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## **All the President's Lawyers: How to Avoid Another "Torture Opinion" Debacle**

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## **All the President's Lawyers: How to Avoid Another "Torture Opinion" Debacle**

**Dawn E. Johnsen\***

Since the terrorist attacks of September 11, 2001, the Bush Administration has engaged in a host of controversial counterterrorism actions that threaten civil liberties and at times even the physical safety of those targeted: extreme interrogation techniques and even torture, enemy combatant designations, extraordinary renditions, secret overseas prisons and warrantless domestic surveillance. To justify policies that would otherwise violate applicable legal constraints, President Bush and his lawyers have espoused an extreme view of expansive presidential power during times of war and national emergency. The resulting debate about desirable external checks—principally from the courts and Congress—has underestimated an essential internal source of constraint on presidential excesses: legal advisors within the executive branch.

Questions about the appropriate role of presidential lawyers also lie at the heart of recent and ongoing scandals involving the Bush Department of Justice (DoJ). Among them: the Office of Legal Counsel's infamous Torture Opinion which found presidential authority to authorize torture in violation of a federal statute;<sup>1</sup> President Bush's firing of U.S. attorneys; inappropriate partisan considerations in the hiring of career lawyers and immigration judges; and, most dramatically, the threatened resignation of top DoJ officials when the White House unsuccessfully sought to pressure a critically ill Attorney General John Ashcroft into approving an unlawful warrantless domestic surveillance program.

To successfully prevent future executive branch abuses, we need as a nation to look long and hard at the standards and processes that should govern presidential lawyers as they work to ensure the legality of executive branch action. Congress should lead that public dialogue. A good reference point is a short statement of ten "Principles to Guide the Office of Legal Counsel," in which nineteen former OLC lawyers, in the wake of the Torture Opinion, set forth the best of longstanding bipartisan practices in an effort to promote presidential fidelity to the rule of law.<sup>2</sup> The Bush Administration and every subsequent administration should either endorse these principles or develop and publicly announce their own.

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1. Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, U.S. Dep't of Justice to Alberto R. Gonzales, Counsel to President George W. Bush (Aug. 1, 2002), *available at* <http://www.washingtonpost.com/wpsrv/nation/documents/dojinterrogationmemo20020801.pdf> [hereinafter Torture Opinion or Opinion].

2. WALTER E. DELLINGER, DAWN JOHNSEN, ET AL., PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL (Dec. 21, 2004), *reprinted at* 81 IND. L.J. 1345 (2006) & *available at* [http://www.acslaw.org/files/2004%20programs\\_OLC%20principles\\_white%20paper.pdf](http://www.acslaw.org/files/2004%20programs_OLC%20principles_white%20paper.pdf).

## I. Inadequacy of Judicial and Congressional Checks

The courts and Congress, of course, provide essential checks on the executive branch, but their issue-by-issue external review will incompletely constrain unlawful executive branch action. The obstacles to judicial or congressional review of executive branch action on matters of war and national security—particularly during times of crisis—are familiar. The courts face (and create) difficult justiciability requirements that mean, for example, that there may be no party who ever has standing to challenge a clearly unlawful governmental action. Courts may deny or delay relief even to parties with standing, because of the political question doctrine, the state secrets privilege, deferential standards of review, or years of complex litigation.

Congress tends to defer strongly to the Commander in Chief on matters of war and national security, even in times of divided government, and legislative efforts always face the possibility of a filibuster or a presidential veto. Perhaps the greatest challenge today is Congress already has enacted legislation with regard to many of the Bush Administration's most objectionable policies. Much of the controversy in fact stems from President Bush's claimed authority to refuse to comply with the relevant laws, including the Foreign Intelligence Surveillance Act (FISA),<sup>3</sup> the anti-torture statute, and the numerous other laws for which President Bush has issued signing statements asserting the right to refuse to enforce the laws when doing so would conflict with his constitutional views.<sup>4</sup>

Executive branch secrecy further hinders both judicial and congressional review. At times, of course, secrecy is essential to preserving national security, but the Bush Administration has taken it to an unwarranted extreme. By its nature, secrecy undercuts the efficacy of external checks. Congress or potential litigants may not even know about unlawful executive action unless someone in the government violates administration policy, and perhaps statutory prohibitions, to leak information. Such leaks were responsible for the public disclosure of the Bush Administration's legal opinions and policies on coercive interrogations and torture, the National Security Administration's domestic surveillance program that operated outside the requirements of FISA, and the use of secret prisons overseas to detain and interrogate suspected terrorists. Ultimately, even with the current Supreme Court's relatively strong willingness to protect rights, coupled with scrutiny from the press and advocacy organizations, the Bush Administration has engaged in years of largely unconstrained illegal practices.

On a daily basis, the President engages in decision-making that implicates important questions of constitutionality and legality. Whether to seek congressional authorization before committing the nation to war or other hostilities, what limits, if any, to set (or when set by Congress, to respect) on coercive interrogation techniques, when to publicly release information regarding the course of war or counterterrorism efforts—all are issues over which the President exercises enormous practical control, and all can profoundly affect individual lives and the

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3. U.S. Dep't of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, 81 IND. L.J. 1374 (2006).

4. See T.J. HALSTEAD, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS (2007); Charlie Savage, *Bush Challenges Hundreds of Laws: President Cites Powers of His Office*, BOSTON GLOBE, Apr. 30, 2006, at A1.

course of history. The possibility of after-the-fact external review of questionable executive action is an inadequate check on executive excesses. Presidents also must face effective internal constraints in the form of executive branch processes and advice aimed at ensuring the legality of the multitude of executive decisions.

## II. Torture

Presidential failures to comport with the law have occurred throughout history, from administrations of both political parties. One particularly egregious example can be found in the Bush Administration's positions regarding the interrogation of detainees suspected of terrorism, and especially OLC's dangerously flawed advice in the early months after the September 11 attacks regarding the legality of using torture to acquire information from detainees. Although the Torture Opinion has been almost universally condemned and the Bush Administration publicly withdrew it after it was leaked, the failures that led to this debacle demand far greater scrutiny, both to determine accountability for past misdeeds and to promote understanding of how presidential lawyers should go about their job.

The images of U.S. soldiers abusing detainees at the Abu Ghraib prison in Iraq are well recognized and easily recalled. The celebratory photographs taken by those involved in the abuse, made public in February 2004, horrified the world. Shortly thereafter, someone leaked to the press an August 2002 legal memorandum, in which OLC advised then-Counsel to the President Alberto Gonzales on the meaning of the federal statute that makes it a crime to commit torture.<sup>5</sup> Congress enacted the statute to implement the terms of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment. OLC's Torture Opinion, however, goes to great lengths first to read the scope of the statute in an exceedingly narrow manner, and then to methodically explore all conceivable arguments whereby persons who engage in aggressive interrogations, including torture, can escape conviction.

Numerous commentators have described, analyzed, and almost invariably harshly criticized the Torture Opinion, and I will just briefly review some highlights.<sup>6</sup> The Opinion begins by interpreting the meaning of torture as limited to the most extreme of acts: "The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function likely will result."<sup>7</sup> The pain must be "excruciating and agonizing." Mental pain or suffering "must result in significant psychological harm of significant duration, e.g., lasting for months or even years." The infliction of such pain must be the defendant's precise objective; it is not enough that the defendant knew that such pain and suffering were reasonably likely to result from his actions.

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5. 18 U.S.C. §§ 2340–2340A (2006).

6. For an outstanding compilation of posts on the Torture Opinion and related issues, see *The Anti-Torture Memos: Balkinization Posts on Civil Liberties, the War on Terror and Presidential Power*, BALKINIZATION, Dec. 22, 2006, available at: <http://balkin.blogspot.com/2006/12/anti-torture-memos.html> (by Professors Jack Balkin, Martin Lederman and others).

7. For all quotations from the Torture Opinion, see *supra* note 1.

Even more ominous, the Torture Opinion goes on to suggest that even acts that come within this extremely narrow definition of torture could not be successfully prosecuted under some circumstances. OLC makes the extraordinary claim that, notwithstanding its facially clear application to government actors, the statute could not be interpreted to allow the prosecution of someone who commits torture “pursuant to the President’s constitutional authority to wage a military campaign,” because to do so would interfere with the President’s Commander-in-Chief power. In exaggerating the President’s war powers, the Opinion ignores entirely Congress’s textually committed war powers—such as the power to make rules concerning captures on land and water and for the government and regulation of the land and naval forces. It fails even to cite a directly relevant watershed Supreme Court opinion, *Youngstown Sheet and Tube v. Sawyer*, in which Justice Jackson’s famous concurring opinion discusses Congress’s authority to limit presidential authority.<sup>8</sup>

Finally, the Torture Opinion crafts creative defenses to “eliminate criminal liability” in the event that “an interrogation method . . . might arguably cross the line [into an act of torture] . . . and application of the statute was not held to be an unconstitutional infringement of the President’s Commander-in-Chief authority.” A defense of “necessity” would argue that torture—notwithstanding the statute’s prohibition—was necessary to gain information to prevent a future terrorist attack. Similarly, the Opinion argues that a torturer could claim he or she acted in self-defense: not the traditional defense of one’s self, but an extension, to defense of one’s nation.

The Torture Opinion’s extreme reading of the President’s Commander-in-Chief powers also could overcome other laws that prohibit highly coercive forms of interrogation. The Bush Administration refuses to reveal whether it actually has relied on such arguments or which interrogation techniques it has authorized. However, news reports have described six “enhanced interrogation techniques” instituted in March 2002 and used on suspected terrorists incarcerated in secret locations outside the United States. They include “the cold cell,” in which the prisoner is stripped naked, repeatedly doused with cold water and held in a cell kept near fifty degrees, and “waterboarding,” in which the prisoner is smothered with water to make him feel he is drowning. Both “the cold cell” and “waterboarding” have reportedly resulted in the deaths of prisoners at the hands of CIA agents.<sup>9</sup>

On December 30, 2004, six months after the leak and public disavowal of the Torture Opinion, OLC issued a new opinion that provides a more careful and accurate analysis of the federal anti-torture statute.<sup>10</sup> This Replacement Opinion opens by describing torture as “abhorrent” and acknowledges early on that many other sources of law regulate the detention and

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8. 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

9. Brian Ross & Richard Esposito, *CIA’s Harsh Interrogation Techniques Described*, ABC News, Nov. 18, 2005, available at <http://abcnews.go.com/WNT/Investigation/story?id=1322866> (finding that “The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner’s face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt.”).

10. Memorandum from Daniel Levin, Acting Assistant Attorney General, to James B. Comey, Deputy Attorney General, Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004) [hereinafter Replacement Opinion].

interrogation of detainees. Rather than craft creative potential defenses, the Replacement Opinion states: “There is no exception under the [federal anti-torture] statute permitting torture to be used for a ‘good reason.’” Although it drops entirely the discussion of the claimed Commander-in-Chief authority to torture notwithstanding the statutory prohibition, the Replacement Opinion does not disavow that authority. Indeed, the Bush Administration has endorsed the same exceedingly broad view of presidential war powers in other contexts before and since. The definition of torture remains extremely narrow, and a footnote reassures recipients of earlier OLC advice—namely, the CIA—that the changes in analysis and tone do not affect the bottom line of prior OLC advice.

Congressional concern about the Bush Administration’s interrogation practices ultimately led to the enactment of the Detainee Treatment Act of 2005 (DTA) and the Military Commissions Act of 2006 (MCA). Through these laws, Congress prohibited the government from subjecting any person to torture or cruel, inhuman, or degrading treatment. Congress, however, acceded to the Bush Administration’s demands to limit dramatically the jurisdiction of the federal courts to hear claims that the government violated those prohibitions. For noncitizens whom the government imprisons outside of U.S. territory, the legality of the conditions of their confinement and interrogation depends more than ever on the executive branch’s internal decision-making processes.

### III. The Office of Legal Counsel

The Torture Opinion thrust into the public eye a previously obscure, though enormously influential, office within DoJ: the Office of Legal Counsel. The constitutional text and structure make plain the President’s obligation to act in conformity with the law and to ensure that all in the executive branch do the same. To fulfill their oath of office and obligation to “take Care that the Laws be faithfully executed,” presidents require a reliable source of legal advice. In recent decades, OLC has filled that role. Thus, OLC’s core function is to provide the legal advice the President—and by extension the entire executive branch—needs to faithfully execute the laws.

OLC functions as a kind of general counsel to the numerous other top executive branch lawyers who tend to send OLC their most difficult and consequential legal questions.<sup>11</sup> OLC’s staff of about two dozen lawyers (most of whom are career employees, led by several political appointees) responds to legal questions from the Counsel to the President, the Attorney General, the General Counsels of the various executive departments and agencies, and the Assistant Attorneys General for the other components of DoJ. Regulations require the submission of legal disputes between executive branch agencies to OLC for resolution. By virtue of regulation and tradition, 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).

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11. For discussions of OLC and the standards that should govern its work, see, e.g., Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105 (2004); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005); Symposium, *Executive Branch Interpretation of the Law*, 15 CARDOZO L. REV. 21 (1993).

OLC's advice, therefore, ordinarily must be followed by the entire executive branch, from the Counsel to the President and cabinet officers, to the military and career administrators, regardless of any disagreement or unhappiness. The President, however, may overrule OLC's advice through formal direction, or simply by declining to follow it. To take a quasi-hypothetical example, if the CIA wanted to use waterboarding to interrogate a detainee but DoJ's criminal division and the Department of State believed that doing so would be illegal, OLC would resolve that dispute. The CIA would be bound by an OLC conclusion that waterboarding was unlawful. The Attorney General or President 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. Of course, even if OLC were to find waterboarding lawful, the President or other appropriate officials could make the policy determination not to use it as a method of interrogation. The President or the Attorney General also could disagree with OLC's interpretation of the relevant law and prohibit waterboarding on legal grounds.

#### IV. Guidelines for OLC

Former OLC lawyers paid special attention when the Torture Opinion leaked. Many were deeply outraged and saddened by what they saw as a dramatic and dangerous deviation from the office's traditions of accurate and principled legal advice. These concerns inspired nineteen OLC alumni to coauthor a short statement of the core principles that should guide the formulation of legal advice regarding contemplated executive action. Their statement of ten principles, issued in December 2004 and entitled "Principles to Guide the Office of Legal Counsel" (Guidelines), affirmatively describes how OLC should function. They are aspirational in the sense that they describe best practices for the office, albeit practices that have not invariably been followed. Deviations undoubtedly can be found in many—possibly all—administrations, often on matters concerning presidential power during times of war or national emergency, when pressures against legal adherence are greatest. But the Guidelines also are realistic in the sense that they were drawn to reflect "the longstanding practices of the Attorney General and the Office of Legal Counsel, across time and administrations."<sup>12</sup>

##### A. OLC's Interpretive Stance: Accuracy Versus Advocacy

The Guidelines' first principle articulates OLC's appropriate interpretive stance when formulating advice to "guide contemplated executive branch action." Where the law is clear—that is, only one reasonable interpretation exists—virtually all would agree that the President must adhere to it. Questions typically end up at OLC, though, when what the law requires is not entirely clear and the White House or other executive branch officers care about the answer. In these cases, what should be OLC's interpretive stance? Should OLC follow an advocacy model, providing legal opinions that set forth the strongest plausible arguments supportive of the desired policies? Or should OLC strive for what it considers an accurate and honest appraisal of the relevant legal constraints?

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12. For all quotations from the Guidelines, *see supra* note 2.

The Guidelines come down squarely on the side of accuracy over advocacy, and most of its ten principles follow from and elaborate upon the Guideline's first and most fundamental principle:

“OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action.”

In short, OLC must be prepared to say “no” to the President. For OLC instead to distort its legal analysis to support preferred policy outcomes would undermine the rule of law and our democratic system of government. The Constitution expressly requires the President to “take Care that the Laws be faithfully executed.” This command cannot be reconciled with executive action based on preferred, merely plausible legal interpretations that support desired policies, rather than attempts to achieve the best, most accurate interpretations—especially when the enforcement of a statute is at stake. For OLC to present merely plausible interpretations framed as best interpretations would, as the Guidelines acknowledge, “deprive the President and other executive branch decisionmakers of critical information and, worse, mislead them regarding the legality of contemplated action.” Alternatively, if OLC gave such advice with a wink and a nod so that the President was not actually misled, OLC would be wrongfully empowering the President to violate his constitutional obligations.

Although OLC serves a role more akin to that of a judge than an advocate—and sometimes literally does resolve intra-branch disputes between parties on conflicting ends of a legal question—OLC's role is more complicated than that of a disinterested arbiter. OLC's charge is to help the President achieve desired policies in conformity with the law, and that often involves actively devising alternatives to a legally flawed proposal. Because the President makes the final call and bears ultimate responsibility for legal determinations as well as policy choices, OLC's advice should fully inform the President, as well as other readers, and address strong arguments counter to its conclusions. OLC lawyers, though, never properly inform the exercise of the President's “Take Care” obligation by misrepresenting what the law requires.

That the President should premise actions on the administration's best—and not merely plausible—interpretations of the relevant law is a relatively uncontroversial principle with strong bipartisan support, at least as a theoretical matter. Senators questioned Attorney General Alberto Gonzales, Deputy Attorney General Timothy Flanigan, and Acting Assistant Attorney General for OLC Steven Bradbury during their confirmation hearings about their views on the Guidelines, and they all indicated their general agreement.<sup>13</sup> In the weeks before President Bill

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13. See, e.g., *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 Gonzalez to questions from Senator Russell D. 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. If confirmed as Attorney General, I would work with the Assistant Attorney General for the Office of Legal Counsel to ensure that OLC continues to employ the practices necessary to meet the highest standards of legal analysis.”); *Confirmation*

Clinton assumed office, I personally conducted numerous interviews as part of the transition effort with current and former OLC lawyers, congressional staffers, and others who had worked with OLC. Virtually all, regardless of party or institutional affiliation, described the primary function of OLC as ensuring the legality of executive action, and they ranked the ability to say “no” to the President as an essential qualification for the job of heading OLC. The challenge is to ensure that the tradition of the office is upheld through standards and practices that encourage consistent adherence to this core principle. In short, the challenge is to avoid another Torture Opinion.

## B. Distinctive Attributes of Presidential Legal Interpretation

Presidential lawyers must further confront whether and how the executive branch may legitimately promote and act upon sincerely held, yet distinctive legal views. The Guidelines address some of the complexities that distinguish OLC interpretation from judicial interpretation, complexities that both allow for a measure of presidential interpretive independence and also impose special obligations on presidential legal interpretation. As the Guidelines state, at times “OLC’s legal analyses . . . should reflect the institutional traditions and competencies of the executive branch as well as the views of the President who currently holds office.” At other times, OLC “appropriately identifies legal limits on executive branch action that a court would not require” because “jurisdictional and prudential limitations do not constrain OLC as they do courts.” The President thus might be constitutionally obliged to refrain from taking a desired action even though a reviewing court would not enjoin the action.

In circumstances where executive action would likely encounter limited or no judicial review—as in the treatment of Guantanamo detainees, given the MCA’s limitations on jurisdiction—OLC’s review should not be limited to that which a court would perform. To the contrary, the President and OLC then have “a special obligation to ensure compliance with the law, including respect for the rights of affected individuals and the constitutional allocation of powers.” Without the possibility of judicial review and in the face of overwhelming secrecy, the legal rights of those affected—including their freedom from physical harm during interrogations—depend heavily on good faith efforts within the executive branch to ensure that all government actors adhere to legal constraints. The Bush Administration’s record raises grounds for serious concern about whether and how the Administration will enforce the MCA’s detainee protections. No serious question exists, though, about the President’s constitutional obligation to comply with them—or about OLC’s obligation to facilitate that compliance through its legal advice.

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*Hearing 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 Edward M. 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 to questions from Senator Patrick Leahy) (“The [Guidelines] generally reflect operating principles that have long guided OLC in both Republican and Democratic administrations.”).

Yet in some contexts, OLC’s legal analysis may appropriately favor desired executive action precisely because executive branch entities possess relevant expertise, or the President holds views on the legal issue presented. In some instances, this presents no direct conflict with the other branches’ legal views and expectations. To take one example, the courts routinely afford the executive branch *Chevron* deference in appropriate circumstances, including where Congress has not made its intent clear, and Congress is well aware of that practice.<sup>14</sup> Further, OLC typically and appropriately considers not only judicial precedent but also executive branch tradition and precedent in the form of Attorney General and OLC opinions, especially regarding separation of powers issues where judicial doctrine tends to be relatively scarce.

Far more suspect—and a more difficult subject of governing standards—are executive branch proposals premised on a legal view that flatly conflicts with the legal views of the Supreme Court or Congress. Presidents may disagree with prevailing judicial precedent or congressional sentiment, based on the advice of lawyers or their own legal understandings, and their alternative view may be principled and not merely policy driven. History provides interesting examples of presidents who openly sought to promote legal change. Prominent examples include Thomas Jefferson on the constitutionality of the Alien and Sedition Act of 1798, Abraham Lincoln on the *Dred Scott* decision,<sup>15</sup> Franklin Roosevelt on congressional authority to address the Great Depression, and Ronald Reagan on many of the great issues of the day, from abortion to criminal procedure to congressional power. I have argued elsewhere that the legitimacy of such presidential actions depends on the context and that chief among the relevant factors are the particular presidential power being exercised and the interpretive processes followed.<sup>16</sup> In formulating legal views, presidents and their advisors should always exercise principled deliberation, humility, and, as the Guidelines state, “due respect for the constitutional views of the courts and Congress.”

That presidents in at least some circumstances possess the authority to promote a distinctive legal view is beyond serious question and helps explain significant constitutional changes throughout U.S. history (some of them unquestionably for the better). Most clear, presidents may act on their own constitutional views, even counter to the Court’s interpretations, when exercising authority the Constitution assigns exclusively to them without limitation as to the reasons for the exercise of the authority. Presidents may exercise the veto or pardon powers based on policy preferences, which may include the desire to promote a preferred constitutional view. Also beyond dispute, presidents may publicly discuss their legal views, including their disagreement with the Court or Congress, and urge either of those bodies to change their views through litigation or legislation. And, as numerous presidents have, they may appoint federal judges likely to implement their view of the law. Those who disagree with a President’s substantive views of course remain free to oppose such efforts—in Congress, before courts, in public debate, and at the polls.

The Bush Administration’s claims go well beyond these widely accepted forms of advocacy and they threaten to tarnish the legitimacy of valuable and appropriate presidential

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14. *See Chevron v. NRDC*, 467 U.S. 837 (1984).

15. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

16. *See* Johnsen, *Functional Departmentalism*, *supra* note 11, at 120–34.

interpretive practices. For example, President Bush has come under severe and warranted attack for frequently refraining from vetoing bills he views as constitutionally objectionable and instead issuing signing statements in which he raises constitutional objections to legislative provisions while signing them into law. In response, the American Bar Association has issued a sweeping condemnation of not only President Bush's use of signing statements, but their use by past presidents as well.<sup>17</sup> Signing statements that announce the President's legal views or planned implementation of a law, however, provide the public with valuable information, which is especially rare and needed from the highly secretive Bush Administration. Critics should take care not to deter the appropriate use of signing statements as a form of presidential communication and should instead focus on evaluating the legal views expressed in the statements.<sup>18</sup>

President Bush's claims of authority to act on his own legal views have been particularly controversial and deservedly condemned because he has made them in a context traditionally suspect and rarely justified: the refusal to enforce a statute. In addition to asserting nonenforcement authority, President Bush often has stated that he will interpret statutory provisions to avoid conflicts with what he views as his office's constitutional authority.<sup>19</sup> President Bush's abuses notwithstanding, in relatively rare circumstances presidents do have the authority to refuse to comply with unconstitutional statutes. The easiest cases for nonenforcement authority involve statutory provisions that are clearly unconstitutional under applicable Supreme Court precedent. For example, despite the Court's ruling in *Chadha* to the contrary,<sup>20</sup> Congress persists in enacting clearly unconstitutional provisions (as parts of multi-provision legislation, which makes a veto more difficult) that require the executive branch to obtain approval from a single house of Congress or congressional committee before taking particular actions. Consistent with *Chadha*, presidents view such provisions as unconstitutional and do not comply with them; they typically treat the provisions instead as requiring mere reporting to the designated entity.<sup>21</sup>

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17. American Bar Association, *Task Force on Presidential Signing Statements and the Separation of Powers Doctrine* (Aug. 2006), available at [http://www.abanet.org/op/signingstatements/aba\\_final\\_signing\\_statements\\_recommendation-report\\_7-24-06.pdf](http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf).

18. See David Barron, Dawn Johnsen, et al., *Untangling the Debate on Presidential Signing Statements*, posting to Georgetown Law Faculty Blog (July 31, 2006), available at [http://gulcfac.typepad.com/georgetown\\_university\\_law/2006/07/thanks\\_to\\_the\\_p.html](http://gulcfac.typepad.com/georgetown_university_law/2006/07/thanks_to_the_p.html).

19. In its classic statement of the judicial canon of constitutional avoidance, the Supreme Court wrote, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Professors Trevor Morrison and H. Jefferson Powell both have raised important questions about whether the executive branch should continue in this way to aggrandize executive power through the use of the constitutional avoidance canon. See Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006); H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313 (2006).

20. See *INS v. Chadha*, 419 U.S. 919 (1983); Trevor Morrison, *The Canon of Constitutional Avoidance and Executive Branch Legal Interpretation in the War on Terror*, 1 ADVANCE: THE J. OF THE AM. CONST. SOC'Y ISSUE GROUPS 79 (2007).

21. See Neil Kinkopf, *Signing Statements and the President's Authority to Refuse to Enforce Law*, 3-4 (2006), available at <http://www.acslaw.org/node/2965>.

Presidential nonenforcement is far more problematic, and far less often justified, when the Court has not provided clear direction and the constitutional issue is susceptible to reasonable dispute. But even then, nonenforcement may be warranted in rare instances. In the most well-known and compelling example, President Thomas Jefferson refused to prosecute anyone under the Sedition Act of 1798 because he viewed the statute as unconstitutional. His judgment that the law violated the First Amendment was hotly contested at the time and the Supreme Court did not expressly resolve the dispute (ultimately in Jefferson's favor) until 163 years later. Thus, at times presidential nonenforcement protects the constitutional rights of individuals. Nonenforcement far more often arises when the President is self-interested: in the context of a law that infringes on presidential authority, or more precisely, what a sitting President views as presidential authority, as in President Bush's expansive claims of presidential power.

The Guidelines do not take a position on the legitimacy or scope of presidential nonenforcement authority and describe the issue as beyond the scope of the statement. The Guidelines simply acknowledge the traditionally very "rare" practice and address the "bare minimum" process the President should follow (the subject of the next section). In practice, presidents rarely have declined to enforce constitutionally objectionable statutes. Former U.S. Attorney General Benjamin Civiletti, who served in the Carter Administration, aptly observed that when the President is confronted with a constitutionally objectionable statute, "it is almost always the case that he can best discharge the responsibilities of his office by defending and enforcing the Act of Congress."<sup>22</sup> Factors that have supported nonenforcement include a constitutional defect that is clear (either on its face or under controlling judicial precedent), an encroachment upon presidential power, or a constitutional violation unlikely to be justiciable absent nonenforcement.<sup>23</sup> I have argued elsewhere that this practice of typically enforcing statutes that presidents find constitutionally dubious properly reflects respect for the constitutional views of Congress and the courts and for the legislative process: the veto and points earlier in the legislative process are when the President ordinarily should act on constitutional concerns.<sup>24</sup>

Because the Bush Administration is highly secretive, whether and to what extent President Bush actually has refused to comply with statutory provisions remains unknown. He has, however, asserted the right to refuse to enforce statutes far more frequently than any

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22. The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. Off. Legal Counsel 55 (1980) (memorandum from Attorney General Benjamin R. Civiletti) [*hereinafter* 1980 Civiletti Memorandum].

23. See 1980 Civiletti Memorandum, *supra* note 18, at 55; Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199 (1994) (memorandum from Assistant Attorney General Walter Dellinger). Under Presidents Ronald Reagan and George H.W. Bush, OLC at times described presidential nonenforcement authority in far more sweeping terms. See Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. Off. Legal Counsel 18 (1992) (memorandum from acting assistant attorney general Timothy E. Flanigan); Issues Raised by Foreign Relations Authorization Bill, 14 Op. Off. Legal Counsel 37 (1990) (memorandum from Assistant Attorney General William P. Barr).

24. See Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS 7 (2000). See also David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, 63 LAW & CONTEMP. PROBS. 61(2000); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1990); Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865 (1994); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

previous President. His vague and abbreviated explanations typically do not adequately inform Congress or the public about the precise nature of the alleged constitutional defect. Notwithstanding the extraordinary frequency of the assertions, the Bush Administration has never described the standards it follows in making nonenforcement decisions. The Torture Opinion in particular does not even acknowledge the profound challenges to the rule of law raised by presidential nonenforcement of statutes, let alone apply any limiting principles. Thus, what is known about the Bush Administration's approach to nonenforcement puts it far out of the mainstreams of presidential practice and legal thought.

### C. OLC's Interpretive Processes: Safeguards for the Rule of Law

As the Guidelines' first principle instructs, the paramount principle guiding OLC's work should be to provide accurate and honest legal appraisals, unbiased by policymakers' preferred outcomes. Several of the Guidelines' remaining principles recommend internal executive branch processes to help achieve this ideal. The detailed nature of these recommendations—which cover everything from the form that requests for advice should take,<sup>25</sup> to how many OLC Deputy Assistant Attorneys General should sign off on advice before it is finalized<sup>26</sup>—reflects the authors' strong conviction that regularized internal processes and mechanisms are critical to maintaining commitment to the first principle in the face of inevitable pressures to the contrary.<sup>27</sup>

The notion that, when assessing a proposed action, OLC should engage not in advocacy but in objective and accurate legal interpretation will not be intuitive to all observers (or to all new OLC attorneys) and therefore must be deliberately reinforced. Our law schools and legal culture teach that courts—not elected officials—are the appropriate neutral expositors of law. Indeed, many executive branch lawyers serving other functions appropriately do act as legal advocates for the government, including in court and in front of OLC.<sup>28</sup> Additionally, cynicism pervades public attitudes about the ability of political actors to interpret the law in a principled fashion, and the Torture Opinion and other legal positions taken by the Bush Administration in the “War on Terror” certainly have reinforced and deepened that cynicism. Lawyers now may come to the executive branch with a distorted view of OLC, knowing only that OLC issued the infamous Torture Opinion and sanctioned the Bush Administration's other highly controversial national security policies. OLC therefore would greatly benefit its new attorneys, as well as

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25. “Whenever possible, agency requests should be in writing, should include the requesting agency's own best legal views as well as any relevant materials and information, and should be as specific as circumstances allow.”

26. “Ordinarily OLC legal advice should be subject to multiple layers of scrutiny and approval; one such mechanism used effectively at times is a ‘two deputy rule’ that requires at least two supervising deputies to review and clear all OLC advice.”

27. “OLC should maintain internal systems and practices to help ensure that OLC's legal advice is of the highest possible quality and represents the best possible view of the law.”

28. As the Guidelines note, OLC's work may also involve other functions and the appropriate interpretive stance might vary accordingly. One common example: OLC at times assists DoJ litigating divisions in developing the government's litigating position. When defending acts of Congress, DoJ typically offers courts all reasonable arguments in their defense—even arguments that do not represent the best view of the law. OLC's advice in this context is not binding on others. The Guidelines provide that, whatever function it serves, OLC should always articulate precisely the nature of its advice: “OLC should be clear whenever it intends its advice to fall outside of OLC's typical role as the source of legal determinations that are binding within the executive branch.” “Client agencies expect OLC to provide its best view of applicable legal constraints and if OLC acts otherwise without adequate warning, it risks prompting unlawful executive branch action.”

potential OLC clients throughout the executive branch, by clearly articulating the principles that guide its work.

OLC also should make those standards available to the public, to inform Congress and the courts as they evaluate executive branch positions and to alert the press and public as they seek accountability. As the Guidelines state, “OLC can help promote public confidence and understanding by publicly announcing its general operating policies and procedures.” OLC’s failures during the Bush Administration and the resulting damage to OLC’s reputation have created a compelling need for clarification of the standards that actually govern OLC’s work. The Bush OLC’s excessive secrecy has compounded the damage to its reputation: because OLC has released shockingly few of its legal opinions, observers cannot assess the extent to which it adheres to best practices. The Guidelines provide a strong starting point, for they reflect what nineteen former OLC attorneys viewed as the best traditions of the office. Every presidential administration should either publicly embrace them or announce its own set of guidelines.

Perhaps most essential to avoiding a culture in which OLC becomes merely an advocate of the Administration’s policy preferences is transparency in the specific legal advice that informs executive action, as well as in the general governing processes and standards. The Guidelines state that “OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.” The Guidelines describe several values served by a presumption of public disclosure, beyond the general public accountability that accompanies openness in government. The likelihood of public disclosure will encourage both the reality and the appearance of governmental adherence to the rule of law by deterring “excessive claims of executive authority” and promoting public confidence that executive branch action actually is taken with regard to legal constraints. The Guidelines note as well that public discourse and “the development of constitutional meaning” may benefit from the executive’s important voice, valuable perspective and expertise.

Of the Guidelines’ ten principles, this call for transparency is perhaps the most controversial, as well as the most susceptible to substantially different applications even among those who endorse it. The Guidelines note that the Administration undoubtedly will possess strong, even compelling, reasons for keeping some OLC advice confidential. The classic example is to protect national security interests, such as where the release of an OLC opinion might reveal the identity of a covert agent. Less obvious perhaps, OLC also has a strong interest in not releasing opinions that would embarrass the administration—or more to the point, the individual or agency who requested the advice. As the Guidelines recognize, “For OLC routinely to release the details of all contemplated action of dubious legality might deter executive branch actors from seeking OLC advice at sufficiently early stages in policy formulation.” Policymakers should not have to fear public disclosure of their hastily conceived ideas for potentially unlawful action—that is, as long as they act lawfully. The public interest is served when government officials run proposals by OLC, and publication policy must not unduly deter the seeking of legal advice. Thus, the Guidelines state, “[o]rdinarily, OLC should honor a requestor’s desire to keep confidential any OLC advice that the proposed executive action would be unlawful, where the requestor then does not take the action.”

A hypothetical helps illustrate: Assume that in the immediate wake of the Oklahoma City bombing, the counsel to the President had asked OLC to consider several necessarily rough and hurriedly prepared proposals, among them whether the government could torture and unilaterally wiretap the leaders of right-wing militias suspected of planning future attacks, notwithstanding federal statutes apparently to the contrary. If OLC advised that the proposed actions would be unlawful and the White House accepted that advice and decided not to pursue the policies, there ordinarily would be relatively little need to publicly disclose the request or the advice and good reason to keep them confidential. If, however, OLC had interpreted the relevant law to allow the torture and warrantless wiretapping, the public would have a strong interest in knowing of that advice and seeing those opinions in an appropriate, timely manner.

The Guidelines describe the need for public disclosure as particularly strong whenever the executive branch does not fully comply with a federal statutory requirement. Although the Guidelines do not take a position on the legitimacy of presidential nonenforcement, they note its “rare” occurrence and call, at a “bare minimum,” for full public disclosure and explanation: “Absent the most compelling need for secrecy, any time the executive branch disregards a federal statutory requirement on constitutional grounds, it should publicly release a clear statement explaining its deviation.” The supporting legal analysis “should fully address applicable Supreme Court precedent.” As the Guidelines also note, Congress has enacted a law that requires the Attorney General to notify Congress if DoJ determines either that it will not enforce a statutory provision on the grounds the provision is unconstitutional or that it will not defend a statute against constitutional challenge.

The Bush Administration, of course, has not complied with this public notice standard and generally has operated in extraordinary secrecy. Its coercive interrogation policy provides one striking example. The Administration kept secret OLC’s determination that the President had the constitutional authority to violate the federal anti-torture statute. The public learned of the Torture Opinion only through a leak almost two years after OLC issued it. During that time, the Opinion was held out to the executive branch as a whole as the definitive legal interpretation and was used to silence those who objected to the use of extreme interrogation techniques.<sup>29</sup>

Given the Bush Administration’s propensity to claim that it is simply engaging in statutory interpretation when it in effect is claiming the authority to disregard a statute, Congress should amend the current notification requirement to extend beyond cases in which the executive branch acknowledges it is refusing to comply with a statute. Presidents should explain publicly not only when they determine a statute is unconstitutional and need not be enforced, but also whenever they rely upon the constitutional avoidance canon to interpret a statute. As Professor Trevor Morrison has explained, the most persuasive justification for allowing executive branch use of the avoidance canon—which promotes judicial restraint when used by courts—is to promote constitutional enforcement by requiring Congress to be clear about its intent when it comes close to a constitutional line. Executive use of the avoidance canon, like judicial use, protects constitutional norms by encouraging Congress to deliberate before coming close to

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29. See DEPARTMENT OF DEFENSE WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS (Apr. 4, 2003); Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, THE NEW YORKER, Feb. 27, 2006, at 32.

violating them. This justification, which has the effect of forcing Congress to reconsider legislation, depends entirely on the executive branch disclosing its concerns to Congress.<sup>30</sup>

But the Bush Administration has relied upon the avoidance doctrine in secret, depriving Congress of any opportunity to respond with clarifying legislation. Moreover, if the President fails to notify Congress when he refuses to comply with a statutory requirement, Congress—and the public—has little ability to monitor the executive branch’s legal compliance. President Bush’s frequent use of boilerplate, vague language in signing statements stating that he will interpret statutes consistent with his views of presidential powers does not provide genuine guidance about whether and how the President will enforce the provision.

Beyond the failure in transparency, the Torture Opinion did not adhere to some of the other best practices that the Guidelines advocate. For example, OLC appears to have acted contrary to the Guidelines’ suggestion that “whenever time and circumstances permit, OLC should seek the views of all affected agencies and components of the DOJ before rendering final advice.” OLC apparently either never solicited or outright ignored the advice of the Department of State and DoJ’s Criminal Division.

The Guidelines also caution that, “OLC typically should provide legal advice in advance of executive branch action, and not regarding executive branch action that already has occurred.” Otherwise, OLC will feel pressure not to opine that executive branch officials have engaged in unlawful activity. According to news reports, the CIA began using extreme interrogation methods, including waterboarding and cold cells, several months before OLC issued the Torture Opinion. If the Torture Opinion instead had concluded that these interrogations violated the federal anti-torture statute, the interrogators could have faced harsh criminal penalties; that knowledge could create understandable pressure on OLC to find no violation.

Related to this caution against post hoc advice, the Guidelines encourage executive branch “structures, routines and expectations . . . to help ensure that OLC is consulted, before the fact, regarding any and all substantial executive branch action of questionable legality.” OLC, for its part, “must be attentive to the need for prompt, responsive legal advice that is not unnecessarily obstructionist.” OLC’s advice often should not end with saying no to a proposed action, but should help the President and policymakers achieve objectives through alternative, lawful means. If instead OLC is perceived as unhelpful and unnecessarily negative, the President and others in the executive branch might avoid asking OLC about the legality of strongly desired policies.

## V. Conclusion

The proposition that the President’s own legal advisors can provide an effective constraint on unlawful action understandably engenders a high degree of skepticism. One of President Bush’s legacies undoubtedly will be the deepening of Americans’ cynicism about

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30. See Morrison, *supra* note 19; Trevor W. Morrison, *Executive Branch Avoidance and the Need for Congressional Notification*, *SIDEBAR: ONLINE PUBL. COLUM. L. REV.*, available at <http://clrsidebar.org/essays/executive-branch-avoidance>.

presidential adherence to the rule of law. Indeed, internal checks alone are insufficient; Congress and the courts must do their part, including encouraging appropriate executive branch practices. But we debase our commitment to democracy and justice if we do not view legal advice from within the executive branch as an essential component in efforts to safeguard civil liberties, the constitutional allocation of governmental authority, and the rule of law. We invite failure if we allow our cynicism to excuse presidential abuses as simply expected—in effect relieving presidents (and those who serve them) of their obligation to take care that the laws be faithfully executed, as the Constitution commands. Instead, we must work to develop standards and processes that promote fidelity to the rule of law. It is both possible and necessary for executive branch lawyers to constrain unlawful executive branch action.

Ultimately, though, the President's own attitude toward the rule of law ultimately will go a long way toward setting the tone for the Administration. If the President desires only a rubber stamp, OLC will have to struggle mightily to provide an effective check on unlawful action. In addition to being prepared to say no, therefore, presidential lawyers must be prepared to resign in the extraordinary event that the President persists in acting unlawfully or demands that OLC issue opinions to help legitimize unlawful activity. Even from within the Bush Administration, some cause for optimism can be found in reports of internal opposition to extreme interrogation policies and of the threatened mass Bush DoJ resignations over the unlawful domestic surveillance program. Commitment to the rule of law must not be a partisan issue. Congress, the courts and the public all should work to empower principled executive branch lawyers—in administrations of both political parties—to safeguard our constitutional democracy.