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Reforming the Office of Legal Counsel: Living up to Its Best Practices

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For decades, the Office of Legal Counsel (OLC) toiled in relative obscurity as the Justice Department component charged with providing authoritative legal advice to the White House and executive branch agencies. In 2004, however, the Office became the focus of much public scrutiny when a classified OLC memorandum justifying the use of torture leaked to the media.¹ After additional revelations surfaced that OLC had played a prominent role in secretly facilitating the George W. Bush administration's use of torture after the September 11, 2001, terrorist attacks, a public debate over how to reform OLC emerged. This debate was grounded in a widespread recognition that, even beyond facilitating an inhumane practice, OLC had transgressed its proper role by acting as an advocate to achieve the president's policy preferences, instead of providing a professional assessment of what the law requires and permits.² Seeking to prevent similar abuses from recurring, OLC over the next several years implemented a number of reforms, including the adoption of a memorandum outlining comprehensive best practices for the Office³ and a concerted effort to publish additional OLC opinions to enhance transparency.⁴

It's now 2020, and calls to reform OLC have resurfaced in light of criticism that the Office has facilitated unlawful conduct by the Trump administration by rendering opinions politically desirable but legally faulty. This criticism echoes concerns that arose more than fifteen years ago. Specifically, recent OLC advice on issues ranging from immigration policy to congressional oversight has provoked suspicion that OLC has again overstepped its proper role

¹ See Daniel Klaidman, *Palace Revolt*, NEWSWEEK (Feb. 5, 2006).

² See, e.g., Dawn Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1583 (2007) ("In what unmistakably is an advocacy piece, OLC abandoned fundamental practices of principled and balanced legal interpretation.").

³ Memorandum from David Barron, Acting Assistant Attorney Gen., Office of Legal Counsel, to Attorneys of the Office (July 16, 2010) [hereinafter *2010 Best Practices*].

⁴ See *id.* at 5; see also Supplemental Op. O.L.C., Vol. 1 (2013).

as an objective purveyor of legal advice based on its best view of the law—an issue that the best practices and other changes adopted fifteen years ago were supposed to have corrected.

This paper addresses a seemingly simple question: Why have past attempts to reform OLC failed—or, at a minimum, failed to become permanent? Although answering that question is more complex than it may initially seem, this paper seeks to provide a starting point by drawing on existing scholarship as well as my own experience as an OLC Attorney-Adviser from 2013 to 2017. Part I provides necessary context by describing OLC’s unique role as the primary source of authoritative legal advice and constitutional interpretation within the executive branch and explaining OLC’s duty to render candid, professional legal advice based on its best view of the law. This part notes, however, that OLC’s position within the democratically accountable executive branch is necessarily in tension with a conception of OLC decision making that requires the Office to be wholly independent from the administration that it serves. Part II then addresses difficult issues that arise in any discussion of reforming OLC, explaining how various constitutional and institutional impediments unique to OLC can act as obstacles to long-lasting reform. Finally, Part III suggests a path forward and concludes that any change must come from within OLC, and—like many other aspects of our government—will be only as effective and long-lasting as the good faith of the president, the attorney general, and the head of OLC allows.

I. OLC’s Unique Role within the Executive Branch

A necessary predicate to any discussion of reforming OLC is an understanding of OLC’s responsibilities and the nature of its work. OLC has long played a crucial role as the primary source of authoritative constitutional interpretation and legal advice for the executive branch, duties that are both constitutionally and statutorily grounded. At its best, OLC strives to provide reasoned, professional legal advice based on its best view of what the law requires, even when doing so results in telling the administration that it cannot pursue its preferred course of action. To be sure, as part of the democratically accountable executive branch, the Office when rendering advice may take into account the policy preferences of the administration that it serves to the extent the law makes room for those preferences to shape outcomes. But OLC transgresses its proper role when it acts as an advocate or provides legal justifications for policy decisions that are merely plausible or arguable, as opposed to grounded in a principled reading of the law.

A. OLC’s Constitutional and Statutory Functions

OLC’s responsibilities ultimately derive from the Constitution. Article II of the Constitution mandates that the president “take Care that the Laws be faithfully executed.”⁵ This provision grants the president substantial authority to execute the laws, but also imposes a limitation that the president do so faithfully. The requirement to execute the laws “faithfully”

⁵ U.S. Const. art. II, § 3.

suggests that the president must satisfy himself that the actions he takes are in fact lawful. To aid him in fulfilling this responsibility, the Constitution authorizes the president to “require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”⁶

Congress has assigned this opinion-writing function on legal matters to the attorney general,⁷ who in turn has delegated this authority to OLC.⁸ OLC’s statutory opinion-writing function can be traced back to the Judiciary Act of 1789, which provided that the attorney general shall “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.”⁹ Until the formal creation of OLC in 1950, this function was performed either by the attorney general himself or by various officials in the Office of the Solicitor General.¹⁰

Today, OLC is “the most significant centralized source of legal advice within the Executive Branch.”¹¹ For the most part, nothing obligates the president or executive branch agencies to seek OLC’s advice before taking action, and the White House Counsel’s Office or agency general counsels often answer routine legal questions for themselves without consulting OLC.¹² But, as a practical matter, OLC is almost always consulted on major issues of executive power and difficult questions of constitutional or statutory interpretation that have not been (and in many cases cannot be) answered by the courts. By longstanding tradition, its advice is treated as binding unless overruled by the attorney general or the president,¹³ which is “an exceedingly rare occurrence.”¹⁴

⁶ *Id.* § 2.

⁷ 28 U.S.C. §§ 511, 512.

⁸ 28 C.F.R. § 0.25.

⁹ Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 (Sep. 24, 1789). These responsibilities have since been codified at 28 U.S.C. §§ 511, 512.

¹⁰ Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 710 (2005).

¹¹ Trevor Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1451 (2011).

¹² *But see* Exec. Order No. 12146 § 1-4, 3 C.F.R., 409 (1979) (providing for the resolution of interagency disputes by the attorney general, authority which has been delegated to OLC under 28 C.F.R. § 0.25); Exec. Order No. 11030 § 2, 3 C.F.R., 610 (1959-1963) (providing that the attorney general must review and approve for form and legality executive orders and presidential proclamations, authority which has been delegated to OLC under 28 C.F.R. § 0.25).

¹³ Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1320 (2000) (“[E]xecutive branch agencies have treated Attorney General (and later Office of Legal Counsel) opinions as conclusive and binding since at least the time of Attorney General William Wirt” in the early 1800s.).

¹⁴ Johnsen, *supra* note 2, at 1577.

OLC advises the White House and executive branch agencies in a wide variety of areas. Most prominently, OLC responds to questions about the legality and constitutionality of executive branch conduct and resolves legal disputes between agencies. This advice can take the form of formal written opinions or can be provided informally on a shorter timeline. OLC is also charged with reviewing and approving executive orders, proclamations, and presidential memoranda for form and legality. In addition, it reviews pending legislation for constitutional problems, resulting in “bill comments” that may be transmitted informally to Congress or, at times, included in statements of administration policy or signing statements that accompany the president’s signature on a bill. Finally, the Office plays a significant role in advising on contemplated assertions of executive privilege and related oversight issues. OLC traditionally adheres to a form of internal *stare decisis*, under which the Office is bound by its own prior decisions.¹⁵ However, OLC’s advice in all of these areas often addresses questions of first impression. Sometimes, justiciability or other threshold judicial doctrines prevent courts from reaching these issues; therefore, OLC may have the first and last word on these questions.

B. OLC’s Duty to Provide Candid, Independent, and Principled Legal Advice

A long-running debate exists about the nature of executive branch legal interpretation and OLC’s proper role as the chief constitutional expositor for the executive branch. Although much has been written on this topic,¹⁶ this paper does not attempt to recapitulate each theory or articulate an optimal decision-making process for OLC. Instead, it suffices to say that scholars, OLC alumni, and OLC itself have broadly agreed that “OLC must always give candid, independent, and principled advice—even when that advice is inconsistent with the aims of policymakers.”¹⁷ Certainly, “the Constitution mandates that the Executive branch interpret and

¹⁵ Morrison, *Stare Decisis*, *supra* note 11.

¹⁶ See, e.g., Johnsen, *supra* note 2; Pillard, *supra* note 10; Morrison, *Stare Decisis*, *supra* note 11; Moss, *supra* note 13; John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375 (1993); Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437 (1993); Douglas W. Kmiec, *OLC’s Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337 (1993).

¹⁷ 2010 *Best Practices*, *supra* note 3, at 1; see also [Memorandum](#) from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to Attorneys of the Office, 1 (May 16, 2005) [hereinafter *2005 Best Practices*] (“Over the years, OLC has earned a reputation for giving candid, independent, and principled advice—even when that advice may be inconsistent with the desires of policymakers.”); [Statement](#) from Walter Dellinger et al., former Office of Legal Counsel attorneys, *Principles to Guide the Office of Legal Counsel*, at 1 (Dec. 21, 2004) (“OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration’s pursuit of desired policies.”); Moss, *supra* note 13 at 1316 (“[T]he duty of the executive branch lawyer to provide the best, as opposed to a merely colorable, view of the law to his or her client is plain.”); Johnsen, *supra* note 2 at 1595 (“[T]he paramount principle that should guide OLC’s work is the imperative to provide accurate and honest legal appraisals, unbiased by policymakers’ preferred outcomes.”).

apply the law – no less than the courts – as objectively and accurately as possible.”¹⁸ OLC, therefore, often describes its duty as providing its “best view” of the law.¹⁹ This is not to suggest that there is always one objectively “best” interpretation of the law; more than one compelling or persuasive position may exist on any given question, particularly on the complex questions of first impression that OLC often considers. Instead, when OLC provides its own “best view” of the law, it seeks to “provide advice based on its best understanding of what the law requires – not simply an advocate’s defense of the contemplated action or position proposed by an agency or the Administration.”²⁰ Indeed, “OLC has long espoused a commitment to acting on its best understanding of the law, and the institutional culture of the office reflects that deeply rooted commitment.”²¹

It is also widely understood, however, that, by virtue of its position in the executive branch, OLC is accountable to the president and the attorney general. In addition to being situated within a democratically accountable administration, OLC is led by an assistant attorney general who is presidentially appointed and Senate confirmed, and four of its five deputies are also presidentially appointed. OLC therefore cannot render advice wholly independent from the administration in the manner of an Article III court.²² Accordingly, in forming its “best view” of the law, OLC should be expected to take into account the policy preferences of the administration to some extent, although those preferences should never be dispositive.²³ It should be acceptable, for example, for OLC to facilitate the president’s policy goals by providing legally sound alternatives if it deems an initial proposal to be unlawful.²⁴

For similar reasons, OLC’s advice at times may appropriately reflect institutional considerations unique to the executive branch. As Trevor Morrison has explained,

OLC’s best view of the law . . . reflects the fact that it is located within the executive branch and that it accords special weight to certain executive sources of legal meaning.

¹⁸ Moss, *supra* note 13, at 1321.

¹⁹ *Id.* at 1316.

²⁰ *2010 Best Practices*, *supra* note 3, at 1.

²¹ Trevor Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1693 (2011).

²² See, e.g., Statement from Walter Dellinger et al. *supra* note 17, at 3 (“OLC’s work should reflect the fact that OLC is located in the executive branch and serves both the institution of the presidency and a particular incumbent, democratically elected President in whom the Constitution vests the executive power.”); JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGEMENT INSIDE THE BUSH ADMINISTRATION 34-35 (2009) (similar).

²³ Morrison, *Stare Decisis*, *supra* note 11, at 1456 (“OLC’s best view of the law . . . reflects the idea that, as an office within the Executive Branch, OLC views the law through a particular lens, and thus that its best view of the law might legitimately differ on some issues from that of a differently situated actor.”).

²⁴ See Moss, *supra* note 13, at 1327-1329; Johnsen, *supra* note 2, at 1581-1582.

That, in turn, means that at least on close questions, OLC's views may legitimately tilt in a more pro-executive direction than those of a court or a legislative lawyer.²⁵

Therefore, for example, on rare occasions, OLC's advice will form the basis of presidents' decisions to "act on their own understanding of constitutional meaning (just as Congress at times enacts laws based on its own constitutional views)."²⁶ Such decisions, which can properly be grounded in a desire to protect executive branch prerogatives, can range from a choice to veto a bill that the president believes is unconstitutional to the rarer and more controversial circumstance in which the president declines to enforce what he deems to be an unconstitutional statute.²⁷

OLC, however, exceeds the bounds of any legitimate conception of its role when it allows partisan or political considerations to overcome principled, objective legal reasoning. OLC should not play the role of an advocate for the administration's policies, nor should it adopt a merely colorable reading of the law to reach a desired outcome. Calls for reform are therefore warranted if OLC employs "a jurisprudence of mere political expedience, engaging in . . . opportunistic, situational constitutionalism through which lawyers advance whatever arguments support the president's immediate agenda."²⁸

II. Challenges of Reforming OLC

Ensuring that OLC consistently meets the highest standards for objective, candid, and professional legal advice can be challenging. Make no mistake: OLC is staffed by career legal professionals of the utmost integrity and ability, many of whom have devoted the majority of their careers to living up to the highest standards of executive branch legal interpretation. But at times the Office, led by political officials, has veered too far toward a model that exalts achieving the president's political goals over principled legal analysis. OLC's justification of the George W. Bush administration's use of torture after September 11th is the most prominent example. Although several changes were adopted in the aftermath of those revelations to help ensure that OLC makes decisions based on its best view of what the law requires instead of politics, both constitutional doctrine and institutional culture pose obstacles to ensuring that such reforms will be permanent or uniformly accepted across administrations.

A. Reforms to OLC After the Torture Memos

When OLC memoranda justifying the Bush administration's use of torture came to light in 2004, OLC was roundly criticized for "abandon[ing] fundamental practices of principled and balanced legal interpretation" to justify the administration's desired, unlawful outcome.²⁹

²⁵ Morrison, *Constitutional Alarmism*, *supra* note 21, at 1717.

²⁶ Statement from Walter Dellinger et al. *supra* note 17, at 3.

²⁷ *Id.*

²⁸ Pillard, *supra* note 10, at 717.

²⁹ Johnsen, *supra* note 2, at 1583.

Indeed, the Justice Department’s Office of Professional Responsibility ultimately concluded that the assistant attorney general and deputy assistant attorney general primarily responsible for the memoranda committed professional misconduct when they failed to “exercise independent legal judgment and render thorough, objective, and candid legal advice.”³⁰ OLC had withdrawn some of these opinions during the Bush administration,³¹ and in 2009, OLC withdrew several additional ones that remained on the books.³²

In the wake of those failings, OLC implemented several changes signaling a recommitment to the highest ideals of executive branch legal interpretation. Most prominently, it published a set of best practices to guide its work. In 2005, OLC adopted the first iteration of this document, which focused principally on the formal opinion-writing process.³³ Five years later, under the Obama administration, OLC revised and expanded this memorandum to announce a comprehensive suite of principles and operating procedures.³⁴

The 2010 best practices memorandum begins by articulating general principles to guide the Office in all of its work, including reiterating OLC’s commitment to “provid[ing] an accurate and honest appraisal of applicable law, even if that appraisal will constrain the Administration’s or an agency’s pursuit of desired practices or policy objectives.”³⁵ The memo further makes clear that doing so includes “candidly and fairly address[ing] the full range of relevant legal sources and significant arguments on all sides of a question” and “focusing on traditional sources of constitutional meaning” when answering constitutional questions.³⁶ These principles acknowledge that “OLC’s analyses may appropriately reflect the fact that its responsibilities also include facilitating the work of the executive Branch and the objectives of the President,” but that “its legal analyses should always be principled, forthright, as thorough as time permits, and not designed merely to advance the policy preferences of the President or other officials.”³⁷

With respect to opinion preparation, the 2010 guidance commits to several procedural protections designed to safeguard OLC’s independence in the opinion-writing process, including ensuring at the outset that the question presented is concrete and warrants a written opinion from the Office; soliciting and considering the views of interested agencies;

³⁰ U.S. DEP’T OF JUSTICE, OFF. OF PROF. RESP., [REPORT: INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS](#), at 11 (July 29, 2009).

³¹ See GOLDSMITH, *THE TERROR PRESIDENCY*, *supra* note 22, at 141-162.

³² [Memorandum](#) from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel to Eric Holder, Attorney General (Apr. 15, 2009).

³³ *2005 Best Practices*, *supra* note 17.

³⁴ *2010 Best Practices*, *supra* note 3.

³⁵ *Id.* at 1.

³⁶ *Id.* at 2.

³⁷ *Id.*

collaboration between OLC attorney-advisers and deputies during the research and drafting process; and requiring that two deputies review and approve a draft opinion before it is finalized and signed.³⁸

Finally, the memo concludes by acknowledging the importance of transparency and the role that publishing the Office’s opinions plays in enhancing accountability and furthering public understanding of OLC’s work. The memo therefore announces a “presumption that [OLC] should make its significant opinions fully and promptly available to the public.”³⁹

This memorandum has not been rescinded or updated since it was issued in 2010, and it remains on OLC’s website to this day.⁴⁰ However, as discussed below, serious questions recently have arisen regarding OLC’s adherence to the principles set forth in this memorandum.

B. Barriers to Long-Lasting Reform

Now, more than a decade after OLC implemented the best practices described above, some commentators are urging that OLC is in need of reform yet again, claiming that the Office has abandoned its best view of the law and other best practices to facilitate unlawful conduct by the Trump administration. In particular, critics have raised significant questions regarding the legal basis for OLC’s approval of several controversial Trump administration actions. They have pointed to, for example, OLC’s approval of President Trump’s travel ban,⁴¹ OLC’s opinion justifying withholding the president’s tax returns from Congress,⁴² and OLC’s conclusion that the administration was not required to transmit to Congress a whistleblower complaint alleging that President Trump had asked Ukraine to investigate his political opponent.⁴³

The merits of these criticisms are beyond the scope of this paper. But assuming that OLC’s recent work on these and other issues has fallen short of the Office’s best practices, it raises an obvious question: Why don’t the previous reforms appear to have lasted? The short answer is that both constitutional doctrine and institutional culture pose obstacles to ensuring that such reforms will be permanent or uniformly accepted across administrations.

³⁸ *Id.* at 2-4.

³⁹ *Id.* at 5.

⁴⁰ See U.S. DEP’T OF JUST., *BEST PRACTICES FOR OLC LEGAL ADVICE AND WRITTEN OPINIONS* (2014).

⁴¹ Benjamin Wittes, *Malevolence Tempered by Incompetence: Trump’s Horrifying Executive Order on Refugees and Visas*, LAWFARE (Jan. 28, 2017) (“This order reads to me, frankly, as though it was not reviewed by competent counsel at all.”).

⁴² Shalev Roisman, *The Real Decline of OLC*, JUST SECURITY (Oct. 8, 2019) (citing the tax-return opinion as an example of how “OLC’s legal analysis has fallen short of what we might expect from an office seeking to provide the ‘best understanding of what the law requires’”).

⁴³ Mark Joseph Stern, *An Unaccountable Office Crafted a Secret Law to Conceal the Whistleblower Complaint*, SLATE (Sept. 23, 2019) (“Under Attorney General William Barr and Assistant Attorney General Steven Engel, who is in charge of the OLC, the office has created a legal rationale for Trump’s agenda while shielding that same rationale from scrutiny.”).

1. Constitutional impediments

As an initial matter, although bills aimed at reforming OLC have been proposed not infrequently,⁴⁴ separation-of-powers principles are significant roadblocks to the success of any such legislation. In particular, the executive branch has opposed and will likely continue to oppose on constitutional grounds any legislation that would micromanage OLC's internal decision making, purport to regulate how the president receives counsel from his advisers, or mandate the disclosure of legal advice.

Specifically, bedrock "separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties."⁴⁵ As explained above, Article II of the Constitution expressly mandates that the president "take Care that the Laws be faithfully executed"⁴⁶ and, to facilitate the performance of that function, authorizes the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."⁴⁷ Any congressional attempt to place parameters on the way the president's cabinet delivers those opinions, or that would affect the advice that the president requires to faithfully execute the laws, would raise substantial questions regarding encroachment on these core Article II functions. In addition, to the extent legislation mandated the disclosure of certain opinions, it would likely raise concerns about congressional encroachment on the president's authority to control executive branch information, particularly legal advice that may be privileged.⁴⁸

It is therefore at least an open question whether Congress through legislation could mandate reforms to OLC's internal processes or require the release of opinions. For these reasons, OLC and the Justice Department have opposed such legislation in the past,⁴⁹ and it seems probable that similar bills will not receive executive branch support going forward. This

⁴⁴ See, e.g., OLC Reporting Act of 2008, S. 3501, 110th Cong. (2008); DOJ OLC Transparency Act, S. 3334, 116th Cong. (2020); See UNdisclosed Legal Interpretations and Get Honest Transparency Act of 2019, H.R. 4556, 116th Cong. (2019).

⁴⁵ *Loving v. United States*, 517 U. S. 748, 757 (1996).

⁴⁶ U.S. Const. art. II, § 3.

⁴⁷ *Id.* § 2.

⁴⁸ See, e.g., *United States v. Nixon*, 418 U.S. 683, 708 (1974) (recognizing "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking" and explaining that "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately"); *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (explaining that "the deliberative process privilege . . . allows the government to withhold documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated" (internal quotation marks omitted)).

⁴⁹ See, e.g., Letter from Michael B. Mukasey, Attorney General, to Harry Reid, Majority Leader, United States Senate (Nov. 14, 2008).

well-entrenched position, designed to protect the executive branch’s institutional interests, means that reform through legislation is most likely not a viable option.

2. Internal OLC and executive branch dynamics

Accordingly, as in the past, any meaningful reforms to OLC likely need to be driven by the Office itself. For the most part, OLC’s important and longstanding “cultural norms”⁵⁰ consistently “prize independence and professional integrity . . . and require OLC to provide legal advice based on its best view of the law.”⁵¹ But, as explained below, OLC’s unique internal dynamics sometimes can make adhering to best practices challenging even in the best of administrations—and can cause a significant breakdown of norms in less-scrupulous ones.

Political Leadership. First and foremost, as mentioned above, OLC is situated within a democratically accountable branch of government and the vast majority of its leadership is politically appointed. Not only does this mean that OLC’s leadership may arrive at the Office more politically attuned to the president’s agenda, but it also means that, to the extent they have not previously served in OLC, they may not be steeped in the Office’s traditions and norms, including its best practices.

This dynamic may be exacerbated by the fact that the majority of OLC’s career staff are relatively junior attorneys whose tenure lasts an average of two to three years. To be sure, the Office also employs a handful of more senior attorneys who have spent significant portions of their careers at OLC and who play a crucial role in maintaining the Office’s traditions and norms across administrations. But those attorneys often are not making the final decisions, and the combination of politically appointed leadership and high staff turnover at the lower levels does not always provide the most effective buffer against political pressure.⁵²

Influence. Compounding these pressures is the reality that, “[l]ike all accommodating lawyers, OLC is eager to please its clients so that it can both maximize its own business and ‘stay in the loop.’”⁵³ Because, for the most part, the White House and executive branch agencies are not required to seek OLC’s advice, OLC occupies “an institutionally fragile position within

⁵⁰ GOLDSMITH, *THE TERROR PRESIDENCY*, *supra* note 22, at 37.

⁵¹ Morrison, *Constitutional Alarmism*, *supra* note 21, at 1693.

⁵² This dynamic at OLC is longstanding and in some ways makes OLC an aberration within the Justice Department. Contrasting OLC with the Office of the Solicitor General, John McGinnis explained in 1993 that OLC’s “large turnover is one of the important reasons that each Assistant Attorney General has the opportunity to appoint a greater proportion of his own staff than the Solicitor General and thus build an office whose members generally share his and the administration’s general jurisprudence. This is one reason that the Office has a culture that tends to take the jurisprudential concerns of the President more seriously than does the Office of the Solicitor General.” McGinnis, *supra* note 16, at 425.

⁵³ Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 515 (1993).

the executive branch.”⁵⁴ In short, “the more critically OLC examines executive conduct, the more cautious its clients are likely to be in some cases about seeking its advice.”⁵⁵

This situation thus creates an undeniable incentive to provide the White House and client agencies with favorable advice—which might not always comport with OLC’s best view of the law—lest the Office be cut out of future decision making. Indeed, OLC is not the only source of legal advice in the executive branch: The White House can always seek counsel from its own lawyers in the White House Counsel’s Office or the general counsels of various agencies.⁵⁶ And particularly in the national security realm, OLC in recent years (or at least during the Obama administration) found itself vying for influence with other lawyers in the interagency lawyers group that was established to advise the White House on such issues.⁵⁷

Legitimacy. Relatedly, OLC’s legitimacy depends largely on the willingness of the White House and executive branch agencies to follow its advice. But the president and the attorney general are free to ignore or overturn OLC’s advice when they disagree with the Office’s analysis. Moreover, OLC’s advice is binding on executive branch agencies only by tradition, and no formal consequences result if it is not followed. This fact puts the Office in a precarious position, creating a risk that saying no too often will lead agencies simply to ignore OLC’s counsel. It therefore can create even more pressure to tailor advice according to the president’s or client agency’s preferred outcome rather than to OLC’s best view of the law.

Pro-Executive Drift. OLC’s tendency to view legal issues through a pro-executive lens can also affect its ability to render objective legal advice. As discussed above, OLC does not dispense legal advice in a vacuum, wholly divorced from its institutional position in the executive branch. To some extent, OLC has developed a generally pro-executive worldview, which often manifests in “a special mandate to ensure that the legislative branch does not encroach on executive function.”⁵⁸ To be sure, as explained above, being particularly sensitive to executive branch interests in separation-of-powers disputes is not necessarily an impermissible posture for OLC to take, given its position within the executive branch. However, the incremental nature of OLC decision making means that what might start as an arguably reasonable thumb on the scale for the executive can evolve gradually into an extreme

⁵⁴ Pillard, *supra* note 10, at 713.

⁵⁵ *Id.* at 717.

⁵⁶ See Jack Goldsmith, *The Decline of OLC*, LAWFARE (Oct. 28, 2015).

⁵⁷ See Jack Goldsmith, *More on the Decline of OLC*, LAWFARE (Nov. 3, 2015); see also Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 837-842 (2017); Trevor Morrison, *Libya, “Hostilities,” the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. FORUM 62 (2011).

⁵⁸ Kmiec, *supra* note 16, at 340; see GOLDSMITH, *THE TERROR PRESIDENCY*, *supra* note 22, at 36 (“OLCs of both parties have always held robust conceptions of presidential power.”).

version of the Office’s initial position.⁵⁹ In this manner, OLC’s advice can drift away from what should be its best view of the law in favor of a default rule defending the executive branch’s institutional interests unless the Office is particularly vigilant.

Fact Finding. At times, OLC’s ability to provide accurate, objective legal advice depends on the good faith of the president or agency officials. An office of legal generalists, OLC is not equipped to find its own facts or perform an overly rigorous independent vetting of the facts provided to it.⁶⁰ It therefore often relies on the White House or executive branch agencies with subject-matter expertise for the factual predicate of its legal analysis. In some circumstances, certain facts are dispositive of whether the president may take a desired action. For example, the president may not invoke various emergency authorities unless he determines that specific facts are true.⁶¹ When this is the case, if the underlying factual determination is untrue or inaccurate, the exercise of authority is unlawful.

Such authorities are generally invoked through executive orders or proclamations, which OLC reviews for form and legality. When, during its review of those documents, OLC accepts a required factual finding wholly at face value, its ability to provide its own best view of the law is at the mercy of the good faith and accuracy of the president’s factual representation.⁶² Although deferring to a president’s or agency’s factual findings might be reasonable in some (or even most) circumstances, factual assertions made in bad faith can undermine OLC’s ability to live up to its best practices.⁶³

Disclosure of Opinions. Finally, the fact that the vast majority of OLC’s work is never made public means that the Office does not always benefit from an external check on its actions. As OLC itself has recognized, publishing its opinions

further the interests of Executive Branch transparency, thereby contributing to accountability and effective government, and promoting public confidence in the legality of government action. Timely publication of OLC opinions is especially important where the Office concludes that a federal statutory requirement is invalid on constitutional grounds and where the Executive Branch acts (or declines to act) in

⁵⁹ See, e.g., Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981-2000*, 89 DENVER U. L. REV. 197 (2011) (tracing OLC’s development of the unitary executive theory over twenty years).

⁶⁰ See Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825, 877 (2019) (observing that “there does not appear to be any formal process requiring articulation of or sign-off on the facts that underlie the exercise of authority” in executive orders invoking presidential authority).

⁶¹ See, e.g., 47 U.S.C. § 606(c) (authorizing the president to invoke emergency authorities to suspend radio communications if the president proclaims “there exists war or a threat of war, or a state of public peril or disaster or other national emergency”).

⁶² See generally Roisman, *supra* note 42.

⁶³ The first version of President Trump’s Travel Ban appears to be a prominent example of this phenomenon. See *id.* at 876-877.

reliance on such a conclusion. In such situations, Congress and the public benefit from understanding the Executive's reasons for non-compliance, so that Congress can consider those reasons and respond appropriately, and so that the public can be assured that Executive action is based on sound legal judgment and in furtherance of the President's obligation to take care that the laws, including the Constitution, are faithfully executed.⁶⁴

Although OLC's best practices memo establishes a presumption that opinions will be published for these reasons, OLC may resist disclosure because making its work public can be a double-edged sword. OLC opinions may contain privileged, classified, or other sensitive information. And more generally, the ability to obtain confidential legal advice and the candid exchange of information are central to effective executive branch decision making. As the Supreme Court has long recognized, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."⁶⁵ But as noted above, OLC is not the only source of legal advice within the executive branch. If OLC's advice were consistently subject to public disclosure, even on sensitive or privileged topics, the White House and other executive branch actors may well forgo OLC's counsel altogether, in favor of other offices that receive less public scrutiny, such as the White House Counsel's Office or agency general counsel's offices.

III. A Path Forward?

At bottom, any reform of OLC will be only as good as the good faith of the incumbent administration allows. Such good faith includes a willingness of the administration to accept legal constraints on its actions and a commitment to working with OLC and other executive branch lawyers to craft policies that hew closely to the best view of the law as interpreted by OLC and the attorney general.

Nonetheless, OLC can take several actions itself to attempt to cement best practices and norms, making them more difficult to violate in the future. As an initial matter, OLC's political leadership should make it a priority to update and publicly reaffirm the Office's best practices at the start of each new administration. Doing so would send a strong message to the Office that complying with its best practices is central to what it means to be an attorney at OLC. It would also provide the public with a greater and more up-to-date understanding of how OLC operates and reassure outside observers that OLC remains committed to providing the highest-quality, principled, and objective legal advice, backed up with procedures that safeguard the integrity of the decision-making process. This periodic renewal of best principles, combined with a meaningful commitment to publishing OLC opinions whenever possible, would go a

⁶⁴ 2010 *Best Practices*, *supra* note 3.

⁶⁵ *United States v. Nixon*, 418 U.S. 683, 705 (1974).

long way toward inculcating a culture of transparency and accountability within the Office.⁶⁶ Indeed, the American Constitution Society in its recent report *The Office of Legal Counsel and the Rule of Law* has proposed several important principles that a new administration should consider including in any such document, as well as additional steps OLC should take to correct course and ensure that it lives up to the highest ideals of executive branch legal interpretation.⁶⁷

Moreover, as *The Office of Legal Counsel and the Rule of Law* also recommends, OLC would benefit from updating its memorandum on general separation-of-powers principles, *The Constitutional Separation of Powers Between the President and Congress*,⁶⁸ which has guided lawyers in the Office for more than two decades. Not only would doing so ensure that OLC's advice on these issues reflects the most current Supreme Court doctrine, but also it would help OLC identify and correct the "pro-executive drift" described above, which has pervaded some of OLC's recent opinions in this area. A recommitment to accepted separation-of-powers principles—which includes a recognition and respect for the prerogatives of the coequal branches—is crucial to OLC's ability to provide reasoned, accurate advice based on its best view of the law.

To be sure, some will be skeptical about OLC's ability to reform itself, especially in light of past experience. But some of the same internal dynamics of the Office and the executive branch described above can actually enhance, rather than discourage, OLC's adherence to best practices in an administration that operates in good faith. For starters, an OLC that consistently provides candid, independent, and principled legal advice based on its best view of the law will be in demand by executive branch officials who take seriously the Constitution's mandate to faithfully execute the laws. As former Assistant Attorney General Randolph D. Moss put it,

there are strong prudential reasons for the . . . Office of Legal Counsel to strive to find the best view of the law, rather than to accept (and endorse) any reasonable argument that promotes the goals and interests of the President and his senior policy advisers. Objectivity and balance are the currency of . . . the Office of Legal Counsel.⁶⁹

Relatedly, the more OLC is perceived as a rubber stamp for high-profile and controversial administration practices—particularly when the underlying legal analysis may be questionable—the more its legitimacy takes a hit.⁷⁰ Recognizing this cause-and-effect relationship should lead OLC to take a hard look at its role in recent controversies and recalibrate its decision-making process going forward.

⁶⁶ See, e.g., McGinnis, *supra* note 16, at 429 (an "emphasis on process" in OLC's formal opinion-writing function "has a powerful influence on the culture of OLC").

⁶⁷ *The Office of Legal Counsel and the Rule of Law*, ACS (Oct. 30, 2020).

⁶⁸ 20 Op. O.L.C. 124 (1996).

⁶⁹ Moss, *supra* note 13, at 1311.

⁷⁰ See Roisman, *The Real Decline of OLC*, *supra* note 42.

In addition, the White House could take steps to reinforce OLC's self-imposed reforms. A commitment to work with the Office in good faith and provide sufficient support for factual findings when necessary will enhance OLC's ability to give accurate, well-reasoned advice. The White House should also work to shore up OLC's traditional institutional role as the chief source of binding legal opinions in the executive branch. The president could do so by updating existing executive orders requiring OLC's review of certain questions and setting a tone for the executive branch as a whole. "[S]ignaling and maintaining a willingness to treat OLC's legal advice as presumptively binding enhances the credibility of a president's claims of good faith and respect for the law, which in turn can help generate public support for his actions."⁷¹

IV. Conclusion

For decades, OLC has played a vital role as the "constitutional conscience" of the executive branch,⁷² ensuring executive branch conduct conforms to the law and aiding the president in carrying out his duty to take care that the laws are faithfully executed. Like so many of our government's institutions, however, OLC ultimately depends on the good faith of those in power to function effectively. OLC's unique institutional position and internal dynamics make it particularly susceptible to abuse by unscrupulous administrations that place politics over the rule of law. However, OLC has operated effectively and in good faith for the majority of its existence, and restoration of OLC to its proper role is worthwhile and possible under the right leadership.

⁷¹ Morrison, *Libya and "Hostilities," supra* note 57, at 64.

⁷² Pillard, *supra* note 10, at 685.

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The American Constitution Society (ACS) believes that law should be a force to improve the lives of all people. ACS works for positive change by shaping debate on vitally important legal and constitutional issues through development and promotion of high-impact ideas to opinion leaders and the media; by building networks of lawyers, law students, judges and policymakers dedicated to those ideas; and by countering the activist conservative legal movement that has sought to erode our enduring constitutional values. By bringing together powerful, relevant ideas and passionate, talented people, ACS makes a difference in the constitutional, legal and public policy debates that shape our democracy.