (2009) (“[T]he nondelegation doctrine is largely moribund at the level of constitutional law; it was invoked to invalidate legislation for the first time in 1935, and for the last time in 1936.”). Indeed, the Court even refused to base its decision in *Clinton* on the so-called nondelegation doctrine, relying instead on a narrower Presentment Clause rationale. *Clinton*, 524 U.S. at 421. Second, the key “historical gloss” cases are not those involving discreet congressional delegations of seemingly core legislative powers, but cases involving decades-long practices by the Executive Branch that fall within areas at least potentially subject to regulation by Congress, in response to which Congress has done nothing. In those cases, *pace* Levinson, the Court appears to accord great weight to longstanding congressional “consent.” See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (“[T]he historical gloss on the ‘executive Power’ vested in Article II of the Constitution has recognized the President’s ‘vast share of responsibility for the conduct of our foreign relations.’” (quoting *Steel Seizure*, 343 U.S. at 610–11 (Frankfurter, J., concurring))); *id.* at 415 (noting practice of entering into executive agreements with foreign nations “goes back over 200 years, and has received congressional acquiescence throughout its history”).

sistently adhered to and acted upon divergent understandings of the boundaries of their respective powers, while also avoiding the kinds of direct confrontations that would trigger litigation yielding a definitive judicial resolution. Foreign affairs are one such area. At various points over the last few decades, Congress has contemplated legislation that would direct or limit the conduct of diplomacy by the Executive Branch.²⁰³ OLC has consistently resisted these limitations, insisting that “the President’s constitutional authority to conduct diplomacy bars Congress from attempting to determine the ‘form and manner in which the United States . . . maintain[s] relations with foreign nations.’”²⁰⁴ OLC is acutely aware of its consistent stance on these issues, and points to that history as a principal justification for its continued resistance to congressional interventions in this area.²⁰⁵ Congress’s repeated contemplation of provisions like this is plainly not a story of acquiescence, even though not all of the provisions were ultimately passed into law. But such acquiescence should not be necessary for OLC to accord extra weight to its precedents in this area. Notice to Congress, not its acquiescence, should suffice. Put another way, given the Madisonian assumption that the political branches will have divergent understandings of their respective powers, it should be permissible for OLC to give extra weight to long-standing executive branch understandings of executive power unless and until the courts resolve the matter in favor of Congress, or Congress takes some other measure forcing the Executive’s acquiescence.

At this point, one might raise a self-dealing objection on the ground that according extra weight to OLC’s executive power precedents will invariably mean granting extra weight to precedents upholding assertions of executive power. As a descriptive matter, OLC’s written opinions are generally quite friendly to executive power. Part of the reason is that, as

203. For discussion of one such limitation implicating the Executive’s specific power to recognize foreign governments, see *Zivotofsky v. Sec’y of State*, 571 F.3d 1227, 1228 (D.C. Cir. 2009) (addressing Foreign Relations Authorization Act’s requirement that, for U.S. citizens born in Jerusalem, the Secretary of State list “Israel” as place of birth in citizen’s passport if citizen so requests and holding State Department’s refusal to do so presented nonjusticiable political question).

204. Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, to Acting Legal Adviser, Dep’t of State, Re: Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, at 4 (June 1, 2009), available at <http://www.justice.gov/olc/2009/section7054.pdf> (on file with the *Columbia Law Review*) (quoting Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18, 21 (1992)).

205. See, e.g., *id.* at 8 (“[T]his Office has ‘repeatedly objected on constitutional grounds to Congressional attempts to mandate the time, manner and content of diplomatic negotiations,’ including in the context of potential engagement with international fora.” (quoting Memorandum from Walter Dellinger, Assistant Att’y Gen., Office of Legal Counsel, to Alan Kreczko, Legal Adviser, Nat’l Sec. Council, Re: WTO Dispute Settlement Review Commission Act, at 3 (Feb. 9, 1995))); *id.* at 8–9 & nn.9–11 (discussing numerous other OLC precedents and presidential statements from Carter, Reagan, George H.W. Bush, and Clinton administrations).

described in Part I, OLC understands itself to have a responsibility to help its clients find lawful ways to achieve their policy goals.²⁰⁶ Thus, when OLC's initial conclusion is that a client's proposed course of action is unlawful, it will often work with the client to find lawful alternative means to pursue its desired ends. If it succeeds, that conclusion is more likely to be memorialized in a written opinion than the earlier determination that the client's first proposal was unlawful.

More broadly, I want to argue that the generally pro-executive tenor in OLC's opinions simply reflects that OLC is part of the Executive Branch.²⁰⁷ Like other executive branch officials, OLC lawyers are players in the scheme envisioned by Madison, wherein each branch defends its institutional prerogatives against incursions by the other two. As the Dellinger Memorandum puts it, "[e]xecutive branch lawyers . . . have a constitutional obligation . . . to assert and maintain the legitimate powers and privileges of the President against inadvertent or intentional congressional intrusion."²⁰⁸ Put another way, Madison's vision of the separation of powers provides a lens through which OLC provides its legal advice.

Critically, this Madisonian paradigm is not at odds with OLC's self-imposed duty to provide legal advice consistent with its best view of the law. But it does underscore the significance of speaking of OLC's best view of the law, not *the* best view in any universal, decontextualized sense—a concept whose applicability I think is questionable in any context. As Randolph Moss puts it, when an OLC lawyer provides legal advice in his or her official capacity, the advice “does not come from the individual lawyer, but from the office that he or she holds,” and must reflect “*the office's* best view of the law.”²⁰⁹ Inattention to this point may help explain why some commentators think “there is simply no way that OLC's aspiration to be a neutral decision-maker can play out in practice.”²¹⁰ That objection demands too much of OLC. 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. The in-between nature of that role can be “uncomfortabl[e]”²¹¹ and difficult to specify in all its particulars, but that does not make it incoherent or unattainable.

This is certainly not to say that the Madisonian model justifies all assertions of executive authority, no matter how audacious. OLC's location within the Executive Branch properly leads it to be especially sensi-

206. See *supra* text accompanying notes 66–69.

207. See 2010 OLC Best Practices Memorandum, *supra* note 14, at 2 (“Because OLC is part of the Executive Branch, its analyses may also reflect the institutional traditions and competencies of that branch of the Government.”).

208. Dellinger Memorandum, *supra* note 195, at 126.

209. Moss, *supra* note 53, at 1324 (emphasis added).

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

211. Goldsmith, *supra* note 15, at 35.

tive to incursions on executive power and prerogative, but that sensitivity does not compel any particular understanding of the precise scope of executive power in any given context. OLC must still defend its conclusions by means of recognized forms of legal argumentation and show that its views are not just plausible but are indeed its best view of the law. My point here is that the mere fact of OLC's special sensitivity to incursions on executive power no more undermines the integrity of its analysis than does the Supreme Court's tendency to use clear statement rules and other devices to resist dramatic legislative reductions of its jurisdiction.²¹² And to return to the precedent issue in particular, OLC's general inclination in favor of executive power does not undermine the legitimacy of its according special weight to its executive power precedents.

Moreover, although OLC's written opinions may tend to favor executive power more than they oppose it, the point about added precedential weight applies equally to opinions pointing in the opposite direction. The argument in favor of such added weight is that the metes and bounds of executive power depend in important respects on historical practice. That cuts both ways. Thus, if OLC or the Attorney General had long opined that the Constitution does not grant the President a particular power, or that any power it does grant is subject to congressional regulation, those long-settled views would merit the same precedential treatment as if they had gone the other way precisely because they would represent part of the historically developed understanding of the law. It is for this reason that the Dellinger Memorandum emphasizes OLC's role in helping the President discharge his "'duty to pass the executive authority on to his successor, unimpaired by the adoption of dangerous precedents.'"²¹³ That duty is critical precisely because once such "dangerous" precedents are adopted and regularly implemented, they become part of the law of executive power.

* * *

There are, then, good reasons for OLC to treat its precedents as at least presumptively binding. Some of those reasons are familiar, as they are derived from conventional discussions of stare decisis in the courts. One is more novel, and reflects the special role of the executive branch lawyer on issues of executive power and the separation of powers more broadly, where accumulated practice is particularly important. In cases of that sort, there is a special added reason for OLC to adhere to its settled precedents (when accompanied by publicly visible executive action in

212. See Morrison, *Avoidance*, *supra* note 4, at 1233–34 & n.196 (discussing Court's "self-protective" use of canon of constitutional avoidance and other interpretive rules, and arguing "[i]f it is permissible for courts to employ avoidance for such purposes, it seems appropriate to grant the executive branch that option as well").

213. Dellinger Memorandum, *supra* note 195, at 128–29 (quoting *Constitutionality of Proposed Legislation Affecting Tax Refunds*, 37 Op. Att'y Gen. 56, 65 (1933)).

conformity with them), as they are a more central, constitutive part of what the law *is*.

B. *Overruling*

Of course, to say that there are good reasons for OLC to adhere to its precedents is not to say that those reasons always trump countervailing considerations. The task here is to identify the circumstances that support overruling.

1. *The Casey Factors*. — OLC's own opinions do not provide much help here. There is no OLC or early Attorney General equivalent to the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, spelling out the criteria for deciding whether to overrule.²¹⁴ Lamenting that absence in 1993, Harold Koh called on OLC to "publicly state the principles that govern overruling in [OLC]," and suggested that in doing so, OLC "can begin, but need not end" with *Casey* itself.²¹⁵ That is indeed a sensible place to start.²¹⁶

A threshold point is obvious but sufficiently important to state explicitly: The decision to depart from settled precedent "should rest on some special reason over and above the belief that a prior case was wrongly decided."²¹⁷ In putting the point this way, the *Casey* Court embraced what Schauer would call a true theory of precedent, not mere experience.²¹⁸ Under such a theory, the fact of a prior decision provides a reason for a court to decide future cases in like manner, without respect to the substantive merit of the past decision. For all the reasons identified in the previous subpart, OLC's past opinions merit comparable treat-

214. 505 U.S. 833, 854–55 (1992).

215. Koh, *supra* note 5, at 523.

216. *Casey's* stare decisis analysis has been the target of substantial criticism. See, e.g., Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 *Notre Dame L. Rev.* 995, 1001 (2003). I do not enter that debate here, but instead begin with *Casey* because numerous subsequent Supreme Court opinions have invoked *Casey's* general approach. See, e.g., *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 166 (1999) (citing *Casey's* enumeration of "considerations relevant to overruling precedent"); *Agostini v. Felton*, 521 U.S. 203, 236 (1997) (citing *Casey's* doctrinal anachronism criterion); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 233–34 (1995) (acknowledging but distinguishing *Casey*); *Boumediene v. Bush*, 128 S. Ct. 2229, 2302 (2008) (Scalia, J., dissenting) (describing *Casey* as "identifying stare decisis factors"); *Gonzales v. Carhart*, 550 U.S. 124, 190–91 (2007) (Ginsburg, J., dissenting) (invoking *Casey's* approach to stare decisis); *Hill v. Colorado*, 530 U.S. 703, 791 (2000) (Kennedy, J., dissenting) (invoking *Casey's* "consider[ation] . . . [of] principles of stare decisis"). But see *Lawrence v. Texas*, 539 U.S. 558, 592 (2003) (Scalia, J., dissenting) (accusing majority of "revis[ing] the standards of stare decisis set forth in *Casey*").

217. *Casey*, 505 U.S. at 864; see also *Citizens United v. FEC*, 130 S. Ct. 876, 938 (2010) (Stevens, J., dissenting) ("[I]f this principle [of stare decisis] is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine.").

218. See *supra* note 18.

ment.²¹⁹ Although new OLC heads may enter the office with diverse personal views on the issues they are liable to address, those views alone do not justify a departure from OLC precedent.²²⁰

This point can have real bite, including in circumstances that advocates of greater self-restraint within the Executive Branch might not relish. As I argued above, OLC precedents on issues of executive power merit special deference by OLC, especially when accompanied by executive branch practice adhering to the precedents.²²¹ This holds true even if later heads of OLC are skeptical about the precedents' accuracy, and even if they think the precedents impose insufficient constraints on executive power. If OLC's precedents support the exercise of a particular executive power but the current OLC has doubts about them, those doubts *alone* do not justify overruling.

Of course, in many instances OLC is likely to face client pressure to adhere to its executive power-favoring precedents. Consider, for example, President Clinton's Executive Order excluding firms from eligibility for government contracts if they hire workers to permanently replace lawfully striking employees.²²² When called upon to review a draft of the proposed Order, OLC expressed doubts to the White House about

219. See Goldsmith, *supra* note 15, at 145 (describing OLC's "powerful tradition of adhering to its past opinions, even when a head of the office concludes that they are wrong").

220. As Walter Dellinger put it while head of OLC:

[U]nlike an academic lawyer, an executive branch attorney may have an obligation to work within a tradition of reasoned, executive branch precedent, memorialized in formal written opinions. . . . When lawyers who are now at the Office of Legal Counsel begin to research an issue, they are not expected to turn to what I might have written or said in a floor discussion at a law professors' convention. They are expected to look to the previous opinions of the Attorneys General and of heads of this office to develop and refine the executive branch's legal positions. That is not to say that prior opinions will never be reversed, only that there are powerful and legitimate institutional reasons why one's views might properly differ when one sits in a different place.

Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. Miami L. Rev. 107, 109–10 (1995). For this reason, I think Eric Posner and Adrian Vermeule committed a kind of category mistake when they defended OLC's August 2002 Torture Memorandum in part on the ground that it reflected the views of "a dynamic generation of younger scholars who emphasize constitutional text, structure and history rather than precedent, and who argue for an expansive conception of presidential power over foreign affairs, relative to Congress." Eric Posner & Adrian Vermeule, *Op-Ed.*, A 'Torture' Memo and Its Tortuous Critics, *Wall St. J.*, July 6, 2004, at A22. When a legal scholar or anyone else takes up an official position within OLC, he assumes the responsibility of providing legal advice consistent with the norms and standards of that office. It is a non sequitur to defend that advice on the ground that it is consistent with views expressed by the official in his personal capacity.

221. See *supra* Part III.A.2.

222. *Ensuring the Economical and Efficient Administration and Completion of Federal Government Contracts*, Exec. Order No. 12,954, 60 Fed. Reg. 13,023, 13,023 (Mar. 10, 1995).

whether the President had the authority to issue it.²²³ But OLC also had to concede that President Bush had issued an Executive Order relying on a similar (though differently motivated) exercise of the government's procurement authority, which OLC at the time had approved.²²⁴ Although the Clinton-era OLC had its doubts about the precedent, the White House was hardly receptive to the suggestion that OLC might overrule itself in order to preclude the President from taking actions supported by OLC precedent.²²⁵ Ultimately, OLC adhered to its earlier analysis and concluded that President Clinton had the authority to issue the Order.²²⁶ That conclusion was later rejected by the U.S. Court of Appeals for the District of Columbia Circuit in an opinion that also cast serious doubt upon the legality of President Bush's earlier Order.²²⁷ In that respect, OLC's misgivings about the Order were justified. Yet in the absence of any of the *Casey* factors discussed below, OLC's mere unease with a precedent should not be enough to warrant overruling itself. Especially but not only in areas of executive power, OLC legal opinions belong to more than just OLC once issued. For good or for ill, they are part of the law of the Executive Branch.

Return now to *Casey*. Above and beyond a belief that the precedent is wrong, under *Casey* the Court asks whether (1) the precedent's central rule has proven unworkable, (2) it could be overruled without serious unfairness to those who have relied on it, (3) intervening changes in the law have rendered it a "doctrinal anachronism," and (4) in light of new information or evolving understandings, its factual premises have been undermined and its central holding made "irrelevant or unjustifiable."²²⁸ In addition, the *Casey* Court explained that in rare cases of great moment, it will ask whether overruling (or, presumably, not overruling) will "seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law."²²⁹

223. E-mail from Walter Dellinger to author (May 24, 2010, 10:24 EDT) (on file with author).

224. Notification of Employee Rights Concerning Payment of Union Dues or Fees, Exec. Order No. 12,800, 57 Fed. Reg. 12,985, 12,985 (Apr. 14, 1992) (requiring government contractors to post notices informing employees they could not be required to join or remain in a union). If OLC issued a written opinion upholding the legality of President Bush's Order, it does not appear to have been made public. But Walter Dellinger, the head of OLC at the time of President Clinton's Order, reports that OLC had indeed upheld the earlier Order.

225. E-mail from Walter Dellinger, *supra* note 223.

226. Auth. to Issue Exec. Order on Gov't Procurement, 19 Op. O.L.C. 90, 90 (1995).

227. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1339 (D.C. Cir. 1996) ("[T]he Executive Order is regulatory in nature and is pre-empted by the [National Labor Relations Act,] which guarantees the right to hire permanent replacements."); *id.* at 1337 n.10 ("We are also dubious that President Bush's Executive Order 12,800 . . . was legal.").

228. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992).

229. *Id.* at 865.

Just as the familiar values associated with stare decisis apply fairly well to OLC, *Casey*'s factors are also transposable to OLC. In practice, OLC's decisions to overrule do occasionally point to discrete grounds that fit within the *Casey* paradigm. For example, OLC quite frequently identifies intervening developments in the courts or Congress that, while not formally dictating a particular result in the matter now before it, do render the precedent something of an anachronism. In 2003, OLC addressed whether the Establishment Clause permits the Department of the Interior to provide grants for the preservation of historic structures used for religious purposes, such as the Old North Church.²³⁰ In finding no barrier to such grants, OLC abandoned a 1995 OLC opinion's conclusion that a reviewing court would likely invalidate a historic preservation grant to an active church.²³¹ Its core reason for doing so was that recent decisions of the Supreme Court had "brought the demise of the 'pervasively sectarian' doctrine that comprised the basis for numerous decisions [of the Court] from the 1970s . . . and the 1995 Opinion of this Office."²³² The claim was not that the Court had issued any decision so directly on point as to bind OLC in a way that compelled overruling its 1995 opinion. Instead, the claim was that the Court's recent decisions reflected a general change in approach to Establishment Clause questions that, in OLC's view, rendered the core reasoning of its 1995 opinion anachronistic. Without regard to the accuracy of the 2003 opinion's specific claims, as a general matter I think these sorts of considerations provide legitimate grounds for OLC to reconsider and overrule its precedents. If "doctrinal anachronism" is a basis upon which the Court may overrule itself, it should be permissible for OLC to do likewise.

Yet the mere invocation of intervening doctrinal change should not automatically justify a decision to overrule. Consider the Dellinger Memorandum. A footnote at the beginning of the Memorandum advises that it supersedes a 1989 memorandum on a similar set of issues, and justifies the move as follows: "While we agree with many of the conclusions of that document, we have determined that subsequent decisions by the Supreme Court and certain differences in approach to the issues make it appropriate to revisit and update the Office's general advice on separation of powers issues."²³³ In principle, "subsequent decisions by the Supreme Court" clearly provide a legitimate basis for OLC to overrule itself. But if those decisions bear only indirectly on the issues OLC is now

230. Memorandum from M. Edward Whelan III, Acting Assistant Att'y Gen., Office of Legal Counsel, to Solicitor, Dep't. of the Interior, Re: Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties such as the Old North Church (Apr. 30, 2003) [hereinafter Old North Church Memorandum], available at <http://www.justice.gov/olc/OldNorthChurch.htm> (on file with the *Columbia Law Review*).

231. Constitutionality of Awarding Historic Pres. Grants to Religious Props., 19 Op. O.L.C. 267, 267 (1995).

232. Old North Church Memorandum, *supra* note 230.

233. Dellinger Memorandum, *supra* note 195, at 124 n.*.

addressing, there is a risk that the real factor driving the decision to overrule might be “certain differences in approach to the issues.”

The best illustration of this risk may be the “Editor’s Note” at the end of the very same footnote. The Dellinger Memorandum did not appear in a bound volume until 2002, by which time OLC was under new management. Reflecting that change, the Editor’s Note states:

This memorandum was issued in 1996 but is being formally published in 2002. We caution that intervening Supreme Court decisions and “certain differences in approach to the issues” discussed herein may render portions of this memorandum inadequate as an expression of the Office’s advice on separation of powers. Rather than drafting a superseding memorandum on separation of powers, divorced from a specific context, the Office will provide advice on separation of powers as questions are presented to it.²³⁴

It is difficult not to read this passage—especially the quotes around the “certain differences” language—as tit-for-tat: You invoke intervening Supreme Court decisions and “certain differences in approach” to justify overruling what you don’t like, and I’ll invoke the same when publishing your advice, rendering it effectively dead on (public) arrival. This may be little more than the serial repudiation of precedents that successive OLC leaders deem to be wrong.²³⁵ And that, as noted above, cannot be squared with the proper role of precedent in OLC. The lesson here is that although intervening doctrinal changes at the Supreme Court can potentially justify a departure from OLC precedent, this factor, like others, is subject to abuse. Any OLC decision to depart from precedent thus deserves careful scrutiny.

Moving on to *Casey*’s other factors, OLC also appears to treat the unworkability of its precedents as a basis for overruling. Indeed, alerting OLC to problems of this sort is a key function of a formal request for reconsideration. Consider OLC’s 1995 opinion, mentioned above,²³⁶ addressing USPS’s obligation to negotiate with the Treasury Department over the potential sale to Treasury of USPS bonds.²³⁷ In an earlier opin-

234. *Id.*

235. To be fair to the Dellinger Memorandum, the body of the document does speak in more detail about its decision to overrule particular conclusions or statements in various past opinions, and in some cases relies in part on specific intervening doctrinal developments for justification. See, e.g., *id.* at 145–47 (relying in part on specific recent Supreme Court and lower court decisions to support its view that “[t]he Appointments Clause simply is not implicated when significant authority is devolved upon non-federal actors”); *id.* at 147 n.68 (stating earlier OLC opinions’ concerns with such arrangements “cannot be reconciled with Appointments Clause principles or caselaw” and disavowing those earlier expressions of concern). Still, the Dellinger Memorandum’s opening footnote reads as though “certain differences in approach” could be the dispositive factor on at least some issues.

236. See *supra* text accompanying notes 144–146 and 162–164.

237. Scope of Treasury Dep’t Purchase Rights with Respect to Fin. Initiatives of the U.S. Postal Serv., 19 Op. O.L.C. 238 (1995).

ion, OLC had construed the relevant statute to impose upon USPS an obligation to negotiate with Treasury once Treasury expresses an election to purchase the bonds.²³⁸ It did not, however, specify how long that obligation lasted. USPS's request that OLC revisit the issue was driven in part by the unworkability of an "indefinite and unlimited" negotiation obligation.²³⁹ OLC's new opinion acknowledged the problem, and offered a revised interpretation of the underlying statute that protected USPS from such uncertainty.²⁴⁰

The use of a request for reconsideration to alert OLC to workability problems is entirely salutary. Indeed, it may well overcome a problem plaguing the Supreme Court's application of this factor. Although *Casey* treats evidence of unworkability as a legitimate reason to overrule, the Court is not always well positioned to learn about the on-the-ground effects of its rules. Formal litigation is slow, its fact-generating capacities are somewhat limited, and the Court tends to shy away from fact-bound cases. Thus, the Court is not always in a position to make sophisticated and informed judgments about the true workability of its precedents. Similar problems can potentially plague OLC. As Professor Pillard has shown, in its attempt to deflect political and other pressures, OLC has adopted procedural rules and practices that have the effect of isolating it from its clients and the contexts in which they operate.²⁴¹ Although there are good reasons for OLC to follow at least some of those rules,²⁴² effectively mimicking the procedures of an appellate court could also limit OLC's capacity to deal with dynamic and complicated facts. Client requests for reconsideration could be one way to mitigate the problem, at least on the relatively few occasions when they are submitted.

Thus, although it is not clear that all such requests are driven by on-the-ground workability concerns (some appear simply to be attempts to reargue abstract legal principles), requests for reconsideration are potentially quite valuable. This is not to say, of course, that OLC should invariably bend to its clients' complaints about unworkability. Rather, the point is simply that when an agency or department informs OLC about problems with the workability of one of its opinions, it enables OLC to make much more factually nuanced and sophisticated judgments about its own precedents. OLC's presumptive respect for its precedents should not entail having to ignore that information.

238. *Id.* at 238.

239. *Id.* at 245.

240. *Id.* at 244 ("Enabling Treasury to force an indefinite delay in a proposed USPS bond offering . . . appears inconsistent with the statute's intent to provide USPS with a significant degree of business freedom and to prevent Treasury from exercising a blanket veto over USPS financial offering proposals.").

241. These include its preference for formal written requests from its clients and an aversion to opining on hypothetical matters. See Pillard, *supra* note 4, at 734–38 (discussing OLC's techniques for resisting pressure from clients and thus achieving a measure of "quasi-judicial neutrality").

242. See generally OLC Guidelines, *supra* note 12 (championing many of the rules).

In addition to *Casey*'s four "ordinary" factors (unworkability, reliance, doctrinal anachronism, factual undermining), a version of its concern for the Court's integrity, credibility, and institutional role also seems appropriate at OLC.²⁴³ Consider the decision to disavow and withdraw the Torture Memorandum. According to Jack Goldsmith, he decided in December 2003 that problems with the Memorandum were so overwhelming—not just in its analysis but also in its unnecessarily broad scope and its needlessly tendentious tone—that it had to be withdrawn.²⁴⁴ But concern for stare decisis-related factors—especially the interests of those in the government who may already have acted in reliance on the Memorandum—led him to delay officially withdrawing it while OLC worked on a replacement.²⁴⁵ Given OLC's ongoing relationships with many of its clients (as opposed to a court's discrete interactions with the parties to particular cases before it), it is not anomalous for OLC to pay heed to reliance interests in this way even as it prepares to replace an opinion with a new one. Put another way, at least some of OLC's advice is ongoing, not confined to the four corners of a written opinion. The relationship between relevant reliance interests and the decision to overrule is thus more complex and dynamic than in the judicial context.

In the case of Goldsmith's preparation of a replacement to the Torture Memorandum, however, the passage of time overtook the effort. By the early summer of 2004, press stories of the abuses at Abu Ghraib and the leaking of the original Torture Memorandum had combined into a toxic mixture. As Goldsmith puts it, "every day the OLC failed to rectify its egregious and now-public error was a day that its institutional reputation, and the reputation of the entire Justice Department, would sink lower yet."²⁴⁶ I think that harm to OLC's institutional reputation was itself a sufficient basis upon which to withdraw the Memorandum, even though a replacement was not yet ready. In other words, even though Goldsmith is adamant that he made his initial decision to withdraw the Torture Memorandum well before it was ever leaked to the public,²⁴⁷ the timing of the ultimate withdrawal is best viewed as a legitimate response to the now-leaked Memorandum's corrosive effect on OLC's integrity and credibility.²⁴⁸

243. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992) (discussing whether overruling *Roe* would "seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law").

244. Goldsmith, *supra* note 15, at 151.

245. See *id.* at 152 (explaining concern for "men and women who had engaged in dangerous and controversial actions in reliance on OLC's blessing" was a factor in decision to delay withdrawal of memorandum until replacement could be drafted).

246. *Id.* at 158.

247. *Id.* at 159.

248. Of course, the mere decision to withdraw the Torture Memorandum did not repair the damage done to OLC's reputation. But surely that is not the test. The question

In sum, the factors identified by the *Casey* Court are adaptable to the OLC context, and OLC at least implicitly (and sometimes explicitly) employs a number of them already. In that respect, OLC seems to have embraced some substantial part of the Supreme Court's approach to implementing and delimiting stare decisis, though without ever elaborating it in any systematic way. On the other hand, OLC also occasionally comes close to suggesting that mere disagreement with the substance of an earlier opinion is enough to justify overruling. I think it is not, except in one special case discussed below.

2. *The President's Constitutional Views.* — There is one additional reason why OLC might legitimately overrule its precedents, and it derives from OLC's particular place within the Executive Branch. If an OLC opinion cannot be reconciled with the current President's considered constitutional views, and if the President intends for the Executive Branch to implement his views, that may provide a legitimate ground for OLC to reexamine and overrule its opinion. The argument here rests on the President's democratic accountability and his ultimate responsibility for the actions of the Executive Branch. As to the former, as Randolph Moss puts it, "the 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."²⁴⁹ The electoral mechanism is a way for the people to participate, indirectly, in the generation of constitutional law; the President is an instrument of that participation.²⁵⁰

Suppose, for example, that before the Supreme Court decided *District of Columbia v. Heller*,²⁵¹ a presidential candidate championed the view that the Second Amendment was best construed as protecting an individual right, and then won the election in part because of the support of voters who agreed with him on that issue. Except where doing so would violate binding judicial precedent,²⁵² I think it would be entirely

is not whether taking the contemplated action would restore OLC's reputation, but whether failure to take the action would compound the harm.

249. Moss, *supra* note 53, at 1327.

250. See *id.* at 1327–28 (“[T]he American people influence the fundamental constitutional and legal norms that govern in the Executive Branch through their choice of President. In this manner, the democratic process informs Constitutional interpretation.”); see also Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245, 2332 (2001) (“[P]residential leadership establishes an electoral link between the public and the bureaucracy, increasing the latter's responsiveness to the former.”).

251. 128 S. Ct. 2783 (2008).

252. By “violate binding judicial precedent,” I mean government action that a court of competent jurisdiction has held to be unconstitutional. In contrast, an executive branch decision to rule out certain conduct as unconstitutional even though the courts have *upheld* its constitutionality does not, in my view, constitute a violation of binding judicial precedent. See Morrison, *Suspension*, *supra* note 4, at 1581–82 & n.235 (contrasting “circumstances where the courts are prepared to enforce a particular constitutional norm more robustly than is the legislative or executive branch” with those “where one or the other political branch is inclined to read the Constitution more stringently than the courts”). The political branches can protect a constitutional norm more robustly than do

appropriate for the President to implement that view not only by pursuing certain firearms-related policies, but also by expecting an office like OLC to take account of his views in its legal advisory work.²⁵³

The key question then becomes what it means for OLC properly to “take account” of the President’s views. A single, overarching answer to that question is probably not realistic; the proper balance between the President’s views and other relevant authorities will often be case specific. Still, it is possible to sketch some general guideposts, and on that basis to identify at least one specific, legitimate role for the President’s legal views as against OLC precedent.

Four interlocking considerations guide the way. First, the President’s constitutional views or preferences should not, ipso facto, be conclusive for OLC’s purposes. OLC should not, in other words, simply cede its duty and power to issue legal opinions to the President. This is reflected in the relevant statutory grants of legal advisory authority, which provide that “[t]he Attorney General shall give *his* advice and opinion on questions of law when required by the President” and that “[t]he head of an executive department may require the opinion *of the Attorney General* on questions of law arising in the administration of his department.”²⁵⁴ The legal advisory function is the Attorney General’s and by delegation OLC’s, not the President’s.²⁵⁵

the courts without threatening judicial supremacy in constitutional interpretation. See Barron, *supra* note 4, at 69 (“Even if the President were to consider himself bound to obey a judicial determination that a statute is unconstitutional, . . . it would not follow that he should understand himself to be similarly bound by a judicial determination that a statute is constitutional.”).

253. President George W. Bush’s first Attorney General may have done precisely that. See Letter from John Ashcroft, Att’y Gen., to James Jay Baker, Exec. Dir., Nat’l Rifle Ass’n 1–2 (May 17, 2001), available at <http://www.nraila.org/images/Ashcroft.pdf> (on file with the *Columbia Law Review*) (opining “that the Constitution protects the private ownership of firearms for lawful purposes” and rejecting “collective” rights view of the Second Amendment on grounds that it “would, in effect, read the Second Amendment out of the Constitution,” and stating that “when I was sworn in as Attorney General of the United States, I took an oath to uphold [and] defend the Constitution. That responsibility applies to all parts of the constitution, including the Second Amendment”).

254. 28 U.S.C. §§ 511–512 (2006) (emphasis added).

255. There is a well-worn debate in the “unitary executive” literature about whether the statutory conferral of power on a particular executive official is best understood as giving that official final decisional authority in the matter, or instead as granting a power whose exercise remains subject to direction and revision by the President wielding final decisional authority. The question divided early Attorneys General. Compare *The President and Accounting Officers*, 1 Op. Att’y Gen. 624, 625 (1823) (Wirt) (asserting “it could never have been the intention of the constitution, in assigning th[e] general power to the President to take care that the laws be executed, that he should in person execute the laws himself,” and that, “were the President to perform [a duty specifically assigned to another official], he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself”), with *Relation of the President to the Exec. Dep’ts*, 7 Op. Att’y Gen. 453, 469–70 (1855) (Cushing) (contending “no Head of Department can lawfully perform an *official* act against the will of the President; and that will is by the Constitution to govern the performance of all such acts,” and arguing that

Beyond the statutory text, as a prudential matter OLC's basic function would be undermined if it treated the President's constitutional views or preferences as conclusive in every case. OLC's value to its clients—including the President—lies in the perception that its legal opinions are the product of independent judgment consistent with its best view of the law.²⁵⁶ As noted above, I see no constitutional requirement that OLC approach its job in that manner.²⁵⁷ But as long as it does, it would be self-defeating to treat the President's constitutional views as dispositive. Those views do have a special status given the President's democratic accountability and position within the Executive Branch, but OLC must keep them at a sufficient distance to retain its own independent judgment.

The second point has to do with the meaning of “the constitutional views of the President.” Although I am referring here to the views of the President, the idea is not to privilege whatever notions about the Constitution the President personally happens to harbor, regardless of their plausibility. Instead, I am treating “the constitutional views of the President” as shorthand for the positions that the President and his senior advisors decide to have the President adopt as a matter of official policy.²⁵⁸ The key question, then, is whether the Office of the President is brought to bear on the constitutional issue at hand, as opposed to the more ordinary course where the issue is resolved by others within the Executive Branch without the direct and public input of the President.

under a contrary rule, “Congress might by statute so divide and transfer the executive power as utterly to subvert the Government, and to change it into a parliamentary despotism, like that of Venice or Great Britain, with a nominal executive chief utterly powerless”). Contemporary scholarship is at least as divided. See Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 *Colum. L. Rev.* 263, 265–67 (2006) (acknowledging prominent defenses of Cushing's view but challenging “recurring claim that statutes conferring power on executive officials should be read to include the President as an implied recipient of authority”); Strauss, *Overseer*, supra note 59, at 697–98 & n.3 (collecting and categorizing various scholarly treatments of the issue).

An argument that the Attorney General's legal advisory function includes the power to impose final, legally binding determinations on the entire Executive Branch would need to take a position in that debate. But here it suffices to proceed more contingently. The relevant statutory provisions grant the Attorney General the power to issue legal opinions in certain circumstances, but do not expressly make those opinions binding. As noted earlier in this Article, Attorney General and OLC opinions are today *treated* as provisionally binding even though their formal legal status is unclear, and even then they are regarded as subject to reversal by the President (and Attorney General in the case of OLC opinions). See supra text accompanying notes 31, 57–60. Given those limitations, treating the opinion power as requiring the exercise of independent judgment by the issuing official does not depend on any particular position in the unitary executive debates. It is consistent, in other words, with both a minimalist and a maximalist view of the power of the President within the Executive Branch.

256. See supra text accompanying notes 33–36, 209–211.

257. See supra notes 32–33 and accompanying text.

258. As I stress infra in Part III.B.3, public disclosure of the adoption is critical.

The third point goes to how the views of the President (as just defined) are typically generated. On most of the legal issues relevant here, the President will not adopt a particular constitutional view independent of input from OLC. Thus, the image of an OLC trying, in the midst of providing legal advice, to reconcile the incumbent President's fixed constitutional views with other relevant authorities is somewhat misleading. In matters coming to OLC from the White House, it is much more common that the President and his advisors will have a policy preference and will turn to OLC for advice as to its constitutionality. The President and his advisors (especially the White House Counsel's Office) may already have a sense of the constitutional issues, and they are likely to present OLC with constitutional arguments in favor of their preferred policy. The same may be true on issues of significance to the White House that come to OLC as requests from other executive components. But as a matter of best and actual practice, the decision to maintain OLC as a source of independent legal advice entails a commitment that clients with the power to reverse OLC (i.e., the President and Attorney General) will not seek its advice after having already formed a fixed position on the issue. Where the client is the President, unusual cases like the Second Amendment hypothetical discussed above are certainly possible; newly elected Presidents undoubtedly enter office with at least some publicly articulated, firmly held constitutional views. But the vast majority of OLC's work involves issues on which the President has no formally established view as he takes office, and when the issue arises he is likely to turn to OLC for assistance on the constitutional question, not report to OLC his already fixed answer.

Admittedly, this third point might seem to remove the President's views from the equation altogether. If (a) the President will typically seek OLC's advice before adopting a constitutional position he expects his administration to implement, (b) OLC follows a rule of *stare decisis* for its own precedents, and (c) the President treats OLC's advice as effectively binding, then unless OLC separately thinks there are legitimate grounds for overruling a precedent, its advice to the President—and any position he adopts on the basis of that advice—will follow the precedent. Thus, except in the rare case where the President comes into office with an already fixed, publicly articulated view, conflicts between his settled legal views and OLC precedent might never materialize.

That leads to the fourth, critical point. There is a difference between a President's coming to OLC with an already fixed view on a constitutional issue he wants OLC to address, and his taking a position on the status of certain OLC precedents bearing on the issue. Without stating a settled view on the ultimate issue OLC is asked to examine, the President could express dissatisfaction with OLC's existing precedents in the area and direct OLC to resolve the issue without regard to those precedents.

His power to do so is entailed in his power, noted above,²⁵⁹ to reverse or overrule OLC's legal advice.

In practice, this may be most likely to happen at the effective invitation of OLC itself. Suppose the White House seeks OLC's advice on the constitutionality of a proposed policy. The White House may present arguments to OLC in support of its proposed policy, and OLC may convey back its tentative views as it works through the issues. In that process, suppose OLC discovers that the White House's position, while supported by some relevant authorities, is foreclosed by OLC precedent. Suppose further that OLC is inclined to think the precedent is wrong but cannot make the case for overruling under the standard *Casey* factors. At that point, I think it would be legitimate for OLC to notify the White House, explain the contours of the issue as OLC sees it, and inquire whether the President wishes to take a position on the status of the precedent. The idea here would not be to seek a dispositive answer from the President on the policy's constitutionality—the White House came to OLC with that question, and answering it remains OLC's responsibility. Instead, the idea is that the democratically accountable President could legitimately abrogate the precedent, freeing OLC to address the issue as a matter of first impression. But the decision to do so would need to come from the President, not just OLC.

This could happen in other contexts too. Consider a non-hypothetical example. Two days after taking office, President Obama signed an Executive Order on interrogation.²⁶⁰ It had been prepared principally by lawyers working for him during the transition period between Election and Inauguration Days, several of whom went on to serve in his administration.²⁶¹ In part, the Order was a response to concerns about the use of "waterboarding" and other enhanced interrogation techniques during the Bush Administration, which many commentators viewed as outright torture but which were carried out under authority of OLC's 2002 Torture Memorandum. While campaigning for President, Obama had pledged that if elected he would take steps to ensure those practices did not resume.²⁶² The Executive Order did just that. But in addition to imposing certain minimum standards for the interrogation and other treatment of detainees in U.S. custody,²⁶³ the Order provided that, "unless the Attorney General with appropriate consultation provides further guidance, officers, employees, and other agents of the United States Government . . . may not, in conducting interrogations, rely upon

259. See *supra* text accompanying notes 70–73.

260. Ensuring Lawful Interrogations, Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

261. In the interest of full disclosure, I should note that I was among the lawyers who helped work on the Order during the transition period.

262. Barack Obama: The War We Need to Win, available at www.barackobama.com/pdf/CounterterrorismFactSheet.pdf (on file with the *Columbia Law Review*) (last visited Aug. 17, 2010).

263. Ensuring Lawful Interrogations, 74 Fed. Reg. at 4894.

any interpretation of the law governing interrogation . . . issued by the Department of Justice between September 11, 2001, and January 20, 2009.”²⁶⁴

This amounted to a presidential abrogation of the precedential force of all OLC opinions covered by the Order, but it did not fully withdraw the opinions themselves. Instead, it effectively required OLC to reexamine and reaffirm any covered opinion before it could be relied upon again. In light of that directive, OLC issued two short memoranda in April and June 2009, identifying a total of five OLC opinions covered by the Executive Order and stating that, “[i]n connection with the consideration of these opinions for possible public release, the Office has reviewed them and has decided to withdraw them. They no longer represent the views of the Office of Legal Counsel.”²⁶⁵ Those memoranda contain no *Casey*-like discussion of the presence of any of the familiar factors justifying a departure from precedent. Instead, the Executive Order eliminated any precedential weight the covered opinions might otherwise have claimed. OLC was thus left to implement the Order by examining the covered opinions on their merits, not as precedents.

I think this was entirely legitimate. The President’s position as the democratically accountable head of the Executive Branch places him in a different position from that of OLC with respect to OLC’s precedents. Especially on constitutional issues of executive power, the incumbent President is both the inheritor and custodian of a set of historically based traditions and understandings. He should thus be deemed to have some leeway to depart from those traditions in a way that OLC, acting alone, does not. Put another way, “certain differences in approach”²⁶⁶ count for more when the President himself, not just OLC, espouses the new approach. Yet at the same time, for OLC to perform its role as conventionally understood, it must retain ultimate control over the legal advice it provides (which is not the same, of course, as ultimate control over an administration’s final position on any particular legal question). The approach I am defending retains that control while also accommodating the President’s views.²⁶⁷

264. *Id.*

265. Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, to the Att’y Gen., Re: Withdrawal of Office of Legal Counsel CIA Interrogation Opinions 1 (Apr. 15, 2009), available at <http://www.justice.gov/olc/2009/withdrawalofficelegalcounsel.pdf> (on file with the *Columbia Law Review*); see also Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, to the Att’y Gen., Re: Withdrawal of Office of Legal Counsel Opinion 1 (June 11, 2009), available at <http://www.justice.gov/olc/2009/memo-barron2009.pdf> (on file with the *Columbia Law Review*).

266. See *supra* text accompanying notes 233–235.

267. Some may fear a slippery slope. What if the next President directs OLC to give no precedential weight to *any* of its precedents issued during administrations of the other political party? And what if his opposite party successor issues a blanket order in the other direction? We could end up with two bodies of OLC precedent—one for Republican administrations, the other for Democratic ones—that are alternately activated and

The precise circumstances of a presidential abrogation could vary. The examples discussed above assume that the White House and OLC are of largely like mind on the issue at hand but face OLC precedent cutting the other way. But abrogation could also legitimately take place in circumstances where the current OLC and White House are at odds. Suppose OLC is inclined to adhere to its precedents on a particular issue, and on that basis to conclude that a course of action favored by the White House or some other executive component is unlawful. There too, I think the President could abrogate the precedents in question and require OLC to decide the matter *de novo*. A President wanting to make a particular break with the work of past administrations might decide to do just that. Allowing him to abrogate the precedent is a means of giving effect to his constitutional views while at the same time keeping OLC in charge of and responsible for its own advice.

In some cases it may be possible for OLC to take account of the President's views even in the absence of an abrogation of its precedent. My defense of abrogation does not deny those other legitimate possibilities, provided they entail adopting positions that are defensible on the basis of all relevant materials other than OLC's precedents. But where those materials do not clearly favor one particular answer, it could be legitimate for OLC to look to the President's considered views when selecting among the plausible alternatives. I tend to think this would be most appropriate where the view embraced by the President does not speak to the particular question before OLC but instead addresses some broader question, like a point of constitutional interpretation. If the White House were willing to adopt a formal presidential policy of "originalism" in constitutional interpretation, for example, I think it would be legitimate for OLC to implement that policy by overruling its non-originalist precedents on a particular question and providing an answer that it deemed consistent with originalism—provided, of course, that the answer was not foreclosed by other governing authority, like Supreme Court precedent.

Undoubtedly, presidential interventions of the sort I am defending here would increase the pressure on OLC to provide the answer the White House seeks. This may be especially true in cases of abrogation. Unable to take shelter behind its precedents, OLC might buckle under

suspended each time the White House changes hands politically. I agree that this would strike a blow to OLC's role as an office concerned with providing legal advice based on its best view of all of the law. Yet as with other theoretically possible interventions (like a direction from the Attorney General that OLC should adopt the perspective of an advocate seeking the best legal defense for its client's preferred policies, or a statute passed by Congress dictating such a change), I am neither prepared to say this change would be unlawful nor especially worried it will happen in the foreseeable future. Changes of this sort would undermine OLC's value to its clients, as it would appear too much the puppet of the White House to be a credible source of independent legal advice. And Presidents would likely shy away from such orders for fear of politically costly (whether or not legally meritorious) charges of improper meddling.

that pressure and compromise its advice to accommodate the President's wishes. Indeed, any answer OLC provides that is consistent with those wishes is liable to *appear* to be tainted in this way. This last point—appearance—points to the best means of ensuring, or at least encouraging, the integrity of OLC's work in these circumstances: public disclosure.

3. *Disclosure.* — The idea that public disclosure is critical to the legitimacy of executive branch legal interpretation is, by now, quite familiar.²⁶⁸ So too are the more targeted arguments in favor of increasing public transparency at OLC.²⁶⁹ On the specific issue of stare decisis, I have already discussed the ways in which certain OLC opinions' claim to special precedential force depends on their being disclosed, at least to Congress.²⁷⁰ Here I want to stress the importance of public disclosure for the legitimacy of OLC decisions to *depart* from precedent.²⁷¹ Simply put, except where compelling national security needs (including the protection of classified information) dictate otherwise, the price for any decision to depart from OLC precedent should be public notice.

There are three specific aspects of the argument for public notice in this context that bear emphasizing. The first is operational clarity. Although OLC typically provides legal advice in response to specific requests from individual executive components, its answers often have broader ramifications across the Executive Branch—and potentially in Congress as well. Accordingly, when OLC departs from positions it has taken in the past, the successful implementation of that departure may require broad disclosure.²⁷² By itself this is not necessarily an argument for full public disclosure; it may be possible for OLC to alert all concerned executive components of a change in its position without disclosing the change outside the Executive Branch. Yet at least when the opinion in question is not classified, broad disclosure within the Executive

268. I have stressed the importance of such disclosure—in particular, disclosure to Congress—when executive entities like OLC use the canon of constitutional avoidance to interpret statutes. See Morrison, *Avoidance*, *supra* note 4, at 1237–39. But issues of disclosure and countervailing arguments for government secrecy obviously have much broader relevance. See generally David E. Pozen, *Deep Secrecy*, 62 *Stan. L. Rev.* 257 (2010).

269. See *supra* note 127 and accompanying text (noting recent calls for greater public disclosure of OLC's work).

270. See *supra* text accompanying notes 200–205.

271. Others have suggested that there is an especially strong case for public disclosure in this context, but have not elaborated on the idea. See Koh, *supra* note 5, at 523 (calling for “prompt and full publication of OLC opinions, particularly those that either wholly or partially overrule past-published OLC opinions”); Pillard, *supra* note 4, at 750–51 (“Surely, when OLC overrules prior public opinions, it must publish its changed constitutional position.”).

272. Cf. Gerhardt, *supra* note 5, at 111–12 (stressing importance of broad “discoverability” of nonjudicial precedent in order for it to have effect).

Branch is liable to yield disclosure to Congress,²⁷³ which for unclassified material is the practical equivalent of public release. Simply put, effectively implementing a departure from OLC precedent will in some circumstances require a level of disclosure that, ultimately, is likely to yield fairly broad public notice.

The second aspect of the disclosure argument is professional reputation. As Jack Goldsmith has described, OLC's "cultural norms" of "detachment and professional integrity" are most tested—and most crucial—when the policy desires of the White House or another client conflict with what OLC otherwise thinks is the best view of the law.²⁷⁴ In the previous subpart, I argued that if the President (likely with the benefit of some legal advice from OLC itself) is prepared to articulate those desires in terms of settled constitutional views, they can play a legitimate role in OLC's legal analysis. But of course there will be situations where the OLC faces pressure to go beyond what is legitimate. When the legal issue is one on which OLC has previously opined, that pressure translates into a risk that it will overrule itself too readily. Public notice is a key counterweight to that risk because it implicates the professional reputation of OLC's lawyers, especially those in leadership positions.²⁷⁵

To be sure, disclosure of an OLC decision to overrule is likely to go largely unnoticed by the general public. Yet those most likely to take notice—scattered legal academics and Washington lawyers, some congressional staffers, an intrepid journalist or two—are among the key opinionmakers driving the professional reputations of OLC's lawyers. Their "oversight" is thus critical. The fear of reputational harm from being seen to depart from OLC's best practices should itself encourage OLC lawyers not just to observe minimal standards of professional responsibility but to strive for the highest standards of professional excellence.²⁷⁶

273. If OLC's decision to overrule itself authorizes or dictates a change in the client agency's actual operation, that change is liable to be noticed by the relevant congressional committees, which may raise questions with the agency about the change in course. In answering, the agency may well disclose the opinion.

274. Goldsmith, *supra* note 15, at 37–38.

275. The idea that public officials might be motivated by a desire to protect or enhance their professional reputation is not new. See, e.g., Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 *Sup. Ct. Econ. Rev.* 1, 15 (1993) (describing reputation "with the legal professional at large" as "potentially significant element in the judicial utility function"); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 *U. Cin. L. Rev.* 615, 628–29 (2000) (suggesting Supreme Court Justices, "like the rest of us, care about their reputation, care about the esteem in which they are held by certain reference groups, and care enough such that . . . they seek to conform their behavior to the demands of the relevant esteem-granting (or withholding) or reputation-creating (or damaging) groups").

276. Notably, Associate Deputy Attorney General David Margolis's review of the OPR Report on the Torture Memorandum took for granted that the Memorandum's analysis would have been better and more thorough had the authors expected it to become public. See Margolis Memorandum, *supra* note 11, at 68 ("Even though the memorandum was intended for a limited audience, Yoo and Bybee certainly could have foreseen that the

The third aspect of the disclosure argument applies specifically to cases where OLC overrules itself to accommodate the President's views. As discussed above, it is ultimately the President's democratic accountability that gives his constitutional views their authority and legitimacy. Thus, in the absence of an extraordinary need for secrecy, the President's constitutional views should be publicly articulated if they are to be implemented.²⁷⁷ And when OLC provides legal advice that would have been foreclosed by its precedents but for the President's decision to abrogate them, the abrogation and the advice should be promptly and publicly disclosed. In other words, the key fact to be disclosed in these cases is not simply OLC's decision to overrule itself, but the President's expression of such dissatisfaction with the precedents that he has abrogated them. President Obama's Executive Order on interrogation illustrates one form of such disclosure, but it could be accomplished in less dramatic ways as well. For example, provided the OLC opinion in question is promptly released to the public, a footnote or other notation in the opinion could note that the President has abrogated the stare decisis effect of certain OLC precedents and thus that OLC has analyzed the issue at hand unconstrained by those precedents.

Requiring disclosure of this sort could have important consequences. If OLC cannot justify overruling a precedent on conventional *Casey* grounds and if the President is unwilling to risk the controversy that might go along with public abrogation, the precedent would remain in place and OLC would remain bound by it. That is exactly as it should be. In the absence of a compelling national security-based need for secrecy, a President who is unwilling to stand publicly by his constitutional views should not expect his OLC to grant those views special legal significance.

C. *An Objection*

Having laid out my affirmative case for a rule of stare decisis in OLC and its appropriate limits, here I identify and respond to a potential objection based on what one might call informational bias. This objection stresses the dissimilarities between the conditions under which OLC produces its opinions and the conditions of litigation, and on that basis insists that OLC's opinions do not merit precedential treatment at all.

Consider first stare decisis in the courts. Judicial adherence to this doctrine means that the litigants presently before a court are liable to have their case decided not purely on the merits of their case but also on the basis of what the court has said in previous cases, where these litigants did not appear. We accept this arrangement in part because, in the main, we trust that the judicial precedent in question was decided after a

memorandum would someday be exposed to a broader audience, and their failure to provide a more balanced analysis of the issues created doubts about the bona fides of their conclusions.”).

²⁷⁷. See *supra* text accompanying notes 249–253.

full airing of arguments on all relevant sides of the issue. Although the present litigants did not have an opportunity to affect the earlier case, similarly situated litigants did have that opportunity through processes we accept as generally fair. In short, as a programmatic matter the judicial process is sufficiently trustworthy for its outputs to merit precedential treatment.

The adjudicative process within OLC is quite different. Most notably, except 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. The requesting agency will likely submit a formal statement of its views, but nongovernmental interests might not get a full airing.²⁷⁸ This is worrisome, especially in matters pitting executive power against individual rights. It is one thing for OLC's pursuit of its best view of the law to include a special concern for the protection of executive prerogatives—which, I have argued, is entailed in the Madisonian paradigm of the separation of powers.²⁷⁹ But it is quite another if OLC's decisionmaking process prevents it from even knowing about the best counterarguments to a particular assertion of executive power. Surely that kind of informational bias cannot be squared with any conception of OLC seeking its best understanding of the law. Given this concern with the process by which OLC opinions are generated, the idea of granting precedential weight to those opinions—and extra weight to those involving executive power—might seem like pouring good money after bad.

At its core, this objection questions the legitimacy of OLC legal advice altogether, whether or not in reliance on precedent. It is a claim that informational bias caused by OLC's location within the Executive Branch prevents it from rendering the evenhanded, independent legal analysis it claims to provide. I am not persuaded. The fact that OLC lacks a mechanism for hearing directly from individual rights claimants does not make it inevitable that OLC will not take those (or other relevant) interests into account. Even if OLC's client agencies are not likely to emphasize those interests, OLC itself can certainly consider them. Indeed, OLC imposes upon itself an obligation, when formulating written opinions, to "tak[e] into account all reasonable counterarguments, whether provided by an agency or not."²⁸⁰ Although the Torture Memorandum is rather vivid evidence that OLC does not always live up to

278. See Katyal, *supra* note 210, at 2339 ("OLC often hears only one side of an issue because a single agency presents an issue to it. As a result, OLC gets a distorted picture, quite unlike a court."); Pillard, *supra* note 4, at 737 ("OLC . . . receives the requestor's view of the question, but ordinarily hears no adverse view. Opposing views are usually unavailable to OLC because the programmatic interests of the requesting entities support only one side.").

279. See *supra* text accompanying notes 208–212.

280. 2010 OLC Best Practices Memorandum, *supra* note 14, at 4; see also OLC Guidelines, *supra* note 12, at 1605 ("OLC's analysis should disclose, and candidly and fairly address, the relevant range of legal sources and substantial arguments on all sides of the question.").

that standard, a more robust norm in favor of public disclosure could improve things considerably, as discussed above.²⁸¹

That said, the objection does raise questions about what OLC could do to improve the overall quality of the information upon which it bases its work. OLC itself recognizes this need, at least in part. Its 2010 Best Practices Memorandum instructs that, “[w]hen appropriate and helpful, and consistent with the confidentiality interests of the requesting agency, we will . . . solicit the views of other agencies not directly involved in the opinion request that have subject-matter expertise or a special interest in the question presented.”²⁸² For example, OLC commonly seeks the views of the State Department’s Legal Adviser when addressing issues of international law, and it typically seeks the views of the Justice Department’s Criminal Division when called upon to interpret a federal criminal statute.²⁸³ As the Guidelines written by the former OLC lawyers explain, the point of this sort of outreach is to provide “an additional check against erroneous reasoning by ensuring that all views and relevant information are considered.”²⁸⁴

The problem with these practices, of course, is their limited scope. Seeking the input of various executive entities with programmatic interests in the issue can help protect against certain kinds of mistakes, but it might increase or at least not allay the risk of others. In particular, individual rights are likely to be given short shrift. As Pillard notes, “[v]irtually all requests for OLC advice are privileged and confidential, so there is no opportunity for members of the public, academics, advocacy groups, or others to supply the otherwise-missing information or analyses.”²⁸⁵ Assuming private actors continue to lack direct access to OLC’s decisionmaking process and thus remain unable to provide the missing information themselves, the question becomes whether any executive branch entities might be able to act on their behalf.

281. See *supra* text accompanying notes 274–276.

282. 2010 OLC Best Practices Memorandum, *supra* note 14, at 3.

283. 2005 OLC Best Practices Memorandum, *supra* note 13, at 2.

284. OLC Guidelines, *supra* note 12, at 1609.

285. Pillard, *supra* note 4, at 737. Interestingly, early Attorneys General may have been less hampered by this limitation than OLC is today. In the nineteenth century, private parties “interested adversely to the government [were] allowed to present [their] side of the case to the Attorney General” before he issued a legal opinion. Cummings & McFarland, *supra* note 87, at 90. During Wirt’s time, the private party’s views were typically communicated to the Attorney General indirectly, through the department that had requested the Attorney General’s advice. *Id.* at 90–91. Later Attorneys General appear to have received input from private parties directly. *Id.* at 91; see also Office and Duties of Att’y Gen., 6 Op. Att’y Gen. 326, 334 (1854) (“It frequently happens that questions of great importance, submitted to [the Attorney General] for determination, are elaborately argued by counsel . . .”). But some of those opinions addressed the validity of an individual land or other claim, which the Attorney General had been directed by statute to adjudicate. See, e.g., The Title to Certain Lands in La., 4 Op. Att’y Gen. 643, 644 (1847). That posture is quite different from that of providing confidential legal advice to another part of the Executive Branch.

There are some possibilities worth contemplating. The most modest would involve reorienting the review process already in place within the office. Typically, initial drafts of OLC opinions are produced by a Deputy and an Attorney-Adviser working together. When they are satisfied the draft is ready, it is assigned to another Deputy to review.²⁸⁶ That Deputy is charged with reviewing the draft and the key underlying materials, and providing comments on the draft. After his or her comments have been addressed, the draft is circulated to the head of the office, the other Deputies, and any other attorneys in the office with special expertise in the area.²⁸⁷ Although hardly a complete fix, one possibility might be to assign the second Deputy a kind of devil's advocate role on behalf of civil liberties and other individual rights arguments. The idea here would be for the second Deputy to review the draft opinion from a civil liberties perspective, and for the drafters to address any concerns the second Deputy raises along those lines before the draft moves on to the next stage in the review process.

Another option might be to establish a kind of civil liberties ombudsman outside OLC but elsewhere in the Justice Department, who would be tasked with reviewing and commenting on draft OLC opinions (or, earlier in the process, agency requests for OLC opinions) implicating civil liberties issues. Under the USA PATRIOT Act, the Justice Department's Office of the Inspector General has already been assigned a comparable responsibility to investigate complaints of certain civil liberties violations by the Department.²⁸⁸ The role I am proposing here could perhaps be played by that same office, or it could be assigned to another.²⁸⁹ A third possibility might be the creation of an advisory board, modeled perhaps on the Privacy and Civil Liberties Oversight Board that was recommended by the 9/11 Commission and then created by statute in 2007.²⁹⁰

Whatever option is chosen, the point is that at least some individual rights-related oversight is possible. The options identified here might not

286. 2010 OLC Best Practices Memorandum, *supra* note 14, at 4.

287. *Id.*

288. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 1001, 115 Stat. 272, 391, reprinted in 5 U.S.C. app. § 8E, at 482 (2006); see Pillard, *supra* note 4, at 756–57 (discussing this responsibility).

289. In its just-released 2010 Best Practices Memorandum, OLC acknowledges that it “may share the substance of an entire draft opinion or the opinion itself within the Department of Justice or with others, primarily to ensure that the opinion does not misstate any facts or legal points of interest.” 2010 OLC Best Practices Memorandum, *supra* note 14, at 4. The review I am proposing here could be achieved through such circulation, to an office or official specially charged with considering civil liberties issues.

290. Nat'l Comm'n on Terrorist Attacks upon the U.S., *The 9/11 Commission Report* 395 (2004); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1061, 118 Stat. 3638, 3684–88. Sharing OLC's work with a board of this sort could raise some potentially difficult questions of executive privilege. Those issues are beyond the scope of this Article.

bring all the argument-testing advantages of adversarial litigation, but they could help protect against certain kinds of errors while also enhancing public perceptions of OLC's decisionmaking process. Especially when paired with the broader publicity of OLC's work for which I have argued above,²⁹¹ this could bolster the (already strong) case for a rule of precedent within OLC.

* * *

I conclude this Part with an observation about the connection between the rule of OLC *stare decisis* for which I have argued and "internal separation of powers"—that is, mechanisms within the Executive Branch for ensuring its actions observe legal boundaries.²⁹² Events of the last decade—in particular, abuses by executive actors on matters likely falling beyond the reach of the courts—have highlighted the importance of such mechanisms, and so it is fair to ask whether the approach to precedent defended here will advance or hinder them. The answer is that *stare decisis* in OLC can help provide an internal check on the Executive Branch, but only partially and contingently. A rule of *stare decisis* makes it more difficult for either OLC or its clients to depart from OLC's past positions. Thus, to the extent an administration seeks OLC's blessing of an expansive new view of executive power beyond what OLC has previously recognized, *stare decisis* will resist it. On the other hand, *stare decisis* will also tend to enshrine OLC precedents supporting broad executive power, even when the current occupants of the office favor a narrower view. *Stare decisis*, in other words, privileges *tradition* over any particular substantive position. Yet by also allowing for departures from tradition especially when publicly endorsed by the President, the approach I have defended here may provide as much as one could ever hope for from an internal constraint at OLC.²⁹³

CONCLUSION

Recent accounts of OLC have tended to depict an office in or on the brink of crisis. The common concern is that the Torture Memorandum and related controversies—which surely did "represent an unfortunate chapter" in OLC's history²⁹⁴—have undermined the credibility and integrity of the office, and that those virtues are not easily regained.

291. See *supra* Part III.B.3.

292. For an excellent discussion of the nature and limits of various internal separation of powers mechanisms, see Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 *Emory L.J.* 423 (2009).

293. See *id.* at 442 ("[T]he success and effectiveness of internal constraints may be better understood not as forestalling presidential control of policy but rather as ensuring that contentious policy choices are made by the President and that the President's role is publicly known.").

294. Margolis Memorandum, *supra* note 11, at 67.

But one chapter is not the whole book. I have stepped back in this Article to consider broader questions about how OLC approaches its duty to provide legal advice to its clients. On one critical issue, the news is largely positive: Across administrations, OLC's precedents appear to play an important role in its publicly reviewable work, and there are powerful normative arguments in favor of such a role. OLC has not elaborated the precise nature of that role in any comprehensive way, and one of my aims in this Article has been to fill that gap. In the process, I have proposed ways to approach the difficult questions that can arise when OLC's precedents, the views of its current leaders, and the desires of its clients do not all align. The normative and conceptual framework I have offered is generally compatible with most of OLC's existing practices, so this Article does not call for massive change.

I do argue for some clarifications, however, including that mere "differences in approach" from one head of OLC to the next are insufficient to support a departure from precedent. Differences in approach from one *President* to the next, in contrast, can sometimes justify such a departure. On that point, one factor is critical: public disclosure. Indeed, above and beyond the calls for greater publicity of OLC's work generally, its decisions to depart from precedent—whether to accommodate the President's views or for other reasons—should be made public whenever possible.

There are some who will find the arguments presented here insufficient, and who will urge more comprehensive change at OLC—or even its effective dismantling.²⁹⁵ I am not persuaded by those calls, but in any event they lie beyond the scope of this Article. I have assumed that OLC will retain its basic form, and that it will operate on the same basic terms that have defined its work since it was created. As long as that remains true, stare decisis has a place in OLC.

295. See, e.g., Ackerman, *supra* note 77, at 138 (lamenting "nobody at the Justice Department [in the Obama Administration] is confronting the need for *fundamental* structural reform" of OLC); *id.* at 224–31 (calling for legislation to create a "Supreme Executive Tribunal," populated by nine presidentially nominated and Senate-confirmed judges each serving twelve-year terms, which would displace OLC's power to issue authoritative legal opinions and which would also entertain "suits" by members of Congress in order to adjudicate and authoritatively resolve constitutional conflicts between the Legislative and Executive Branches).

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