

“Stare Decisis in the Office of Legal Counsel”

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STARE DECISIS IN THE OFFICE OF LEGAL COUNSEL

*Trevor W. Morrison**

INTRODUCTION

The doctrine of precedent, or stare decisis,¹ holds that a prior decision to resolve issue *X* in manner *Y* is by itself a reason to continue to resolve *X* in manner *Y* in the future, without regard to the current apparent correctness of *Y*.² There is a vast literature on the nature, limits, merits, and demerits of this idea, most of which focuses on the courts.³ Precedents, on this view, come in the form of judicial decisions, and the arguments for and against adhering to precedent—as well as academic studies questioning whether precedent even matters⁴—are directed at the courts. But this account is incomplete. Just as legal interpretation in general is not the exclusive province of the courts,⁵ so too do questions of precedent extend beyond the

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

² This is a slightly more contextualized version of Frederick Schauer’s depiction of “[t]he bare skeleton of an appeal to precedent”: “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 an when *X* again occurs.” Frederick Schauer, Precedent, 39 Stan. L. Rev. 571, 571 (1987).

³ See, e.g., Michael J. Gerhardt, The Power of Precedent (2008); Larry Alexander, Constrained by Precedent, 63 S. Cal. L. Rev. 1 (1989); Richard H. Fallon, Jr., Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence, 86 N.C. L. Rev. 1107 (2008); 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); Michael Stokes Paulsen, Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?, 109 Yale L.J. 1535 (2000); Schauer, *supra* note __.

⁴ See, e.g., Lee Epstein & Joseph F. Kobylka, The Supreme Court and Legal Change: Abortion and the Death Penalty (1992); Thomas G. Hansford & James F. Spriggs II, The Politics of Precedent on the U.S. Supreme Court (2006); Jeffrey A. Segal & Harold J. Spaeth, The Influence of Stare Decisis on the Votes of Supreme Court Justices, 40 Am. J. Pol. Sci. 971 (1996).

⁵ There is a vast academic literature on extrajudicial legal (especially constitutional) interpretation. 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); David Barron, Constitutionalism in the Shadow of Doctrine: The President’s Non-enforcement Power, Law & Contemp. Probs., Winter/Spring 2000, at 61; 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); Walter F. Murphy, Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter, 48 Rev. Pol. 401 (1986); 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

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judiciary.⁶

This point is underappreciated. To be sure, there is a large and growing literature—generally pitting “judicial supremacy” against “departmentalism”—on the extent to which judicial interpretations of the Constitution ought to bind the other branches of government, and, conversely, on the weight that the courts ought to give to the constitutional judgments of those other branches.⁷ But those questions all bear on the production of legal (especially constitutional) precedent by the courts. What of the role of *nonjudicial* precedent in *nonjudicial* legal interpretation, constitutional and otherwise? Specifically, to what extent do nonjudicial actors called upon to resolve legal questions employ something like a doctrine of stare decisis with respect to their own prior decisions? To what extent should they?

Neither the descriptive nor the normative answer is likely to be uniform across all domains. What is true in Congress may not be true in the executive branch. And even within the latter, differences in function, power, and accountability suggest that not only the content but also the role of precedent may (and likely should) vary greatly from one executive component to the next.⁸ The study of nonjudicial precedent should therefore be context-sensitive. Proceeding from that premise, this article focuses on the role of precedent in a single executive office: 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.⁹

of the Constitution in Executive Hands, 103 Mich. L. Rev. 676, 710 (2005). My own contributions to the literature 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”).

⁶ In contrast to the huge literature on extrajudicial legal interpretation generally, there are very few treatments of extrajudicial *precedent* in particular. But few does not mean none. See, e.g., Michael J. Gerhardt, Non-Judicial Precedent, 61 Vand. L. Rev. 713 (2008); Mark Tushnet, Legislative and Executive Stare Decisis, 83 Notre Dame L. Rev. 1339 (2008); Harold Hongju Koh, Protecting the Office of Legal Counsel From Itself, 15 Cardozo L. Rev. 513 (1993).

⁷ In addition to sources cited in note ___, supra, recent treatments of these issues include three of the four contributions to a symposium in the *Notre Dame Law Review* entitled “Stare Decisis and Nonjudicial Actors.” See Thomas Healy, Stare Decisis and the Constitution: Four Questions and Answers, 83 Notre Dame L. Rev. 1173 (2008); Michael Stokes Paulsen, Lincoln and Judicial Authority, 83 Notre Dame L. Rev. 1227 (2008); Kermit Roosevelt, Polyphonic Stare Decisis: Listening to Non-Article III Actors, 83 Notre Dame L. Rev. 1303 (2008). The fourth contribution to the symposium is the essay by Mark Tushnet, cited in note ___, supra. His focus is similar to mine here.

⁸ Cf. Philip C. 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) (“[T]here are as many kinds of precedent as there are constitutional institutions creating them.”).

⁹ See Pillard, supra note ___, at 710 (“[T]he head of the Office of Legal Counsel is the executive branch’s chief legal advisor.”).

Exercising authority delegated by the Attorney General, it provides legal advice to the President and other executive components when they seek it.¹⁰ The questions on which that advice is sought are often among the most vexing in the executive branch. OLC's duty, it is widely agreed, is to answer those questions consistent with its best view of the law.¹¹ Its answers often (though not always) 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 interpretations of the Constitution and statutes outside the volumes of the federal court reporters."¹² 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 and until OLC overrules itself.

Until recently, OLC operated largely outside the public eye. That changed in 2004, when OLC opinions addressing issues related to the "war on terror" were leaked to the public. The opinions, especially the so-called "Torture Opinion" of August 2002,¹³ were immediately met with widespread criticism.¹⁴ Although much of the

¹⁰ See 28 U.S.C. § 511 ("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."); 28 C.F.R. § 0.25(a) (assigning to the 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"); see also id. § 0.25(c) (tasking the 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").

¹¹ There is, of course, much disagreement about what it means for an executive office like OLC to discern the best view of the law. That disagreement is part of the inspiration for this article. My point at this stage is simply that OLC's legal advisory role is widely understood to be distinct from that of an advocate trying to make the best arguments on behalf of its client. For more on the significance of this point, see *infra* text accompanying notes ___-___.

¹² 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). 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* xv n.2 (1999).

¹³ Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President 34 (Aug. 1, 2002) (hereinafter "Torture Opinion"), subsequently withdrawn and replaced by Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A, Op. Off. Legal Counsel (2004), at <http://www.usdoj.gov/olc/18usc23402340A2.htm>. The Torture Opinion addressed whether and to what extent the federal criminal statute prohibiting torture applied to the government's interrogation and treatment of alleged enemy combatants in its custody. "Torture Opinion" may strike some as tendentious. In previous work, I called it the "Bybee Memorandum," following the custom of referring to major OLC opinions by the names of their authors. (The opinion was signed by Jay Bybee, then the head of OLC.) See Morrison, *supra* note ___, at 1229-32. But "Torture Opinion" or "Torture Memo" has become the conventional name for this particular opinion. See, e.g.,

criticism focused on specific substantive problems with the Torture Opinion itself, some of it looked more at the norms that ought to govern OLC practice more generally. That, in turn, has highlighted questions about the status of OLC precedent in OLC's work.

Consider in this vein the "Principles to Guide the Office of Legal Counsel" ("OLC Guidelines" or "Guidelines"), written by a group of former OLC lawyers in the wake of the Torture Opinion's release.¹⁵ Issued in late 2004, the OLC Guidelines have since been embraced not only by critics of the Bush administration, but by high-ranking lawyers within the administration as well.¹⁶ This support is sufficiently widespread for the Guidelines to serve as a generally accepted statement of OLC best practices. They thus provide a good starting point for this article's inquiry.

The Guidelines reveal an important tension in OLC's work when they state that while OLC should generally "adher[e] to judicial (especially Supreme Court) precedent," its "legal analyses . . . should also reflect the institutional traditions and competencies of the executive branch as well as the views of the President who currently holds office."¹⁷ Whether and when additional considerations of this sort

Johnsen, *supra* note ___, at 1566-73, 1576-79; David Luban, *On the Commander in Chief Power*, 81 S. Cal. L. Rev. 477, 478-79 (2008); Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 Colum. L. Rev. 1013, 1072 (2008); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 Cornell L. Rev. 67, 68 (2005). I follow that convention here to avoid confusion.

¹⁴ For a collection of some of the criticisms, see Morrison, *supra* note ___, at 1231 n.182.

¹⁵ Walter Dellinger, et al., *Principles to Guide the Office of Legal Counsel* (2004), reprinted in 54 UCLA L. Rev. 1559 app. (2007). The nineteen signatories to the OLC Guidelines all served in OLC during the Clinton administration, some as political appointees and some as nonpolitical attorney-advisors. Some also served in previous Republican administrations or held over into the George W. Bush administration. In the interests of full disclosure, I note that although I am not among the signatories, I served with several of them during my time in OLC in 2000-01. I have also worked with several of them on recent projects in the same basic area, including written testimony that effectively endorses the Guidelines. See *Restoring the Rule of Law Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. (2008) (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).

¹⁶ See, e.g., Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* 34 (2007) (expressing agreement with the Guidelines' statement of OLC's basic institutional posture); *Confirmation Hearings on the Nomination of Timothy Elliott Flanigan to Be Deputy Attorney General: 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."); *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.").

¹⁷ OLC Guidelines, *supra* note ___, at 1606.

warrant a departure from judicial precedent is an important yet familiar question, typically subsumed within the broader debate between departmentalism and judicial supremacy noted above.¹⁸ But accepting that there are circumstances when OLC's legal analysis should go beyond judicial doctrine (where, for example, judicial precedents are scant because of justiciability constraints, or where the judiciary defers to the actions of the executive branch for one reason or another),¹⁹ the problem for present purposes is that the additional factors OLC might consider—executive branch traditions and the views of the current President—will not always align. The Guidelines recognize but do not resolve this tension, stressing that OLC “serves both the institution of the presidency and a particular incumbent, democratically elected President in whom the Constitution vests the Executive power.”²⁰ Agreeing with that sentiment, Jack Goldsmith (head of OLC in 2003-04) has observed that “OLC is not entirely neutral to the President’s agenda,” and that its legal advice should keep “the political dimension in view.”²¹ OLC is thus in a delicate position. Its advice “is neither like advice from a private attorney nor like a politically neutral ruling from a court. It is something inevitably, and uncomfortably, in between.”²²

The proper role of OLC's own precedents in this “in between” space is far from clear. 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.²³ But they do not specify the particular factors to be considered, nor do they identify the kinds of explanations that ought to suffice. The closest they come is to say that “OLC's current best view of the law sometimes will require repudiation of OLC precedent.”²⁴ If, as noted above, “the views of the President who currently holds office” should at least sometimes inform OLC's determination of what constitutes the best view of the law,²⁵ what ought to happen when the current President's views are at odds with OLC precedent? We may fairly suspect that OLC will face great pressure to conform its views to those of the President, and those pressures are certainly worth attending to.²⁶ But as a matter of best practice, when, if ever, should the current President's views trump OLC precedent?

¹⁸ See *supra* text accompanying notes __.

¹⁹ I have defended this view elsewhere, see Morrison, *supra* note __, at 1581-82 & n.235, and I embrace it here.

²⁰ OLC Guidelines, *supra* note __, at 1606.

²¹ Goldsmith, *supra* note __, at 35.

²² *Id.*

²³ OLC Guidelines, *supra* note __, at 1606.

²⁴ *Id.* at 1609.

²⁵ *Id.* at 1606.

²⁶ I discuss the institutional pressures and incentives bearing on OLC's work in Part I, *infra*.

Even more fundamentally, the observation that OLC's precedents must sometimes yield to its "current best view of the law" raises questions about the extent to which those precedents *contribute to* OLC's current best view of the law. When trying to discern that best view, does OLC look to its precedents, and for what purposes? If OLC followed its precedents only when they fit what it otherwise thought was the best view of the law, it would have no operative doctrine of stare decisis.²⁷ This is not to say, however, that OLC's past decisions would be entirely irrelevant in such circumstances. As Frederick Schauer has explained, there is a difference between arguments from *precedent* and 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 the child keeps his hand away from a red hot stove after having been burned before.²⁸ But in these circumstances, the fact of the past event or decision has no independent weight beyond what it can teach us about the present. Does this describe the status of OLC precedent? Does OLC treat its past decisions as experiences from which it now seeks to learn, but to which it is not otherwise bound? In a related vein, does OLC treat its precedents as *evidence* of the law but not as a *source* of the law itself?²⁹ Or, in contrast, do OLC's past decisions carry independent weight above and beyond the extent to which OLC now deems them correct? Does the fact that OLC previously expressed view *X* count as a reason to treat *X* as the best view today, even if OLC now thinks *X* is wrong? Should it?

Finally, assuming OLC does and should accord *some* precedential weight to its past decisions—assuming, that is, that OLC's past expression of view *X* counts as some reason, all by itself, to treat *X* as the best view—how much weight does it accord, and how much is appropriate? To put it differently, what are the values underlying respect for precedent in OLC, and when might those values be outweighed by other considerations? Consider here the situation facing Jack Goldsmith upon becoming the head of OLC in late 2003. Shortly after taking office, he was briefed on a number of OLC opinions supporting a range of government operations in connection with the war on terror. Goldsmith soon concluded that some of the opinions, including the Torture Opinion, "were deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President."³⁰ By the time Goldsmith contemplated withdrawing the Torture Opinion in the middle of 2004, many in the government argued that even if it was indefensible on its own terms,

²⁷ 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. It is significant only when a court feels constrained to stick to a former ruling although the Court has come to regard it as unwise or unjust.").

²⁸ Schauer, *supra* note __, at 575.

²⁹ See Philip Hamburger, *Law and Judicial Duty* 225-34 (2008) (describing the prevalence of this view of judicial opinions in seventeenth and eighteenth century England).

³⁰ Goldsmith, *supra* note __, at 10.

it ought to be retained because people had acted in reliance on it. This, of course, is standard stare decisis argumentation in the courts.³¹ But it did not carry the day. Despite expressing support for a “superstrong stare decisis presumption” in favor of adhering to OLC precedents “even when a head of the office concludes that they are wrong,” Goldsmith decided to withdraw the Torture Opinion.³² Should the Torture Opinion’s manifest errors have been sufficient to justify abandoning it? Even if mere error is not enough, should *clear* error suffice?

This article takes up both the descriptive and the normative questions posed above. Descriptively, I survey all publicly available written OLC opinions from the beginning of the Carter administration to the present, identifying how often and in what circumstances OLC overrules or substantially modifies its past decisions. Normatively, I examine and evaluate the reasons OLC gives for overruling itself, and I consider whether OLC ought to be constrained by something like a doctrine of stare decisis.

The article proceeds in three parts. Part I is background. It places OLC and its work in an institutional context, looking in particular at the incentives and constraints OLC faces in its work. The Torture Opinion and other OLC opinions during the “war on terror” might cause a cynic to assume that OLC’s legal advice generally, and its use of precedent in particular, is entirely beholden to the political agenda of the administration in which it sits. That is too simplistic a picture. OLC clearly is subject to certain external pressures from time to time, not all of which are necessarily illegitimate. But administrations of both political parties have tended to recognize the instrumental value of having a largely independent OLC with broad-based credibility. 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 independence and credibility, some of which use political pressures 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 descriptive account of precedent—or, more precisely, the limits of precedent—in OLC. I examine all publicly available, written OLC opinions from the beginning of the Carter administration to the present (1094 in all) to determine how frequently OLC overrules or substantially amends its precedents, and to identify the case characteristics that seem to correlate most with overruling. The data suggest that OLC is most likely to abandon its precedents when urged to do so by another agency or department within the executive branch, typically the agency or department most directly affected by the precedent in question.

³¹ See *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992) (examining whether the core holding of *Roe v. Wade* “could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by the rule in question”).

³² Goldsmith, *supra* note ___, at 145-46.

Part III moves from outputs to reasons. I identify the values that OLC associates with its own precedent, as well as the reasons it cites for adhering to precedent. Although it is unclear precisely how much weight OLC's precedents actually carry in these circumstances, I argue that they should be accorded considerable weight. Indeed, most of the values associated with stare decisis in the courts—including consistency, predictability, reliance, efficiency, and credibility—are important in OLC's work as well, and thus there is good reason for OLC to maintain at least a strong presumption in favor of its precedents.

Of course, the real trick is to determine when that presumption should yield to other considerations. OLC's own opinions are not much help on this point, as its decisions to overrule are rarely accompanied by the sort of formal stare decisis-trumping analysis we are accustomed to seeing in court opinions. Indeed, in some cases OLC seems to say little more than that its earlier opinion is inconsistent with its current views of the law. But mere error, I argue, does not provide a sufficient ground for OLC to overrule. As in the courts, something more should be required. The additional factors that would suffice for a court are relevant in OLC as well. But I also argue that OLC's location in the executive branch introduces additional legitimate arguments for overruling that do not apply in the courts.

I. THE SUPPLY AND DEMAND OF OLC LEGAL ADVICE

OLC's work should be viewed in its institutional context, and so I sketch some of that context in this Part. I describe the structural, procedural, and other features of OLC's work and consider some the incentives and pressures on OLC that those features create, exacerbate, or mitigate. The goal is to provide a general picture of OLC in its institutional context, which can provide a backdrop for the precedent-focused discussions to follow.

Before proceeding, however, I want to address what may be a common assumption about OLC and its work—that the very idea of independent legal advice within the executive branch is delusional, that OLC simply follows the policy and even ideological agenda of the incumbent presidential administration, and that its legal opinions are therefore “invariably and exclusively lawyers’ rationalizations for the policy preference of the President.”³³ I would offer two responses. First, arguments of this sort often draw an implausibly stark distinction between the motives and capacities of political branch officials and those of supposedly “neutral” judges. Whereas the former's capacity to engage in reasoned legal analysis is thought to be so compromised that anything masquerading as such cannot be taken seriously, the latter are seen as insulated from all such concerns. Both sides of this contrast are implausible, however. In fact, we all understand that judges are not perfectly objective

³³ Powell, *supra* note ___, at xvi. Powell describes this as “the most cynical of positions” with respect to the legal opinions of Attorneys General, *id.*, and he himself does not subscribe to it. See *id.* at xvii.

“umpires,”³⁴ and that underneath the formal reasoning of a judicial opinion may lurk motives, biases, and beliefs that the law means to exclude. Yet this does not typically lead us (or at least not all of us) to ignore all judicial opinions as just so much disingenuous posturing. Instead, we treat judicially crafted legal doctrine not as a body of knowledge wholly divorced from politics or other considerations, but as a set of rules that can at least potentially constrain and discipline those other influences even as it is shaped by them. The task is to understand judicially created legal doctrine in the context that generated it, not to ignore it altogether. So too, I would argue, with the work product of the executive branch. To acknowledge that political and ideological agendas inevitably affect the work of an office like OLC is no reason to reject its legal interpretations wholesale. It is instead a reason to read OLC’s work, and to base our evaluations on the content of the work.

Second, if the core of the above-described assumption is that OLC’s legal analysis is invariably beholden to the interests of the current President, then history disproves it. At various points throughout its history, OLC has opposed the President on nontrivial matters. Jack Goldsmith’s withdrawal of the Torture Opinion may be the most dramatic recent example,³⁵ but it is not the only one. Others include OLC’s conclusion during the Nixon administration that the President lacks the inherent authority to impound funds appropriated by Congress,³⁶ its conclusion during the Reagan administration that the President lacks inherent line-item veto authority,³⁷ and its conclusion near the end of the Clinton administration that a former President can be indicted and tried for the same offenses for which he had been impeached in the House of Representatives and acquitted in the Senate.³⁸ Of course, anecdotal evidence like this does not prove the total absence of politics, ideology, or other pressures in the work of OLC. And as with the courts, there is no reason to believe those factors are entirely absent. These examples simply confirm, however, that OLC can, and indeed has, opposed the President on important matters.

Whether, when, and to what extent OLC manages to deflect the political or other pressures weighing on it depends on the institutional and procedural tools at its

³⁴ But see the comments of John Roberts during his confirmation hearings, comparing the judicial role to that of a disinterested baseball umpire whose calling of balls and strikes Roberts seemed to understand as an essentially objective enterprise. As far as I know, no academic commentator takes this account of the judicial function seriously.

³⁵ See *supra* text accompanying notes ___-___.

³⁶ Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Re: Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools (Dec. 1, 1969).

³⁷ The President’s Veto Power, 12 Op. O.L.C. 128 (1988).

³⁸ Memorandum from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, to the Attorney General, 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.usdoj.gov/olc/expresident.htm>.

disposal. I survey some of those tools below, but first I provide some basic background information about the office.

A. General Background

OLC's core function is the rendering of legal opinions.³⁹ Its clients range across the executive branch, though the White House and the Attorney General are the most frequent.⁴⁰

OLC's legal advisory function actually belongs by statute to the Attorney General, but is delegated to OLC by regulation. It has not always been this way. Indeed, although Attorneys General have provided legal advice to the President and others in the executive branch from the earliest days of the Union,⁴¹ OLC itself is of much more recent vintage. In 1870, the newly created position of Solicitor General was tasked with providing legal opinions on matters referred by the Attorney General.⁴² Starting in the late 1920s, that advisory function was performed within the Office of the Solicitor General by a specialized Assistant Solicitor General. 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 (named the Office of Legal Counsel in 1953), to be headed by its own presidentially nominated and Senate-confirmed Assistant Attorney General.⁴⁴

³⁹ OLC performs a number of other functions as well. For example, in its "bill comment" practice OLC reviews pending legislation for potential constitutional problems. See Pillard, *supra* note __, at 711-12 (describing bill comment process); Morrison, *supra* note __, at 1244-45 (same). And in its "executive order" practice, OLC by regulation is tasked with reviewing all proposed executive orders for both form and legality. See 28 C.F.R. § 0.25(b); Pillard, *supra* note __, at 712.

⁴⁰ See Pillard, *supra* note __, at 711; Johnsen, *supra* note __, at 1577.

⁴¹ When section 16 of the Judiciary Act of 1789 created the office of Attorney General of the United States, one of the two duties it gave to 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." 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. See Powell, *supra* note __, at 3-10 (reprinting the opinion and commenting on it). The competing opinions of Secretary of the Treasury Hamilton and Secretary of State Jefferson on the issue are relatively well known; Randolph's have 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. But Washington was ultimately persuaded by Hamilton's 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).

⁴² Act of June 22, 1870, ch. 150 §§ 1-2, 16 Stat. 162. From the very beginning the Solicitor General was given other duties as well, including that which remains his core duty today—representing the United States before the Supreme Court. Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 *Ind. L.J.* 1297, 1299-1300 (2000).

⁴³ See Pillard, *supra* note __, at 710.

⁴⁴ Reorganization Plan No. 2 of 1950, 64 Stat. 1261 § 4 (1950); see Pillard, *supra* note __, at 710.

Today, OLC is a fairly small office composed of about two dozen lawyers. In addition to the Assistant Attorney General who heads the office, there are also several politically appointed Deputy Assistant Attorneys General. The rest of the lawyers in the office, known as attorney-advisors, are “career” employees. Relatively few attorney-advisors remain in their positions for many years or across multiple administrations. The more common tenure is two to four years.

B. Particular Features of OLC’s Work

OLC’s legal advisory function is not subject to justiciability and other constraints familiar in the judicial context, 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 the answers it provides are not backstopped by a court’s contempt power, but neither are they merely precatory. What, then, are the salient institutional and procedural features of OLC’s work? This section provides an overview.

1. *Nonmandatory Jurisdiction*

OLC has very little mandatory jurisdiction. That is, in most instances there is no formal requirement that an issue be submitted to OLC for its review. The exception is for jurisdictional or other disputes between different agencies or departments, in which case regulations either require or encourage the submission of the matter to OLC for resolution.⁴⁵ Beyond those cases, however, OLC’s involvement is a function of client choice.

That function creates certain incentives. Put simply, OLC has an incentive to discharge its advice-giving function in a way that encourages its clients to value its work and thus to return with more requests in the future.⁴⁶ It is not obvious, however, how this ultimately cuts. On one hand, OLC may be tempted to say “yes” too readily—concluding on dubious grounds that the client possesses the statutory or constitutional authority to take the action in question, or that it does not have certain statutory or constitutional obligations it would like to avoid, and so on. The assumption here is straightforward: clients like good news, and will return to OLC if it is perceived as a likely source of such news.

⁴⁵ Exec. Order No. 12,146, 3 C.F.R. 409, 411 (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 such disputes is part of the power delegated by the Attorney General to OLC.

⁴⁶ Cf. Pillard, *supra* note __, at 716-17 (“Because it lacks mandatory jurisdiction, OLC decides only those issues that the president, 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.”).

On the other hand, an OLC that says “yes” too often is not in the client’s long-run interest.⁴⁷ Virtually all of OLC’s clients have their own legal staffs, whether it be the White House Counsel’s Office or the general counsel’s office in other departments and agencies. Those offices are capable of answering many, indeed most, of the day-to-day legal issues that arise in those components. They turn to OLC when the issue is sufficiently complex or controversial that some external validation holds special value.⁴⁸ When the component ultimately embarks upon a new program or course of action that raises difficult legal questions, it has an interest in being able to point to a credible source as the basis for its judgment that its actions are lawful.⁴⁹ Put another way, OLC’s clients have an interest in OLC being the kind of office whose “yes” answers are taken seriously.⁵⁰ Otherwise, there is little point in seeking OLC’s advice in the first place.⁵¹

The risk, however, is that OLC’s clients will not internalize the long-run costs of sapping OLC’s integrity. If an agency wants to embark upon some program whose legality is uncertain, the agency’s immediate enthusiasm for the program may well overwhelm concern for OLC’s integrity. Moreover, the very fact that the agency has come to OLC for legal advice likely means that it thinks there is at least a plausible legal argument in favor of the new program. In that circumstance, the agency is unlikely to see a “yes” from OLC as untoward, even if OLC might not deem it the best answer.

⁴⁷ See Goldsmith, *supra* note __, 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”).

⁴⁸ See Pillard, *supra* note __, at 714 (describing reasons why OLC’s advice might be sought).

⁴⁹ 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.

⁵⁰ As explained by Randolph Moss, former 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, *supra* note __, at 1352 (noting that 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”).

⁵¹ OLC’s clients also have an interest in OLC’s “no” answers being accompanied by advice about how to pursue their policy goals by lawful means, which is a point I take up in Part I.B.3.

Thus can threats to OLC's credibility and integrity come drip-by-drip, not just all at once.

Thus, 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 he can profitably pursue an extreme agenda inconsistent with current doctrine, OLC faces no such immediate constraint. Whether OLC honors its longstanding commitment to providing legal advice based on its best understanding of the law depends largely on its own self-restraint.⁵²

2. Formal Requests and Binding Answers

Over time, OLC has adopted practices and policies that help maintain its independence and credibility.⁵³ First, OLC typically requires that requests for legal advice come from the head or general counsel of the requesting department or agency, that the client submit its own views on the question (typically in the form of a letter brief) as part of its request, and that the request be as specific and concrete as possible.⁵⁴ These requirements help OLC by constraining 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 in its requests.

Second, by a combination of formal regulation and settled tradition, OLC's legal advice is consistently treated as binding within the executive branch until withdrawn or overruled.⁵⁵ To secure this treatment, OLC typically requires independent agencies to agree in advance that they will abide by OLC's advice.⁵⁶ The

⁵² For discussion of OLC's longstanding commitment to seeking the best understanding of the law in its legal advice, see *supra* text accompanying notes ___-___ and *infra* text accompanying notes ___-___.

⁵³ In what follows, I do not discuss all of OLC's policies with regard to its advice-giving function, nor do I discuss all the goals underlying those policies. Rather, I focus only on a few policies that appear designed at least in part to help OLC shield itself from external pressures. For a fuller list of OLC policies and best practices, see the OLC Guidelines, *supra* note ___.

⁵⁴ See Pillard, *supra* note ___, at 711; OLC Guidelines, *supra* note ___, at 1608. There are exceptions, especially when OLC's advice is needed quickly and the client seeks only an oral response.

⁵⁵ See Moss, *supra* note ___, at 1318-20 (discussing disagreements dating back to the mid-nineteenth century over whether the legal opinions of the Attorney General are formally binding on the rest of the executive branch or are merely advisory, and noting that "[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 inter-departmental and inter-agency 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.

⁵⁶ The rest of the executive branch is already presumptively bound.

binding status of OLC opinions protects against “advice-shopping by entities willing to abide only by advice they like.”⁵⁷ Of course, by itself this rule does not stop a client agency from seeking legal advice from other sources before coming to OLC in the first place. But in cases where the agency has decided to seek OLC’s advice, the bindingness norm does shield OLC from direct competition with other real or potential sources of advice.

To be sure, OLC’s opinions are binding only to the extent that they are not displaced by a higher authority. A judicial opinion directly on point will generally be taken to displace OLC’s work, especially when it is from the Supreme Court. And even in the absence of such an intervening judicial event (which is the domain with which this article is principally concerned), OLC’s opinions are subject to “reversal” by the President or the Attorney General.⁵⁸

Presidential or Attorney General reversals of OLC are very rare, however. There are a number of reasons for this. First, as a formal matter, “the 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.”⁵⁹ Second and relatedly, the legal staffs of the Attorney General and President typically have neither the time nor the expertise to do the kind of research and analysis necessary to reverse an OLC opinion.⁶⁰ Third, the Attorney General is especially unlikely to commit resources to such an effort. Having largely delegated his legal advisory function to OLC, the Attorney General would risk undermining the credibility and damaging the morale of the office if he countermanded OLC’s work with any regularity. Finally, in circumstances where OLC concludes that a particular program or course of action is unlawful, a contrary conclusion by these higher offices is likely to be viewed with skepticism. If, for example, Congress demands to know why the executive branch thinks the program is lawful, a response that relies on the conclusions of White House lawyers is unlikely to suffice if OLC had earlier concluded otherwise. Similarly, especially on questions of criminal liability (as under the federal anti-torture statute), the relevant government actors “might worry that reliance on a President’s legal imprimatur in the face of an OLC opinion to the contrary would not be respected by a future Justice Department of a different administration when

⁵⁷ See Pillard, *supra* note __, at 711.

⁵⁸ See Johnsen, *supra* note __, 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).”); Goldsmith, *supra* note __, 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.”). I think it is best to refer to actions of this sort as a reversal, not an overruling, as it seems more analogous to an appellate court reversing a lower court in the same proceeding than to a later-in-time decision in some other context to overrule the initial decision.

⁵⁹ Johnsen, *supra* note __, at 1577.

⁶⁰ See Goldsmith, *supra* note __, at 79-80.

deciding whether to prosecute.”⁶¹ Thus, although in theory OLC is subject to reversal, in practice the prospect is so remote that it is unlikely to shape OLC’s work in any appreciable way.

3. *Written v. Oral Advice*

A final point concerns the form of OLC’s advice. Not all of it is memorialized in a written opinion; some of it is oral, and some is communicated by email.⁶² At least in theory, this variation presents gaming opportunities. An agency or department seeking OLC’s advice on the legality of a proposed program might first seek oral advice. If OLC advises the agency that the program is lawful, the agency could then ask that the advice be memorialized in writing. But if OLC returns with a negative answer, the agency might try 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 most brazen and, I think, least likely in practice: If the program in question is important to the agency, it might choose to ignore OLC’s advice and press forward with the program anyway. If OLC’s advice is merely oral, there will be less of a paper trail on the issue (or none at all), making it less likely that an external monitor like Congress will know about the agency’s defiance of OLC. Although the possibility of this sort of gaming should not be dismissed, I am inclined to doubt it occurs with much frequency. As discussed above,⁶³ there is a robust norm in favor of treating OLC’s advice as binding, and OLC has a strong interest in the preservation of that norm. If OLC learned that its oral advice was being ignored, it might take countermeasures. Those could include alerting the Attorney General in hopes that he would raise objections at the Cabinet level or even with the President; declining to provide any future advice to the agency without its advance agreement to be bound (whether or not it is an independent agency⁶⁴); and insisting that any future advice it provides to the agency be in writing and thus less easily ignored. These are powerful tools. Thus, especially because virtually all of OLC’s clients are repeat customers, it seems unlikely that many would defy OLC in this manner.

But there is a second reason why an agency might seek oral advice first, and ask for a written version only when it likes the answer: precedent. In the main, it is reasonable to assume that oral advice will often be 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 may worry that the written version of a “no” from OLC could impose a broader set of constraints on the agency going

⁶¹ Id. at 80.

⁶² See Pillard, *supra* note ___, at 713.

⁶³ See *supra* text accompanying notes ___-___.

⁶⁴ See *supra* text accompanying note ___.

forward than would narrower, more fact-specific oral advice. 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 on the issue.

Although the “precedent-gaming” response just described seems plausible, there are countervailing considerations as well. Perhaps most significantly, the tactic deprives the agency of information that it could use to guide its actions going forward. If the idea is that relatively narrow oral advice from OLC will preclude fewer courses of agency action in the future, the problem is that the agency is still unsure about the legal status of those other courses of action. If the agency waits until some future point to seek OLC’s advice on its next course, OLC might simply say “no” at that point. If that is an answer that the agency could have inferred from a written answer to its initial request, then its tactic will have achieved little but a loss of time and resources. On the other hand, if the agency has reason to believe that the passage of time will yield an OLC that is more favorable to its agenda, then it will have reason to employ the precedent-gaming tactic. This may be especially likely if a presidential election is approaching, and if at least one of the candidates appears likely to appoint a head of OLC more sympathetic to the agency’s position. Put another way, the more an agency views the current OLC as an impediment to its agenda, the more it has an incentive to engage in precedent-gaming and other strategic behavior.

To mitigate this concern, OLC often helps agencies overcome legal barriers where possible. That is, although OLC consistently stresses that its legal advice is based on its best view of the law, it often accompanies its “no” answers with advice about how to achieve the client’s ends through legally available means. As explained by Randolph Moss (acting and then confirmed head of OLC from 1998 to 2001), “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.”⁶⁵ Through this process, OLC “can contribute to the ability of the popularly-elected President and his administration to achieve important policy goals.”⁶⁶ In so doing, OLC can also maintain the kind of constructive working relationship with its clients that minimizes the risk of precedent-gaming.

* * *

The picture that emerges here is of an office that is not immune from various biasing pressures, but that can also rely on a range of devices—including rules for how its clients should seek its advice, conventions about how they are expected to treat its advice, and a commitment to helping them find ways to pursue their policy goals while still heeding its advice—to deflect at least some of those pressures. What those devices cannot do, however, is guarantee OLC’s own commitment to integrity, independence,

⁶⁵ Moss, *supra* note __, at 1329. See also Goldsmith, *supra* note __, at 35 (“Whenever I advised the White House that a proposed action was legally problematic, I would try to suggest ways to achieve its goals through alternative and legally available means.”).

⁶⁶ *Id.* at 1330.

and excellence in its work. Although maintaining those virtues is vital to OLC's continued value to the President and the rest of the executive branch, it ultimately depends upon what Jack Goldsmith has called "the cultural norms in the office."⁶⁷ In particular, "the norms of detachment and professional integrity that permeate OLC and that transcend particular administrations" are critical to OLC's ability to bind the President and the rest of the executive branch to the rule of law.⁶⁸

This suggests a point to which I will 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 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.

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. THE LIMITS OF OLC PRECEDENT

This Part provides an empirical picture of the limits of precedent in OLC. Specifically, I look at the frequency with which OLC overrules or modifies its prior opinions, and attempt to identify the kinds of cases in which it is most likely to do so. The focus here is on outputs: without regard to how OLC justifies its decisions, when does it overrule itself?

It bears emphasizing that, as suggested by the title to this Part, the results presented here speak not so much to the *role* of precedent in OLC as to the *limits* of that role. 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 some of its precedents in support of a conclusion it was already inclined to reach, in which case the precedents are doing little or no real work. Accordingly, this study of OLC's outputs does not provide a complete picture of the true influence of precedent in the mine run of cases. Instead, it tells us more about the kinds of cases in which OLC is most likely to dispense with precedent. It provides a picture of the kinds of circumstances that stand beyond precedent's reach.

A. The Data

I begin with a brief description of the data, their limitations, and the consequences of those limitations. The data are drawn from 1094 publicly available, written OLC opinions. That total comprises all such opinions from the beginning of

⁶⁷ Goldsmith, *supra* note ___, at 37.

⁶⁸ *Id.*

the Carter administration to the present.⁶⁹

The total does not, however, include all opinions rendered by OLC during the years covered. First, as noted above,⁷⁰ some of OLC's advice is conveyed orally or by email. Unless later memorialized in a formal written opinion, oral and email advice is not included here.⁷¹ I have already discussed some of the gaming risks entailed in the possibility of oral advice, as well as measures for protecting against those risks.⁷² The question now is data limitation: to what extent does the exclusion of oral and email advice likely leave out instances of OLC overruling?

The answer is not obvious. On one hand, it seems quite unlikely that 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. On the other hand, although an oral opinion is unlikely to overrule an earlier written one, oral or email advice may also be more susceptible to *being overruled* itself, but without any formal recognition of such. OLC maintains an internal searchable database of its opinions, but, as far as is publicly known, the database does not systematically include either copies of emailed advice or memoranda to the files recounting oral advice.⁷³ Thus, unless the earlier advice is known to either the client seeking the current opinion or the OLC lawyers working on it, it may be effectively overruled without anyone knowing of it. I am inclined to doubt that this happens with great frequency. For one thing, OLC or the client may well retain knowledge of significant oral or email advice, especially if the client relies upon it as authority to implement a particular program. For another, it is my understanding that most oral advice tends to be fairly narrow and fact-specific, and tends not to rely on legal theories or principles that have not already been laid out in written OLC opinions or judicial decisions. Oral advice, in other words, is unlikely to be the source of any legal rule or principle extending beyond the particular circumstances prompting the advice. Thus, OLC would have little reason ever to overrule the advice even if it did know about it.⁷⁴

⁶⁹ I start with the Carter administration because it was in 1977 that OLC, at the direction of the Attorney General, began publishing certain of its opinions "for the convenience of the executive, legislative, and judicial branches of the Government, and for the convenience of the professional bar and general public." Leon Ulman, Foreword to 1 Op. O.L.C., at v (1977).

⁷⁰ See supra text accompanying notes ___-__.

⁷¹ See Pillard, supra note __, at 713.

⁷² See supra text accompanying notes ___-__.

⁷³ See Pillard, supra note __, at 713 n.115.

⁷⁴ Of course, OLC might well have occasion to overrule the written OLC precedents upon which oral advice depends. But the data I am drawing on here should capture all of those overrulings. The exception would be cases where OLC provides advice without realizing that one of its *written* precedents cuts the other way. That seems fairly unlikely today, but it may have been more likely earlier in OLC's history, when researching its own precedents was more cumbersome. I discuss this point infra at text accompanying notes ___-__.

A second limitation is more clearly significant: only publicly available opinions are included. I have relied both on the Westlaw electronic database and on OLC's own website to access the opinions, checking each against the other for completeness.⁷⁵ The problem, though, is that many OLC opinions are never released to the public. As explained by Nina Pillard, a former Deputy Assistant Attorney General at OLC, "[w]hen OLC writes an opinion, it sends it in confidence to the requestor and includes it in OLC's own internal and confidential database. After a period of time, OLC lawyers review completed opinions, decide which might be worthy of publication, and seek permission from the requestors for release."⁷⁶ OLC can try to encourage a reluctant client to consent to publication, "but it cannot force the issue, and would lose the trust of its client base if it did."⁷⁷ Professor Pillard concludes that "[m]ost OLC advice is never made public."⁷⁸ Similarly, another former deputy head of OLC, John McGinnis, has described OLC's published opinions as "only the tip of the iceberg."⁷⁹ It is possible that the rate of publication has changed over time. But because even the total number of OLC opinions in any given period is not publicly available, we cannot know whether OLC has published at the same rate across administrations or even from one year to the next.⁸⁰ Finally, even among the opinions that OLC does release, there is often a long interval between the date of signing and the date of release, sometimes stretching well beyond a presidential term.⁸¹ This likely means that the dataset currently includes fewer opinions from the current administration than if the study were performed two years from now.

There have been numerous calls over the years for OLC to publish more of its opinions (subject to legitimate national security and other constraints), and to do so promptly after the opinions are issued.⁸² At present, however, any study of OLC legal

⁷⁵ Westlaw collects OLC opinions in its "USAG" database. OLC's website is <http://www.usdoj.gov/olc/>. I have also consulted the bound volumes of the *Opinions of the Office of Legal Counsel*, which date back to 1977. I do not rely exclusively on this source, however, because it is not current. The most recent opinions in the most recently published volume, which appeared in 2002, are from late 1996.

⁷⁶ Pillard, *supra* note __, at 712.

⁷⁷ Pillard, *supra* note __, at 712 n.113.

⁷⁸ Pillard, *supra* note __, at 712.

⁷⁹ McGinnis, *supra* note __, at 376.

⁸⁰ Legislation was recently proposed that would mandate such disclosure. See H.R. 6929, § 5, 110th Cong., 2d Sess. (2008).

⁸¹ On October 17, 2008, the interval between those dates for the 20 opinions that OLC had most recently added to its website varied from three days to nearly seven years, with the average being about two years. See <http://www.usdoj.gov/olc/whatsnew.htm> (last visited Oct. 17, 2008).

⁸² See OLC Guidelines, *supra* note __, at 1608-09; Restoring the Rule of Law Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 110th Cong. (2008) (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) (manuscript at 4-5); Koh, *supra* note __, at 517 (identifying a "pressing need to publish OLC opinions promptly and to make them widely available"); Sudha Setty,

interpretation is necessarily limited by OLC's rather confined publication policies.

B. Findings

I have categorized every opinion in the dataset based on its treatment of OLC precedent, as follows:

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, 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.

In the main, I focus on opinions qualifying as modifying or overruling, which I group together as “negative treatment” opinions. I do not focus especially on opinions qualifying as neutral. As noted above, even in the case of opinions containing favorable citations to OLC precedent, the role and weight of the precedent in the analysis is far from clear. The precedent might be the decisive factor in the analysis, but it might also be a kind of post-hoc rationalization for an already determined result. Thus, I do not rely on the results reported here to depict a complete picture of the affirmative role of precedent. Instead, these results tell us more about the opposite set of cases, where whatever force precedent might have is overwhelmed by some other consideration. The results, in other words, speak principally to the limits of OLC precedent.

1. Overall Treatment

Table 1 presents a summary of the way OLC precedents are treated in the full set of 1094 opinions I have surveyed. Overall, 21 of the opinions, or 1.92%, qualify as overruling. As a point of comparison, empirical studies of the Supreme Court treatment of precedent reveal comparable rates of overruling. One study, for example, found that the rates of overruling during 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.⁸³ Thus, OLC's overruling rate compares quite

No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn't Let the Terrorists Win, __ Kan. L. Rev. __ (forthcoming) (manuscript at 3) (arguing that “it is feasible, desirable and realistic to expect the disclosure of most Office of Legal Counsel opinions”).

⁸³ Christopher P. Banks, The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends, 75 *Judicature* 262, 264 (1992); see id. (“Out of a total of 13 Courts in which

well with that of the Supreme Court, at least during the latter’s most “active” eras.

Returning to the OLC data, an additional 47 opinions, or 4.30% of the total, qualify as modifying. As noted above, I am inclined to group the overruling and modifying opinions together to get a fuller picture of the rate at which OLC produces opinions containing negative treatment of its precedents. Reported as “M + O” in Table 1, those two categories amount to 68 opinions, or 6.22% of the total.

Table 1: Overall Treatment of OLC Precedent

Neutral	Distinguishing	Recognizing	Modifying	Overruling	M + O	Total
951 (86.93%)	65 (5.94%)	10 (0.91%)	47 (4.30%)	21 (1.92%)	68 (6.22%)	1094

2. *Statutory v. Constitutional Precedent*

I have looked at a number of variables to see which seem most correlated with negative treatments of OLC’s precedents.⁸⁴ One of the variables 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 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.⁸⁵ One might expect to see a similar pattern in OLC.

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 is the best source I have found that reports the Court’s overruling rate the way I am presenting OLC’s rate—that is, number of overruling opinions or decisions over total number of opinions or decisions. For another study of precedent in the Supreme Court that provide a different perspective on the data (but which does not contradict Banks), see Saul Brenner & Harold Spaeth, *Stare Indecisus: The Alteration of Precedent on the U.S. Supreme Court, 1946-92* (1995) (reporting that the Court between 1946 and 1992 overruled about 2.5 cases per Term).

⁸⁴ [Note to UCLA readers: Multiple regression analysis is still to be done, so my findings here are highly tentative.]

⁸⁵ *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989) (explaining that stare 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”); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 627-28 (1974) (“Where the Court errs in its construction of a statute, correction may always be accomplished by legislative action. Revision of a constitutional interpretation, on the other hand, is often impossible as a practical matter . . .”). This “two-track” approach is often associated with Justice Brandeis’s dissenting opinion in *Burnet v. Coronado Oil & Gas*. See 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting) (defending the wisdom of stare decisis on the ground that “in most matters it is more important that the applicable rule of law be settled than that it be settled right”; explaining that “[t]his is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation”; but then adding that “in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions”). But see Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 *Vand. L. Rev.* 647, 708-12 (1999) (noting that the founding generation

As Table 2 illustrates, however, there is only a modest difference in how OLC treats its constitutional and statutory precedents. The overruling rates are virtually identical (1.97% for constitutional cases; 1.90% for statutory), and the rates of modifying plus overruling are fairly close as well (7.87% and 5.39%, respectively). OLC thus does not appear to draw a strong distinction between constitutional and statutory cases when it comes to the precedential limits of its opinions.

Table 2: Treatment of Statutory v. Constitutional Precedent

	Neutral	Distinguishing	Recognizing	Modifying	Overruling	M+O	Total
Constitutional	216 (85.04%) ⁸⁶	13 (5.12%)	5 (1.97%)	15 (5.90%)	5 (1.97%)	20 (7.87%)	254
Statutory	604 (88.05%)	45 (6.56%)	1 (0.15%)	24 (3.50%)	13 (1.90%)	37 (5.39%)	686
Both	102 (84.30%)	7 (5.79%)	4 (3.30%)	6 (4.96%)	2 (1.65%)	8 (6.61%)	121
Neither	29 (87.88%)	1 (3.03%)	0	2 (6.06%)	1 (3.03%)	3 (9.09%)	33

One explanation for this could be the relative lack of publicity of many OLC opinions. The idea supporting the Supreme Court’s “super strong” stare decisis rule in statutory cases—that Congress can correct the Court’s errors if needed—depends on Congress knowing what the Court has done with its statutes. Without notice (or at least constructive notice) to Congress, the familiar argument for differentiating between statutory and constitutional cases doesn’t work.⁸⁷

Consider the infamous Torture Opinion of August 2002.⁸⁸ 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,⁸⁹ and constitutional in its further conclusion that the statute would be unconstitutional if it did so apply.⁹⁰ If members of Congress had known about the Opinion when it was issued, they may well have forced the constitutional issue by amending the statute to make it clear that it did, in fact, apply to presidentially ordered conduct.⁹¹ But when Jack Goldsmith assumed the leadership of OLC in late

did not distinguish for stare decisis purposes between constitutional and statutory cases).

⁸⁶ Percentages refer to the fraction within each substantive category (constitutional, statutory, etc.) of each treatment (neutral, distinguishing, etc.). So 85.04% represents the percentage of constitutional opinions with neutral treatments of OLC precedent.

⁸⁷ This is true of a number of judicially-developed rules of statutory construction, including the canon of constitutional avoidance. See Morrison, *supra* note __, at

⁸⁸ See *supra* text accompanying notes __-__ (discussing the Opinion).

⁸⁹ Torture Opinion, *supra* note __, at at 34-35.

⁹⁰ *Id.* at 36-39.

⁹¹ Indeed, a year and a half after the Opinion was finally leaked to the public in mid-2004, Congress passed the McCain Amendment, which provides that “[n]o individual in the custody or under

2003, none of his doubts about the Opinion 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 the Opinion. Thus, although there may well have been some stare decisis-based arguments cutting against Goldsmith's ultimate decision to disavow and withdraw the Opinion, leaving the matter to Congress was not one of them.⁹² In short, the secrecy of an OLC opinion undermines any notion that Congress can fix the opinion's errors. In those circumstances, the judicial preference for an especially strong rule of stare decisis in statutory cases simply does not work.

Another explanation might be that for some of the statutory issues addressed by OLC, the most immediate stakeholders on both sides are within the executive branch. For example, in October 1995 OLC took up a request from the U.S. Postal Service to "reconsider and rescind" a 1993 opinion that "responded to the Department of the Treasury's . . . request for an opinion regarding the statutory relationship between the USPS and Treasury with respect to USPS financing initiatives."⁹³ (I discuss the significance of such requests for reconsideration in a separate section below.⁹⁴) 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 set additional limits on that obligation.⁹⁵ After receiving the request, OLC notified Treasury so that it would have an opportunity to respond.⁹⁶ This enabled OLC to learn about the

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." Title X, Division A, § 1003(a) of H.R. 2863 (2005). The McCain Amendment further provides that "'cruel, inhuman, or degrading treatment or punishment' means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984." *Id.* § 1003(d). In addition, a separate provision directs that "[n]o person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation." *Id.* § 1002(a). For a discussion of President Bush's use of a signing statement to at least potentially limit the reach and force of the McCain Amendment, see Morrison, *supra* note ___, at ___-___.

⁹² To be clear, I am referring here to Goldsmith's contemplation of the issue before the Torture Opinion was leaked to the public in June 2004. Although the Opinion was not formally withdrawn until after the leak, Goldsmith reports in his book that he had decided in December 2003 that two opinions—the August 2002 Torture Opinion and another opinion dated March 14, 2003—"must be withdrawn, corrected, and replaced." Goldsmith, *supra* note ___, at 146; *id.* at 151 ("[I]n December 2003 I concluded that I must withdraw and replace OLC's analysis.").

⁹³ Scope of Treasury Department Purchase Rights with Respect to Financing Initiatives of the U.S. Postal Service, 19 Op. O.L.C. 238, 238 (1995).

⁹⁴ See *infra* Part II.B.4.

⁹⁵ *Id.* at 239 n.2.

⁹⁶ *Id.* at 239.

impact and workability of its 1993 opinion from the two entities with the most direct stake in it. In that respect, it may have been easier for OLC than for Congress to gather the information necessary to understand the practical working of its 1993 opinion, and to determine whether any modification was in order. In such cases, even though the issue is statutory, the leaders of the relevant congressional committees might expect and even want OLC to revisit its interpretations as needed.

In sum, differences in institutional context between OLC and the courts may help explain the absence of a clear “two-track” approach to statutory and constitutional precedents in OLC.

3. Party Affiliation and Presidential Administration

The status of OLC precedent does appear to vary somewhat with presidential administration and party affiliation. As Table 3 shows, looking only at party affiliation of the current administration reveals only minor differences.

Table 3: Treatment of Precedent by Party Affiliation of Current Administration

	Neutral	Distinguishing	Recognizing	Modifying	Overruling	M+O	Total
Democratic	526 (86.37%)	34 (5.58%)	8 (1.31%)	30 (4.93%)	11 (1.80%)	41 (6.73%)	609
Republican	425 (87.63%)	31 (6.40%)	2 (0.41%)	17 (3.51%)	10 (2.06%)	27 (5.57%)	485

More visible differences appear, however, when the opinions are sorted by particular administration. Table 4 presents those results.

Table 4: Treatment of Precedent by Presidential Administration

	Neutral	Distinguishing	Recognizing	Modifying	Overruling	M+O	Total
Carter	341 (92.92%)	13 (3.54%)	4 (1.09%)	7 (1.90%)	2 (0.54%)	9 (2.45%)	367
Reagan	251 (89.64%)	14 (5.00%)	2 (0.71%)	9 (3.21%)	4 (1.43%)	13 (4.64%)	280
Bush I	95 (88.79%)	6 (5.60%)	0	4 (3.74%)	2 (1.87%)	6 (5.61%)	107
Clinton	185 (76.45%)	21 (8.68%)	4 (1.65%)	23 (9.50%)	9 (3.72%)	32 (13.22%)	242
Bush II	79 (80.61%)	11 (11.22%)	0	4 (4.08%)	4 (4.08%)	8 (8.16%)	98

Table 5 slices the data one step further. Looking at negative treatment opinions by administration, it identifies the party affiliation of the administration that produced the precedent OLC is now treating negatively. The shaded cells show the negative treatments of precedents issued during an administration of the other party.

Table 5: Negative Treatment by Administration and Party Affiliation

	M + O Democratic	M + O Republican	M + O Both ⁹⁷	Total ⁹⁸
Carter	2 (40.00%)	3 (60.00%)	0	5
Reagan	5 (50.00%)	4 (40.00%)	1 (10.00%)	10
Bush I	2 (33.33%)	4 (66.67%)	0	6
Clinton	6 (19.35%)	23 (74.19%)	2 (6.45%)	31
Bush II	4 (50.00%)	4 (50.00%)	0	8

At least three things bear emphasizing here. First, as Table 4 shows, there has been a general increase in the negative treatment (M + O) rate from one administration to the next, apparently peaking in the Clinton administration. One possible explanation for this trend might be the gradual accumulation of OLC precedents over time. It was not until the 1960s that OLC (as opposed to the Attorney General himself) became the principal source of centralized legal advice in the executive branch.⁹⁹ This means that at the start of the Carter administration there would have been far fewer precedents for OLC to contend with than at the beginning of the George W. Bush administration.¹⁰⁰ Although of course a norm of presumptively adhering to precedent would presumably lead OLC to follow its precedents as they accumulate over time, it is nevertheless the case that the larger the volume of precedents, the more OLC will be confronted with the decision whether to overrule or modify a precedent. Put simply, more precedents means more opportunities to overrule or modify.

Another possible explanation for the increased negative treatment rate might be improvements in the accessibility and searchability of OLC's precedents. As recently as 1993, OLC's internal library of opinions was a series of overfilled filings cabinets.¹⁰¹ By the end of the Clinton administration, physical files were supplemented with an at least partially searchable electronic database.¹⁰² One result of these changes

⁹⁷ This column reports opinions that modify or overrule more than one OLC precedent, where the precedents are from administrations of both parties.

⁹⁸ 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.

⁹⁹ See *supra* note ____.

¹⁰⁰ I assume here that OLC would be much more reluctant to overrule an actual Attorney General opinion than one issued by OLC itself. [twm: check this.]

¹⁰¹ See McGinnis, *supra* note ___, at 376.

¹⁰² See Pillard, *supra* note ___, at 712.

(which have presumably continued apace for the past eight years) has been an ability to search OLC's precedents more efficiently and comprehensively. That ability, in turn, may have helped OLC to know more about its own precedents. When research was more cumbersome, OLC may have been less aware of some of its own precedents, hence sometimes unaware that it was issuing legal advice contrary to those precedents. Over time, easier research may have increased the number of cases in which OLC has known that its present conclusions demand overruling earlier ones. In this way, the increase in the negative treatment rate may be a matter of more *acknowledged* negative treatments, which in turn reflects OLC's greater knowledge of its own precedents. Of course, whether this *should* be the result depends on what one thinks the role of precedent should be in OLC's work. But holding that question aside until Part III, the point here is that an increase in the negative treatment rate does not necessarily mean a decrease in the weight given to precedent. Instead, it might simply reflect improved information.

The second thing worth emphasizing about these results is that the numbers for the George W. Bush administration are especially incomplete at this point. Because many OLC opinions are not publicly released until months or even years after they are issued,¹⁰³ the current figures for the second Bush administration are almost certainly not what they will be two years from now. As it stands now, that administration's negative treatment rate is closer to Clinton's than any other. It might come even closer over time, or it might instead move in the direction of the pre-Clinton administrations.

Third, Tables 4 and 5 reveal two distinctive things about the Clinton administration. It has a much higher negative treatment rate than any other administration, and the percentage of its negative treatments that involve precedents from an opposite-party administration is also much higher. There are a number of possible explanations for these differences. Critics of the Clinton-era OLC might see in the data evidence of a diminished respect for OLC precedent. That is one possibility.

Another possibility, however, is that the Clinton administration simply faced far more precedents with which it disagreed than did its predecessors.¹⁰⁴ 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 George H.W. 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.¹⁰⁵ Thus, on at least some issues OLC may have been marginally less likely to disagree with its own precedents. If so, then during those

¹⁰³ See *supra* text accompanying notes ___-___.

¹⁰⁴ For the reasons noted in the preceding paragraph, comparisons to the George W. Bush administration are unreliable at this point.

¹⁰⁵ [Cite to Meese DOJ documents and OLC's involvement in them or related matters.]

years OLC would have faced fewer instances where its precedents and its otherwise best view of the law conflicted.

The Clinton-era OLC leadership brought with it a somewhat different set of underlying views, and thus would have felt differently about at least some of the precedents generated during the previous 12 years. Indeed, to the extent any of OLC's opinions during the Reagan and first Bush administrations pursued a distinctive set of ideas about the content and scope of the executive power in particular, the very distinctiveness of those ideas is a measure of the likelihood that the Clinton-era OLC would have disagreed with them.¹⁰⁶ Again, whether that disagreement should have led OLC to overrule its earlier precedent depends on the weight that one thinks 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 both the higher negative treatment rate and the seemingly more "politicized" nature of the negative treatments during the Clinton administration does not necessarily reflect a different attitude towards precedent. Instead, it may suggest that the Clinton-era OLC's views on precedent were *tested* more often than in previous administrations.

In short, the presidential administration of the current OLC and the party affiliation of the precedent do seem to affect the likelihood of negative treatment, the implications of the effect are far from clear. That politics influences OLC's work in some measure is neither surprising nor necessarily undesirable. Precisely *how* that influence operates in this context is less clear.

4. Requests for Reconsideration

Of the variables I have examined, by far the best predictor of whether OLC will overrule or modify 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 and to decide whether to retain it. As Table 6 shows, the dataset includes 30 requests for reconsideration, 18 of which resulted in negative treatment of the precedent (M + O in the Table).¹⁰⁷ Recall that, as Table 1 shows, the total number of negative treatments in the dataset is 68. This means that 26.47% 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, 30, is only 2.74% of the overall total of 1094. So those opinions' share of all negative treatments is almost

¹⁰⁶ See, e.g., The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 124 n.* (1996) (noting that the opinion superseded a 1989 OLC opinion, and that, "[w]hile 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") (emphasis added). For more on this opinion, see *infra* text accompanying notes ___-___.

¹⁰⁷ The complete list of opinions in response to requests for reconsideration, as well as a range of information about each, is found in the Appendix.

ten times their share of the overall total.

Table 6: Responses to Client Requests for Reconsideration

Affirming ¹⁰⁸	Distinguishing	Recognizing	Modifying	Overruling	M + O	Total
10 (33.33%)	2 (6.67%)	0	10 (33.33%)	8 (26.67%)	18 (60.00%)	30

Another way of seeing the effect of a request for reconsideration is to focus on the percentage of such cases yielding a negative treatment. As Table 6 shows, 60% of all requests for reconsideration yielded a negative treatment. That rate is nearly ten times the overall rate of 6.22%.

In fact, the 60% figure probably understates the influence of a reconsideration request. The reason is that the preference of the requesting agency can vary considerably from one request to the next. Sometimes, the agency takes a strong position that OLC should not only reconsider its prior opinion, but *overrule* it. Indeed, in some such cases the requesting agency is not even the one that procured the earlier opinion, but is a different agency that feels the burden of the precedent and wants it changed. That was the case with 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.¹⁰⁹ The earlier opinion was written in response to a request from Treasury, and was quite favorable to Treasury in terms of USPS's negotiation obligations.¹¹⁰ USPS's subsequent request was an attempt to persuade OLC to set additional limits on that obligation.¹¹¹ This kind of request for reconsideration seems roughly analogous to a losing litigant's motion to reopen a trial or rehear an appeal.

At the other end of the spectrum, some requests come from clients that clearly hope OLC will reaffirm its earlier conclusion. In May 2003, for example, the Counsel to the President asked OLC whether it stood by a 1995 opinion that a federal criminal statute did not bar civilian executive branch employees from making contributions to a President's reelection campaign committee.¹¹² With the 2004 presidential election on

¹⁰⁸ I use "affirming" here rather than "neutral," because it is in the nature of these responsive opinions is that none of them simply fail to cite any past precedents. Of course, as noted above in the text, to say that an opinion affirms an early precedent is not necessarily to say that the existence of the precedent itself was decisive in the analysis. An affirmance may simply reflect that the current OLC agrees with the conclusions of the precedent opinion, without placing any independent weight on the existence of the precedent itself.

¹⁰⁹ See *supra* text accompanying notes ___-___.

¹¹⁰ See Authority of the Secretary of the Treasury Regarding Postal Service Bond Offerings, 17 Op. O.L.C. 6 (1993).

¹¹¹ 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*." *Id.* at 239.

¹¹² Application of 18 U.S.C. § 603 to Contributions to the President's Re-Election Committee,

the horizon and the incumbent seeking reelection, the White House surely did not pose this question in the hope that OLC would overrule itself and find such contributions unlawful. Rather, 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.¹¹³ OLC concluded, though, that its 1995 opinion "continue[d] to apply with full force in its limited realm," which is undoubtedly what its client was hoping for.¹¹⁴

Not all requests yielding an OLC decision to affirm have the clear valence of the example just described, which is why I have not tried to separate those cases out from the other requests for reconsideration. But because the "request for reconsideration" category clearly includes *some* requests like the one just described, the total number of requests in which the agency actually wants OLC to overrule or modify its precedent is smaller than the number of all requests for reconsideration. Accordingly, the 60% negative treatment rate reported in Table 6 understates the correlation between a client's expressed request for an overruling or modification and an OLC opinion reaching such a result. OLC, in other words, is even more responsive to requests to overrule or modify than Table 6 would suggest.¹¹⁵

Op. O.L.C. (May 23, 2003), available at <http://www.usdoj.gov/olc/2003/18usc603.pdf>. The 1995 opinion is *Whether 18 U.S.C. § 603 Bars Civilian Executive Branch Employees and Officers from Making Contributions to a President's Authorized Re-Election Campaign Committee*, 19 Op. O.L.C. 103 (1995).

¹¹³ *Haddon v. Walters*, 43 F.3d 1488 (D.C. Cir. 1995).

¹¹⁴ Application of 18 U.S.C. § 603, *supra* note ___, at 2. There are other requests of this sort as well. In December 1995, for example, the Counsel to the President asked OLC whether it stood by an opinion it had issued earlier that year, concluding that an anti-nepotism 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. Application of 28 U.S.C. § 458 to Presidential Appointment of Federal Judges, 19 Op. O.L.C. 350 (1995). The statute provided that "No 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." Act of June 25, 1948, ch. 646, 62 Stat. 908 (codified at 28 U.S.C. § 455 (1964)), amended by Act of Oct. 27, 1998, Pub. L. No. 105-300, § 1(a)(2), 112 Stat. 2836, 2836 (codified at 28 U.S.C. § 458(b)(2) (2000)). And the question arose because President Clinton had nominated William A. Fletcher to a seat on the U.S. Court of Appeals for the Ninth Circuit, where his mother, Betty B. Fletcher, had been sitting since 1979. See 19 Op. O.L.C. at 350. Before the President made the nomination, OLC issued an opinion to the head of the Justice Department's Office of Policy Development concluding that the anti-nepotism did not apply to judicial appointments. *Id.* (citing Memorandum for Eleanor D. Acheson, Assistant Attorney General, Office of Policy Development, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Applicability of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges (Mar. 13, 1995)). After the nomination was announced, however, Senator Orrin Hatch, the chairman of the Senate Judiciary Committee, objected on the ground that it would violate the statute. It was in that context that the White House asked OLC "whether [it] adhere[d] to th[e] position" it had expressed earlier. 19 Op. O.L.C. at 350. Here too, this was anything but a request that OLC reconsider and rescind its earlier opinion. And in response, OLC confirmed that it did indeed adhere to the position that it had earlier expressed.

¹¹⁵ The numbers are too small to infer anything of significance from an

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There is, of course, much more empirical work to be done on the practice of precedent in OLC. As I have pointed out, the data presented here do not tell us what role OLC’s precedents play when OLC resolves an issue consistent with those precedents. We do not know, in other words, whether and when OLC reaches the resolution it reaches *because* the precedents point in that direction. Further empirical study, perhaps applying some of the tools political scientists have developed for the study of precedent on the Supreme Court,¹¹⁶ may shed light on that question.

In the meantime, the results presented here do shed some light on the kinds of cases in which OLC is most likely to overrule or substantially amend one of its precedents. Of the factors I have examined, by far the most significant is the presence of a formal request to reconsider and rescind or amend a precedent. The status of OLC precedent, then, depends in substantial part on its continued acceptance with the executive branch. As I will suggest in the next Part, this lends a kind of contingent quality to OLC’s precedent that, in the right measure, is not only acceptable but desirable.

III. TOWARD A THEORY OF PRECEDENT IN OLC

The discussion in Part II looked exclusively at outcomes—at how often OLC overrules itself, and in what kinds of cases. Although empirical information of that sort is important, legal scholarship ought to combine awareness of outcomes with attention to *reasons*. The more openly normative inquiry in this Part begins by examining and evaluating the reasons counting in favor of a general OLC practice of adhering to its past decisions. Through that process, I arrive at an account of what I deem to be a legitimate role for OLC precedent in OLC’s work. I then turn to a consideration of the circumstances in which OLC’s precedents may legitimately be reexamined and overruled. In doing so, I stress one point above all else: public notice

administration-by-administration breakdown of the responses to requests for reconsideration, but I provide that here for completeness:

	Affirming	Distinguishing	Recognizing	Modifying	Overruling	M+O	Total
Carter	2 (22.22%)	2 (22.22%)	0	3 (33.33%)	2 (22.22%)	5 (55.56%)	9
Reagan	2 (66.67%)	0	0	0	1 (33.33%)	1 (33.33%)	3
Bush I	1 (25.00%)	0	0	2 (50.00%)	1 (25.00%)	3 (75.00%)	4
Clinton	3 (30.00%)	0	0	5 (50.00%)	2 (20.00%)	7 (70.00%)	10
Bush II	2 (50.00%)	0	0	0	2 (50.00%)	2 (50.00%)	4

¹¹⁶ See, e.g., Brenner & Spaeth, *supra* note __; Lee Epstein & Jack Knight, *The Choices Justices Make* 167-77 (1998); Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* 307-10 (2002).

of OLC's decision to overrule itself is crucial to the legitimacy of the decision.

Before proceeding, I pause to clarify the scope of this Part's inquiry. I am interested here in whether and to what extent OLC ought to follow something like a doctrine of stare decisis, *taking as given OLC's consistent description of the nature of its job*. Across administrations, that description has held that OLC's legal advice should be based on its best view of the law.¹¹⁷ It is not inevitable that this would be so. Many other offices in the Justice Department, including virtually every litigating office, operate in an advocacy mode. Their job is to provide the best defense before a court (within the limits of plausibility, credibility, and so on) of an already-passed law, or an already-determined position.¹¹⁸ Some have suggested that it would be at least defensible for OLC to adopt a similar advocacy stance when providing legal advice.¹¹⁹ Others, in contrast, have suggested that in order for the President to fulfill his oath of office¹²⁰ and his duty to "take Care that the Laws be faithfully executed,"¹²¹ he needs *some* executive office to advise him as to the best meaning of the relevant law.¹²² I do not directly engage either argument here. Instead, I take OLC as I find it: committed,

¹¹⁷ See, e.g., OLC Guidelines, *supra* note __, 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."); Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 229 (2005) (written responses of Alberto Gonzales to questions from Senator Feingold) ("I completely agree that it is, and has always been, the duty and function of the Office of Legal Counsel to provide the President and the Executive Branch with an accurate and honest analysis of the law, even if that analysis would constrain the pursuit of policy goals."); Frontline, *The Torture Question* (PBS television broadcast, Jul. 19, 2005) (John Yoo, principal drafter of the Torture Opinion, stating during an interview, "At the Justice Department and [OLC], there's a long tradition of keeping the law and policy separate. The department is there to interpret the law so that people who make policy know the rules of the game, but you're not telling them what plays to call, essentially."). It is, of course, a separate question how well OLC has lived up to this understanding over time.

¹¹⁸ See generally Seth P. Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073 (2001).

¹¹⁹ See, e.g., McGinnis, *supra* note __, at 377, 403 (identifying three "plausible" interpretive models for OLC, including a "situational model" in which OLC "would write opinions in the situational interest of his client without any obligation to preserve legal principles whether autonomous or court-centered," instead relying on "any plausible principles to achieve the policy goal desired by his client"). OLC already occasionally adopts more of an advocacy stance when doing things other than providing legal advice. For example, it sometimes helps the Justice Department's litigating offices craft arguments to be presented in court. See Johnsen, *supra* note __, at 1590 n.130.

¹²⁰ U.S. Const. art. II, § 1, cl. 8 (requiring the President, before "enter[ing] on the Execution of his Office," to swear or affirm that he "will faithfully execute the Office of President of the United States, and will to be best of [his] Ability, preserve, protect and defend the Constitution of the United States").

¹²¹ *Id.* art II, § 3.

¹²² See, e.g., Moss, *supra* note __, at 1316 ("The executive branch has no power to act beyond the authority provided by the Constitution or statutes of the United States, and, if the Constitution and relevant statutes are *best* construed to preclude a proposed policy or action, it is largely irrelevant whether a *reasonable* argument might be made in favor of the legality of the proposal.").

at least in theory, to providing legal advice based on its best view of the law. From there, I am interested in considering what *this* OLC should do with its own precedents.

A. Precedent's Role

1. *The Precedent Norm*

One place to begin is to ask how OLC's own opinions describe the role of its precedents. Of course, it is difficult to tell from the face of an opinion just how important any of the cited authorities were to OLC's actual thinking about the matter. Still, it is worth asking how OLC describes the function of its precedents, as well as the values it associates with reliance upon them.

Arguably the most notable statement in support of executive branch precedent comes not from OLC itself but from an Attorney General in the nineteenth century, before OLC even existed. Asked in 1881 to opine on the President's power to dismiss officers from the United States military, Attorney General Charles Devens noted that although the Constitution does not expressly address the issue, 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 authority thus to dismiss was possessed by the President."¹²³ After citing four such opinions, Devens stated that he was "of the opinion, therefore, 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."¹²⁴ He concluded by saying that he "ha[d] not thought it necessary to recapitulate the reasons upon which these decisions have been made, as they are fully stated in the opinions referred to."¹²⁵ The reasons supporting those earlier decisions required no further examination; the settled precedents themselves sufficed.

To be sure, Devens relied for his analysis not only on the existence of settled Attorney General legal opinions, but also on a long history of presidential exercises of the power in question.¹²⁶ The latter is clearly significant. As Justice Frankfurter famously explained in the *Steel Seizure Case*, "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution . . . may be treated as a gloss on 'executive Power' vested in the President."¹²⁷ Such unbroken presidential conduct goes beyond a long line of Attorney General opinions, which Presidents may

¹²³ Dismissal of Officer in the Marine Corps, 15 Op. Att'y Gen. 421, 422 (1881).

¹²⁴ Id.

¹²⁵ Id.

¹²⁶ Id. ("The power to dismiss officers from the military service of the United States . . . was repeatedly and frequently exercised from the time of the adoption of the Constitution.")

¹²⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, ___ (1952) (Frankfurter, J., concurring).

or may not act upon.¹²⁸

Still, Devens did treat the existence of settled Attorney General precedent as independently significant. And H. Jefferson Powell, whose book *The Constitution and the Attorneys General* remains the most important collection of and commentary upon leading opinions of the Attorney General and OLC, sees Devens's opinion as "a clear expression of the view generally held by Attorneys General that reasoned and reiterated executive branch precedent ought to be taken to settle the proper construction of the Constitution."¹²⁹ Settled executive branch precedent, on this view, settles the law itself. To recall Professor Schauer's distinction between reasoning from precedent and reasoning from experience,¹³⁰ Devens's reasoning is clearly the former. That is, the existence of the long line of Attorney General opinions was itself a reason for Devens to resolve the matter that way.

One does not find in contemporary OLC opinions many comparably clear statements about the role of its own precedents, but in the main it appears that OLC continues to follow this basic approach. In his book recounting his time at OLC, Professor Goldsmith contends that "OLC has a powerful tradition of adhering to its past opinions, even when a head of the office concludes that they are wrong. The tradition is akin to the doctrine of stare decisis, which counsels a court to stand by erroneous prior decisions except in very special circumstances."¹³¹ And in an article published shortly after the completion of his tenure as head of OLC, Randolph Moss echoes Devens in embracing the idea that, "for the executive branch lawyer, the best view of the law is not only that which finds coherence in the general body of law, but also finds consistency and principle in the more specific body of executive branch legal interpretation."¹³² In principle, then, OLC appears to embrace the idea that its precedents help supply the law (as opposed to merely providing experiences with the law), that the existence of well settled precedent is itself a strong reason to resolve future issues in a manner consistent with that precedent, and that OLC would need a very good reason to depart from such precedent. I take up those reasons—that is, the reasons why OLC might legitimately overrule itself—in Part III.B. First, though, it is worth asking *why* OLC should accord its precedents the kind of weight that Devens, Goldsmith, and Moss have described.

2. Reasons for Following Precedent

There are two sets of reasons why OLC precedents might receive, and merit, the kind of deference described above, and I will consider them in turn.

a. The Standard Stare Decisis Values

¹²⁸ Id.

¹²⁹ Powell, *supra* note __, at 212.

¹³⁰ See Schauer, *supra* note __, at 575.

¹³¹ Goldsmith, *supra* note __, at 145.

¹³² Moss, *supra* note __, at 1324.

First, many of the standard values associated with stare decisis in the courts are resonant in this context as well. Those values include consistency and predictability in the law, efficiency, and credibility of the decisionmaker.¹³³ The arguments on behalf of these values are familiar, and I do not propose to rehash them fully here. But it is worth observing their relevance to OLC in particular.

Consider first consistency and predictability, to which we might also attach the interest in protecting reliance interests. OLC's clients across the executive branch clearly have an interest in the consistency, predictability, and hence reliability of OLC's legal advice.¹³⁴ Moreover, given OLC's relatively small size, the sheer vastness of the executive branch heightens the need for predictability in its work. As Professor 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."¹³⁵ That is, if 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, then predictability in its advice is critical.¹³⁶ An OLC that too readily changes its mind is an OLC that causes its clients not only to doubt whether the advice they received in the past remains sound, but also whether there is any overarching guidance to be gleaned from the totality of OLC's work.

The interest in efficiency is also resonant in OLC. In the main, 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. Provided that likelihood is high enough 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."¹³⁷ As Mark Tushnet suggests, these sorts of efficiency gains would seem to be just as beneficial to an executive office like

¹³³ Schauer, *supra* note __, at 597-602. There is some variation in how one might group these values. In the article just cited, Professor Schauer suggests that "[a]rguments premised on the values of reliance, predictability, and decisional efficiency all share a focus on stability." *Id.* at 601. Elsewhere, however, he appears to slice the values associated with precedent even more finely. See Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 *Ga. St. U. L. Rev.* 381, 401 (2007) (referring to "stability, consistency, settlement, reliance, notice, and predictability"). I think the differences here are largely expositional, and do not intend to any possible substantive divergence.

¹³⁴ See Goldsmith, *supra* note __, at 146 ("Constant reevaluation of prior OLC decisions would make it hard for OLC's many clients to rely on its decisions.").

¹³⁵ Pillard, *supra* note __, at 739 n.199.

¹³⁶ Cf. Cardozo, *The Nature of the Judicial Process* 149 (1921) ("The 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.").

¹³⁷ Tushnet, *supra* note __, at 1339.

OLC as to a court.¹³⁸ In addition, however, adherence to OLC precedent can provide efficiency gains in a different set of cases—those in which resolving the issue at all would be very difficult in the absence of accrued precedent. Many of the issues OLC 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 in areas implicating the constitutional separation of powers, to ignore OLC’s own developed precedents on an issue could be to ignore the most ready 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 providing a “gloss” on constitutional provisions that are both textually spare and under-addressed by judicial doctrine.¹³⁹ 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.

Finally, adhering to OLC precedent can contribute to OLC’s own institutional credibility.¹⁴⁰ 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 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 the answer is “no.” That could include overruling OLC precedent whenever it stands in the way of the client’s current preferences. But as Professor Goldsmith puts it, “If 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.”¹⁴¹ 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 heavily 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. Put simply, if OLC claims that it treats its precedents as at least presumptively binding, it also thereby claims that it will presumptively follow those precedents over the immediate policy preferences of its clients. But for this to work in the long run it cannot just be a matter of appearance. If in fact OLC regularly bent to the will of its clients even at the expense of its settled precedents, then over time its claims to be pursuing its best view of the law would become just so much hollow rhetoric. Actually *employing* a stare decisis-like preference for adhering to its precedents can protect against that by providing a robust basis for saying “no” to its clients. And that, in turn, will help safeguard OLC’s credibility and integrity in the long run, which

¹³⁸ Id.

¹³⁹ *Youngstown*, 343 U.S. at ___ (Frankfurter, J., concurring).

¹⁴⁰ See Tushnet, *supra* note ___, at 1352 (discussing the credibility value in this context).

¹⁴¹ Goldsmith, *supra* note ___, at 146.

is where its ultimate value to its clients resides.¹⁴²

In sum, the arguments commonly mounted on behalf of stare decisis in the courts seem to apply just as well to OLC. It is, of course, important to consider the particular values thought to underlie any particular judicially developed approach to legal interpretation before deciding whether it is appropriate in any given extrajudicial context.¹⁴³ In this instance, however, the underlying values seem portable from the courts to OLC.

b. Stare Decisis and Executive Power

Attorney General Devens's 1881 opinion also suggests an additional, more distinctive but also more contingent and confined, argument in favor of something like a doctrine of stare decisis in OLC: the protection of executive power. Note that the particular issue that Devens addressed did not involve a question of law unrelated to presidential power. Rather, it went to what Presidents since the Founding have apparently deemed a core component of their authority as Commander-in-Chief: the power to dismiss military officers.¹⁴⁴ Whether this in fact is appropriately understood as a central part of the Commander-in-Chief power is immaterial for present purposes. Instead, the point is the *substance* of the precedents upon which Devens relied. They concerned executive power, and they cut in favor rather than against that power.

One needn't be an extreme cynic to assume that Attorneys General and OLC alike will be most inclined to defer to their precedents when they support expansive executive power. (Indeed, this is part of what makes Jack Goldsmith's disavowal and withdrawal of the Torture Opinion so striking, as an exception to what is surely the general rule.) What I want to examine here is whether an enhanced deference to precedent of this sort may be not only likely, but normatively defensible.

OLC has articulated the core of the defense in a 1996 opinion known as the Dellinger Memorandum (after its signatory Walter Dellinger, then the head of OLC).¹⁴⁵ The Memorandum begins with "[s]ome general observations on the sources and methodology we employ in analyzing separation of powers questions."¹⁴⁶ Noting that "[t]he constitutional structure obligates the executive branch to adhere to settled judicial doctrine that limits executive and legislative power," it explains that OLC's "analyses are guided and, where there is a decision of the Court on point, governed by

¹⁴² See Tushnet, *supra* note __, 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.").

¹⁴³ Cf. Morrison, *supra* note __ (examining whether the judicially developed canon of constitutional avoidance is appropriate in the executive branch).

¹⁴⁴ Dismissal of Officer in the Marine Corps, 15 Op. Att'y Gen. 421, 422 (1881). [twm: check Barron & Lederman on this power]

¹⁴⁵ The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124 (1996) (hereinafter "Dellinger Memorandum").

¹⁴⁶ *Id.* at 127

the Supreme Court's decisions on separation of powers."¹⁴⁷ It goes on to stress, however, 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."¹⁴⁸ It is for that reason—that is, the fact that many separation of powers norms are judicially underenforced¹⁴⁹—that the Dellinger Memorandum stresses the importance when addressing separation of powers issues of "giv[ing] careful consideration to the views of our predecessors."¹⁵⁰ In matters of executive power, then, OLC (and also Attorney General) precedents play a special role.

At bottom, the argument here proceeds from the Madisonian vision of the separation of powers. "Ambition," Madison famously explained, "must be made to counteract ambition."¹⁵¹ To that end, "the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."¹⁵² The separation of powers, in other words, entails each branch defending its institutional prerogatives against encroachments by the other two. OLC is a player in that process. 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 to intentional congressional intrusion."¹⁵³ And because the judicially underenforced status of many executive power norms means that executive branch precedent—including OLC opinions—are likely to be more protective of executive prerogatives than judicial doctrine, OLC's general duty to defend those executive

¹⁴⁷ Id. at 127-28.

¹⁴⁸ Id. at 128.

¹⁴⁹ For a discussion of separation of powers norms as judicially underenforced, see Morrison, *supra* note ___, at 1223-1228. And for the classic work on judicially underenforced constitutional norms more generally, see Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *Harv. L. Rev.* 1212 (1978).

¹⁵⁰ Dellinger Memorandum, *supra* note ___, at 128. The Memorandum also emphasizes the importance of considering constitutional text, structure, and history. Id. In focusing here on "the views of [OLC's] predecessors, I take up the source most related to the issue of stare decisis. But I do not mean to suggest that the Dellinger Memorandum places exclusive reliance upon OLC precedent.

¹⁵¹ *The Federalist* No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

¹⁵² Id. at 321-22; see *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) (stating that the 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."). But see Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 *Harv. L. Rev.* 915 (2005) (arguing that government officials more often act on the basis of personal and political incentives that do not entail defending the institutional powers and prerogatives of the branch that employs them).

¹⁵³ Dellinger Memorandum, *supra* note ___, at 126.

prerogatives translates into an at least presumptive duty to adhere to its precedents. At least in matters of executive power, then, the Dellinger Memorandum suggests that OLC has a special duty of fidelity to its precedents.

Of course, the underlying assumption is that OLC's precedents are, in fact, generally protective of executive prerogatives—and that this is entirely defensible from the standpoint of separation of powers theory. In the main, the factual premise of the assumption is accurate: OLC's precedents are indeed fairly protective of executive prerogatives on the whole.¹⁵⁴ But what should happen when the current OLC views its precedents as insufficiently protective of executive power? Is the Dellinger Memorandum's call for "careful consideration of the views of our predecessors" directionally contingent? Does it provide an additional reason to adhere to OLC precedent only to the extent that such precedents appear to enhance, not detract from, the power of the executive branch?

Consider the alternatives. On one hand, it could be that OLC still owes its executive power precedents the same presumptive weight no matter what their directional valence. The theory here would be that the accumulation of executive experience has revealed over time the appropriate metes and bounds of executive power. This view could again claim support in Justice Frankfurter's account of settled institutional practice: "Deeply 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."¹⁵⁵ 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,¹⁵⁶ those long-settled views would merit the same precedential treatment as if they had gone the other way, precisely because they represented part of the historically revealed meaning of the law. On this view, executive branch precedent has special force in this area because and to the extent that it is a principal source of our understanding of the scope of the power granted to the President by the Constitution and laws, not only because or to the extent

¹⁵⁴ This fact is not necessarily evidence that OLC has diverged from its self-imposed duty to provide legal advice consistent with its best view of the law. The reason, plainly, is that if OLC accepts the basic Madisonian vision of the separation of powers, then for an executive branch lawyer to err on the side of presidential power is for him to pursue what he takes to be the best understanding of the overarching plan of the constitutional separation of powers. This is not to say that the Madisonian vision necessarily justifies all assertions of robust executive authority, no matter how audacious. But it is to say that to observe that OLC tends to see the law in a somewhat executive-favoring light is not necessarily to say that it is not seeking its best understanding of the law.

¹⁵⁵ See *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring).

¹⁵⁶ The difference here is crucial. To conclude that the President possesses certain powers under Article II is not necessarily to conclude that his exercise of those powers is not subject to regulation by Congress. That is the difference between the second and third categories in the famous three-tiered framework that Justice Jackson laid out in his *Steel Seizure Case* concurrence. See *Youngstown*, 343 U.S. at 635-37; see also *Barron & Lederman II* (exploring the history of assertions of presidential power in "category three" cases).

that it enhances executive power beyond where it would otherwise be if we ignored the precedent.

On the other hand, it could be that when the current OLC concludes that one of its precedents embodies an unduly narrow view of executive power, the precedent therefore cannot claim the additional ground for adherence suggested in the Dellinger Memorandum. As that Memorandum further explains, “it is . . . the President’s ‘duty to pass the executive authority on to his successor, unimpaired by the adoption of dangerous precedents.’”¹⁵⁷ When a new administration takes office and finds such “dangerous precedents,” perhaps the fact of their dangerousness—that is, their tendency to underprotect executive power, at least from the perspective of the current OLC—deprives them of any special precedential force. To be clear, this position does not entail rejecting every precedent that OLC now thinks is underprotective of executive power. As noted in the previous section, many of the conventional arguments in favor of stare decisis in the courts apply fairly well to OLC, and thus there are good reasons for OLC to treat all its precedents as at least presumptively controlling. The argument here is that the mere fact that an opinion addresses an issue of executive power should not count as an *additional* reason in favor of its precedential status, nor should it increase the opinion’s precedential force. Instead, the argument goes, that additional precedential bite exists only for opinions that enhance executive power and prerogative beyond where it otherwise might be thought to extend.

I am inclined favor the first possibility. Executive branch lawyers may well have a duty to help the President “pass the executive authority on to his successor, unimpaired by the adoption of dangerous precedents.”¹⁵⁸ But that duty is important precisely because once such “dangerous” precedents are adopted and implemented, they become part of the settled traditions of the executive branch and help describe the metes and bounds of the executive power. To put the point differently, the existence of settled OLC or Attorney General precedent concluding, for example, that certain actions are beyond the President’s constitutional authority means that there is also a settled tradition of the President not taking those actions. In that respect, power-limiting as well as power-enhancing precedents contribute to the actual historical practice of the executive branch. And as Justice Frankfurter and others have pointed out, it is that historical practice that is the key source of constitutional meaning when it comes to many textually open-ended, often judicially untouched issues of executive power and separation of powers.

In sum, it is sensible to view OLC precedent addressing matters of executive power and executive-legislative relations as having a special, or added, claim to precedential force. It is not sensible to make that added force depend on whether the precedent seems to enhance or diminish the President’s powers.

¹⁵⁷ Dellinger Memorandum, *supra* note __, at 128-29 (quoting Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att’y Gen. 56, 65 (1933)).

¹⁵⁸ Dellinger Memorandum, *supra* note __, at 129.

* * *

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 in a set of constitutional issues heavily influenced by accumulated practice—executive power, and separation of powers more broadly. In cases of that sort, there is a special added reason for OLC to adhere to its settled precedents, as those precedents 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, then, 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 equivalent to the Supreme Court’s decision in *Planned Parenthood v. Casey*,¹⁵⁹ spelling out the criteria for deciding whether to overrule. 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.¹⁶⁰ That is indeed a fruitful place to start.

According to *Casey*, in deciding whether to depart from its presumptively controlling constitutional precedents,¹⁶¹ the Court asks (1) whether the precedent’s central rule has proven unworkable, (2) whether it could be overruled without serious unfairness to those who have relied on it, (3) whether intervening changes in the law have rendered it a “doctrinal anachronism,” and (4) whether, in light of new information or evolving understandings, its factual premises have been undermined in a way that renders its central holding “irrelevant or unjustifiable.”¹⁶² In addition, the 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.”¹⁶³ Just as the familiar values associated with stare decisis seem to apply about

¹⁵⁹ 505 U.S. 833 (1992).

¹⁶⁰ Koh, *supra* note ___, at 523.

¹⁶¹ As noted above, the Court at least claims to follow a more rigid rule of stare decisis in statutory cases. See *supra* text accompanying notes ___-___.

¹⁶² *Casey*, 505 U.S. at 855.

¹⁶³ *Id.* at 865. In *Casey*, the Court talked about this consideration as applied to whether overruling one of its precedents—namely, *Roe v. Wade*—would have this effect. But it seems clear that the Court means to be sensitive to the possibility that, in other contexts, *failure* to overrule might have a similar effect. See, e.g., *Lawrence v. Texas*.

as well in OLC as in the courts, *Casey*'s factors seem quite portable to OLC as well.

Moreover, OLC's decisions to overrule do occasionally point to discrete grounds that fit within the *Casey* paradigm. For example, OLC quite frequently points to 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 the precedent something of an anachronism. In 2003, for example, 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.¹⁶⁴ In finding no barrier to such grants, OLC abandoned a 1995 OLC opinion's conclusion that the Supreme Court would likely invalidate the provision of a historic preservation grant to an active church.¹⁶⁵ 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."¹⁶⁶ The point here was not that recent decisions of the Court were so directly on point as to bind OLC in a way that compelled overruling its 1995 opinion. Instead, the point was that the more recent decisions reflected a general change in approach to Establishment Clause questions that, in OLC's view, rendered the core reasoning of the 1995 opinion anachronistic. Without regard to the accuracy of the 2003 opinion's specific claims, a general matter I think these sorts of considerations provide legitimate grounds for OLC to reconsider and overrule one of its precedents. If "doctrinal anachronism" is a permissible basis upon which the Court may reconsider and overrule one of its precedents, it should be permissible for OLC to do likewise.

That is not so say, however, that the mere invocation of intervening doctrinal change automatically justifies overruling. And in fact, OLC has on occasion referred generally to intervening changes in the law in rather unsatisfying ways. Consider the Dellinger Memorandum. A footnote at the beginning of the Memorandum advises that it supersedes a 1989 memorandum on a similar set of separation of powers 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."¹⁶⁷ As a general matter, "subsequent decisions by the Supreme Court" clearly provide a legitimate basis

¹⁶⁴ Mem. From M. Edward Whelan III, Acting Assistant Attorney Gen., Office of Legal Counsel, to Solicitor, Dept. of Labor, 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").

¹⁶⁵ Constitutionality of Awarding Historic Preservation Grants to Religious Properties, 19 Op. O.L.C. 267 (1995).

¹⁶⁶ Old North Church Memorandum, *supra* note ___, at 18.

¹⁶⁷ Dellinger Memorandum, *supra* note ___, at 124 n.*.

for OLC to overrule itself. But if those decisions bear only quite indirectly on the issues OLC is now 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 footnote in the Dellinger Memorandum. The 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 difference 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.¹⁶⁸

It is difficult to resist reading the Editors’ reference to intervening decisions of the Court and, quoting, “certain differences in approach to the issues” as almost tongue-in-cheek. One worries that this amounts to little more than a game of magic words: you invoke intervening Supreme Court decisions and certain differences in approach to justify overruling what you don’t like, and I’ll invoke same when publishing your advice, rendering it effectively dead on (public) arrival.

Again, if OLC in both 1996 and 2002 truly did think that there were new Supreme Court decisions sufficiently on point to render its previous advice a doctrinal anachronism, then there is nothing untoward here. There is reason to wonder, though, whether “certain differences in approach” might be doing most of the work.¹⁶⁹ This is not necessarily to suggest disingenuousness on OLC’s part. OLC in 1996 and 2002 may have thought that differences in approach are sufficient to support overruling. I think they are not. A difference in approach amounts to a conviction that the prior decision is wrong. Because the core values of stare decisis are salient in OLC, mere disagreement with the outcome or approach of a prior decision should typically not be enough, on its own, to warrant overruling. (I say “typically” and not “categorically” because I would recognize an exception in one special case, which I discuss below in Part III.B.2.)

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 one of the functions of a formal client request for

¹⁶⁸ Id.

¹⁶⁹ To be fair to the Dellinger Memorandum, the body of the document does speak in more detail about its decision to overrule specific aspects of its prior precedents, and at least some of those do seem supportable in light of intervening doctrinal developments. Still, the opening footnote does read as though “certain differences in approach” might be the dispositive factor on at least some issues, and it is not clear that that is not the case.

reconsideration. Consider OLC's 1995 opinion, mentioned above,¹⁷⁰ addressing USPS's obligation to negotiate with the Treasury Department over the potential sale to Treasury of USPS bonds.¹⁷¹ In an earlier opinion, 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.¹⁷² It did not, however, specify how long that obligation lasted. USPS's request that OLC revisit the issue appears to have been driven in part by the unworkability of an "indefinite and unlimited" negotiation obligation.¹⁷³ OLC's response acknowledged the practical problems with such an obligation, and concluded that it was not supported by the underlying statute.¹⁷⁴

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 Court's application of this factor. Although *Casey* treats evidence of a unworkability as a legitimate reason to overrule, the problem is that 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 Supreme Court tends to shy away from nuanced fact-based judgments. Thus, while litigants will of course argue unworkability from time to time, the Court's consideration of the issue risks being more arid and formal than textured and nuanced. Similar problems can plague OLC. As Professor Pillard has insightfully 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.¹⁷⁵ Although there are good reasons for OLC to adhere to at least some of those rules,¹⁷⁶ it may well be that, in effectively mimicking the procedures of an appellate court, OLC is also hampered by that institution's relatively limited capacity to deal with dynamic and complicated facts. Client reconsideration requests may 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 of that sort are potentially quite valuable. This is not to say, of

¹⁷⁰ See *supra* text accompanying notes ___-___ and ___-___.

¹⁷¹ Scope of Treasury Department Purchase Rights with Respect to Financing Initiatives of the U.S. Postal Service, 19 Op. O.L.C. 238 (1995).

¹⁷² *Id.* at 238.

¹⁷³ *Id.* at 245.

¹⁷⁴ *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.").

¹⁷⁵ These include a preference for formal written requests from its clients, and an aversion to opining on hypothetical matters. See Pillard, *supra* note ___, at 734-38.

¹⁷⁶ See OLC Guidelines (championing many of the rules).

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 practicality, stability, or 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.

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.¹⁷⁷ Consider the decision to disavow and withdraw the Torture Opinion. According to Jack Goldsmith, he decided in December 2003 that problems with the Opinion were so overwhelming—not just in its analysis but also in its unnecessarily broad scope and its needlessly tendentious tone¹⁷⁸—that it had to be withdrawn. But concern for stare decisis-related factors—especially the interests of those in the government who may already have acted in reliance on the Opinion—led him to delay officially withdrawing it while OLC worked on a replacement. Given OLC's more ongoing connection to at least some of its clients (as opposed to a court's confinement to the particular cases or controversies before it), it is not anomalous for OLC to pay heed to reliance interests in this way even as it prepares to replace a precedent with a new opinion. Put another way, at least some of OLC's advice is ongoing, not confined to the four corners of a written opinion. The problem in this case, though, was that the passage of time overtook attempts to prepare a replacement opinion. By the early summer of 2004, press stories of the abuses at Abu Ghraib and the leaking of the original Torture Opinion combined into a toxic mixture. As Goldsmith puts it, "every day that 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."¹⁷⁹

This, it seems to me, was an appropriate basis upon which to withdraw the Opinion—even though a replacement was not yet ready. Put another way, even though Goldsmith is adamant that he made his initial decision to withdraw the Torture Opinion well before it was ever leaked to the public,¹⁸⁰ the timing of the ultimate withdrawal is best viewed as a legitimate response to the now-leaked Opinion's corrosive effect on OLC's integrity and credibility. It is hardly novel to observe that OLC withdrew the Opinion when it did because of the public relations nightmare it was causing. My point here is that the underlying considerations of institutional

¹⁷⁷ See *Casey*, 505 U.S. at 865 (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").

¹⁷⁸ See Goldsmith, *supra* note ___, at 151.

¹⁷⁹ *Id.* at 158.

¹⁸⁰ See *id.* at 159

credibility parallel the kinds of considerations the Court takes into account, at least in cases of great national significance.¹⁸¹

In sum, the factors identified by the *Casey* Court seem adaptable to the OLC context, and in fact OLC at least implicitly employs a number of them already. In that respect, OLC seems to have embraced at least some substantial components of the judicially crafted means of implementing and delimiting stare decisis. But on occasion, OLC comes close to suggesting that a disagreement with the approach taken in one of its precedents is sufficient to warrant overruling. I think it is not, except in one special case discussed below.

2. *One Special Case*

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 is contrary to the current President's considered constitutional views, and if the President intends for the executive branch to implement those views, that may provide a legitimate ground for OLC to reexamine and overrule its opinion.

Randolph Moss captures the basic argument:

[T]he public may elect a President based, in part, on his view of the law, and that view should appropriately influence legal interpretation in that President's administration. Due respect for the democratic principle and the President's status as Chief Executive demands that executive branch lawyers not substitute their own views for the views of the President, who is directly responsible to the People. Indeed, the Framers' belief that the electoral process would provide a check on legal interpretation by the political branches, at least to the extent that government might "make a tyrannical use of its powers," assures that the public may appropriately influence legal interpretation by electing officials who share their view of the law. The President, and the lawyers who serve in his administration, must maintain a principled and coherent view of the law, but the 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.¹⁸²

The core idea here is that the electoral mechanism is a way for the people to participate in the creation of constitutional meaning. The President is a means through which that participation can be accomplished.

¹⁸¹ Of course, the mere decision to withdraw the Torture Opinion did not repair the damage done to OLC's reputation. But surely that is not the test. The question is not whether taking the contemplated action would restore OLC's reputation, but whether failure to take the action would compound the harm. This was a matter of stopping or even merely slowing the bleeding, not healing the wound all at once.

¹⁸² Moss, *supra* note ___, at 1327-28.

The simplest illustration of the point involves a presidential candidate whose platform takes a firm position on a constitutional issue, and whose victory in the election turns on support for her view on that issue. Suppose, for example, that in the absence of the Supreme Court's decision in *District of Columbia v. Heller*, a presidential candidate runs on the view that the Second Amendment should be construed to protect an individual right, and that she wins the election in no small part because of the support of voters who agreed with her on that issue. Except where doing so would be directly contradicted by Supreme Court precedent,¹⁸³ it would be entirely appropriate for the President to implement that view not only by adopting certain policies with reference to federal gun laws but also by expecting an office like OLC to take account of her views in its work.¹⁸⁴ This is not to say that the President could or should simply dictate to OLC the content of its legal opinions. But it is to say that the sources to which OLC should turn when discerning its best view of the law include the popularly endorsed constitutional views of the current President. And having looked to those views, OLC might well legitimately conclude that the best way to reconcile the President's constitutional views and any OLC precedents to the contrary is to overrule those precedents.¹⁸⁵

Of course, most cases are not that clear. Most voters are entirely unfamiliar with most constitutional issues, and most of those issues are completely invisible during presidential campaigns. Indeed, on many constitutional issues the new President herself may lack any real view when she first comes into office. Sooner or later, however, a conscientious President will have to form views on those issues. By her oath of office she assumes an independent duty of fidelity to the Constitution,¹⁸⁶

¹⁸³ This is not the place to rehearse the full “judicial supremacy” v. “departmentalism” debate, but I will observe that OLC takes itself to be bound by controlling Supreme Court authority, and that I agree with that position. See Dellinger Memorandum, *supra* note __, at 127-28. Note that taking this position does not entail rejecting the possibility of robust extrajudicial constitutionalism. Among other things, judicial doctrines of nonjusticiability and deference to the political branches leave ample space for those branches to implement constitutional norms in ways that the Court would not. Such overprotection does not challenge judicial supremacy the way defying a judicial determination of unconstitutionality does. See generally Morrison, Suspension, *supra* note __, at 1579-82 & 1603-09 (developing an approach to extrajudicial constitutional implementation).

¹⁸⁴ Cf. Ashcroft Letter to NRA as a possible example of this.

¹⁸⁵ Some might argue that because OLC's work is always subject to reversal by the President, OLC ought to do its work without regard to the incumbent's constitutional views and leave it to him to invoke those views later on. I think this objection mistakes both the role of the President's views in this context and the content of OLC's stated duty to provide advice based on its best view of the law. When the President takes a considered position on a constitutional issue, that position becomes a *source* of constitutional meaning. And by undertaking to provide legal advice consistent with the best view of the law, OLC undertakes an obligation to incorporate the President's understanding into its work. To ignore the President's views on the theory that he can act on them later would be to provide legal advice on the basis of something other than all relevant sources of legal meaning.

¹⁸⁶ U.S. Const. art. II, § 1, cl. 8 (specifying the required oath as follows: “I do solemnly swear (or affirm) that I will faithfully execute the Office of the President of the United States, and will to the

and that inevitably requires her (with the aid of her advisors, including OLC) to determine what the Constitution demands, permits, and prohibits in a whole range of circumstances. If the President arrives at a considered judgment about how best to understand or approach a constitutional issue, and as long as that understanding is not foreclosed by Supreme Court precedent, I think it would again be appropriate for OLC to give effect to those views even if it meant overruling OLC precedent.

The price for such actions, however, should be public notice. Even on constitutional issues that were largely unknown to the voters and unstudied by the President at the time of her election, it is ultimately the President's democratic accountability that gives her constitutional views their force. Thus, in the absence of an extraordinary national security-related need for secrecy, OLC's decisions to accommodate the President's constitutional views by overruling its precedent should be made public immediately. In some cases, the underlying issue will have a public salience and the combination of press and congressional attention will put the people themselves in a position to police, in some way, the administration's implementation of the Constitution.

Admittedly, in most cases the issue is unlikely to be salient to anyone beyond parts of the legal academy, some congressional staffers, and a few Washington law firms. Yet even in those cases, notice matters. First, from the perspective of democratic legitimacy, the fact that the people *could* find out about OLC's (and, more broadly, the administration's) actions confers at least some measure of legitimacy to the destabilizing effects of abandoning settled executive branch precedent. Put another way, public notice avoids the threats to democratic rule posed by "secret law." Second and more practically, if OLC's integrity and credibility are ultimately in the hands of the lawyers in the office, the object should be to incentivize the protection of those virtues. And the best way to do that may be to make OLC lawyers' professional reputations depend on it. In the main, that reputation depends on the views of those most likely to take notice when OLC publicizes its actions in this area. So if, for example, the concern is that OLC will fabricate conflicts between presidentially expressed constitutional views and particular OLC precedents where in fact there is none, requiring OLC to publish its decision whether to overrule may discourage that sort of shoddy reasoning. Similarly, if the concern is that OLC will simply advise the President to adopt a particular constitutional view so that OLC can then overrule the precedents it does not favor, the best we can hope for is that the scrutiny of those who know how to detect such cynical gaming will discourage it.

One can multiply the concerns, but the best response will still be to require public notice. Consider two more related problems. First, it will often be difficult to discern the difference between a President's (or, more broadly, an administration's) policy goals and her constitutional views. If a pre-*Heller* President opposed legislative

best of my Ability, preserve, protect and defend the Constitution of the United States").

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bans on handguns kept for self defense because she thought it impeded individuals' ability to protect themselves, their families, and their homes, would that have constituted a policy preference or a statement about how she thought the Second Amendment should be construed? Even worse, the position I am advocating here might read like a set of special pleading rules for the President: package your policy preferences as constitutional views and OLC will implement them as law. Pursued very far, an approach like that could make a mockery of the idea that OLC's job is to determine its best view of the law, not to provide the best legal defense for the President's policies. I don't see any way around these problems except to say that we must rely on the professional judgment and integrity of the lawyers in OLC to avoid them as best they can. And the best way to encourage them to do so is to expose their choices to public view. Ultimately, though, the fate of OLC precedent is in OLC's hands.

CONCLUSION

Stare decisis has a place in the Office of Legal Counsel.

[more!]

APPENDIX
REQUESTS FOR RECONSIDERATION

Date	Decision	Precedent	Treatment	Agency Requesting	Admin: Decision	Admin: Reviewed	Matter Interpreted	Likely Litigated	Intervening Development	Type of Development
9/27/1977	Dues-Paying Practices of Private Clubs-Discriminatory Practices	December 7, 1976 O.L.C. Opinion (Scalia Letter)	Distinguishing	Department of Labor	Carter	Ford	Constitution	Yes	No	NA
12/14/1977	Presidential Approval of Naval Petroleum Reserve Contract NOD 4219-2664	Attorney General Statement drafted by O.L.C.	Overruling	Department of Energy	Carter	NA	Statute	Yes	No	NA
3/21/1979	Jurisdiction-Federal or State-"Victimless" Crimes Committed by Non-Indians on Indian Reservations-18 U.S.C. §§ 1152, 1153	June 19, 1978 O.L.C. Opinion	Distinguishing	Department of Justice	Carter	Carter	Constitution	Yes	Yes	Court
6/15/1979	Settlement of Litigation-Authority of the Postal Service (39 U.S.C. §§ 409, 2008)-Authority of the Attorney General (28 U.S.C. §§ 516, 519)	February 13, 1973 O.L.C. Opinion	Modifying	Department of Justice	Carter	Nixon	Statute	No	Yes	Court
7/18/1979	Immigration and Nationality Act-8 U.S.C. § 1101(a)(15)(H)-Nonimmigrant Aliens-Soccer Strike	April 18, 1979 O.L.C. Memorandum	Overruling	Department of Labor	Carter	Carter	Other	Yes	Yes	Administrative
2/1/1980	Status of Nonimmigrant Alien Temporary Workers During a Strike	3 Op. O.L.C. 179 (1979)	Affirming	INS	Carter	Carter	Statute	Yes	Yes	OLC
2/8/1980	Management of Admiralty Island and Misty Fiords National Monuments	1979 O.L.C. Opinion	Modifying	USDA	Carter	Carter	Statute	No	No	NA
3/17/1980	Application of 18 U.S.C. §§ 203 and 205 to Federal Employees Detailed to State and Local Governments	1971 O.L.C. Opinion (Rehnquist Letter)	Modifying	EPA	Carter	Nixon	Statute	Yes	No	NA

REQUESTS FOR RECONSIDERATION (CONT.)

Date	Decision	Precedent	Treatment	Agency Requesting	Admin: Decision	Admin: Reviewed	Matter Interpreted	Likely Litigated	Intervening Development	Type of Development
8/15/1980	Disclosure of Confidential Business Records Obtained Under the National Traffic and Motor Vehicle Safety Act	1977 O.L.C. Opinion	Affirming	National Highway Traffic Safety Admin.	Carter	Carter	Statute	Yes	No	NA
6/26/1981	Applicability of 18 U.S.C. § 205 to Union Organizing Activities of Department of Justice Employee	Unidentified	Affirming	Office of Justice Assistance, Research and Statistics	Reagan	NA	Statute	Yes	No	NA
10/18/1982	Authority of Military Investigators to Request Search Warrants Under Rule 41	Opinions from 11/18/80 and 10/8/81	Overruling	Department of Defense	Reagan	Carter, Reagan	Statute	Yes	No	NA
10/25/1982	Recess Appointments Issues	Acting Attorney General's 1960 opinion on recess appointments (41 Op. Att'y Gen. 463)	Affirming	Counsel to the President	Reagan	Eisenhower	Constitution	No	No	NA
6/21/1989	Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities	Extraterritorial Apprehension by the Federal Bureau of Investigation, 4B Op. O.L.C. 543 (1980)	Modifying	Federal Bureau of Investigation	George H.W. Bush	Carter	Statute	Yes	No	NA
7/3/1989	Application of the Posse Comitatus Act to Assistance to the United States National Central Bureau	Memorandum for Richard C. Stiener, Chief, INTERPOL-United States National Central Bureau, from Charles J. Cooper, AAG, OLC, Re: Cooperation by the United States Central Bureau with United States Military Agencies (June 5, 1986)	Modifying	INTERPOL-United States National Central Bureau	George H.W. Bush	Reagan	Statute	No	No	NA

REQUESTS FOR RECONSIDERATION (CONT.)

Date	Decision	Precedent	Treatment	Agency Requesting	Admin: Decision	Admin: Reviewed	Matter Interpreted	Likely Litigated	Intervening Development	Type of Development
4/27/1990	Constitutional Limitations on "Contracting Out" Department of Justice Functions Under OMB Circular A-76	Memorandum to Deputy Attorney General Schmults, from AAG Olson, OLC (May 20, 1983)	Affirming	Justice Management Division	George H.W. Bush	Reagan	Constitution	No	No	NA
8/17/1992	Enforcement Jurisdiction of the Special Counsel for Immigration Related Unfair Employment Practices	Memorandum for Andrew M. Strojny, Acting Special Counsel, from Lynda Guild Simpson, DAAG, OLC, Re: Department of Defense Cooperation with Investigation of Immigration Related Unfair Employment Practice (May 2, 1990)	Overruling	Department of the Navy	George H.W. Bush	George H.W. Bush	Both	Yes	No	NA
10/18/1993	Liability of the United States for State and Local Taxes on Seized and Forfeited Property	Liability of the United States for State and Local Taxes on Seized and Forfeited Property, 15 Op. O.L.C. 69 (1991)	Modifying	Office for Asset Forfeiture	Clinton	George H.W. Bush	Statute	Yes	Yes	Court
12/23/1993	Reconsideration of Prior Opinion Concerning Land-Grant Colleges	Letter for Alan Charles Raul, General Counsel, Department of Agriculture, from Principal DAAG Douglas R. Cox, OLC (Aug. 21, 1992)	Overruling	Department of Agriculture	Clinton	George H.W. Bush	Statute	Yes	No	NA
5/23/1994	Reconsideration of Applicability of the Davis-Bacon Act to the Veteran Administration's Lease of Medical Facilities	Applicability of the Davis-Bacon Act to the Veterans Administration's Lease of Medical Facilities, 12 Op. O.L.C. 89 (1988)	Overruling	Department of Justice	Clinton	Reagan	Statute	Yes	No	NA

REQUESTS FOR RECONSIDERATION (CONT.)

Date	Decision	Precedent	Treatment	Agency Requesting	Admin: Decision	Admin: Reviewed	Matter Interpreted	Likely Litigated	Intervening Development	Type of Development
7/8/1994	Review of 1988 Opinion Concerning the Applicability of Section 504 of the Rehabilitation Act to Individuals Infected with HIV	Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals, 12 Op. O.L.C. 209 (1988)	Modifying	Department of Justice	Clinton	Reagan	Statute	Yes	No	NA
5/22/1995	Fiduciary Obligations Regarding Bureau of Prisons Commissary Fund	Memorandum for Norman Carlson, Director, Bureau of Prisons, from Samuel A. Alito, Jr., DAAG, OLC, Re: Disposition of Income From Prison Vending Machines Under the Randolph-Sheppard Act (Mar. 25, 1986)	Modifying	Civil Division	Clinton	Reagan	Statute	No	No	NA
10/10/1995	Scope of Treasury Department Purchase Rights with Respect to Financing Initiatives of the U.S. Postal Service	Memorandum for Jeanne S. Archibald, General Counsel, Department of the Treasury, from Timothy E. Flanigan, AAG, OLC (Jan. 19, 1993)	Modifying	USPS	Clinton	George H.W. Bush	Statute	No	No	NA
12/18/1995	Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges	Memorandum for Eleanor D. Acheson, AAG, Office of Policy Development, from Richard L. Shiffrin, DAAG, OLC, Re: Applicability of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges (Mar. 13, 1995)	Affirming	Counsel to President	Clinton	Clinton	Both	No	No	NA
7/23/1996	Government Printing Office Involvement in Executive Branch Printing	General Services Administration Printing Operations, 17 Op. O.L.C. 54 (1993)	Modifying	Government Printing Office	Clinton	Clinton	Constitution	No	No	NA

REQUESTS FOR RECONSIDERATION (CONT.)

Date	Decision	Precedent	Treatment	Agency Requesting	Admin: Decision	Admin: Reviewed	Matter Interpreted	Likely Litigated	Intervening Development	Type of Development
10/16/2000	A Sitting President's Amenability to Indictment and Criminal Prosecution	Mem. from Robert G. Dixon, Jr., AAG, OLC, Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office (Sept. 24, 1973)	Affirming	NA	Clinton	Nixon	Constitution	Yes	Yes	Court
11/22/2000	Use of Agency Resources to Support Presidential Transition	Mem. for C. Boyden Gray, Counsel to the President, from Timothy E. Flanigan, AAG, OLC, Re: Use of Agency Resources to Support the Presidential Transition (Dec. 14, 1992)	Affirming	General Services Admin.	Clinton	George H.W. Bush	Statute	No	No	NA
4/30/2003	Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties such as the Old North Church	Constitutionality of Awarding Historic Preservation Grants to Religious Properties, 19 Op. O.L.C. 267 (1995)	Overruling	Department of the Interior	George W. Bush	Clinton	Constitution	Yes	Yes	Court
5/23/2003	Application of 18 U.S.C. § 603 to Contributions to the President's Re-Election Committee	Memorandum for Abner J. Mikva, Counsel to the President, from Dawn Johnsen, DAAG, OLC, Re: Whether 18 U.S.C. § 603 Bars Civilian Executive Branch Employees and Officers from Making Contributions to a President's Authorized Re-election Campaign Committee (May 5, 1995)	Affirming	Counsel to President	George W. Bush	Clinton	Statute	Yes	Yes	Court
12/30/2004	Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340a	Standards of Conduct under 18 U.S.C. Secs. 2340---2340A (Aug. 1, 2002)	Overruling	OLC	George W. Bush	George W. Bush	Both	Yes	No	NA

REQUESTS FOR RECONSIDERATION (CONT.)

Date	Decision	Precedent	Treatment	Agency Requesting	Admin: Decision	Admin: Reviewed	Matter Interpreted	Likely Litigated	Intervening Development	Type of Development
1/26/2007	Days of Service by Special Government Employees	<p>Advisory Committees-Food and Drug Administration-Conflicts of Interest (18 U.S.C. § 208), 2 Op. O.L.C. 151 (1978);</p> <p>Memorandum for Dudley Chapman, Associate Counsel to the President, from Leon Ulman, DAAG, OLC (July 10, 1974);</p> <p>Memorandum for Charles F.C. Ruff, Associate Deputy Attorney General, from Leon Ulman, DAAG, OLC, Re: Application of the Conflict of Interest Laws to Special Assistant United States Attorney (Apr. 19, 1979);</p> <p>Memorandum for Fred F. Fielding, Counsel to the President, from Ralph W. Tarr, Acting AAG, OLC, Re: President's Counsel on Physical Fitness and Sports (Feb. 8, 1985);</p> <p>Restrictions on a Federal Appointee's Continued Employment by a Private Law Firm, 7 Op. O.L.C. 123 (1983);</p> <p>Employment of Temporary or Intermittent Attorneys and Investigators, 3 Op. O.L.C. 78 (1979)</p>	Affirming	Department of Defense	George W. Bush	Ford; Carter; Reagan	Statute	Yes	NA	NA