

THE LAW PRESIDENTS MAKE

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The standard conception of executive branch legal review in the scholarship is a quasi-judicial Office of Legal Counsel (“OLC”) dispensing formal, written opinions binding on the executive branch. That structure of executive branch legalism did have a brief heyday. But it obscures core characteristics of contemporary practice. A different structure of executive branch legalism—informal, diffuse, and intermingled in its approach to lawyers, policymakers, and political leadership—has gained new prominence. This Article documents, analyzes, and assesses that transformation. Scholars have suggested that the failure of OLC to constrain presidential power in recent publicized episodes means that executive branch legalism should become more court-like. They have mourned what they perceive to be a disappearing external constraint on the presidency. Executive branch legalism has never been an exogenous or external check on presidential power, however. It is a tool of presidential administration itself. Exploring changes in the structure of executive branch legal review sheds light on the shifting needs of the

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presidency, the role of law and lawyers in its institutional web, and the institutional variants of presidential control.

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INTRODUCTION

A core question has consumed legal scholarship on presidential power and the administrative state: does law constrain the

president?¹ While scholars have made important progress on the question, they have also emphasized obstacles. It can be difficult, if not impossible, to distinguish legal constraint from political calculation. Was the presidential decision not to bring Guantanamo detainees into the U.S. the work of legal compliance or politics?² Was presidential compliance with the Office of Legal Counsel's opinion on immigration reform an instance of law operating as a constraint, or was it political self-interest?

This Article seeks to shift some attention to a somewhat different, but potentially generative, inquiry: what is a president trying to achieve in his design of executive branch legal review? And what makes the

¹ Compare, e.g., Bruce Ackerman, *The Decline and Fall of the American Republic* (2010) (arguing that, over the last half century, the presidency has become increasingly unconstrained by legal institutions), Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* 4 (2010) (“We live in a regime of executive-centered government, in an age after the separation of powers, and the legally constrained executive is now a historical curiosity.”), and Peter M. Shane, *Madison's Nightmare: How Executive Power Threatens American Democracy*, at vii (2009) (arguing that instead of checks and balances and legal constraint, we see what “looks more and more like a virtually unchecked presidency, nurtured too often in its political aggressiveness by a feckless Congress and obsequious courts”), with, e.g., Jack Goldsmith, *Power and Constraint: The Accountable Presidency After 9/11*, at xvi (2012) (“[I]n the last decade, . . . we have witnessed the rise and operation of purposeful forms of democratic (and judicial) control over the Commander in Chief, and have indeed established strong legal and constitutional constraints on the presidency.”), Trevor W. Morrison, *Constitutional Alarmism*, 124 *Harv. L. Rev.* 1688, 1692 (2011) (book review of Ackerman, *supra*) (arguing that “constraints [exist] that have real, if imperfect, traction even on matters of grave importance and during times of heightened strain”), and Richard H. Pildes, *Law and the President*, 125 *Harv. L. Rev.* 1381, 1411 (2012) (book review of Posner & Vermeule, *supra*) (arguing that “the world of public and political responses to presidential action is filtered through law itself,” such that “[i]n many contexts, no separation between law and public judgment exists”). See generally Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 *Colum. L. Rev.* 1097, 1101–30 (2013) (analyzing what legal constraint on the presidency entails and how it relates to disagreement about the content of law); Richard H. Fallon, Jr., *Constitutional Constraints*, 97 *Calif. L. Rev.* 975, 985 (2009) (arguing that “the Constitution performs part of its constraining function by constituting, empowering, and supporting a network of mutually reinforcing institutions with the capacity to visit unwanted consequences on officials who would otherwise not comply with constitutional norms”). For earlier explorations, see, for example, Abram Chayes, *The Cuban Missile Crisis: International Crises and the Role of Law* 26 (1987).

² Compare Posner & Vermeule, *supra* note 1, at 37 (“[T]he pattern of executive detention, over time, is fundamentally driven by political imperatives, not judicial orders or legal norms.”), with Morrison, *supra* note 1, at 1699–1701, 1716 n.108 (describing judicial and legislative constraints that affected presidential control over executive detentions). See generally Bradley & Morrison, *supra* note 1, at 1114 (explaining the problem of observational equivalence).

answer to that question change? The institutions of executive branch legal review shape the relationship between presidential discretion and legal constraint. But presidents are active participants in shaping, and reshaping, those institutions. The president structures the administrative state to advance his political priorities. This is a familiar tenet of administrative law theory, elaborated in both legal scholarship and the social sciences. And yet, prevailing conceptions of executive branch legalism tend to resist the implications of this theory—to view legal constraint as external, or exogenous, to the president.³

This Article rejects that separation: legal analysis is crucial to the president's policy agenda, and so presidents have much at stake in how they structure their legal decisional apparatus.⁴ Focusing on how and why presidents structure legal power inside the executive enables us to explore the idea of constraint through a different lens. Rather than looking to whether legal interpretation constrains the executive, we can ask whether the underlying institutions are constraining—that is, durable.⁵ Do presidents preserve those institutional characteristics over time? What conditions challenge their durability?

³ This approach to institutions, as external constraints on political actors, is reflected more broadly in constitutional theory and the social sciences. See generally Kenneth A. Shepsle, Institutional Equilibrium and Equilibrium Institutions, *in* *Political Science: The Science of Politics* 51, 66–70 (Herbert F. Weisberg ed., 1986) (describing and critiquing this approach). For important exceptions in public law theory, see, for example, Daryl J. Levinson, Parchment and Politics: The Positive Puzzle of Constitutional Commitment, 124 *Harv. L. Rev.* 657, 680–82 (2011) (arguing that the standard picture of institutions as stable external constraints on political actors ignores the underlying question of “how certain political arrangements become ‘institutionalized’”—in other words, how these institutions become politically stable external constraints, *id.* at 681); Matthew C. Stephenson, Information Acquisition and Institutional Design, 124 *Harv. L. Rev.* 1422, 1426 (2011) (arguing that “public decisionmakers’ expertise about policy decisions is often endogenous (produced by factors internal to the legal-institutional system) rather than exogenous (determined by factors external to, and therefore independent of, legal-institutional design choices”).

⁴ I use “the president” as a placeholder for the cluster of actors inside the White House complex. See *infra* notes 186–187 and accompanying text; see also Elena Kagan, Presidential Administration, 114 *Harv. L. Rev.* 2245, 2338 (2001) (“[O]ften when I refer to ‘the President’ in this Article, I am really speaking of a more nearly institutional actor—the President *and* his immediate . . . advisors in [the Office of Management and Budget] and the White House.”).

⁵ See Kenneth A. Shepsle, Old Questions and New Answers About Institutions: The Riker Objection Revisited, *in* *The Oxford Handbook of Political Economy* 1031, 1034 (Barry R. Weingast & Donald A. Wittman eds., 2006) (arguing that if small changes to the political environment unsettle an institutional arrangement, “then it makes far less sense to refer to the institution as constraining”).

Political scientist Stephen Skowronek has argued that “the presidency is a governing institution inherently hostile to inherited governing arrangements.”⁶ Presidents use their power to reshape politics, and presidents simultaneously inhabit a “political time” that structures their capacity to govern.⁷ Like the politics presidents make, the law that presidents make is dynamic. Presidents structure executive branch legalism in response to shifting political imperatives. And presidents inhabit a legal time that structures the scope of their discretion.

In the aftermath of Watergate and the intelligence scandals of the 1970s, President Carter and his Attorney General, Griffin B. Bell, sought to use the institutions of formal legal review at the Office of Legal Counsel (“OLC”) to rebuild trust in presidential governance.⁸ Carter and his Attorney General used OLC to instantiate a type of legalistic credibility in response to political pressures from a wary public, Congress, and legal professional elites. These incentives bolstered a particular institutional design: a centralized adjudicator creating the authoritative law of the executive. This was a brief heyday for the *formalist structure* of OLC. Under this conception, formal legal decisions reached through a relatively apolitical process might cabin presidential discretion in any one-off case. But they would empower the president by helping to rebuild credibility. This formalist model constitutes the dominant conception of executive branch legalism in the literature. Scholars debate the extent to which current practice approximates it. But most share its aspirational mold and its underlying premise: a tradition of executive branch legal review grounded in the formal, authoritative law of OLC.

Yet the underlying institutions of the formalist model have proven unstable, and increasingly vulnerable in practice. While the myth of a supreme OLC dispensing formal legal opinions persists, the reality is a less insulated, more diffuse, and more informal set of institutional arrangements. OLC’s opinion-writing institution is withering. And on questions of special salience to the president, there is growing reliance

⁶ Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to George Bush 19–20* (1993).

⁷ See *id.* at 20–21.

⁸ The idea that lawyers and legal craft can help to legitimize the structures and institutions of governance shares an intellectual pedigree with early reformers of the administrative state. See, e.g., Daniel R. Ernst, *Tocqueville’s Nightmare: The Administrative State Emerges in America, 1900–1940*, at 2 (2014); see also, e.g., Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 *Harv. L. Rev.* 718, 719–20 (2016) (reviewing Ernst, *supra*).

on a more policy- and politics-infused legal apparatus, directed by the White House but reliant on a diffusion of ambiguously overlapping legal interpreters. Rather than OLC supremacy, legal views are developed by a collection of administrative actors. OLC usually has a seat at the table. But it is no longer the decider. Call it *porous legalism*.

This Article analyzes that transformation. It argues that two dynamics help to explain the fragility of the formalist structure in contemporary governance. The first is a story about politics. Both the benefits and the costs of a formalist OLC have changed for the president, as a result of interrelated structural developments. The formalist model of the Carter period responded to a specific presidential interest: to rebuild legitimacy by committing to a relatively detached adjudicator inside the executive. A loss of presidential control at the retail level—that is, on any particular legal question—was perceived to be a gain at the wholesale level because it helped to rebuild credibility.⁹ As policymaking has become more legalistic, more politically contentious, and more dependent on administrative authorities, however, the president’s desire for retail-level discretion has grown.

At the same time, revelations about the opinions produced by OLC in the aftermath of 9/11 enhanced public consciousness of the Office’s role, even as they simultaneously tarnished OLC’s reputation as a legal decider.¹⁰ Efforts by Congress and the courts to compel the disclosure of opinions from OLC have changed the cost-benefit analysis, for the executive, of requesting a formal opinion. These structural features of transparency alter when and how the president can exercise a particular form of control—control over the disclosure of executive branch law.

Finally, national security legal policy has taken on a special salience in contemporary domestic governance.¹¹ The national security executive is often analyzed as distinct from the bread-and-butter administrative

⁹ I use the terms “credibility” and “political trust” interchangeably, and elaborate these concepts *infra* at notes 197–202 and accompanying text.

¹⁰ See Daniel Carpenter, *Reputation and Power: Organizational Image and Pharmaceutical Regulation at the FDA* (2010) (developing a reputation-based approach to regulatory power); see also *id.* at 33 (“Reputations are composed of symbolic beliefs about an organization—its capacities, intentions, history, mission—and these images are embedded in a network of multiple audiences.”).

¹¹ “National security” is a highly contested and fluid concept. See Mariano-Florentino Cuéllar, *Governing Security: The Hidden Origins of American Security Agencies* 14, 21 (2013) (“Debates about national security . . . can provide different actors in the system with an opportunity to increase their control over the functions of government” *Id.* at 14.).

state. But as national security legal policy has itself become a regularized and routine feature of domestic governance, it has reshaped the president's priorities for executive branch legalism, the centers of legal power inside the executive branch, and the mechanisms of transparency at work.

Scholars have long studied the strategies that the president uses to control the bureaucracy—what then-Professor Elena Kagan labeled “presidential administration.”¹² Presidents use tools like centralized regulatory review or directives to the agencies to shape the policies of the administrative state. A different literature has unpacked the political underpinnings of administrative law. Those political scientists and legal scholars have focused on how political actors (usually, Congress) use administrative procedure to advance their policy preferences through the bureaucracy.¹³ Neither literature, however, has explored executive branch legalism as a form of presidential control. I build on those interdisciplinary works to begin to develop a positive account of what the president desires from executive branch legal review, and how the diffusion of legal power can enable the president to augment discretion at the retail level.¹⁴

Political incentives tell only part of the story, however. Presidential decisionmaking is also the product of legal time. And the sociological authority of OLC to decide among potential legal interpretations—that is, of OLC supremacy as an approach to presidential decisionmaking—is

¹² Kagan, *supra* note 4; see David E. Lewis, *Presidents and the Politics of Agency Design: Political Insulation in the United States Government Bureaucracy, 1946–1997*, at 4 (2003); Terry M. Moe, *The Politicized Presidency*, in *The New Direction in American Politics* 235 (John E. Chubb & Paul E. Peterson eds., 1985); Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure, L. & Contemp. Probs.*, Spring 1994, at 1, 12; see also, e.g., David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 *Geo. Wash. L. Rev.* 1095 (2008) (exploring the rise of politicization in the agencies and its implications for administrative law); Samuel J. Rascoff, *Presidential Intelligence*, 129 *Harv. L. Rev.* 633 (2016) (arguing that features of presidential administration increasingly extend to intelligence oversight and prescribing additional institutions of presidential control for intelligence collection).

¹³ See generally McNollgast, *The Political Economy of Law*, in 2 *Handbook of Law & Economics* 1651, 1707–15 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (synthesizing work by the authors and others on Congress's exercise of ex ante control over agency policy outputs through administrative procedures). For a look at how administrative law doctrines allocate power inside agencies, see Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 *Yale L.J.* 1032 (2011).

¹⁴ Discretion is a product of both control and credibility. I discuss the control-credibility tradeoff and its implications for the design of executive legalism *infra* in Section II.A.

itself unraveling. Moral and policy dimensions of legal advice regularly converge with the deeply technocratic minutiae of complex legal frameworks. Contemporary legal culture, shaped by professional practice, legal doctrine, and the lived experience of executive branch lawyers, has made it more difficult for OLC to exercise decisive legal judgment, in particular, in national security contexts that simultaneously implicate the technical expertise of other agencies' counsel and the moral and national strategic dimensions of presidential judgment. Neither the political story nor the legal story is complete on its own. But together, they offer a theoretical foundation for understanding an important institutional shift.

An influential account of executive branch legalism argues that the failure of OLC to constrain presidential power in recent publicized episodes means that the institutions of legal review inside the executive ought to become *more* court-like.¹⁵ A problem of contemporary governance, scholars suggest, is the decline of legalistic constraint as an external check on the presidency. But executive branch legalism has never been an external, or exogenous, constraint on presidential power. It has always been a tool of presidential administration itself. The president today looks to executive branch legal review to forge pathways to policy and political compromise in highly contested, consequential, and increasingly legalistic terrain.

There is much at stake in this transformation. But it is not the disappearance of law as an external constraint on the president. Rather, it is a reformation of executive branch legalism as an instrument of presidential power.¹⁶ Exploring executive branch legalism as a form of

¹⁵ See Ackerman, *supra* note 1, at 143–44.

¹⁶ Professor Daryl Levinson has investigated the “positive puzzle of constitutional commitment”—the question of what mechanisms give rise to institutional entrenchment. See Levinson, *supra* note 3. I share Levinson’s starting point—a view of institutions as endogenous to the legal and political orders that they govern. See *id.* at 681; see also Kenneth A. Shepsle, Rational Choice Institutionalism, *in* *The Oxford Handbook of Political Institutions* 23, 24–26 (R.A.W. Rhodes et al. eds., 2006) (contrasting two rational choice interpretations of institutions, the institution-as-equilibrium with the institution-as-exogenous-constraint); Barry R. Weingast, Political Institutions: Rational Choice Perspectives, *in* *A New Handbook of Political Science* 167, 168 (Robert E. Goodin & Hans-Dieter Klingemann eds., 1996) (arguing that “[i]n contrast to approaches that take institutions as a given,” treating institutions as endogenous “allows scholars to study how actors attempt to affect the institutions themselves as conditions change”). But I approach the puzzle from the other side—what makes some institutions more vulnerable? What structural

presidential power brings into view a distinct variant of control. The standard account identifies two institutional moves of the modern presidency: presidents seek to “centralize[]” administration by shifting decisionmaking to a White House structure;¹⁷ and they seek to “politiciz[e]” decisionmaking by adding a layer of political loyalists inside the agencies.¹⁸ This approach originated in the political science work of Professor Terry Moe and it has shaped a generation of administrative law scholarship.¹⁹ Porous legalism brings into view a perhaps surprising variant: control through diffusion.

The Article makes three contributions, which roughly track the argument’s progression. First, it develops a conceptual typology of executive branch legalism and uses it to document a shift in institutional practice. This account relies in part on original research and data that have not previously been integrated into theories of executive branch legalism. Second, the Article seeks to understand the fragility of the formalist model in current times. Drawing on both a rational choice perspective and a more sociological account of the role of law and the nature of legal advice, the Article seeks to explain the decline of a formalist OLC and the rise of porous legalism. Third, the Article marks a set of questions and considerations to assess the structures of executive branch legalism on the ground. The shift to a more informal, diffuse, and porous brand of legalism creates opportunities for blended judgment—for the exercise of presidential discretion informed by, rather than resolved through lawyers and legal reasoning.²⁰ This approach might

forces explain discontinuous change? Cf. *id.* (“Explicit models of discontinuous political change provide an exciting new set of applications of rational choice theory.”).

¹⁷ See Moe, *supra* note 12, at 244. The classic example of this in the literature is the Office of Information and Regulatory Affairs (“OIRA”) review. See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 *Colum. L. Rev.* 1260, 1264–65 (2006); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 *Geo. L.J.* 1337, 1340 (2013); Cass R. Sunstein, *Commentary, The Office of Information and Regulatory Affairs: Myths and Realities*, 126 *Harv. L. Rev.* 1838, 1840 (2013).

¹⁸ See David E. Lewis, *The Politics of Presidential Appointments: Political Control and Bureaucratic Performance* 6–7 (2008); Moe, *supra* note 12, at 245; Moe & Wilson, *supra* note 12, at 11.

¹⁹ See, e.g., sources cited *supra* note 12.

²⁰ On the idea of accommodation among interests in the choice among legal systems, see David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 *Harv. L. Rev.* 1, 53 (2015).

ultimately present a more modest, but perhaps also more honest vision of what law can and should achieve outside the courts.²¹

I. TWO CORE CONCEPTIONS OF EXECUTIVE BRANCH LEGALISM

Executive branch legalism is not a static concept. This Part identifies two ideal types.²² These conceptions illuminate and help to clarify institutional choices in the structure of executive branch legal review over time. Any one president relies on each model at different moments or in different decisional domains. The models coexist and, in practice, may be approximated more or less closely under any one president, or with respect to any specific legal-policy decision.

While the models coexist to varying degrees within any administration, however, there are also important inflections in institutional practice over time. Section I.A documents the prominence of the formalist structure under President Carter. This was, in many ways, the heyday of a formalist OLC. And it is a piece of executive branch legalism's institutional history that has not been told.²³ Section I.B describes the prominence of porous legalism under President Obama. Section I.C refines the scope of the inquiry by briefly identifying and bracketing a third conception.

The goals of this Part, then, are twofold. I aim to develop a conceptual typology and to use it to document a specific institutional shift.

²¹ Presidents also play a significant role in shaping law *in* the courts through the institutions of executive branch legal review. See, e.g., Charles Fried, *Order and Law: Arguing the Reagan Revolution—A Firsthand Account* 14 (1991) (“In a real sense the Solicitor General is responsible for the government’s legal theories, its legal philosophy.”). The framework here developed might be extended to those legal institutions, as well.

²² As introduced in the work of Max Weber, ideal types are “formed by the synthesis of [several] . . . more or less present and occasionally absent, concrete individual phenomena, which are arranged . . . into a unified analytical construct.” Carl G. Hempel, *Aspects of Scientific Explanation and Other Essays in the Philosophy of Science* 156 (1965); see 1 Max Weber, *Economy and Society: An Outline of Interpretive Sociology* 19–22 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1978). While historical practice can approach or “approximate[]” the ideal type, it exhibits a “conceptual purity” rarely found in reality. See Hempel, *supra*, at 156, 160; see also Weber, *supra*, at 20. See generally David Collier et al., *Typologies: Forming Concepts and Creating Categorical Variables*, in *The Oxford Handbook of Political Methodology* 152 (Janet M. Box-Steffensmeier et al. eds., 2008) (exploring the role of ideal types in concept formation).

²³ The modern form of the formalist structure centers on OLC. Prior to the emergence of OLC, however, it was realized in the institutional practice of the attorneys general. I discuss the connection, and eventual decoupling, of the formalist model and the attorney general *infra* at notes 283–285 and accompanying text.

A. Formalist Structure

The dominant conception of executive branch legalism in the literature is a quasi-judicial OLC dispensing formal, written opinions binding on the executive.²⁴ While the conception is pervasive, its institutional characteristics are underdeveloped.

The model can be broken down into two key characteristics or interconnected institutional arrangements. First, legal review is *formal and authoritative*. OLC decides legal questions by issuing written opinions signed by the head of the Office or one of its deputies. The decisional process resembles a court: it is case specific and precedent based.²⁵ OLC generally avoids abstract or code-like decrees. And OLC's opinions build on and generally comply with its prior precedent.²⁶ As with any common law system, some precedent gets overturned and some legal questions do not come before the formal decisionmaker. But there is a body of formal, written law that is relied upon, distinguished, and evaluated over time.²⁷

²⁴ The idea of a “quasi-judicial” OLC has its roots in a description by Caleb Cushing, President Pierce’s Attorney General, of the attorney general’s opinion-writing function. See *Office and Duties of the Attorney General*, 6 Op. Att’y Gen. 326, 334 (1854). This conception has been embraced and elaborated by scholars of executive constitutionalism. See generally Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 Mich. L. Rev. 676, 726–27 (2005) (defining “quasi-judicial” to mean “interpreting the law more as a judge would than as a lawyer for a private client” and tracing this conception of OLC in the literature).

²⁵ The requesting agency typically must provide its own written views on the issue in the request for the OLC’s opinion, but this requirement does not apply to the Attorney General or to the White House. See Morrison, *supra* note 1, at 1710.

²⁶ See Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 Colum. L. Rev. 1448 (2010).

²⁷ In a legal opinion drafted in 1854, Attorney General Cushing explained the increasingly accepted practice:

[The Attorney General’s] opinions officially define the law, in a multitude of cases, where his decision is in practice final and conclusive

Accordingly, the opinions of successive Attorneys General, possessed of greater or less amount of legal acumen, acquirement, and experience, have come to constitute a body of legal precedents and exposition, having authority the same in kind, if not the same in degree, with decisions of the courts of justice.

Office and Duties of Attorney General, 6 Op. Att’y. Gen. at 334. On the early precedent-based system of attorneys general opinions, see Jerry L. Mashaw & Avi Perry, *Administrative Statutory Interpretation in the Antebellum Republic*, 2009 Mich. St. L. Rev. 7, 44 (2009) (“[R]eliance on past precedent may have been the only interpretive rule about which every Attorney General under consideration appears to have been equally dogmatic.”); see also Homer Cummings & Carl McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive* 78–84, 92 (1937) (describing Attorney General

Second, the institutional structure is *centralized*. OLC's role among legal advisors inside the executive branch is singular and articulated *ex ante*, that is, before any particular legal question arises. OLC's opinions are distinctively authoritative inside the executive branch. While the president (or his attorney general) can overrule an OLC opinion, this happens rarely. Barring such a reversal, OLC creates the binding law of the executive.²⁸ Centralized review by OLC creates a forum for legal analysis that is relatively removed from the pressures of the White House complex or the operational agencies.

This design facilitates a mode of governance that might be described as "articulated."²⁹ Professor Jeremy Waldron has elaborated the principle of articulated governance in connection to the separation of powers. In an "articulated process," he explains, "the various aspects of law-making and legally authorized action are not just run together into a single gestalt."³⁰ Instead, articulated government involves "successive phases of governance each of which maintains its own [institutional] integrity."³¹ An articulated approach to governance is at the crux of the formalist model: a centralized, court-like structure—institutionally insulated from other modes of regulatory power—reviews questions of law and issues formal opinions generally binding on those actors.

Scholars debate whether current practice realizes the aspirations of this model.³² But this is the standard (albeit often implicit) conception of

William Wirt's role in the development of recorded precedential opinions). For a comprehensive study of the use of *stare decisis* by OLC, see Morrison, *supra* note 26.

²⁸ See Randolph D. Moss, Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel, 52 Admin. L. Rev. 1303, 1318–20 (2000). The idea that OLC makes formal, binding law analogous to the courts, yet with a distinctly executive bent, has been a staple of public law discourse, at least since the 1990s when academics began to reveal and explore the workings of OLC. See, e.g., Douglas W. Kmiec, OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive, 15 Cardozo L. Rev. 337 (1993); Harold Hongju Koh, Protecting the Office of Legal Counsel from Itself, 15 Cardozo L. Rev. 513, 514 (1993); John O. McGinnis, Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon, 15 Cardozo L. Rev. 375, 422–29 (1993). But see Samuel A. Alito, Jr., Change in Continuity at the Office of Legal Counsel, 15 Cardozo L. Rev. 507 (1993) (cautioning against focusing on OLC's opinion-writing function to the exclusion of its significant role providing informal advice).

²⁹ See Jeremy Waldron, Separation of Powers in Thought and Practice?, 54 B.C. L. Rev. 433, 456–59 (2013).

³⁰ *Id.* at 457.

³¹ *Id.* at 467.

³² See sources cited *supra* note 1.

executive branch legalism in the scholarship. Does this model really exist on the ground?

I argue that the formalist structure did have a brief heyday. The Carter period depicts a fairly close on-the-ground approximation. But the underlying institutions of the formalist model are unstable. I describe the rise of this model under Carter in some detail, then, both because it is an under-examined piece of OLC's institutional history and because it provides a baseline for the institutional variation that follows.

President Carter came to office in the aftermath of Watergate and the legitimacy challenges that Watergate and the Saturday Night Massacre posed for the Justice Department.³³ The intelligence-related scandals that culminated in the extensive Church Committee investigation and reports had further eroded the credibility of agencies operating without legal constraint.³⁴ President Carter chose Griffin Bell, a former federal court of appeals judge, for his attorney general.³⁵ Carter and Bell agreed that the Justice Department would be a “neutral zone in the government”³⁶—a law department removed from politics and political influence.³⁷

³³ In what became known as the Saturday Night Massacre, President Nixon directed Attorney General Elliot Richardson to fire independent special prosecutor Archibald Cox. Richardson refused and resigned, as did Deputy Attorney General William Ruckelshaus. Nixon then ordered Solicitor General Robert Bork, as acting head of the Department of Justice, to fire Cox, which he did. See generally Nancy V. Baker, *Conflicting Loyalties: Law and Politics in the Attorney General's Office, 1789–1990*, at 140 (1992). Daniel Meador, who served in the Justice Department under Attorney General Bell, wrote that with “Watergate . . . only three years in the past[,] [m]orale among Justice Department lawyers had sunk to an all-time low.” Daniel J. Meador, *Griffin Bell at the Intersection of Law and Politics: The Department of Justice, 1977–1979*, 24 *J.L. & Pol.* 529, 531 (2008); see also Baker, *supra*, at 151 (1992) (“Disillusionment because of Watergate was so entrenched that” both President Ford and his successor “Jimmy Carter . . . sought to build confidence in the attorney generalship by appointing a law officer with Neutral type characteristics.”). It was the Carter administration that instantiated this commitment through institutional reform at OLC, as discussed in the text *infra*.

³⁴ See generally S. Select Comm. to Study Governmental Operations, *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities of the United States Senate*, S. Rep. No. 94-755 (1976), <http://www.aarclibrary.org/publib/church/reports/contents.htm> [<https://perma.cc/87MS-VE64>].

³⁵ See Baker, *supra* note 33, at 151.

³⁶ Griffin B. Bell with Ronald J. Ostrow, *Taking Care of the Law* 26–27 (1982) (quoting Letter from Attorney General Bell to President Carter (June 15, 1979)).

³⁷ See Baker, *supra* note 33, at 155 (quoting *The Prospective Nomination of Griffin B. Bell, of Georgia, to be Attorney General: Hearing before the S. Comm. on the Judiciary, 95th Cong. 33* (1977) (statement of Griffin B. Bell)); Bell with Ostrow, *supra* note 36, at 28.

Indeed, Carter, at Bell's suggestion, had campaigned on a pledge to make the attorney general structurally independent from the president.³⁸ When Carter was elected, he asked Bell to make good on this pledge.³⁹ OLC, however, concluded in a written opinion that a proposal to make the office of the attorney general a term-limited post, removable only for cause, would violate the constitutional separation of powers.⁴⁰ Bell soon came to believe that for both legal and practical reasons, an attorney general could not be fully insulated from politics. Instead, he focused throughout his tenure on bolstering the functional independence of offices within the Justice Department, like OLC, that he believed could be more insulated—more dispassionate or detached in legal analysis—than the attorney general could ultimately be.⁴¹

For the President and his attorney general, the formalist structure of OLC enhanced a type of legalistic credibility—a form of reputation building using the institutions of formal legal analysis. It enabled the President and Attorney General Bell to signal to elites and congressional committees focused on the Justice Department's independence in Watergate's shadow that Carter's would be a presidency constrained by law. For Attorney General Bell, the formalist model of OLC also provided a mechanism to build the reputation of the Justice Department internal to the executive branch (that is, among the agencies) and in Congress as a singular and supreme site of legal decisional power. Confronted with a growing diffusion of executive branch lawyers and the rise of statutory litigation authority independent from the Department of Justice for the agencies, Bell used OLC's formal opinion-giving function to impress upon congressional committees and agency heads the uniqueness of the Justice Department's institutional role.⁴²

³⁸ See Bell with Ostrow, *supra* note 36, at 28; Griffin B. Bell, Att'y Gen. of the U.S., An Address Before Department of Justice Lawyers 4 (Sept. 6, 1978) [hereinafter Bell, DOJ Address]; Griffin B. Bell, Office of Attorney General's Client Relationship, 36 *Bus. Law.* 791, 796 (1981) [hereinafter Bell, Attorney General's Client Relationship].

³⁹ See Bell, DOJ Address, *supra* note 38, at 4; Bell with Ostrow, *supra* note 36, at 24.

⁴⁰ See Proposals Regarding an Independent Attorney General, 1 *Op. O.L.C.* 75, 75 (1977).

⁴¹ See The Prospective Nomination of Griffin B. Bell, of Georgia, to be Attorney General: Hearings Before the S. Comm. on the Judiciary, 95th Cong. 494–95 (1977) (statement of Hon. Griffin B. Bell) (describing the need for an attorney general to rely on persons and offices capable of being more “insulated from any claim that politics would be involved,” *id.* at 494); see also Bell with Ostrow, *supra* note 36, at 28; Bell, DOJ Address, *supra* note 38, at 9–11.

⁴² See *infra* notes 78–79 and accompanying text.

1. Formality

Formal opinion writing was an avowed priority for Bell, and he undertook several efforts to enhance the OLC opinion's stature and visibility. Opinion writing had long been a function of OLC. The Judiciary Act of 1789 authorizes the attorney general to render opinions on questions of law when requested by the president or the heads of executive departments.⁴³ This authority has been delegated to the office that is today OLC since 1933.⁴⁴ OLC originally would prepare the opinions for the attorney general's signature. Since the early 1960s, the assistant attorney general for OLC or one of his deputies "has signed all but a tiny percentage of the Justice Department's legal opinions."⁴⁵

The number of OLC opinions rose dramatically during the Carter administration, and this was a deliberate design of Bell's. John Harmon, the head of OLC under Bell, testified in 1978 that:

During the past fiscal year over 380 formal opinions, an increase of over 45 percent from the previous fiscal year, were issued by the Office of Legal Counsel to various agencies of the Government, concerning the scope of, and limitations upon, Executive powers, and concerning the interpretation of many Federal statutes⁴⁶

Increasing OLC's opinion-writing function was a specific goal of the Attorney General.⁴⁷ In connection with the rise of agency general

⁴³ See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 (codified as amended at 28 U.S.C. §§ 511–513 (2012)).

⁴⁴ See 28 C.F.R. § 0.25 (2016). Originally, the opinion-writing function was delegated to an Assistant Solicitor General. See Independent Offices Appropriation Act of 1934, Pub. L. No. 73-78, § 16(a), 48 Stat. 283, 307–08 (1934); Att'y Gen. Order No. 2507, 1–2, Schedule A-10 (Dec. 30, 1933). In 1950, the opinion-writing function was transferred to a new office in the Justice Department called the Executive Adjudications Division. In 1953, that office was renamed the Office of Legal Counsel. See Att'y Gen. Order No. 9-53 (Apr. 3, 1953). See generally Foreword, 1 Op. O.L.C. Supp., at vii (2013) (documenting the organizational origins of OLC).

⁴⁵ H. Jefferson Powell, *The Constitution and the Attorneys General*, at xv n.2 (1999).

⁴⁶ Department of Justice Authorization: Hearing Before the H. Comm. on the Judiciary, 95th Cong. 146–47 (1978) (statement of John M. Harmon, Assistant Att'y Gen., Office of Legal Counsel). Harmon further testified that, "[i]n addition, the Office [had] issued 695 informal opinions to other Executive agencies as well as other components of the Department of Justice." *Id.* at 147.

⁴⁷ See *id.* at 53 (statement of Rep. Lamar Gudger) (describing an exchange with Attorney General Bell, in which he asked Bell to "comment a little further . . . [on] the long-range goal of . . . the Office of Legal Counsel . . . in which you state that one of those goals is to increase the volume of these opinions").

counsels elsewhere in the bureaucracy, Bell stated, “I think the Government would be better off on substantial questions if there was a requirement that you had to go to this Office of Legal Counsel for a legal opinion.”⁴⁸

It was Bell, moreover, who first directed OLC to compile and begin to publish select opinions of OLC.⁴⁹ In earlier periods, OLC had drafted opinions for the attorney general’s signature, some of which were published in bound volumes of the *Opinions of the Attorneys General*.⁵⁰ As the attorney general’s functions expanded after World War II, however, his involvement in issuing legal opinions receded. During this period, opinions from OLC began to increase. But those opinions were never published. Beginning in 1977 and under the direction of Bell, OLC began to publish selected opinions under its own name, and these quickly replaced the opinions of the attorneys general as the growing body of executive branch common law.⁵¹ OLC published seventy-three opinions in the first bound volume of the office, in 1977.⁵² Those published opinions comprised “approximately one-quarter” of the written legal opinions OLC decided in that year.⁵³

Published opinions enabled OLC to perform legal review using an institution with court-like attributes and court-like credibility, and they suggested a stable, precedent-based development of executive branch law. Bell sought and obtained for OLC additional funding to enable OLC to develop a research system “to ensure consistency and accuracy

⁴⁸ *Id.* at 54.

⁴⁹ See Foreword, 1 *Op. O.L.C. Supp.*, at vii–viii (2013).

⁵⁰ See *infra* notes 220–221 and accompanying text.

⁵¹ See Foreword, 1 *Op. O.L.C. Supp.*, at vii–viii (2013).

⁵² Foreword, 1 *Op. O.L.C.*, at v (1977). The Foreword to the first bound volume of OLC opinions states that Attorney General Bell “believed that [OLC opinions]’ value as precedents and as a body of executive law on important matters would be enormously enhanced by publication” *Id.* at vi.

⁵³ *Id.* at v.

of new legal opinions.”⁵⁴ And the Office routinely relied on its own prior legal analysis as authoritative precedent.⁵⁵

Judge Bell, as most called him, underscored what he understood to be the values of the “opinion-giving functions.”⁵⁶ The “increased complexity of our society,” he argued, demanded a centralized and singular voice of executive branch legality.⁵⁷ This was so not simply as a matter of good governance, but also constitutional values: “[T]he commitment of our government to due process of law and to equal protection . . . probably requires that our executive officers proceed in accordance with a coherent, consistent interpretation of the law, to the extent that it is administratively possible to do so.”⁵⁸ So too, argued Bell, the task of “developing a single, coherent view of the law,” which is “entrusted to the President himself,” should be delegated to a dispassionate and detached institutional actor—one “who is not

⁵⁴ Departments of State, Justice and Commerce, the Judiciary, and Related Agencies Appropriations for 1980: Hearings Before a Subcomm. of the H. Comm. On Approps., Part 5 96th Cong. 281 (1979) (opening statement of Kevin D. Rooney, Assistant Att’y Gen.); see also Departments of State, Justice and Commerce, the Judiciary, and Related Agencies Appropriations for 1981: Hearings Before a Subcomm. of the H. Comm. On Approps., Part 3, 96th Cong. 263 (1980) (reporting that “[a]ll OLC opinions from 1945 to the present are now available on a computerized research and retrieval system”).

⁵⁵ In his comprehensive empirical study of *stare decisis* at OLC, Professor Trevor Morrison found that OLC was most protective of prior precedent during the Carter administration. OLC overruled or modified a prior precedent in only 2.17% of opinions under Carter. By contrast, for example, OLC overruled or modified a prior precedent in 16.67% of opinions in the first term of the Clinton administration. See Morrison, *supra* note 26, at 1484. Morrison identifies a variety of explanations for this variation across administrations, including that there was less OLC precedent in the 1970s than in later administrations and perhaps less capacity to research prior opinions exhaustively. See *id.* at 1486.

⁵⁶ See Griffin B. Bell, U.S. Att’y Gen., Remarks Adapted from the Eighth Annual John F. Sonnett Memorial Lecture at Fordham University School of Law (Mar. 14, 1978), in *The Attorney General: The Federal Government’s Chief Lawyer and Chief Litigator, or One Among Many?*, 46 *Fordham L. Rev.* 1049, 1064 (1978).

⁵⁷ *Id.* at 1064–65. Bell previewed this lecture in testimony before the House Judiciary Committee. Discussing the significance of OLC opinions and the important role of OLC, Bell told the Committee that the lecture he would give at Fordham “will be a revelation to everyone on the history of all these things.” Department of Justice Authorization: Hearing Before the H. Comm. on the Judiciary, 95th Cong. 53 (1978) (statement of Griffin B. Bell, U.S. Att’y Gen.).

⁵⁸ Bell, *supra* note 56, at 1068.

required, as a general matter, to play a decisive role in the formulation of policy.”⁵⁹

2. *Centralization*

Bell emphasized the importance of an OLC with singular authority, clearly articulated *ex ante*. Bell described his view of the relevant relationships to political scientist Linda Baker: “While the White House counsel and department legal staffs can answer routine legal questions, it is the Office of Legal Counsel alone that provides ‘the real legal opinion, the true word.’”⁶⁰ On Bell’s telling, OLC’s role as a singular legal expositor was generally respected by the President, but confronted more skepticism among agency leadership.⁶¹

OLC during this time also assumed a singular, centralizing role in intelligence oversight. The Office “played a major role” in drafting President Carter’s executive order governing intelligence activities.⁶² The order gave the Attorney General responsibility for oversight and regulation of executive intelligence activities, and OLC both served as his “principal legal adviser” and also had “primary responsibility for coordinating the drafting of the procedures as well as for their effective implementation.”⁶³

In implementing the formalist structure, Bell sought to insulate OLC from White House interference. He described his exchange with President Carter in recommending Harmon, then serving as the acting

⁵⁹ *Id.* Bell is discussing in these pages the opinion-giving function of the attorney general. He explains, however, that the role has been delegated to OLC and that OLC will now begin to publish its opinions. See *id.* at 1064 & n.44.

⁶⁰ See Baker, *supra* note 33, at 163 (quoting Interview by Nancy V. Baker with Griffin B. Bell, U.S. Att’y Gen. (1987)).

⁶¹ See Bell, Attorney General’s Client Relationship, *supra* note 38, at 792 (“Only two people in the government are required to use [OLC]. One is the president, who has to get his legal opinions from [OLC]; and the other is the attorney general. All the other people in the cabinet or heads of agencies can use their own lawyers to get an opinion, and most of them do.”); see also Oral History: Conversations with Judge Griffin B. Bell, 18 *J.S. Legal Hist.* 213, 218 (2010) (“I think the President gets in trouble if he tries to use the Attorney General as his lawyer. The Attorney General is not the President’s lawyer, but if I wanted a legal opinion, I had to get it from the Office of Legal Counsel at the Department of Justice, and the President got his there, too.”).

⁶² Department of Justice Authorization: Hearings Before the H. Comm. on the Judiciary, 95th Cong. 147 (1978) (statement of John M. Harmon, Assistant Att’y Gen., Office of Legal Counsel). OLC generally plays an important role in reviewing executive orders for legality.

⁶³ *Id.* at 147–48.

head of OLC, to be nominated as formal head of the Office. The President asked,

“Is this the young man who has been ruling against me so much?”
And I said, it was the same person. I said, “He rules against me, too.
And aren’t we lucky that we have some lawyers who are objective and
tell us what the law is?” And we are.⁶⁴

Bell instituted a set of policies designed to prevent White House staff and others from exerting political pressure or imposing extralegal preferences on OLC attorneys and the litigation components of the Justice Department. “What must be avoided,” Bell remarked in a speech, “is pressure from any source that is intended to influence our legal judgment.”⁶⁵ Accordingly, Bell directed the Assistant Attorney General for OLC to report to him “any communication[s] that, in his view, constitute attempts to exert such pressure,”⁶⁶ and he limited access between White House staff and OLC staff.⁶⁷

While the President could overrule a legal decision from OLC, the relationship was hierarchical, not intermeshed. Bell’s account of the single instance when President Carter overruled an OLC opinion underscores Bell’s commitment to protecting these institutional arrangements. The question at issue concerned whether the federal government could extend aid to sectarian schools under the Comprehensive Employment and Training Act (“CETA”).⁶⁸ OLC concluded that certain uses of federal funding under CETA that were authorized by regulations then being issued by the Department of Labor were unconstitutional.⁶⁹ Bell and OLC confronted considerable pressure to reverse this position, including from the Vice President. In a written opinion, OLC (with Bell’s support) reaffirmed its position.⁷⁰ President

⁶⁴ Id. at 54 (testimony of Griffin B. Bell, U.S. Att’y Gen.).

⁶⁵ Bell, DOJ Address, *supra* note 38, at 11.

⁶⁶ Id.

⁶⁷ See *id.* at 10–11. This is a policy that was adopted more broadly across the Justice Department. See James Michael Strine, *The Office of Legal Counsel: Legal Professionals in a Political System* 116–18 (1992) (unpublished Ph.D. dissertation, Johns Hopkins University).

⁶⁸ See John M. Harmon, Assistant Att’y Gen., Office of Legal Counsel, Memorandum for the Attorney General, Re: CETA Programs in Religiously-Affiliated Schools (May 15, 1979) (on file with author). Bell discusses this episode in Bell with Ostrow, *supra* note 36, at 24–28.

⁶⁹ See Bell with Ostrow, *supra* note 36, at 25.

⁷⁰ See *id.* at 25–26.

Carter then overruled that legal conclusion in a letter to the Attorney General.⁷¹ Bell wrote to the President that “there is nothing inconsistent with my concept of an independent attorney general for you to overrule my decision, even on a question of law.”⁷² But Bell sharply resisted a suggestion made by a presidential aide “that [Bell] should have given [President Carter] the opportunity to direct what [Bell’s] legal opinion should be.”⁷³ Such a course, wrote Bell, would “fl[y] in the face of all that we have been trying to do since coming to Washington to rebuild the Department of Justice.”⁷⁴

For Bell, centralized OLC review was not solely about depoliticizing legal judgment. It was also a protective strategy to guard against a growing diffusion of legal expertise across the bureaucracy. Bell expressed consternation that “lawyers . . . performing ‘lawyer-like’ functions” had grown to 19,479 positions across the federal bureaucracy.⁷⁵ “These lawyers are distributed throughout the departments and agencies,” Bell continued, “and practically no agency is too small to have its own ‘General Counsel.’”⁷⁶ In testimony before the House Committee on the Judiciary, Bell expressed concern that Congress was diminishing the ability of the executive branch to speak with one voice by allocating litigation authority to other agencies. Bell’s testimony focused more broadly on the proliferation of lawyers in other agencies.⁷⁷ But he also emphasized the unique role of OLC in issuing legal opinions for the executive branch as a whole.⁷⁸ Bell’s speeches and testimony make explicit that he saw consolidating legal review inside the Office of Legal Counsel as valuable for the reputation of the attorney

⁷¹ See *id.* at 26–27.

⁷² *Id.* at 27 (quoting Letter from Attorney General Bell to President Carter (June 15, 1979)).

⁷³ *Id.* (quoting letter).

⁷⁴ *Id.* (quoting letter). Bell writes that this incident “brought [him] . . . close to the brink of resigning.” *Id.* at 26. The Justice Department did ultimately defend the regulations in litigation. The regulations were enjoined by the Eastern District of Wisconsin, an injunction affirmed on appeal. See *id.* at 27–28. The Justice Department did not seek certiorari on the question from the Supreme Court. *Id.* at 28.

⁷⁵ Bell, *supra* note 56, at 1050. Bell indicates that he undertook this inventory at the request of the President shortly after taking office. See *id.*

⁷⁶ *Id.*

⁷⁷ See, e.g., Department of Justice Authorization: Hearings Before the H. Comm. on the Judiciary, 95th Cong. 54 (1978) (testimony of Hon. Griffin B. Bell, U.S. Att’y Gen.).

⁷⁸ See *id.* at 37 (“They have 400-some-odd lawyers going into the new Department of Energy If I could—I would go back one step beyond that and have all substantial legal opinions rendered by the Office of Legal Counsel.”).

general as a legal leader of the executive branch. The power of OLC was wrapped up with the centrality of the Justice Department itself.⁷⁹

Over a hundred published opinions address questions of presidential authority or otherwise respond to requests for legal advice from President Carter, his White House Counsel, and others in the Executive Office of the President.⁸⁰ The opinions address a range of legal questions from ethics compliance and more routine statutory interpretation questions to sensitive and high-stakes presidential decisionmaking. While many of the published opinions conclude that the President's desired conduct is lawful, a number of opinions impose meaningful constraints and some determine that a contemplated action would be unlawful. For example, OLC concluded that the Vice President's office was subject to election-related restrictions under the Hatch Act, rejecting a contrary conclusion from the Vice President's office.⁸¹ OLC also concluded that the FBI lacked authority to apprehend and abduct a fugitive residing in a foreign state without the asylum state's consent, a legal conclusion that greatly rankled the President.⁸²

⁷⁹ See *id.* at 53 (responding to a question about “the long-range goal of [OLC]” by indicating that he, Bell, “would get back to having a greater opinion-rendering requirement in [OLC]”); see also Bell, *supra* note 56, at 1049 (“It is my firm belief that clarifying the position and role of the Department of Justice in the order of government is of first importance to the long-range interests of the nation.”).

⁸⁰ OLC's published opinions are available online at <https://www.justice.gov/olc/opinions> [<https://perma.cc/5MNA-SW49>]. A number of opinions from this period that address questions of presidential authority are from a requester outside the Executive Office of the President, often the Attorney General. Approximately eighty opinions respond to a White House requester, most often the White House Counsel.

⁸¹ See *Application of the Hatch Act to the Vice President's Staff*, 1 Op. O.L.C. 54, 57–58 (1977).

⁸² See *Extraterritorial Apprehension by the Federal Bureau of Investigation*, 4B Op. O.L.C. 543, 552–54 (1980); see also Telephone Interview with John Harmon (Jan. 6, 2017) [hereinafter Harmon interview] (notes on file with author) (recalling that “the President really wanted to do [this],” “really wanted this guy,” and the FBI “was ready to go”).

In 1989, OLC reconsidered this question and concluded that its 1980 opinion “erred in ruling that the FBI does not have legal authority to carry out extraterritorial law enforcement activities that contravene customary international law.” *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. O.L.C. 163, 163 (1989). Several years later, the Supreme Court answered the central questions in much the same way. See *United States v. Alvarez-Machain*, 504 U.S. 655, 670 (1992).

OLC prepared over twenty opinions relating to the Iran Hostage Crisis, the defining foreign policy event of the Carter administration.⁸³ These opinions address myriad legal questions involving presidential power under Article II,⁸⁴ statutory authorities including emergency powers under the International Emergency Economic Powers Act,⁸⁵ international law,⁸⁶ and individual rights (such as the First Amendment right to receive information from abroad and the equal protection rights of Iranian students inside the United States).⁸⁷ One opinion, which remains formally unpublished, concerned Iranian student demonstrations in Washington.⁸⁸ The President and members of his Cabinet were concerned that onlookers might respond violently to Iranian student demonstrations against the Shah, and that this could in turn threaten the lives of the U.S. hostages in Iran.⁸⁹ Accordingly, President Carter wanted to prohibit such demonstrations in Washington while the

⁸³ The opinions were published together in the 1980 bound volume, which went to print in the early years of the Reagan administration. See 4A Op. O.L.C. 1, vii–viii, 71–333 (1980). OLC, then under the leadership of Reagan’s Assistant Attorney General, Theodore Olson, published these opinions along with an introductory compendium of historical and background materials. *Id.* at v–vi, 71–114. The introduction stated that “[t]he extraordinarily broad range of legal questions raised and resolved during the course of the Iranian Hostage Crisis makes it a seminal legal event, unique in our Nation’s history.” *Id.* at 71. OLC explained that it had “chosen to publish [the opinions] together in the 1980 volume, both to preserve for the reader the continuity of the historical events to which they relate, and to illustrate the complex interrelationship between their numerous issues of private and public, domestic and international law.” *Id.* at 72.

⁸⁴ See, e.g., *Presidential Powers Relating to the Situation in Iran*, 4A Op. O.L.C. 115 (1979) (outlining the President’s powers under the Constitution and various statutes).

⁸⁵ See, e.g., *Presidential Implementation of Emergency Powers Under the International Emergency Economic Powers Act*, 4A Op. O.L.C. 146 (1979) (discussing the President’s powers under the International Emergency Economic Powers Act (“IEEPA”).

⁸⁶ See, e.g., *Presidential Power to Expel Diplomatic Personnel from the United States*, 4A Op. O.L.C. 207 (1980) (discussing the President’s authority to expel diplomats under domestic and international law); *Presidential Authority to Settle the Iranian Crisis*, 4A Op. O.L.C. 248 (1980) (discussing the President’s authority under the Constitution, IEEPA, and international law to settle the Iranian crisis).

⁸⁷ See, e.g., *Immigration Laws and Iranian Students*, 4A Op. O.L.C. 133 (1979) (discussing First and Fifth Amendment limits to the President’s power to deport Iranian students); *The President’s Authority to Take Certain Actions Relating to Communications from Iran*, 4A Op. O.L.C. 153 (1979) (discussing the First Amendment limits to the President’s authority to block communications from Iran).

⁸⁸ This opinion has not been designated for publication by OLC, but it is today available in President Carter’s papers. See Memorandum from Benjamin R. Civiletti, Att’y Gen., to the President, Re: Iranian Student Demonstrations (Nov. 8, 1979) (on file with Jimmy Carter Library) [hereinafter Civiletti Memo].

⁸⁹ See Harmon interview, *supra* note 82.

hostages were still being held in Iran.⁹⁰ But the Deputy Chief of the D.C. Police took the position that the Iranian student protesters could be adequately protected, and might be better protected by local police if they “march[ed] with a permit in prescribed areas than if permits [were] denied and the demonstrators appear[ed] at random in the city.”⁹¹ As a result, OLC concluded in a written opinion that a blanket prohibition on such demonstrations would violate the First Amendment.⁹² The opinion, prepared by OLC and signed by Attorney General Civiletti (Bell’s successor) was met with great consternation by the President and his advisors. But the demonstration was allowed to go forward, and future protests were to be reviewed on a case-by-case basis.⁹³

Another opinion concerning the Iranian hostage crisis, dated February 12, 1980, concluded that the President had the constitutional authority to attempt a military rescue of the hostages, and that such a rescue mission would be consistent with the War Powers Resolution.⁹⁴ The opinion observed, however, that the War Powers Resolution requires presidential consultation with Congress “in every possible instance” before introducing armed forces into hostilities,⁹⁵ and that the report must be

⁹⁰ See *id.*

⁹¹ Civiletti Memo, *supra* note 88, at 2.

⁹² See *id.* at 3; see also *id.* at 2 (“We can clearly show that if this demonstration ends in violence, there is serious risk of death in Tehran. However, we have no evidence or compelling reason to believe that violence will occur if the demonstration goes forward . . . [T]he evidence available now suggests . . . [to the contrary].”).

⁹³ A copy of this memo in the Carter Library papers includes a handwritten note at the bottom by the President, stating, “You can submit individual issues or proposals to me as required.” See *id.* at 4; see also E-mail from John Harmon to author (Mar. 17, 2017) (on file with author) (recalling that both the President and the Vice President were very concerned about this demonstration in particular, as was Warren Christopher and the Cabinet members involved, and that White House Counsel Lloyd Cutler “was particularly frustrated by the OLC decision”). Demonstrations after this point appear to have been considered on a case-by-case basis, with OLC taking the view that demonstrations *could* be prohibited in Lafayette Park and on the White House sidewalk. See Memorandum from Lloyd N. Cutler, White House Counsel, to the President, Re: Iranian Demonstrations (Aug. 7, 1980) (on file with author). Narrow permit denials, along these lines, were sustained in litigation brought by the ACLU. See *id.* at 1–2; see also *Jackalone v. Andrus*, No. 79-3140 (D.C. Cir., Nov. 19, 1979) (on file with author) (order “accept[ing] the representation of the State Department that a demonstration at Lafayette Park has unacceptable potential for danger to the hostages [in Tehran],” and emphasizing that the availability of “other nearby sites” to the plaintiffs is a “material consideration” in reversing the district court’s injunction).

⁹⁴ See Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 185–86 (1980).

⁹⁵ *Id.* at 190 (quoting War Powers Resolution, 50 U.S.C. § 1542 (1976)).

filed “within 48 hours from the time that they are introduced into the area triggering the requirement.”⁹⁶

In the four days immediately preceding the failed rescue attempt of April 24, 1980, President Carter consulted then-White House Counsel Lloyd Cutler (and, through Cutler, the Attorney General) about the legality of the rescue mission under the War Powers Resolution. He chose, however, not to involve OLC.⁹⁷ The decision to exclude OLC from these final discussions is in considerable tension with the stature that OLC otherwise appears to have enjoyed in legal decisionmaking under Carter. It underscores that the formalist structure, even under Carter, was not fully realized on the ground. It is perhaps noteworthy, however, that even these final discussions occurred against the backdrop of extensive legal advice from OLC and do not appear to contradict OLC’s earlier legal assessment. A contemporaneous memorandum from White House Counsel Lloyd Cutler concerning the legality of the rescue attempt under the War Powers Resolution appears to track the analysis of the February 12 OLC opinion, but goes beyond it in this critical respect: Cutler concludes that, where a rescue mission “depends on total surprise,” the President has the authority to delay consultation with Congress “if the President concludes . . . that to do so would unreasonably endanger the success of the operation and the safety of those to be rescued.”⁹⁸

⁹⁶ *Id.*

⁹⁷ In a 1999 interview of White House Counsel Lloyd Cutler, Cutler recalled that:

I got called in four days before the rescue mission to give an opinion as to whether the rescue mission was covered by the War Powers Resolution, and obliged us to consult Congress. . . . I was told I couldn’t even talk to the Attorney General[, then Benjamin Civiletti,] about it; I had to do it by myself. But I persuaded President Carter that I needed to talk to the Attorney General. He couldn’t do it without involving the Attorney General. And we gave the opinion and the rescue mission was launched.

Interview by Martha Kumar with Nancy Kassop of Lloyd Cutler, White House Interview Program 7 (July 8, 1999), <https://www.archives.gov/files/presidential-libraries/research/transition-interviews/pdf/cutler.pdf> [<https://perma.cc/E45Y-S3B4>]. Scholars have cited this interview with Cutler, but have reached different conclusions as to its implications. Compare Ackerman, *supra* note 1, at 99–100, 230 n.41 (suggesting that this incident is an instance of White House lawyers “expect[ing] a no [from OLC and] . . . writ[ing] up their own legal memo telling the president yes,” *id.* at 100), with Morrison, *supra* note 1, at 1735 (arguing that, “[t]o the contrary, [the incident] reflects the [White House] Counsel’s view that, even on a matter of grave importance and sensitivity, it was imperative to involve the Justice Department and not simply rely on his own legal analysis”).

⁹⁸ Memorandum from Lloyd Cutler, White House Counsel 1 (Apr. 25, 1980) (on file with Jimmy Carter Library). Cutler’s memorandum goes on to state that introducing the rescue team into Iran did not involve hostilities and that “[t]he rescue effort itself . . . could have

A final structural change involving the make-up of OLC is noteworthy, both for how it fit with the formalist model as implemented under Carter and for how it might have fueled the shift away from the formalist model over time. OLC, to this point, had been staffed by longtime career civil servants, often arriving at OLC with extensive experience at other agencies.⁹⁹ The hiring approach changed under Bell and Harmon to an office of fairly young lawyers, many just out of prestigious clerkships and most of whom would work in the office for only a few years.¹⁰⁰ The change appears initially to have been intended to create an office with lawyers more familiar with the interpretive methods and craft of the judges for whom they had recently clerked.¹⁰¹ The new hiring approach proved enduring, however, and it has had the effect of populating the office with a more transient civil service largely, though not exclusively, in ideological alignment with the sitting president.¹⁰² This is not true across the board, and a small cluster of long-serving attorneys at OLC continue to be pivotal to the substantive work, institutional memory, and professional norms of the office. But the weight of experience in the office has shifted.

It was also during this time—and perhaps in part as a result of some of the institutional commitments underlying the formalist model—that the office of the White House Counsel took on a more prominent legal role.¹⁰³ Carter’s initial White House Counsel, Robert Lipshutz,

been aborted before any involvement in hostilities was ‘clearly indicated,’ and this is in fact what occurred.” *Id.* at 2 (quoting War Powers Resolution, 50 U.S.C. § 1542 (1976)). Although OLC’s earlier opinion had not considered these facts, the advice does not appear inconsistent with the advice that OLC had provided. See *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 190–96 (1980) (discussing “hostilities” and the consultation requirement under the War Powers Resolution and concluding that prior consultation may not be required in certain emergencies or when the requirement is incompatible with the President’s independent powers and obligations).

⁹⁹ See Frank M. Wozencraft, *OLC: The Unfamiliar Acronym*, 57 A.B.A.J. 33, 37 (1971) (describing OLC’s “core . . . [as made up of] career lawyers who joined the office in the early Eisenhower years or more recently, following experience elsewhere in government or in private practice”).

¹⁰⁰ See McGinnis, *supra* note 28, at 424–25, 425 n.186.

¹⁰¹ See *id.* at 425 n.186. Harmon described the change to me this way: “[W]e were not looking for advocates, but looking for judges . . . Sometimes that’s a different [kind of talent],” and the idea was to bring in younger lawyers, “like law clerks” who were in touch with how judges were thinking about the law. See Harmon interview, *supra* note 82.

¹⁰² See McGinnis, *supra* note 28, at 425.

¹⁰³ See Jeremy Rabkin, *At the President’s Side: The Role of the White House Counsel in Constitutional Policy*, L. & Contemp. Probs., Autumn 1993, at 63, 69. On the emergence of

“apparently played a peripheral role” in White House decisionmaking and a generally subservient role to the Attorney General.¹⁰⁴ But Lipshutz’s replacement under Carter, Lloyd Cutler, would turn the White House Counsel’s office into a powerful legal center.¹⁰⁵ Political scientist James Michael Strine has argued that the push for an independent OLC under President Carter worked to “isolate OLC lawyers from the legal policy stream” and “heighten conflict” between OLC, White House staff, and agency counsel.¹⁰⁶ The effect of OLC’s formal adjudicatory posture in interagency disputes, writes Strine, “was to escalate close policy disputes to the level of constitutional confrontation, forcing the issues into courts.”¹⁰⁷ This prompted the White House Counsel’s office in at least one high-profile dispute concerning constitutional limits on the application of minimum wage laws to local transit authorities to seek to intervene in OLC’s adjudication of the interagency dispute in order to ameliorate the conflict and negotiate a settlement.¹⁰⁸

The rise of the formalist model under President Carter, then, also coincided with and in some ways perhaps propelled forces that would eventually contribute to its decline—including a more robust center of legal power in the White House Counsel and a growing diffusion of legal power in the agencies.

3. Independent Legal Judgment.

The quasi-judicial conception of OLC implemented under President Carter reflects an idea of law as somehow severable from politics and underlying ideological commitments. There is a “best view” of the law and if you can sufficiently insulate OLC from partisan pressures, that

the modern structure of the White House Counsel’s office as a legal institution, with origins in President Nixon’s Counsel, see *id.* at 68.

¹⁰⁴ *Id.* at 69; see also Bell with Ostrow, *supra* note 36, at 37 (describing Lipshutz as “a relatively unassertive, retiring lawyer”).

¹⁰⁵ See Bell with Ostrow, *supra* note 36, at 37; Rabkin, *supra* note 103, at 69.

¹⁰⁶ See Strine, *supra* note 67, at 187–88; see also Rabkin, *supra* note 103, at 80 (“[W]ith the Justice Department held at arms length [under President Carter], the White House Counsel became a much more important source of independent guidance and information for the President. In some matters, the Justice Department seems to have been cut out of presidential deliberations altogether.”).

¹⁰⁷ See Strine, *supra* note 67, at 135. Strine traces a formal, detached, and adjudicatory posture of OLC—what he describes as OLC’s “test-case strategy” on structural constitutional issues—from President Carter into the Reagan administration. *Id.* at 191–216.

¹⁰⁸ See *id.* at 133, 137–90.

legal answer will emerge.¹⁰⁹ President Carter and his Attorney General used the formalist structure to express a commitment to this conception of “neutral” legal advice, or law’s independence from politics.¹¹⁰ But the formalist structure also can be used by a president to support other forms of independence in legal judgment,¹¹¹ and these other forms of independence will become crucial to my discussion of presidential incentives in Part II.

First, a president can use the formalist structure to develop a rival theory of constitutional power insulated or independent from the theories of constitutional power being developed in the judiciary.¹¹² In a series of legal opinions beginning in the Reagan administration, for example, OLC has advanced a theory of the “unitary executive” grounded in a robust vision of Article II. The unitary executive theory developed in these opinions was designed to incubate a model of presidential power distinct from then-prevailing theories in the courts.¹¹³

Second, a president can use the formalist model to insulate legal policy from *bureaucratic* resistance; he can use the formalist structure as a mechanism of internal control. OLC review can provide effective immunity for government actors engaged in implementing high-risk

¹⁰⁹ See also Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 *UCLA L. Rev.* 1559, 1577, 1580, 1595–96 (2007) (arguing that OLC should “strive for what it considers an accurate and honest appraisal of the relevant legal constraints,” rather than “plausible arguments supportive of the desired policies”); *infra* notes 349–354 and accompanying text.

¹¹⁰ See *supra* notes 36–37 and accompanying text.

¹¹¹ See Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe and Kagan on the Administrative State*, 130 *Harv. L. Rev.* (forthcoming 2017) (manuscript at 1) (exploring “‘independence’ . . . [as] a relational notion—independence of what, and from what?”).

¹¹² See McGinnis, *supra* note 28, at 389–400.

¹¹³ Political scientist Amanda Hollis-Brusky has traced the evolution of the unitary executive theory in executive branch materials. See Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981–2000*, 89 *Denv. U. L. Rev.* 197 (2011). She identifies the initial development of the theory in seven opinions of the Reagan OLC, and describes how the theory, in these opinions, is “becoming better defined, better supported, and more freely deployed.” *Id.* at 205. She traces the maturation of the theory in a series of OLC opinions during the George H.W. Bush administration and culminating in the post-9/11 opinions of the Office. See *id.* at 213–19, 229–36. See also Douglas W. Kmiec, *The Attorney General’s Lawyer: Inside the Meese Justice Department 47–65* (1992) (discussing the development of unitary executive theory under Reagan); see generally Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 *Harv. L. Rev.* 2070 (2009) (analyzing unitary executive theory “as a political instrument and a developmental phenomenon,” *id.* at 2073).

(legally) operations by removing the risk of criminal prosecution. The OLC opinion thus becomes a tool for the president to assuage the reluctant bureaucrat.¹¹⁴

These uses of the formalist model are in many ways routine. Presidents have regularly relied on OLC opinions to advance a robust vision of presidential authority, and the executive routinely turns to OLC to provide a formal opinion where government conduct might implicate a criminal prohibition.¹¹⁵ Recent examples of each include the Obama OLC's interpretation of the recess appointments power and its opinions on targeted killing.¹¹⁶

These uses of the formalist model are illustrated most starkly, however, in the Bush administration's approach to national security decisionmaking in the aftermath of 9/11—for example, in a series of OLC opinions concerning interrogation of detainees held by the United States abroad. The formalist structure became a tool for President Bush and his senior advisors to substantiate novel assertions of presidential power and to protect government actors from the potential liability that the chosen course of conduct presented. An OLC opinion concluding that a policy would be lawful—treated as binding on the executive branch—in effect prevented criminal prosecution for the proposed course of conduct.¹¹⁷

¹¹⁴ See Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* 130–32 (2007).

¹¹⁵ For example, the executive routinely confronts fiscal questions involving the Anti-Deficiency Act, a statute backed by criminal sanction. See, e.g., *The Anti-Deficiency Act Implications of Consent by Government Employees to Online Terms of Service Agreements Containing Open-Ended Indemnification Clauses*, 36 Op. O.L.C. ___, 2012 WL 5885535 (Mar. 27, 2012), <https://www.justice.gov/file/20596/download> [<https://perma.cc/9TFL-BB4S>]; *Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap Within an Appropriation*, 25 Op. O.L.C. 33 (2001); *Indemnification Agreements and the Anti-Deficiency Act*, 8 Op. O.L.C. 94 (1984).

¹¹⁶ See *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. ___, 2012 WL 168645 (Jan. 6, 2012), <https://www.justice.gov/file/18326/download> [<https://perma.cc/EY5J-JXHK>]; Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, to Eric Holder, U.S. Att'y Gen., Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi (July 16, 2010); Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, to Eric Holder, U.S. Att'y Gen., Re: Lethal Operation Against Shaykh Anwar Aulaqi (Feb. 19, 2010).

¹¹⁷ See Goldsmith, *supra* 114, at 170 (describing then-White House Counsel Alberto Gonzales and Counsel to the Vice President David Addington's "obsess[ion]" with the immunity-endowing effects of an OLC opinion); Cornelia Pillard, *Unitariness and Myopia*:

As recounted exhaustively by others, the OLC opinions—what would become known as the “torture memos”—addressed, among other things, the question whether interrogation programs of the CIA and the Defense Department would violate a criminal statute prohibiting torture.¹¹⁸ The opinions—authored by then head of the Office, Jay Bybee, and a political deputy in the office, John Yoo—swept aside statutory prohibitions, including the possibility of criminal sanction, and advanced an unprecedented view of presidential power to disregard statutory constraints.¹¹⁹ Yoo, on behalf of OLC, “wrote opinion after opinion

The Executive Branch, Legal Process, and Torture, 81 *Ind. L.J.* 1297 (2006); Daniel L. Pines, *Are Even Torturers Immune from Suit? How Attorney General Opinions Shield Government Employees from Civil Litigation and Criminal Prosecution*, 43 *Wake Forest L. Rev.* 93 (2008).

¹¹⁸ See Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States, to William J. Haynes II, Gen. Counsel, Dep’t of Defense (Mar. 14, 2003); Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A, to Alberto Gonzales, Counsel to the President (Aug. 1, 2002); see also Memorandum from Daniel Levin, Acting Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A, to James B. Comey, Deputy Att’y Gen. (Dec. 30, 2004) (replacing the Bybee memorandum after its formal withdrawal by OLC); Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, Re: Withdrawal of Office of Legal Counsel CIA Interrogation Opinions, to Eric Holder, U.S. Att’y Gen. (Apr. 15, 2009) (officially withdrawing four OLC memoranda, including the August 2002 Bybee memorandum, stating that the memos “no longer represent the views of the Office of Legal Counsel”).

¹¹⁹ See Office of Prof’l Responsibility, U.S. Dep’t of Justice, Report: Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists 159–60 (July 29, 2009) [hereinafter OPR Report] (“[W]e found errors, omissions, misstatements, and illogical conclusions in the Bybee Memo . . . that allowed the CIA interrogation program to go forward . . . that, when viewed together, support our conclusion that the Yoo and Bybee Memos did not represent thorough, objective, and candid legal advice.”). The OPR Report was reviewed by David Margolis, a longtime deputy in the Office of the Deputy Attorney General. Margolis agreed with OPR that Yoo and Bybee had exercised “poor judgment” and conducted flawed legal analysis, but rejected OPR’s finding of professional misconduct. See Memorandum of Decision from David Margolis, Assoc. Deputy Att’y Gen., Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility’s Report of Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists, to Eric Holder, Att’y Gen. 68 (Jan. 5, 2010) [hereinafter Margolis Review].

approving every aspect of the administration's aggressive antiterrorism efforts."¹²⁰

This was a clear preservation of role definition: OLC had the singular authority to bind the executive through formal and definitive legal analysis. But oversight shifted to the White House,¹²¹ with OLC lawyers under the direct supervision of the close advisors of the President and the Vice President.¹²² The internal process of opinion writing changed as well. Rather than circulate drafts of opinions broadly to other agencies with expertise in the issue and interests in the outcome, consequential opinions like the Bybee-Yoo memos were treated as "close hold[s]."¹²³ A close hold is government lingo for an exceptionally limited circulation of work product inside the executive branch. As Jack Goldsmith, the next confirmed head of the Office, would write, "I eventually came to believe that [the close-hold practice] was done to control outcomes in the opinions and minimize resistance to them," even when they did not include classified information.¹²⁴

The torture memos reflect a specific and extreme use of the formalist model. In explaining why he withdrew the interrogation opinions, Goldsmith writes that their "clumsy definitional arbitrage [in interpreting the torture statute] didn't seem even in the ballpark," and their analysis of the president's commander-in-chief authority was unprecedented and "wildly broader than . . . necessary" to resolve the questions at issue.¹²⁵ But a president's desire to put in power heads of OLC in ideological alignment with him and to use formal OLC opinions strategically, at least on occasion, to advance presidential policies,

¹²⁰ Goldsmith, *supra* note 114, at 23; see *id.* at 22–24, 96–98.

¹²¹ See generally Moe, *supra* note 12, at 263 (identifying strategies of centralization and politicization).

¹²² Goldsmith recounts that during his interview with Attorney General John Ashcroft for the position of Assistant Attorney General for OLC, Attorney General Ashcroft placed special emphasis on the need to be brought back "in the loop"; this was the "single issue" that preoccupied Ashcroft during the interview. See Goldsmith, *supra* note 114, at 30–31.

¹²³ *Id.* at 166–67.

¹²⁴ *Id.* at 167. Goldsmith returned the Office to its earlier practice of circulating draft opinions among key stakeholders inside the Justice Department and across the interagency. See *id.* at 165–67, 181–82.

¹²⁵ See *id.* at 145, 150; see also Margolis Review, *supra* note 119, at 64–65 (concluding that the "errors [in the interrogation opinions] were more than minor," but declining to adopt OPR's finding of professional misconduct).

reflects a perhaps inevitable maturation of the formalist model, observed across administrations.¹²⁶

B. Porous Legalism

A very different ideal type is what we might call porous legalism. Rather than resolve legal questions through formal and authoritative opinion writing, legal review is *informal*—an approach to legal analysis that might be described as talking shop. Instead of a centralized structure with clear role definition, moreover, legal power is *diffuse*. There are multiple sources of legal interpretive power—a diffusion of legal decisionmakers with ambiguously overlapping authority. Informality and diffusion enable a different institutional interplay between lawyers, policymakers, and political leadership. Rather than insulating legal review from either the presidential team or the bureaucracy, the interaction is more *porous*.¹²⁷

1. Porous Legal Judgment.

By porous, I do not mean simply that considerations of legality will include evaluations of policy or political context. This is always true to a point, perhaps especially in legal advice to the president (notwithstanding expressions of law’s neutrality such as those by Bell).¹²⁸ Instead, I mean that considerations of legality and considerations of politics or policy are no longer *institutionally* distinct and sequential inside the executive; they are intermingled.

Porous legalism thus rejects the “articulated” mode of governance at the crux of the formalist structure.¹²⁹ Instead of “successive phases of governance,”¹³⁰ porous legalism embraces a more institutionally fluid

¹²⁶ See, e.g., Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 *Cardozo L. Rev.* 437, 453–57 (1993) (discussing strategic uses of OLC under President Reagan); Morrison, *supra* note 1, at 1739 (describing interactions between White House officials and OLC under President Clinton).

¹²⁷ These elements form a distinctive ideal type, but they can also be disaggregated. See *infra* notes 385–387 and accompanying text.

¹²⁸ See, e.g., Daniel J. Meador, *The President, the Attorney General, and the Department of Justice* 39 (1980) (“[I]t has been said that ‘[t]he flavor of politics hangs about the opinions of the Attorney General.’” (quoting Paul Bator et al., *Hart and Wechsler’s The Federal Courts and the Federal System* 73 (2d ed. 1973))); Morrison, *supra* note 1, at 1715; Moss, *supra* note 28, at 1318–20.

¹²⁹ See Waldron, *supra* note 29, at 456–59.

¹³⁰ *Id.* at 467.

and iterative approach. The interplay among institutional actors exercising different facets of regulatory power is more porous.

An analogous conception might be found in the administrative law idea of “*Chevron* space.”¹³¹ In the courts, *Chevron* (when it applies) carves out a “zone of [legal] ambiguity,” within which the agency’s reasonable interpretation prevails.¹³² As a conception of legal decisionmaking power, however, *Chevron* embraces an institutionally intermingled process. Lawyers (and legal interpretive skills) lack primacy in resolving open questions inside this space.¹³³ Instead, the power to interpret statutes is shared with technocrats, policymakers, and political leadership.¹³⁴ The analogy to *Chevron* is not perfect. With judicial *Chevron*, courts police congressionally defined boundaries of administrative discretion. Executive branch legalism sometimes elaborates congressional mandates, sometimes constitutional authorities, and often occurs in contexts without meaningful judicial review.

Porous legalism is institutionalized by unwinding the common law adjudicatory institutions of the formalist model. It is realized through diffusion and informality. Porous legalism is not new; it is a longstanding model of executive branch legalism.¹³⁵ The design of legal review during the Cuban missile crisis, detailed extensively by Abram

¹³¹ See Peter L. Strauss, “Deference” is Too Confusing—Let’s Call Them “*Chevron* Space” and “*Skidmore* Weight,” 112 Colum. L. Rev. 1143 (2012); see also *Chevron U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 862 (1984).

¹³² Matthew C. Stephenson & Adrian Vermeule, *Chevron* Has Only One Step, 95 Va. L. Rev. 597, 601–02 (2009) (proposing conception of “zone of ambiguity”).

¹³³ See Magill & Vermeule, *supra* note 13, at 1045–46; see also E. Donald Elliott, *Chevron* Matters: How the *Chevron* Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law, 16 Vill. Envtl. L.J. 1, 11–12 (2005) (describing institutional shift under *Chevron* inside the EPA). But see Aaron Saiger, Agencies’ Obligation to Interpret the Statute, 69 Vand. L. Rev. 1231 (2016) (arguing that agencies and their lawyers have an obligation to pick the “best interpretation” of a statute, without resort to policy considerations).

¹³⁴ See Elliott, *supra* note 133, at 12; Magill & Vermeule, *supra* note 13, at 1046.

¹³⁵ Writing in 1979 about his experience as head of OLC under President Ford, then-Professor Antonin Scalia alluded to the threat to OLC of porous legalism:

The White House will accept distasteful legal advice from a lawyer who is unquestionably “on the team;” it will reject it, and indeed not even seek it, from an outsider—when more permissive and congenial advice can be obtained closer to home. And it almost always can be, if not from the White House Counsel then from one of the Cabinet members who is a lawyer, or from one of the Washington attorneys who soon become advisors of any administration.

Meador, *supra* note 128, at 40 (quoting letter from Scalia to Meador (July 20, 1979)).

Chayes, provides an important historical illustration.¹³⁶ And first-hand accounts of participants in the George H.W. Bush and the George W. Bush administrations suggest occasional uses of a more diffuse and overlapping legal advisory structure in connection with covert action or other specific foreign policy decisions.¹³⁷ But porous legalism became routinized during the Obama administration, at least in some types of presidential decisionmaking.

2. *Diffusion*

President Obama relied heavily on the structure of an interagency Lawyers Group to decide legal questions in the national security space.¹³⁸ The Lawyers Group consisted of leadership from the legal offices of the key national security agencies, as well as the head of OLC and the legal advisor to the National Security Council inside the White House.¹³⁹

The Lawyers Group adopted a “consensus-based” approach to decisionmaking, though the meaning of consensus in this context is underspecified and information about the process on the public record remains sparse.¹⁴⁰ The process for reviewing legal questions was

¹³⁶ See Chayes, *supra* note 1, at 30–35; see also Bob Bauer, *The National Security Lawyer, in Crisis: When the “Best View” of the Law May Not Be the Best View* 6–30 (N.Y.U. Pub. L. & Legal Theory Research Paper Series, Working Paper No. 17–08, 2017) (analyzing legal decisionmaking during the Cuban Missile Crisis).

¹³⁷ Interviews with C. Boyden Gray, White House Counsel to President George H.W. Bush, indicate that Gray “presided over several meetings of top officials from the Defense Department and the State Department, along with top officials from OLC, to consider the legal options of the President in a particular foreign crisis.” Rabkin, *supra* note 103, at 92 (citing interview by Jeremy Rabkin with Gray (May 12, 1993)). While those meetings did not result in a position “contrary to the advice of OLC,” Gray indicates that they did ensure that OLC was just one view at the table. *Id.* at 92 & n.129.

¹³⁸ See Charlie Savage, *Power Wars: Inside Obama’s Post-9/11 Presidency* 64 (2015). The Lawyers Group was initially created by President George H.W. Bush in a classified Presidential Directive governing interagency legal review of covert action. See John Bellinger, *Charlie Savage and the NSC Lawyers Group*, *Lawfare* (Nov. 8, 2015, 11:25 AM), <https://www.lawfareblog.com/charlie-savage-and-nsc-lawyers-group> [<https://perma.cc/5BZ5-9GCG>]; Jennifer N. Marrett, *The National Security Council Legal Adviser: Crafting Legal Positions on Matters of War and Peace*, 8 *J. Nat’l Sec. L. & Pol’y* 153, 168 (2015).

¹³⁹ See Savage, *supra* note 138, at 64.

¹⁴⁰ Emergent accounts of the Lawyers Group diverge on the question whether consensus requires actual unanimity among the participants and, relatedly, whether it operates to stifle or preserve a space for dissenting views. Compare Oona A. Hathaway, *The Rule of Law in National Security Lawyering* 15 (unpublished manuscript) (on file with author) (“Where each member of the group knows that the group makes decisions on a consensus basis and

iterative, and informed by ongoing exchanges with the President's policy team. Legal discussions evolved in response to new information and shifting priorities.¹⁴¹ The Lawyers Group addressed legal questions through informal working papers, often unsigned and undated, that reflected the group's collective bottom line.¹⁴²

Journalistic accounts suggest that it was rare for the Lawyers Group to decline to sign off on a contemplated course of conduct.¹⁴³ But the iterative nature of the legal-policy process and the still-classified nature of many national security decisions make it difficult to systematically ascertain the effects of the Lawyers Group on presidential decisionmaking.¹⁴⁴ The Lawyers Group does appear to have limited the policy options considered by the President on several occasions, and to have delayed (and, in effect, mooted) some operations under consideration.¹⁴⁵

where, moreover, failure to make a decision is not an option, a member who has concerns may be less likely to raise them.”), with Rebecca Ingber, *The Obama War Powers Legacy and the Internal Forces that Entrench Executive Power*, 110 *Am. J. Int'l. L.* 680, 692 (2016) (suggesting the Lawyers Group practice facilitates dissent).

¹⁴¹ See, e.g., Savage, *supra* note 138, at 285–87 (describing ongoing and iterative discussions between Lawyers Group and policymakers on targeted killing, including the question whether Mohanad Mahmoud al-Farekh, a U.S. citizen turned militant, could be lawfully targeted); see also *id.* at 534–38 (describing evolving legal views on the extraterritorial scope of the cruelty prohibition in the Convention Against Torture in response to both internal contestation and external pressure from world leaders); *id.* at 671 (describing evolving legal views on Guantanamo transfer restrictions).

¹⁴² One recent participant describes “[t]he typical lawyers group paper [as] about three single spaced pages long, containing just a handful of legal citations, outlining the key conclusions on what is often an extremely difficult and important legal question.” Hathaway, *supra* note 140, at 14–15.

¹⁴³ See Savage, *supra* note 138, at 278 (quoting John Brennan's statement, in 2011, that he had “never found a case that our legal authorities, or legal interpretations that came out from that [L]awyers [G]roup, prevented us from doing something that we thought was in the best interests of the United States to do”). But cf. *id.* at 484 (describing Ben Rhodes's recollection, in 2014, that legal concerns prevented policymakers from taking preferred actions involving detainees in custody in Iraq and Afghanistan).

¹⁴⁴ What is known today is in no small part due to Charlie Savage's indispensable reporting, now compiled in his book, *Power Wars*. I rely on his exhaustive documentation of specific legal-policy episodes to flesh out my account of diffusion in the national security space.

¹⁴⁵ See, e.g., Savage, *supra* note 138, at 286 (discussing deliberations over the legality of targeting al-Farekh); *id.* at 627–31 (describing legal concerns with a contemplated military action in Syria and the Lawyers Group recommendation to policymakers that “it would be prudent to make an explicit request for congressional authorization at the outset” (internal quotation marks omitted)).

Informality combined with a diffusion of overlapping legal interpreters, however, can also enable a president, so inclined, to forum shop. This approach is reflected in the decisionmaking process on Obama's intervention in Libya.¹⁴⁶ The legal question at issue in Libya concerned the requirement, under the War Powers Resolution, that the President terminate "hostilities" within sixty days unless Congress authorizes the action.¹⁴⁷ President Obama commenced military operations against the Qadhafi regime in Libya in 2011. His avowed goal was to avert a humanitarian crisis arising out of Qadhafi's violent efforts to thwart a growing rebellion within Libya.¹⁴⁸ The President's initial decision to use force in Libya was supported by a published legal opinion from OLC, concluding that the President had the constitutional authority to direct the use of force in Libya and that prior congressional approval was not required in the "limited operations under consideration."¹⁴⁹

As air strikes in Libya continued and political negotiations over a possible congressional authorization stagnated, a legal question confronted the President's senior advisors: what happens on day sixty?

¹⁴⁶ See *id.* at 635–49.

¹⁴⁷ Section 1543(a) of the War Powers Resolution requires the president to report to Congress "in any case in which United States Armed Forces are introduced . . . into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." 50 U.S.C. § 1543(a)(1) (2012). Section 1544(b) then requires:

Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1) of this title, whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress . . . has enacted a specific authorization for such use of United States Armed Forces.

Id. § 1544(b); see also Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 196 (1980) ("The practical effect of the [War Powers Resolution's] 60-day limit is to shift the burden to the President to convince the Congress of the continuing need for the use of our armed forces abroad. We cannot say that placing that burden on the President unconstitutionally intrudes upon his executive powers."). But see John C. Yoo, Applying the War Powers Resolution to the War on Terrorism, 6 Green Bag 175, 175 (2003) ("[The Bush] Administration follows the course of administrations before us, both Democratic and Republican, in the view that the President's power to engage U.S. Armed Forces in military hostilities is not limited by the War Powers Resolution."). See generally Trevor W. Morrison, "Hostilities," 1 Pub. L. Misc. 233 (2011) (introducing compendium of materials on the War Powers Resolution and its interpretation by executive branch actors and synthesizing the relevant legal debates).

¹⁴⁸ See Authority to Use Military Force in Libya, 35 Op. O.L.C. ___, 2011 WL 1459998, at *2–4 (Apr. 1, 2011), <https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf> [<https://perma.cc/MLE7-77RR>].

¹⁴⁹ See *id.* at *1.

The question whether the military activity in Libya constituted “hostilities” for purposes of the War Powers Resolution initially was put to the Lawyers Group.¹⁵⁰ Jeh Johnson, then the General Counsel of the Defense Department, circulated a discussion paper that suggested the administration should change its involvement to a purely supporting role, such as refueling warplanes, in order for its conduct to fall outside the term “hostilities.”¹⁵¹ Then acting head of OLC, Caroline Krass was understood by participants of the Lawyers Group to agree with Johnson’s position, though the question was never explicitly put to OLC for decision.¹⁵²

As policy and political discussions progressed in other corners of the executive, policymakers concluded both that authorization from Congress was not politically viable and that U.S. military activities in Libya should proceed apace.¹⁵³ Bob Bauer, then the White House Counsel, began to hold “one-on-one . . . [discussions] with the major participants,” including Harold Koh, then the Legal Adviser at the State Department.¹⁵⁴ Koh, a leading international law scholar and a longtime proponent of humanitarian intervention, told Bauer that he believed there was a defensible interpretation of “hostilities” that would permit the U.S. military activities to continue.¹⁵⁵ Bauer conveyed Koh’s legal analysis to President Obama.¹⁵⁶ Bauer told the President that “this [legal] approach was not the *favored* interpretation of the law among others on the administration legal team and predicted that Obama would be criticized for embracing it.”¹⁵⁷ But he advised the President that it was a reasonable legal ground on which to proceed.¹⁵⁸ Krass is reported to have indicated to Bauer that OLC could not support such an interpretation of the statute, though OLC was never asked for a legal opinion.¹⁵⁹

¹⁵⁰ See Savage, *supra* note 138, at 643.

¹⁵¹ See *id.*

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ *Id.* at 644.

¹⁵⁵ See *id.*

¹⁵⁶ See *id.* at 644–45.

¹⁵⁷ *Id.*

¹⁵⁸ See *id.* at 645.

¹⁵⁹ See *id.* at 646.

President Obama decided to continue military operations in Libya under the legal basis advanced by Koh.¹⁶⁰ That legal position was conveyed to Congress (and to the public) in testimony from Koh before the Senate Foreign Relations Committee.¹⁶¹ The legal rationale was contested by most war powers experts, including a former head of OLC.¹⁶²

The institution of a diffuse legal advisory structure was recurrent in reports of national security decisionmaking under President Obama. While evidence on the public record is more limited outside of the national security context, there is some suggestion that such an institutional structure also was used in limited legal-policy domains of special salience to the President or the Attorney General. For example, the Obama administration's legal decisions implementing the Affordable Care Act ("ACA"), Obama's signature legislative achievement, appear to approximate this model. Though the available accounts are less definitive, they point to the use of a more diffuse interagency structure to resolve at least some significant legal questions arising under the ACA.¹⁶³ In addition, although the ACA has presented some of the

¹⁶⁰ See *id.* at 645.

¹⁶¹ See *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations, 112th Cong. 10 (2011)* (statement of Hon. Harold Koh, Legal Adviser, U.S. Dep't of State) ("[I]t was [the] unusual confluence of . . . four limitations, an operation that is limited in mission, limited in exposure, limited in risk of escalation, and limited in choice of military means, that led the President to conclude that the Libya operation did not fall under the automatic 60-day pullout rule.").

¹⁶² See Jack Goldsmith, *Problems with the Obama Administration's War Powers Resolution Theory*, *Lawfare* (June 16, 2011, 8:38 AM), <https://www.lawfareblog.com/problems-obama-administrations-war-powers-resolution-theory> [<https://perma.cc/445E-BXUB>] (providing an extensive analysis of the administration's legal position and arguing that it is unpersuasive). Scholars, former officials, and public intellectuals also debated the process through which the administration arrived at its legal conclusion. Compare, e.g., Eric Posner & Adrian Vermeule, *Libyan Legal Limbo: Why There's Nothing Wrong with Obama Ignoring Some of his Own Legal Advisers on Libya*, *Slate* (July 5, 2011, 6:17 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/06/libyan_legal_limbo.html [<https://perma.cc/T4WK-2JSV>], with Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 *Harv. L. Rev. F.* 62–63 (2011).

¹⁶³ For a substantive analysis of the legal questions involved, see Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 *U. Pa. L. Rev.* 1715 (2016); see also *id.* at 1729–35 (critiquing the Obama administration's legal position on cost-sharing subsidies and discussing the resulting litigation on this issue). For a partial (and quite partisan) discussion relating to the structure and process of legal decisionmaking in connection to the ACA's cost-sharing reduction program, see House Comm. on Energy & Commerce and House Comm. on Ways & Means, 114th Cong., *Joint Congressional*

thorniest and most complex legal questions involving domestic policy under the Obama administration, there is no available OLC opinion on the ACA.

Attorney General Holder himself opted at times for a diffusion of legal power even inside the Justice Department. An early legal question to confront the Obama administration was the question whether a bill that would give the District of Columbia a seat in the House (and add a seat for Utah) was constitutional. President Obama had cosponsored a similar bill as a senator, and the Attorney General had been a longtime advocate for congressional representation for the District.¹⁶⁴ As reported in the press, OLC prepared a legal opinion concluding that the D.C. voting rights bill would be unconstitutional. The Attorney General then asked the Acting Solicitor General to provide a separate legal analysis of the bill and embraced his conclusion that the bill was defensible.¹⁶⁵

As these examples illustrate, diffusion can take two forms. It can consist of a regularized structure where power over legal interpretation is shared among institutional actors, as in the Lawyers Group. Or it can consist of forum shopping among legal interpreters given a particular policy preference. While the latter probably occurs to a point under any administration, the former appears to have taken on new rigor during the Obama administration, at least in the national security context.

3. Informality

While diffusion remains a localized practice, the decline of formality is general and widespread. Informal advice has displaced the formal legal opinion as the predominant mode of executive branch legalism. That significant institutional change has gone largely unnoticed in the

Investigative Report into the Source of Funding for the ACA's Cost Sharing Reduction Program 52–88 (2016). See also Deposition of David Fisher before the House Comm. on Ways & Means, at 26–35 (May 11, 2016) (describing a legal memorandum on cost sharing subsidies, authored by a lawyer from the Office of Management and Budget and, according to the testimony, discussed and approved by a group of administration lawyers including the Attorney General). For a general discussion of the structure set up to address legal-policy questions arising under the ACA, see, for example, N.C. Aizenman, *New Health-Care Rules Multiply Man-Hours for Policymakers, Bureaucrats*, *Wash. Post* (June 3, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/02/AR2010060204452.html> [<https://perma.cc/XM4R-CFPQ>].

¹⁶⁴ See Carrie Johnson, *D.C. Vote Memo Called Informal*, *Wash. Post* (Apr. 3, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/02/AR2009040203979.html> [<https://perma.cc/V393-9HNX>].

¹⁶⁵ See *id.*

legal scholarship. OLC has always engaged in informal, sometimes oral, legal advice in addition to formal opinion writing. But its formal opinions docket has diminished dramatically in recent years. The number of unclassified OLC opinions went down to just five opinions annually in 2014 and 2015. And, even though there is often an effort to push out new opinions before a change in administration, the number for 2016 was just nine opinions.¹⁶⁶ Figure 1 depicts the change in OLC's opinions practice over time. These numbers include both OLC's "published" opinions and unclassified OLC opinions that have not been publicly released.¹⁶⁷ The data is derived from Freedom of Information Act ("FOIA") releases of the Office's annual "Opinions Lists" from 1998 to 2016.¹⁶⁸ The Office began to compile these lists of unclassified opinions for internal management purposes, so they may not be exhaustive.¹⁶⁹ There is also some variation across administrations and personnel in terms of what of OLC's work product is designated as a formal opinion.¹⁷⁰ But the annual "Opinions Lists" are the best available

¹⁶⁶ By contrast, OLC's unclassified Opinions List for the last year of the Clinton administration (2000) includes 47 opinions, and the unclassified Opinions List for the last year of the Bush administration (2008) includes 32 opinions.

¹⁶⁷ For a discussion of OLC's classified opinions practice in recent years, see *infra* note 173 and accompanying text.

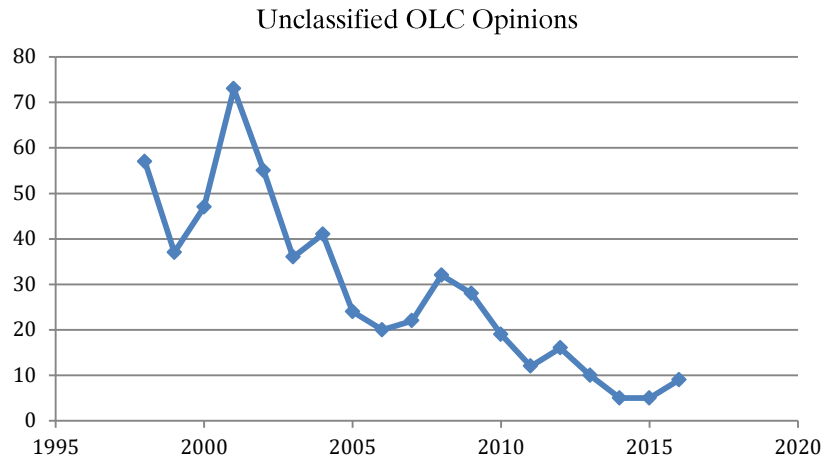
¹⁶⁸ Many of the titles for specific opinions are redacted in the lists.

¹⁶⁹ Because these unclassified opinions lists are created contemporaneously by OLC, they also do not include opinions that are initially classified but subsequently either leaked or formally declassified. See Letter from Peter J. Kadzik, Assistant Att'y Gen., U.S. Dep't of Justice, to Jason Chaffetz and Ranking Member Elijah E. Cummings, House Comm. on Oversight & Gov't Reform 2 (Apr. 1, 2016) (on file with author) [hereinafter Chaffetz Response Letter].

¹⁷⁰ In an April 2016 correspondence with Congress, OLC noted this variation over time and defined, for purposes of the correspondence, a "formal opinion" as "a letter or memorandum containing substantive final legal advice of OLC, transmitted to a client agency, and signed by an OLC Assistant Attorney General or Deputy Assistant Attorney General, generally drafted pursuant to the process described in the 'Best Practices Memorandum.'" *Id.* (citing Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, to Attorneys of the Office on Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010) [hereinafter Barron Memorandum]). Representatives Chaffetz and Cummings had asked OLC to provide them, *inter alia*, with the number of unclassified (and classified) opinions that OLC issued between 2005–2015. See *id.* at 2. The estimates of unclassified opinions that OLC provided in response to Chaffetz and Cummings differ somewhat from those in the Opinions Lists discussed in the text. Sometimes the annual number is slightly below what is in the Opinions List, and sometimes it is slightly above. For consistency, I have used the numbers contained in the Opinions Lists throughout (as the data in the letter to Chaffetz and Cummings only goes back to 2005). I

data on the size of OLC's unclassified opinions docket since the mid-1990s.

Figure 1.

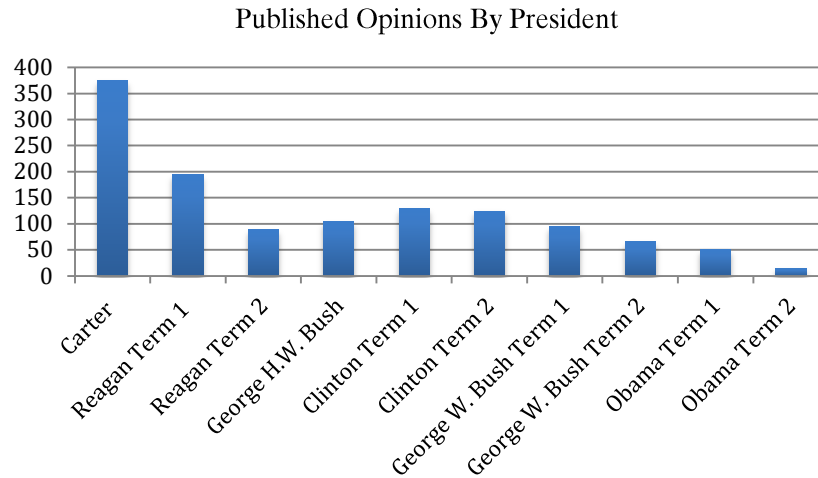


OLC did not compile such Opinions Lists prior to 1998 and so data on the number of opinions has not been obtainable through FOIA.¹⁷¹ Figure 2 documents changes in the Office's *published* opinions over time, beginning with the Carter administration when OLC started to publish its opinions.¹⁷² Published opinions are a less useful metric because many of the Office's opinions do not receive publication, and administrations may vary in their willingness to publish. The data nevertheless demonstrates a significant decline in OLC opinion writing since President Carter.

discuss the data on classified opinions, drawing from the letter response to Chaffetz and Cummings, *infra* in the text and accompanying notes.

¹⁷¹ In response to a FOIA request to OLC, I was informed that the office lacks aggregate data on opinions by year prior to 1998.

¹⁷² These data are derived from the database of published opinions that OLC maintains online. See Office of Legal Counsel, Dep't of Justice, Opinions (June 5, 2016), <https://www.justice.gov/olc/opinions> [<https://perma.cc/3VWD-8LSH>].

Figure 2.

While it might be tempting to attribute this change to a rise in classified opinions work, this is not borne out in the data. In response to a request from the House Oversight Committee, OLC recently estimated that it issued an average of seven classified opinions per year between 2005 and 2010.¹⁷³ Those numbers dropped to just two opinions in 2011 and 2012, and zero or one classified opinion per year in 2013 through 2015.¹⁷⁴

Of the published OLC opinions under President Obama, only fourteen respond to a request from a component of the White House.¹⁷⁵ Of course,

¹⁷³ OLC issued 8 classified opinions in 2005, 4 in 2006, 10 in 2007, 4 in 2008, 9 in 2009, and 8 in 2010. See Chaffetz Response Letter, *supra* note 169, at 2.

¹⁷⁴ See *id.*

¹⁷⁵ I am including in this count an OLC opinion addressing the President's Article II authority to direct the use of force in Libya, even though the opinion was requested by the Attorney General. See *Authority to Use Military Force in Libya*, 35 Op. O.L.C. ___, 2011 WL 1459998, at *2-4 (Apr. 1, 2011), <https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf> [<https://perma.cc/SC5U-TT2C>]. There is, in addition, a letter from the Attorney General to the President requesting that he assert executive privilege in response to a congressional subpoena concerning Operation Fast and Furious and concluding that such an assertion of executive privilege would be legally appropriate. I do not include this letter in the fourteen opinions identified in the text, although it would be reasonable to do so. See *Assertion of Executive Privilege over Documents Generated in Response to Congressional Investigation into Operation Fast and Furious*, 36 Op. O.L.C. ___, 2012 WL 2869615 (June 19, 2012), https://www.justice.gov/sites/default/files/olc/opinions/2012/06/31/ag-ff-exec-priv_0.pdf [<https://perma.cc/UB57-YGAC>].

White House lawyers may have been closely involved in some of the requests to OLC that came from an agency head. It is also possible that an administration more focused on leveraging administrative authorities would have relied more heavily on agency-level requesters. But the difference from the Carter period underscores the divergence in institutional practice.¹⁷⁶

C. Bracketing Technocratic Coordination

The decline of formality is not antithetical to a centralized structure of OLC review. It is possible to imagine a centralized OLC that continues to be decisive on questions of law, albeit working through an informal

¹⁷⁶ Of the fourteen opinions responding to a White House requester, only one opinion provides a (partial) “no” to a proposed presidential course of action. See *The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, 38 Op. O.L.C. __, 2014 WL 10788677 (Nov. 19, 2014), <https://www.justice.gov/file/179206/download> [<https://perma.cc/UPL3-DWND>] (concluding that a proposed deferred action program for parents of U.S. citizens and legal permanent residents would be a permissible exercise of DHS’s discretion, but a proposed deferred action program for parents of recipients of deferred action under DACA (a prior deferred action for childhood arrivals program) would be impermissible). One other opinion limits the manner in which the president must exercise his statutory authority. See *Applicability of the National Emergencies Act to Statutes that Do Not Expressly Require the President to Declare a National Emergency*, 40 Op. O.L.C. __ (Aug. 24, 2016), <https://www.justice.gov/opinion/file/914396/download> (concluding that the National Emergencies Act’s provision limiting statutory authorities to be exercised during national emergencies to only instances in which the President “specifically declares a national emergency,” 50 U.S.C. § 1621(b), applies to any statutory authority for national emergencies, even to statutes that do not themselves require the President to declare a national emergency). Where a desired policy or action is discernable, the other twelve opinions approve it. See, e.g., *Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach from Congressional Subpoena*, 38 Op. O.L.C. __, 2014 WL 10788678 (July 15, 2014), <https://www.justice.gov/file/30896/download> [<https://perma.cc/42W7-AHEC>]; *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. __, 2012 WL 168645 (Jan. 6, 2012), <https://www.justice.gov/file/18326/download> [<https://perma.cc/KXD7-Z7MF>]; *Authority to Use Military Force in Libya*, 35 Op. O.L.C. __, 2011 WL 1459998 (Apr. 1, 2011), <https://www.justice.gov/file/18376/download> [<https://perma.cc/JQ86-YVTR>].

This does not mean, of course, that OLC did not on other occasions counsel the president’s team against a desired policy or action on the ground that it raised legal concerns. Indeed, as Professor Trevor Morrison explains, there are many reasons why a “no” to the president is rarely formalized in an OLC opinion. See Morrison, *supra* note 1, at 1719. As detailed in the text *infra*, however, the absence of such constraining opinions over time may limit the availability of an OLC opinion as a credibility signal. See *infra* note 286–288 and accompanying text.

decisional mechanism like talking shop. Executive branch officials might regularly request and comply with OLC's legal views. They would simply do so informally.¹⁷⁷

Yet the rise of porous legalism underscores the difficulties of preserving OLC's centrality to high-stakes decisionmaking, where the president and his policy advisers have strong extralegal reasons to prefer a particular course of conduct and where legal experts inside the executive are divided on the viable legal grounds for decision.

There is a specific category of legal decisionmaking, however, that is especially amenable to a model of informal but centralized OLC review. Some questions are put to a legal decider where there is no driving, extralegal presidential preference, but simply a desire to resolve uncertainty by some agreed-upon mechanism. We might think of this as technocratic coordination. In a variety of contexts, resolving uncertainty is more important than how substantively the issue will be resolved. In game theoretic terms, this is the classic coordination strategy. The means of coordination can be legal analysis by OLC.¹⁷⁸ A president might resort to technocratic coordination because the issue is not one that implicates extralegal considerations. Or he might resort to OLC because, even though extralegal considerations are present, he decides not to expend political capital on them.

This model of legal decisionmaking is especially useful in overlapping regulatory space.¹⁷⁹ Indeed, OLC's organizational origins are as an intra-executive dispute resolution office "adjudicating" disagreements between the agencies. Agencies regularly brush up against each other's legal authorities and policy or enforcement domains. Some mechanism is needed to resolve disagreement, including conflicting legal views among regulators.¹⁸⁰ Even absent a specific

¹⁷⁷ OLC does not decide when a formal legal opinion will be prepared. The requester (an agency or White House actor) chooses whether the request is for formal or informal advice. Karl Thompson, an acting head of OLC under President Obama, suggested in public comments that "[t]he vast majority of our advice is provided informally." Letter from Jason Chaffetz and Ranking Member Elijah E. Cummings, House Comm. on Oversight and Gov't Reform, to Loretta E. Lynch, Att'y Gen. 1 (Mar. 14, 2016). Thompson emphasized that this informal advice "is still binding by custom and practice in the executive branch." *Id.*

¹⁷⁸ Technocratic coordination can also take a more policy-oriented approach, for example, through the mechanism of OIRA review.

¹⁷⁹ See Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 *Harv. L. Rev.* 1131 (2012); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 *Sup. Ct. Rev.* 201 (2007).

¹⁸⁰ See Freeman & Rossi, *supra* note 179, at 1193–94.

interagency dispute, there are a variety of bread-and-butter questions that the agencies routinely confront. OLC has long been an intra-executive branch mechanism for resolving those questions using legal analysis. Both political and bureaucratic actors might continue to turn to OLC to resolve legal disagreement simply because it is what they and their predecessors have previously done.¹⁸¹

Irrespective of formality, then, legal review might still be centralized in OLC for at least some legal questions. Indeed, this model of an informal coordinator in a variety of technocratic domains lacking strong extralegal pressures or preferences probably describes much of OLC's work across administrations. Informality, under this model, might be less a deliberate design than a consequence of other developments that nevertheless fails to dislodge the coordinative tradition of OLC review.

While technocratic coordination is a form of legalism that is pervasive in day-in, day-out governance, however, it is somewhat removed from high-stakes legalism—that is, from the legal-policy questions of special salience to the presidential team. I therefore note it to complete a conceptual typology of executive branch legalism but largely bracket it in the discussion of presidential decisionmaking that follows.

II. ANALYZING THE TRANSFORMATION OF EXECUTIVE BRANCH LEGALISM

The formalist structure and porous legalism coexist in any administration. Yet the foregoing has documented a significant shift in institutional practice. While occasional uses of the formalist model continue, porous legalism is on the rise. This Part offers some building blocks toward a positive theory of executive branch legalism—one that can help to explain the fragility of the formalist structure in current times.¹⁸²

I argue that two sets of forces have converged to reshape executive branch legalism. The first is important changes in the incentives

¹⁸¹ A variety of extant theories can help to explain the resilience of technocratic coordination. The idea of “focal points” provides one potentially illuminating account. As Professor Richard McAdams explains, “[I]n situations requiring coordination, anything that makes salient one behavioral means of coordinating tends to produce self-fulfilling expectations that this equilibrium will occur.” Richard H. McAdams, *Beyond the Prisoners’ Dilemma: Coordination, Game Theory, and Law*, 82 S. Cal. L. Rev. 209, 231–33 (2009). For the classic game theoretic account of focal points, see Thomas C. Schelling, *The Strategy of Conflict* 54–67 (1960).

¹⁸² See generally Shepsle, *supra* note 16, at 26 (arguing that institutions are “equilibrium ways of doing things,” and they change if a decisive player so chooses).

operating on the presidential team. Section II.A thus begins by examining the president's choice between the two models.¹⁸³ It explores a central tradeoff that the president confronts, between credibility and control, and breaks down presidential control into a few relevant components. It then analyzes a set of structural developments that alter the control-credibility calculus in contemporary governance.

The second, concurrent account is internal to law itself, and more sociological.¹⁸⁴ Looking from the Carter period to the Obama administration, I argue that executive branch lawyers have come to embrace a more porous conception of law—that is, that many lawyers themselves understand legal judgment as a more iterative and interactive endeavor, involving nonlawyers as well as agency counsel with a diverse array of technical expertise. The questions of law implicated in high-stakes presidential decisionmaking concern, simultaneously, matters of significant national strategy, policy, and morality and the technical minutiae of complex and textured statutory and regulatory frameworks. A model of OLC supremacy, Section II.B argues, is increasingly removed from how executive branch lawyers understand their own role in governance. Section II.B concludes by suggesting a set of feedback effects that reinforce the fragility of the formalist model. The rise of porous legalism itself diminishes the availability of the formalist model, in part because of porous legalism's effects on OLC's sociological legitimacy.¹⁸⁵

I note one clarification and one caveat at the outset. My use of “the president” intends to capture the collection of institutional actors inside

¹⁸³ I explore presidential design from a rational choice perspective. This is a familiar approach in agency design theory. See Jacob E. Gersen, *Designing Agencies*, in *Research Handbook on Public Choice and Public Law* 333 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010); McNollgast, *supra* note 13. For a critique of this approach in the context of presidential power and legal constraint, see Pildes, *supra* note 1, at 1406. For a rational choice account of why OLC itself might be motivated to adopt an independent-minded or quasi-judicial approach to legal review, see Lund, *supra* note 126, at 486–504.

¹⁸⁴ See Adrian Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* 2–8 (2016).

¹⁸⁵ Both the question of OLC's effective power and the question how legal power should be designed concern facets of legitimacy. Richard Fallon has suggested the distinction between “sociological legitimacy” and “moral legitimacy” to distinguish between the questions whether the legal position of an actor like the Supreme Court is treated as authoritative, at least among certain groups (sociological legitimacy), and whether it *ought* to be (moral legitimacy). See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 *Harv. L. Rev.* 1787, 1794–1801 (2005). On Fallon's terms, this discussion focuses on OLC's sociological legitimacy. Part IV turns to questions of moral legitimacy.

the White House complex.¹⁸⁶ This approach necessarily misses some important nuance, for the White House is a “they” not an “it.”¹⁸⁷ By focusing on the presidential team, I am also sweeping away some significant real-world complexity. Presidential design is the product of both presidential vision and presidential acquiescence in the choices of other executive branch actors. Personalities, too, play a crucial part in the implementation of what is often a somewhat loose or abstract presidential vision of executive branch legalism. While recognizing the significance of these dynamics, I have sought to make the framework more tractable by focusing, at least initially, on the presidential team. Although this is an incomplete account of the institutional dynamics inside the executive, my hope is that this framework helps to illuminate some important structural forces underlying the change in executive branch legalism described in Part I.

The caveat: my argument is a theoretical one; I do not purport to substantiate it empirically. Instead, I suggest that these claims are plausible on the available data and, in the process, continue to flesh out a grounded account of executive branch legalism in contemporary governance.¹⁸⁸

A. Executive Branch Legalism in Political Context

What is a president trying to achieve in the design of executive branch legalism? Interdisciplinary accounts of presidential design tend to focus on political control.¹⁸⁹ A well-developed account of the presidency argues that the president structures the bureaucracy to facilitate control over decisionmaking relevant to his national policy agenda. As political scientist Terry Moe argued in a series of works, the president uses structure to exercise control (*vis-à-vis* Congress) over the

¹⁸⁶ See Kagan, *supra* note 4, at 2338. The actors constituting the presidential team might include, for instance, the White House Counsel, the president’s Chief of Staff, or his national security advisors.

¹⁸⁷ See Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 *Mich. L. Rev.* 47, 49 (2006).

¹⁸⁸ Cf. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 *Yale L.J.* 104, 166 (2015) (“[A]ny theory of power allocation must emerge from institutional and historical context.”).

¹⁸⁹ Control need not be complete, as the discussion of shared control *infra* (at notes 224–248 and accompanying text) illustrates.

bureaucracy.¹⁹⁰ Building on this interdisciplinary account of what she termed “presidential administration,” then-Professor Elena Kagan analyzed the use of presidential directives to shape policymaking by the agencies.¹⁹¹

The president also desires control over executive branch legalism. We can decompose presidential control into three relevant components. First, the president desires retail-level control over specific legal-policy decisions. He seeks discretion to set policy and to be able to assert that he is doing so lawfully.¹⁹² Legal decisions set the boundaries of

¹⁹⁰ See Moe, *supra* note 12; Moe & Wilson, *supra* note 12; see also, e.g., Lewis, *supra* note 18, at 88–106; William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 *J. Pol.* 1095, 1096 (2002). The legal literature is vast and rich. It includes, for example, debates over the legality and desirability of regulatory review by the OIRA, see, e.g., Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 *Cornell L. Rev.* 769, 836–42 (2013); the use of presidential directives, see *infra* note 191; and the growth of White House “czars,” see Aaron J. Saiger, *Obama’s “Czars” for Domestic Policy and the Law of the White House Staff*, 79 *Fordham L. Rev.* 2577, 2577–78 (2011).

¹⁹¹ Kagan focused on the rise of presidential directives during the Clinton presidency. See Kagan, *supra* note 4. In more recent work, Kathryn Watts shows how presidential control over bureaucratic policymaking has become entrenched under Presidents George W. Bush and Barack Obama. See Kathryn A. Watts, *Controlling Presidential Control*, 114 *Mich. L. Rev.* 683, 692 (2016). The scope of the president’s directive authority over the agencies is contested. Some defenders of a strongly unitary executive argue that the president has constitutional authority to control the exercise of agency discretion, even in those contexts when Congress has attempted to curtail his authority. See, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *Harv. L. Rev.* 1153, 1166 (1992); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *Yale L.J.* 541, 598–99 (1994). Other scholars defend presidential directive authority on policy grounds and argue for a presumption in favor of it when legislation has not foreclosed it. See, e.g., Kagan, *supra* note 4, at 2250–52. But see Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 *Colum. L. Rev.* 263, 267 (2006) (arguing presidents only have authority to direct administrative action where such authority is expressly conferred by statute). Meanwhile, some scholars argue that the president may supervise the agencies, but he may not direct their decisions, see, e.g., Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 *Geo. Wash. L. Rev.* 696, 703–05 (2007); Peter L. Strauss, *Presidential Rulemaking*, 72 *Chi.-Kent L. Rev.* 965, 984–86 (1997); while others challenge this distinction between oversight and control as too faint to be legally meaningful, see, for example, Kate Andrias, *The President’s Enforcement Power*, 88 *N.Y.U. L. Rev.* 1031, 1110–11 (2013); Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 *U. Pa. J. Const. L.* 637, 645–46 (2010).

¹⁹² See, e.g., Jack Goldsmith, *The Irrelevance of Prerogative Power, and the Evils of Secret Legal Interpretation*, in *Extra-Legal Power and Legitimacy: Perspectives on Prerogative* 214, 214 (Clement Fatovic & Benjamin A. Kleinerman eds., 2013); Gabriella Blum, *The Role of the Client: The President’s Role in Government Lawyering*, 32 *B.C. Int’l & Comp. L. Rev.* 275, 278–79 (2009).

permissible policy. The president thus desires discretion to make policy at the retail level.

Second, the president wants his legal-policy decisions to be effectuated by the bureaucracy. He seeks internal control over, or compliance from, line-level personnel inside the agencies. For the president to govern effectively, he must be able to alleviate the line-level concern that following presidential policy could open individual bureaucrats to liability, especially criminal liability. This concern is prevalent in the national security context where a number of legal authorities implicate criminal penalties,¹⁹³ although it is not limited to this policy space.¹⁹⁴

Third, the president desires a form of informational control: he wants to control disclosure. The president wishes to decide whether, when, and to whom legal advice will be revealed.¹⁹⁵ A legal opinion, when it is made public, can help to defend a presidential policy. It can also create controversy, distract from other priorities, or put presidential policies at risk. Presidents thus desire control over what legal advice is disclosed, when, and how widely.¹⁹⁶

¹⁹³ See, e.g., Goldsmith, *supra* note 114, at 142–44; see also, e.g., Intelligence—Warrantless Electronic Surveillance—Common Carriers (18 U.S.C. §§ 2510–2520, 47 U.S.C. § 605), 2 Op. O.L.C. 123 (1978) (analyzing legal implications for private parties’ cooperation with executive directive); Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi, to Eric Holder, U.S. Att’y General (July 16, 2010), https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16_-_olc_aaga_barron_-_al-aulaqi.pdf [<https://perma.cc/2XF2-FSQ9>]; Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel of the Dep’t of Def. (Jan. 22, 2002), <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-laws-taliban-detainees.pdf> [<https://perma.cc/P4N5-2TAC>].

¹⁹⁴ See *supra* note 115 and accompanying text.

¹⁹⁵ An extensive literature studies the implications of information acquisition and use for institutional design. See generally Stephenson, *supra* note 3 (collecting sources on information use and aggregation, and offering a theory of information acquisition). On the question of control over timing, see, for example, Jacob E. Gersen & Anne Joseph O’Connell, Hiding in Plain Sight? Timing and Transparency in the Administrative State, 76 U. Chi. L. Rev. 1157 (2009); Jacob E. Gersen & Eric A. Posner, Timing Rules and Legal Institutions, 121 Harv. L. Rev. 543 (2007).

¹⁹⁶ See, e.g., Lund, *supra* note 126, at 475 n.83 (describing the strategic release of “[a]n enormous mass of OLC opinions, selected from a full decade of the Office’s work . . . during the closing moments of the Bush administration” and positing that the “mass release may hinder the Clinton administration’s ability to defend positions that differ from those taken by OLC in these now-public documents”).

In structuring executive branch legalism, the president does not only desire control, however. He also seeks credibility.¹⁹⁷ Credibility, or political trust, involves “a judgment, however tacit or habitual, to accept vulnerability to the potential ill will of others by granting them discretionary power over some good.”¹⁹⁸ Through executive branch legalism, the president seeks to signal his credibility to elites and engaged actors in civil society, as well as to congressional overseers of executive policies and programs.¹⁹⁹ By adopting an institutional structure “that impose[s] heavier costs on ill-motivated actors than on well-motivated ones,” the president seeks to convey that he is credible—that is, that he is deserving of discretion.²⁰⁰ Executive branch legalism also serves as a more specific signal. Presidential credibility is wrapped up with public perceptions about legality.²⁰¹ The president wants to signal to congressional overseers, elites, and engaged actors in civil society that he acts in accordance with law.²⁰²

¹⁹⁷ See Posner & Vermeule, *supra* note 1, at 122–23 (offering a rationalist account of credibility or political “trust” in connection to the presidency); Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 *U. Chi. L. Rev.* 865, 868 (2007). For alternative accounts, see generally Mark E. Warren, *Democratic Theory and Trust*, in *Democracy and Trust*, 310 (Mark E. Warren ed., 1999) (elaborating three distinct approaches to trust and politics).

¹⁹⁸ Warren, *supra* note 197, at 311. Scholars have analogized presidential credibility to the idea of “diffuse support” developed in connection to the Supreme Court. See Pildes, *supra* note 1, at 1387–88. Diffuse support, explains Professor Rick Pildes, “means the willingness of the public to support the Court’s discretionary power, even when people might disagree with particular outcomes, because they generally believe the Court is exercising these powers in sound ways for good reasons.” *Id.*

¹⁹⁹ See Posner & Vermeule, *The Credible Executive*, *supra* note 197, at 894–913 (developing a theory of executive signaling).

²⁰⁰ *Id.* at 867–68.

²⁰¹ See Pildes, *supra* note 1, at 1407 (arguing “legal compliance [is] a powerful signal, perhaps the most powerful signal, in maintaining a President’s critical credibility as a well-motivated user of discretionary power”); see also, e.g., David J. Barron, *Waging War: The Clash Between Presidents and Congress, 1776 to ISIS*, at xii (2016) (“[R]ather than defiantly blow past [statutory] limits, all but a few presidents have opted for a less confrontational course. Through delay, adjustment, clever argument, political calculation, and even retreat, [presidents generally] have worked to accommodate . . . the restrictions that Congress has placed on their power to wage war.”); Goldsmith, *supra* note 192, at 223 (“Executive power based on interpretation of legal authorities, even when the interpretation is tendentious, is perceived as a less momentous step than prerogative power, from the perspective of both the presidency and the public, for the president in that case still expresses implicit fealty to law and legal constraint.”).

²⁰² While my framework builds on Eric Posner and Adrian Vermeule’s generative work on executive signaling, I part ways with their thesis that the president is unconstrained by law. See Posner & Vermeule, *supra* note 1, at 7, 12–15. As Pildes has argued, legality provides an

Finally (and relatedly), even on purely consequentialist grounds, the president desires sound legal counsel.²⁰³ Legal interpretations are more and less viable, legal craft matters, and aggressive interpretations of legality can have political costs as well as consequences in the courts.²⁰⁴ Losses in the courts, in turn, can have political costs for the president by creating a perception of overreach, and they can diminish the scope of presidential discretion under governing court doctrines. The president thus desires sound legal advice—that is, candid and thorough legal analysis of the authorities (constitutional, statutory, and regulatory) governing a contemplated course of conduct.

These goals create some inescapable tradeoffs. The cost of an effective credibility signal, for example, is usually some form of control.²⁰⁵ Similarly, the president may desire candid advice that a legal position is precarious or contested while seeking to avoid a legal conclusion that the conduct would be unlawful.

Under the formalist structure, these objectives of control, credibility, and competence are “bundled.”²⁰⁶ OLC is both a legal advice giver and a

important and distinct form of executive signaling. See Pildes, *supra* note 1, at 1407. The question that I explore in the text is how this incentive affects the design of executive branch legalism—that is, the president’s choice among institutional structures that define the boundaries of legality.

²⁰³ Cf. Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. Pa. L. Rev. 841, 882–84 (2014) (on competence as a goal of the president and Congress in agency design). For an argument against purely consequentialist approaches to the president’s relationship to law, see Pildes, *supra* note 1, at 1404–08.

²⁰⁴ The types of questions that courts will deem justiciable are perpetually in flux, even in the field of national security and foreign affairs. See, e.g., *Zivotofsky ex rel. Zivotofsky v. Clinton* (Zivotofsky I), 132 S. Ct. 1421, 1425–30 (2012) (holding that the political question doctrine did not bar the federal courts from deciding whether the Department of State properly refused to follow a statute allowing Americans born in Jerusalem to list their place of birth as “Israel,” even as the Department argued that the law conflicted with its longstanding neutrality policy on the political status of Jerusalem); see also, Jack Goldsmith, *Zivotofsky II* as Precedent in the Executive Branch, 129 Harv. L. Rev. 112, 114 (2015) (noting that when the constitutionality of the law was ultimately addressed in *Zivotofsky ex rel. Zivotofsky v. Kerry* (Zivotofsky II), 135 S. Ct. 2076 (2015), it was “the most important Supreme Court decision ever on the sources and scope of the President’s independent and exclusive powers to conduct foreign relations”).

²⁰⁵ See Posner & Vermeule, *The Credible Executive*, *supra* note 197, at 868, 910–13.

²⁰⁶ On the relationship between bundled government functions and the separation of powers across the branches, see Jacob E. Gersen, *Unbundled Powers*, 96 Va. L. Rev. 301 (2010). For explorations in the administrative law literature of the problem of dual and conflicting mandates—that is, functions bundled by legislation or policy and allocated to a particular agency—see, for example, Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 Va. L. Rev. 271, 275 (2013); J.R.

centralized legal decider. OLC operates as a signaling mechanism to the extent that the president commits, in advance, to be bound by a competent and reputable OLC's articulation of legality. To do so, however, the president forfeits a measure of control.

The president responds to these conflicting goals by unbundling institutional practice.²⁰⁷ He makes only partial commitments to either the formalist structure or porous legalism. In this way, the president calibrates, and recalibrates, these inescapable tradeoffs. Presidential choice between the models operates at a micro-level, that is, within any administration in connection to any specific legal-policy decision.

But there are also structural forces that drive a more systemic choice between the models. Designing executive branch legalism in Watergate's shadow, for example, President Carter traded in some control over numerous legal-policy decisions in order to derive credibility from the formalist structure. More recent developments have altered the president's cost-benefit analysis. Three developments in particular have helped to reshape the president's control-credibility calculus. Pressures on the president to exercise retail-level control over legal policy have grown. Meanwhile, the president's ability to control the disclosure of legal opinions, once they have been prepared, has diminished. The loss of ex post control over disclosure affects the ex ante decision whether to request a formal legal opinion. At the same time, a formalist OLC is less effective at signaling credibility because of reputational changes inside the executive. In combination, these factors diminish the benefits and enhance the costs, for the president, of the formalist structure.

1. Control over Policy

A "legalistic" culture inside the executive branch has made legal decisionmaking increasingly salient to the president's policy agenda. This legalism is reaching pockets of national policy that had traditionally been more insulated from it—most prominently, in the national security

DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 *Colum. L. Rev.* 2217, 2221 (2005); and Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 *Stan. L. Rev.* 1039, 1113 (2016).

²⁰⁷ Cf. Stephenson, *supra* note 3, at 1426 ("Whenever one has to perform two tasks with one tool, it is likely that neither will be performed perfectly"; any one of those tasks "may be performed very badly indeed.").

space.²⁰⁸ When President Carter took office, Congress was on the verge of passing, for the first time, comprehensive framework legislation concerning foreign intelligence.²⁰⁹ The Privacy Act was new,²¹⁰ and the Inspector General Act was enacted in 1978.²¹¹ Prohibitions backed by criminal liability increasingly attached to the conduct of the national security bureaucracy.²¹² So too, constitutional law was increasingly being interpreted by the Court to reach and constrain government conduct.²¹³ As a result, law-informed decisionmaking has become central to the president's policy-making process.

At the same time, political polarization infuses contemporary governance.²¹⁴ Political polarization limits the ability of the president to affect legal policy through Congress. It makes the president more dependent on unilateral action—and, in turn, more reliant on

²⁰⁸ See Goldsmith, *supra* note 114, at 90.

²⁰⁹ Congress passed the Foreign Intelligence Surveillance Act (“FISA”) in 1978. See ch. 36, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801–1863 (2012)).

²¹⁰ The Privacy Act of 1974 was enacted on December 31, 1974, roughly two years before President Carter took office. See Pub. L. No. 93-579, 88 Stat. 1986 (1974) (codified as amended at 5 U.S.C. § 552(a) (2012)).

²¹¹ See Pub. L. 95-452, 92 Stat. 1101 (1978) (codified as amended at 5 U.S.C. app. 3 §§ 1–13 (2012)).

²¹² See, e.g., Foreign Intelligence Surveillance Act of 1978, Pub. L. 95-511, § 109, 92 Stat. 1783, 1796 (1978) (codified as amended at 50 U.S.C. § 1809 (2012)).

²¹³ See, e.g., *United States v. U.S. Dist. Court for E. Dist. of Mich. (Keith)*, 407 U.S. 297, 321 (1972) (holding that the Fourth Amendment requires the government to obtain a warrant prior to electronic surveillance of domestic security threats); see also Rabkin, *supra* note 103, at 82 (“The prominence of constitutional issues in national politics is so much a feature of recent decades that it is easy to forget how novel this pattern really is in historical terms.”).

²¹⁴ Professor Nate Persily defines polarization to include “three separate but interacting phenomena”: first, the “ideological convergence within parties and divergence between parties”; second, “the inability of the system to perform basic policy-making functions due to obstructionist tactics”; and third, “the erosion of norms that historically constrained the discourse and actions of political actors or the mass public.” Nathaniel Persily, *Introduction to Solutions to Political Polarization in America* 3, 4 (Nathaniel Persily ed., 2015). For a review and synthesis of the political science literature on congressional polarization, see Michael J. Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in *Solutions to Political Polarization in America* 15, *supra*; Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 *Colum. L. Rev.* 1689 (2015). On the relationship between parties, polarization, and the separation of powers, see Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *Harv. L. Rev.* 2311 (2006); and on the connection between polarization and contemporary federalism, see Jessica Bulman-Pozen, *Partisan Federalism*, 127 *Harv. L. Rev.* 1077 (2014). See also Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 *Colum. L. Rev.* 1739 (2015) (exploring relationship between administrative agencies and political polarization).

administrative authorities.²¹⁵ Novel, sometimes aggressive, interpretations of the tapestry of laws that governs the administrative state help to facilitate presidential policy change without Congress.²¹⁶ Polarization also exacerbates or makes more divisive national legal-policy debates.²¹⁷

Questions at the crux of national governance have thus become both more legalistic and more politically contentious. As a result, the president is motivated to exercise greater retail-level control. Individual legal questions are too important to the presidential team. The pervasiveness of formal legal constraints in the years since Watergate, polarized and divided government, and the significant national security decisions that routinely confront the president, in combination, have made high-stakes legalism the norm. The president and his senior policy advisors have significant incentives to create a legal decisional apparatus that will preserve or augment discretion on significant legal-policy decisions.

2. *Control over Disclosure*

The president also seeks to control the disclosure of legal analysis.²¹⁸ He desires control over whether a specific legal opinion will be released, when it will be released, and to whom it will be disclosed—for example, to a limited audience (such as a congressional committee) or to the broader public.²¹⁹

²¹⁵ See Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. Pa. L. Rev. 1, 63–79 (2014); Paul Pierson, *Conclusion: Madison Upside Down: The Policy Roots of Our Polarized Politics*, in *The Politics of Major Policy Reform in Postwar America* 282, 294–295 (Jeffery A. Jenkins & Sidney M. Milkis eds., 2014).

²¹⁶ See Bagley, *supra* note 163, at 1746–47; Freeman & Spence, *supra* note 215, at 2–5.

²¹⁷ See Bagley, *supra* note 163, at 1751; Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 Va. L. Rev. 953, 957–63, 994–1009 (2016).

²¹⁸ Charlie Savage describes, for example, careful consideration by Obama’s White House Counsel (and other executive branch actors) about whether OLC should include in its written opinion on the legality of the Deferred Action for Parents of Americans (“DAPA”) policy a discussion of a separate potential program that OLC concluded would not be lawful (and that the administration did not pursue). See Savage, *supra* note 138, at 662–63 (“[White House Counsel] Eggleston directed [the head of OLC] to include the negative analysis about [DAPA] in his formal written memo, which the administration made public.” *Id.* at 663. “Eggleston [believed] that showing that [OLC] had said some steps [under consideration] would not be lawful would show that [the Obama team] had really thought about it and obeyed legal limits.” *Id.* at 662.).

²¹⁹ Cf. Julian Hattem, *Senate Dem Pressures DOJ for Secret Cyber Memo*, *The Hill* (Mar. 24, 2016, 6:10 PM), <http://thehill.com/policy/national-security/274256-senate-dem->

This desire to control the disclosure of legal advice has always been in some tension with the idea of executive branch legalism as a form of public law. That tension existed well before the creation of OLC. William Wirt, who served as Attorney General to Presidents Monroe and Adams, is generally recognized as having commenced the practice of compiling the legal opinions of the attorneys general and developing a body of authoritative executive branch precedent. Wirt, however, emphasized the attorney general's role as "confidential law adviser."²²⁰ Writing in 1937, Attorney General Homer Cummings celebrated the tradition Wirt had commenced, but simultaneously underscored the importance of publicity. Of the first publication of the opinions of the attorneys general in 1850, Cummings wrote, "Light had been admitted into a theretofore shadowy field of public law."²²¹

This conceptual tension between confidential legal advice and the public law of the executive deepened with the rise of the formalist model of OLC, though it lurked largely in the background for a time—probably because there were not sufficiently strong external pressures on it. While OLC published more opinions under Carter than under any other president, for example, those opinions still constituted only a small percentage of the Office's formal opinions.²²² OLC's relationships with its "clients" (those inside the Executive Office of the President and in the agencies) still turned on an attorney-client relationship grounded in confidentiality. OLC's discretionary disclosure of select opinions, with the approval of those clients, did not threaten that attorney-client relationship.

All of this changed, however, in the aftermath of 9/11. Revelations of the interrogation-related opinions enhanced public consciousness of the Office's significant role in executive branch law making, even as they simultaneously tarnished the credibility of OLC as an expert adjudicator

pressures-doj-for-secret-cyber-memo [<https://perma.cc/Z6C2-VAZM>] (reporting on a dispute between the Department of Justice and Ron Wyden, a member of the Senate Select Committee on Intelligence, over whether the Administration should publicly release an opinion that had been released only to the Committee).

²²⁰ Cummings & McFarland, *supra* note 27, at 80–91. "According to my view of his official character," Wirt said of the office of the Attorney General, "it is that of the confidential law adviser of the Executive branch of the government." *Id.* at 91.

²²¹ *Id.* at 92.

²²² See *supra* note 53 and accompanying text.

of executive branch law.²²³ Both the power of OLC to make consequential and binding legal decisions and the frailty of the institutions of OLC to prevent aggressive, even irresponsible, claims of legality were brought into sharp relief. As a result, the tension between OLC the confidential legal advisor and the public law decider became more salient to actors outside of the executive branch.

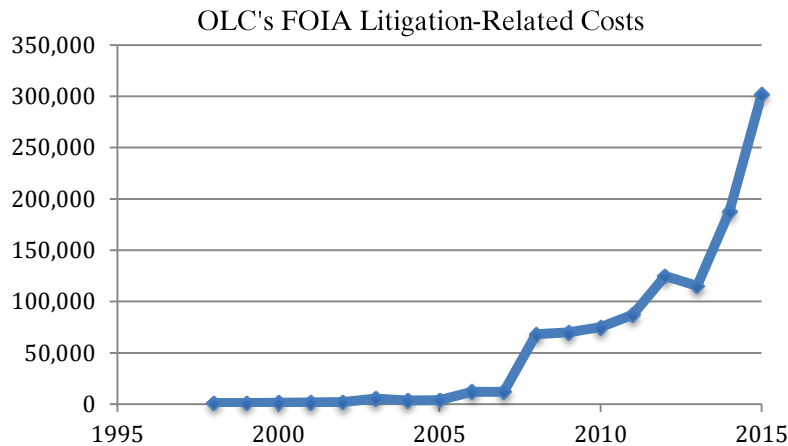
As audiences outside of the executive branch came to appreciate the OLC opinion as the binding law of the executive—including and especially in high-stakes and deeply contested national security issues that would never reach the courts—pressures have mounted for OLC advice to be made public. The courts and Congress have begun to compel, for the first time, the disclosure of OLC opinions under certain conditions. This means that once a legal opinion is written, the executive no longer has control over its disclosure. That control is now shared with the other branches.

²²³ A look at coverage of OLC in the Washington Post, a primary news source on “inside the beltway” matters, reveals that media interest in the Office rose dramatically following the disclosure of the “torture memos.” The average number of articles per year on OLC prior to 2004 when the torture memos were leaked (and beginning in 1978) was 10. In 2004, the number rose to 29, and the average, between 2004 and 2015, was 35 articles per year (with a high of 91 in 2009, and a low of 15 in 2015). These numbers are based on searches for “Office of Legal Counsel” in the Washington Post through Westlaw, supplemented by nonduplicating articles from Lexis. A research assistant reviewed the articles and removed from the count obituaries, wedding announcements, and articles that discussed an office of legal counsel other than the Justice Department OLC. The average prior to 2004 is heavily skewed by mention of OLC during the confirmations of Justices Scalia and Rehnquist, both of whom were former heads of OLC. Those articles generally mention OLC only in passing in detailing the nominees’ backgrounds.

A significant increase in attention to OLC is also apparent in the legal scholarship. For a small sampling of the extensive literature on OLC following the disclosure of the torture memos, see David D. Cole, *The Sacrificial Yoo: Accounting for Torture in the OPR Report*, 4 *J. Nat’l Sec. L. & Pol’y* 455 (2010); George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 *J. Nat’l Sec. L. & Pol’y* 409 (2005); Dawn E. Johnsen, *Introduction: Guidelines for the President’s Legal Advisors*, 81 *Ind. L.J.* 1345 (2006); Andrew Kaufman, *Lochner for the Executive Branch: The Torture Memo as Anticanon*, 7 *Harv. L. & Pol’y Rev.* 199 (2013); David Kaye, *The Legal Bureaucracy and the Law of War*, 38 *Geo. Wash. Int’l L. Rev.* 589 (2006); Harold Hongju Koh, *A World Without Torture*, 43 *Colum. J. Transnat’l L.* 641 (2005); John O. McGinnis, *Losing the Law War: The Bush Administration’s Strategic Errors*, 25 *Ga. St. U. L. Rev.* 377 (2008); Pillard, *supra* note 117; Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 *Colum. L. Rev.* 1681 (2005); W. Bradley Wendel, *The Torture Memos and the Demands of Legality*, 12 *Legal Ethics* 107 (2009) (reviewing five books, including Goldsmith, *supra* note 114, and John Yoo, *War by Other Means: An Insider’s Account of the War on Terror* (2006)).

i. Judicial Control over Disclosure

While OLC has long received administrative requests for the disclosure of OLC opinions under FOIA, it routinely declined those requests. Litigation for OLC work product under FOIA is almost entirely a phenomenon of the past decade, and it has increased dramatically since the torture memos were first leaked in 2004.²²⁴

Figure 3.

²²⁴ The following data is collected from annual FOIA reports that OLC (as part of the Justice Department) is required to submit to Congress on an annual basis. See U.S. Dep't of Justice, Department of Justice Annual FOIA Reports, <https://www.justice.gov/oip/reports-1> [<https://perma.cc/W297-GT73>] (last updated Mar. 15, 2017). The publicly available online reports date back to 1998, following FOIA reporting requirements enacted as part of the Electronic Freedom of Information Act Amendments of 1996. See Pub. L. No. 104-231, 110 Stat. 3048 (1996) (codified as amended at 5 U.S.C. § 552 (2012)).

I rely on litigation costs rather than the number of FOIA requests submitted to OLC because the former better captures the growing role of the courts. As indicated in the text, FOIA requests to the agencies are not new. But they previously were addressed at the agency level, with frequent denials and disclosure at the agency's discretion. That said, notwithstanding year-to-year variation, the number of FOIA requests received by OLC also has steadily increased since data collection began in 1998, reaching a peak of 130 in 2012 (up from approximately 50 in 1998), with 111 received in 2016. See U.S. Dep't of Justice, Department of Justice Annual FOIA Reports, <https://www.justice.gov/oip/reports-1> (last updated Mar. 15, 2017).

During this same period, the courts began to order the executive to disclose certain OLC opinions under FOIA.²²⁵ While compelled disclosure continues to occur relatively infrequently, judicial decisions in high-profile and sensitive areas have raised awareness within the executive branch of the possibility of compelled disclosure of OLC's written advice—especially OLC opinions represented by executive branch agencies to be the binding and relied-upon legal position of the executive. These include judicial decisions compelling disclosure of OLC's interrogation opinions, targeted killing opinions, and sensitive immigration-related decisions.²²⁶

The Second Circuit's recent decision in *N.Y. Times Co. v. U.S. Department of Justice* is illustrative.²²⁷ The New York Times and the American Civil Liberties Union filed a FOIA lawsuit seeking, among other things, OLC's opinion concluding that the targeted killing of a U.S. citizen in Yemen would be lawful. The government countered that OLC's opinion was protected as classified information under FOIA exemption 1 and as privileged (deliberative-process and attorney-client) information under FOIA exemption 5.²²⁸ The court of appeals first disposed of the government's exemption 1 argument. While exemption 1 protected certain operational details in the document, it did not protect

²²⁵ See *Nat'l Council of La Raza v. U.S. Dep't of Justice*, 339 F. Supp. 2d 572 (S.D.N.Y. 2004), *aff'd* 411 F.3d 350, 352 (2d Cir. 2005); see also *N.Y. Times Co. v. U.S. Dep't of Def.*, 2007 WL 2609572 (S.D.N.Y. Aug. 28, 2007); *Bronx Defs. v. U.S. Dep't of Homeland Sec.*, 2005 WL 3462725 (S.D.N.Y. Dec. 19, 2005).

²²⁶ See, e.g., *N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 103–04 (2d Cir. 2014) (ordering disclosure of 2010 OLC opinion concerning legality of drone strike targeting al-Awlaki); *Brennan Ctr. for Justice v. U.S. Dep't of Justice*, 697 F.3d 184, 188, 208–09 (2d Cir. 2012) (ordering disclosure of a February 2004 OLC opinion on the constitutionality of “pledge requirement,” purporting to require organizations receiving funds for HIV/AIDS and antitrafficking work to have a policy opposing prostitution and sex trafficking); *Nat'l Council of La Raza*, 411 F.3d at 352, 361 (ordering disclosure of 2002 OLC opinion on whether state and local police have authority to enforce immigration laws); *Electronic Frontier Found. v. U.S. Dep't of Justice*, 2014 WL 3945646, at *1–2, 8 (N.D. Cal. Aug. 11, 2014) (ordering disclosure of 2010 OLC opinion to the Department of Commerce concerning § 215 of the Patriot Act).

Over years of litigation, for instance, the ACLU has obtained myriad OLC opinions relating to prisoners in U.S. detention centers overseas. The opinions are today collected and made publicly available in a “torture database” on the ACLU's website. See *The Torture Database*, <https://www.thetorturedatabase.org> [<https://perma.cc/ZN2X-HYAD>] (last visited June 2, 2016).

²²⁷ 756 F.3d 100 (2d Cir. 2014).

²²⁸ See *id.* at 104–06, 113–14.

legal analysis severable from those operational details. Instead, that legal analysis would turn on the government's exemption 5 claim.²²⁹

The deliberative-process privilege, the Supreme Court explained in *NLRB v. Sears, Roebuck & Co.*, protects “papers which reflect the agency’s group thinking in the process of working out its policy and determining what its law shall be,” but not “opinions and interpretations which embody the agency’s effective law and policy.”²³⁰ In the case before the Second Circuit, senior government officials had “assured the public that targeted killings are ‘lawful’ and that OLC advice ‘establishes the legal boundaries within which we can operate.’”²³¹ The government, moreover, had produced and disclosed a DOJ “White Paper” detailing much of that legal reasoning.²³² By “publicly asserting that OLC advice ‘establishes the legal boundaries within which we can operate,’” the court of appeals concluded, senior officials had “adopted” or “incorporated by reference” the OLC opinion.²³³ The government could not “invoke that relied-upon authority and then shield it from public view.”²³⁴ In other words, high-level officials could not simultaneously rely on OLC to support the legality of targeted killing and protect OLC’s analysis from public scrutiny. By in effect tying public invocation of OLC review (to build credibility) to the disclosure of those underlying opinions, the court’s opinion raises the cost of using OLC opinions for credibility building.

While many FOIA releases relate to national security, they are not limited to this space. FOIA litigation has resulted in the compelled disclosure of OLC opinions addressing legal questions in a variety of domestic policy and law enforcement contexts.²³⁵

²²⁹ See *id.* at 113–14.

²³⁰ 421 U.S. 132, 153 (1975) (quoting Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 797 (1967)) (internal quotation marks omitted).

²³¹ *N.Y. Times Co.*, 756 F.3d at 116 (quoting Open Hearing on the Nomination of John O. Brennan to be Director of the Central Intelligence Agency Before the S. Select Comm. on Intelligence, 113th Cong. 57 (Feb. 7, 2013) (statement of John O. Brennan)).

²³² See *id.*

²³³ *Id.*

²³⁴ *Id.* at 116–17 (quoting *Brennan Ctr. for Justice v. U.S. Dep’t of Justice*, 697 F.3d 184, 208 (2d Cir. 2012)); see also *Nat’l Council of La Raza v. U.S. Dep’t of Justice*, 411 F.3d 350, 359–60 (2d Cir. 2005).

²³⁵ Former Acting Assistant Attorney General for OLC Caroline Krass suggested in public comments that frequent FOIA requests and publicity concerns have “served as a deterrent to some in terms of coming to the OLC to ask for an opinion.” See Letter from Jason Chaffetz

ii. Congressional Control over Disclosure

Congressional interest in OLC opinions has increased dramatically in the last decade as well, especially in the national security context. In 2008, Senator Russell Feingold, together with Senator Dianne Feinstein, introduced a bill, the OLC Reporting Act of 2008, which would have required the Justice Department to notify Congress when an OLC opinion concludes that the executive is not bound by a statute.²³⁶ In introducing the bill, Senator Feingold emphasized the public perception of OLC as a source of “secret law . . . justify[ing] controversial administration policies that operate outside the framework of statutory [constraints].”²³⁷ The bill would not have required the release of the OLC opinion itself, but it would have required the Justice Department to notify Congress under certain circumstances.²³⁸ The Bush administration opposed the bill, including through a published OLC opinion that concluded the bill was unconstitutional.²³⁹ While not ultimately enacted, the bill pointed to a growing concern in Congress about OLC review as a type of public law that should be brought into the light.

and Ranking Member Elijah E. Cummings, House Comm. on Oversight and Gov’t Reform, to Hon. Loretta E. Lynch, Att’y Gen. (Mar. 14, 2016). In response to a request from the House Committee on Oversight and Government Reform, OLC provided data on OLC opinions released under FOIA each year between 2007 and 2015. In those eight years, OLC released to FOIA requesters 226 OLC opinions. The letter does not indicate how many of these were judicially compelled disclosures. See Chaffetz Response Letter, *supra* note 169, at 7.

²³⁶ See OLC Reporting Act of 2008, S. 3501, 110th Cong. (2008); see also 154 Cong. Rec. 19144–45 (Sept. 16, 2008) (statement of Sen. Feingold).

²³⁷ 154 Cong. Rec. 19145 (2008) (statement of Sen. Feingold).

²³⁸ See *id.* at 19145–46. The bill would have amended a provision of the U.S. Code that requires the Attorney General to notify Congress when the Justice Department decides not to enforce or defend a statute on the ground that it is unconstitutional. See 28 U.S.C. § 530D (2012). The Committee Report explained that OLC opinions were binding “law” inside the executive, “not just a piece of legal advice,” and that the bill provides a “targeted response to [this] particularly problematic manifestation of ‘secret law.’” S. Rep. No. 110-528, at 1–2 (2008).

²³⁹ See Constitutionality of the OLC Reporting Act of 2008, 32 Op. O.L.C. 14 (2008). The bill had been actively supported by former acting Assistant Attorney General for OLC under President Clinton, Dawn Johnsen, and former Associate Counsel to President George W. Bush, Brad Berenson. Together, they wrote in a letter to the Senate Committee that the bill “strikes a sensible and constitutionally sound balance between the executive branch’s need to have access to candid legal advice, to protect national security information, and to avoid being overburdened by unduly intrusive reporting requirements and the legislative branch’s need to know the manner in which its laws are interpreted.” See 154 Cong. Rec. 19147 (2008) (reprinting letter).

In 2010, Congress directed the executive branch to disclose to the congressional intelligence committees “the legal basis” under which an intelligence activity “is being or was conducted.”²⁴⁰ President Obama issued a signing statement indicating that he would not construe a provision of this law, Section 331, to require “disclosure of any privileged advice or information or disclosure of information in any particular form.”²⁴¹ The subtext of the statement, made explicit in earlier correspondence between the administration and Congress, is that the President would not construe the provision to mandate disclosure of OLC opinions—precisely the materials that the bill sponsor intended the new provision to cover.²⁴²

Congressional interest in the intelligence-related opinions of OLC culminated, in 2014, in a first-ever statutory requirement for the publication of OLC opinions and, absent publication, disclosure of those opinions to Congress under certain circumstances. The statute requires the attorney general, in coordination with the Director of National Intelligence, to “establish a process for the regular review for official publication of significant opinions of [OLC] that have been provided to an element of the intelligence community.”²⁴³ Congress mandated that the review process would consider the “potential importance” of an OLC opinion, the likelihood that questions addressed in the opinion “may arise in the future,” the “historical importance of an opinion or the context in which it arose,” and the “potential significance of an opinion

²⁴⁰ Intelligence Authorization Act for Fiscal Year 2010, Pub. L. No. 111-259, 124 Stat. 2685, § 331(b); see also *id.* § 331(c) (requiring disclosure of “the legal basis under which [a] covert action is being or was conducted”).

²⁴¹ Statement on Signing the Intelligence Authorization Act for Fiscal Year 2010, 2010 Daily Comp. Pres. Doc. 845 (Oct. 7, 2010).

²⁴² Compare Senate Select Committee on Intelligence Report, No. 111-55, at 76 (2009) (statement of Senator Feingold, the sponsor of the provision, noting that the provision would “allow the committees to review the opinions of [OLC]”), with Letter from Ronald Weich, Assistant Att’y Gen., U.S. Dep’t of Justice to the Honorable Dianne Feinstein, Chairman, S. Select Comm. on Intelligence, at 8 (Dec. 9, 2009) (“We do not read this language to require production of confidential and deliberative Executive branch legal advice that is subject to a valid claim of executive privilege. A provision that did purport to require disclosure of such legal materials would raise serious constitutional concerns.”). While the correspondence from the Department of Justice is sent under the name of the Assistant Attorney General from Legislative Affairs, constitutional concerns with a bill are drafted by OLC. See Pillard, *supra* note 24, at 712.

²⁴³ Intelligence Authorization Act for Fiscal Year 2014, Pub. L. No. 113-126, § 322(a) (2014).

to the overall jurisprudence of [OLC].”²⁴⁴ The statute goes on to require that “[a]ny opinion of [OLC] that would have been selected for publication under [this] process . . . but for the fact that publication would reveal classified or other sensitive information relating to national security shall be provided or made available to the appropriate committees of Congress.”²⁴⁵ In the first two years since Congress promulgated this requirement, OLC was asked by an executive branch official to prepare only one opinion that would be subject to the new procedure.²⁴⁶

Tracing congressional pressure through legislation tells only a partial story. Specific members and committees have also expressed heightened interest in OLC’s work product, and exercised more indirect forms of congressional power to promote disclosure. In polarized times, the disclosure of OLC advice itself becomes a front for contestation between the president and Congress. And the executive’s refusal to disclose OLC opinions is a recurring battleground in judicial and other nominations, especially those of former officials of OLC.²⁴⁷

Once OLC has prepared an opinion, then, the executive shares control over its publicity with Congress and the courts. It is the executive, however, that decides whether to use the formalist structure in the first

²⁴⁴ Id. § 322(b)(1)–(4).

²⁴⁵ Id. § 322(e)(1). There is an exception for covert action. See id. § 322(e)(2).

²⁴⁶ See Chaffetz Response Letter, *supra* note 169, at 5.

²⁴⁷ See, e.g., Ed O’Keefe, David Barron’s Judicial Nomination Clears Procedural Hurdle, *Wash. Post* (May 21, 2014), https://www.washingtonpost.com/news/post-politics/wp/2014/05/21/david-barrons-judicial-nomination-clears-procedural-hurdle/?utm_term=.b5956c0158fe [<https://perma.cc/XZ69-ZNKR>] (reporting that “[a] group of liberal and conservative senators had said they would fight the nomination [of David Barron, former head of OLC, to the First Circuit] unless memos he wrote [at OLC] on the legality of drone strikes were made public”). Congressional use of the confirmation process to press for the disclosure of OLC opinions is not new. During then-Justice Rehnquist’s confirmation to Chief Justice in 1986, the Senate Judiciary Committee demanded access to memoranda authored by Rehnquist as head of OLC under President Nixon. President Reagan initially asserted executive privilege to withhold the memos but eventually acquiesced to their release. See Stuart Taylor, Jr., *President Asserts He Will Withhold Rehnquist Memos*, *N.Y. Times* (Aug. 1, 1986), <http://www.nytimes.com/1986/08/01/us/president-asserts-he-will-withhold-rehnquist-memos.html?pagewanted=all&pagewanted=print> [<https://perma.cc/VGP9-6WNW>]; Ronald J. Ostrow & David Savage, *Senate Panel to Receive Rehnquist Documents: Administration Ends Impasse on Memos Written as Legal Adviser to Nixon; Scalia Hearings Open*, *L.A. Times* (Aug. 6, 1986), http://articles.latimes.com/print/1986-08-06/news/mn-1439_1_senate-panel.

place. The loss of ex post control over disclosure affects the ex ante decision whether and when to resort to the formalist model.²⁴⁸

Opinion writing in the shadow of compelled disclosure also has indirect effects on OLC's opinion-writing practice that, in turn, make the formalist structure more costly. Opinions prepared by OLC are now considerably longer, more thorough, and more worked over than many of the opinions from earlier periods. Those preparing OLC opinions today likely take great care to explore every angle and every counterargument to guard against claims of careless craft that the torture memos garnered—should the opinion one day be made public. This nuance, thoroughness, and studied deliberation are desirable in many respects. But the more rigorous and labor-intensive process is also a vastly slower process of legal advice giving. It can take many months, or even years, for OLC to complete an opinion. Even aside from the president's desire to control disclosure, these indirect effects of publicity can drive those requesting OLC advice to more informal channels.

3. Credibility and Reputational Change.

Presidents are not only focused on control. They also need credibility to govern. The formalist model, for President Carter, was a signaling mechanism.²⁴⁹ The ex ante commitment to comply with law as announced by an institutionally insulated, court-like structure signaled legalistic credibility to elites, engaged actors in civil society, and congressional committees pressing for the Justice Department's independence in Watergate's shadow. But the formalist model itself has become less capable of signaling credibility. The president's ability to use the formalist structure to signal credibility depends on the legal

²⁴⁸ This is true for the presidential team, but also for any executive branch agency seeking legal review from OLC. Inside the executive, the presidential team is only involved in the question whether to request formal advice from OLC on issues of significance or salience to the president. For issues of low salience to the president, what I have described as technocratic coordination in Section I.C, the agency requester generally makes that decision on its own.

²⁴⁹ See Posner & Vermeule, *The Credible Executive*, supra note 197, at 867–68 (arguing that “executive signaling” enables a “well-motivated executive” to demonstrate his credibility to the public, “[b]y tying policies to institutional mechanisms that impose heavier costs on ill-motivated actors than on well-motivated ones”); see also Jon Elster, *Ulysses Revisited: How and Why People Bind Themselves*, in *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* 1 (2000) (discussing precommitment theory). For an analogous phenomenon, see Elizabeth Magill, *Agency Self-Regulation*, 77 *Geo. Wash. L. Rev.* 859, 860 (2009).

decider's sociological legitimacy.²⁵⁰ It turns on OLC's reputation among "overlapping audiences" both internal and external to the executive branch.²⁵¹

OLC's reputation was perhaps irreparably altered by its role in national security decisionmaking in the aftermath of 9/11. The executive constitutionalism story of 9/11 is not that the President chose to ignore advice from OLC. It is that the formalist structure itself resulted in what many in the public and in the legal profession regard as an irresponsible, even illegitimate outcome. Many of these opinions have been widely repudiated, and were formally withdrawn by OLC's subsequent leadership. The interrogation memos prompted calls to impeach a sitting judge (who had been the head of the office when they issued),²⁵² *Bivens* claims against the individual attorneys in the office responsible for the opinions,²⁵³ and an exhaustive and contested review by the Justice Department itself into whether the lawyers involved had violated professional ethics.²⁵⁴ These perceptions of OLC's moral legitimacy in turn compromise its sociological authority.²⁵⁵

²⁵⁰ See Fallon, *supra* note 185, at 1795–96.

²⁵¹ Carpenter, *supra* note 10, at 26. Professor Daniel Carpenter defines organizational reputation as "a set of symbolic beliefs about the unique or separable capacities, roles, and obligations of an organization, where these beliefs are embedded in audience networks." *Id.* at 45; see *id.* at 26, 33, 59 (identifying audience as a "central concept in a reputation-based perspective on regulation," *id.* at 34, and arguing that "[m]uch of the politics of reputation in modern organizations would appear to require the management of an ambiguous image among multiple audiences," *id.* at 59).

Legal scholars and social scientists have recognized the role of reputation in sustaining institutions. See, e.g., Levinson, *supra* note 3, at 684–85 (identifying reputation as one of a cluster of mechanisms for institutional stability recognized in the social sciences); see also Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* 71–117 (2008) (developing reputation-based theory of international law compliance). Organizational reputation can also destabilize an institution; it can make it less durable.

²⁵² See, e.g., Bruce Ackerman, *Impeach Jay Bybee: Why Should a Suspected War Criminal Serve as a Federal Judge?*, *Slate* (Jan. 13, 2009, 4:30 PM), http://www.slate.com/articles/news_and_politics/recycled/2009/04/impeach_jay_bybee.html [https://perma.cc/W8PN-HQSB].

²⁵³ See *Padilla v. Yoo*, 678 F.3d 748, 752, 768 (9th Cir. 2010).

²⁵⁴ OPR conducted a multi-year investigation and produced a 261-page report finding "John Yoo committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice" and "Jay Bybee committed professional misconduct when he acted in reckless disregard" of those obligations. OPR Report, *supra* note 119, at 260. OPR's findings were ultimately reversed by David Margolis in his 2010 memorandum to Attorney General Holder. See Margolis Review, *supra* note 119, at 2, 67–68 (concluding OLC memos contained "significant flaws," *id.* at 67, and reflected "poor judgment," *id.* at 68, but

The overlapping audiences that help to shape OLC's reputation also include an OLC diaspora—former officials and attorneys from OLC who have joined the academy and authored important writings on the work of the Office in the academic literature, in the popular press and blogs, and through congressional testimony. That OLC diaspora helped to forge OLC's reputation as a central source of public law making,²⁵⁶ and it rose up to critique, challenge, and defend OLC when the torture memos came to light. While a broad range of views has been advanced, many responded to the torture memos by trying to distance those outputs from the institutional structure itself; the opinions did not reflect the norms and craft values of OLC.

That defense of OLC, however, had the effect of exposing and deepening a tension at the crux of OLC's reputation and role: What is the underlying rationale for opinion writing? Is the OLC opinion intended to be a check on the president, or is it a check on *other* law expositors (in particular, Congress and the courts)? OLC's role has always been a mix of both, though different audiences and different time periods have tended to accentuate one or the other. During the Reagan administration, for example, government lawyers tended to emphasize the latter—an idea that the OLC diaspora imported into debates about departmentalism and executive branch law.²⁵⁷ By offering an independent account of constitutional obligation, OLC provided a counterweight to the elaboration of a very different constitutional vision from the judiciary.²⁵⁸

The post-9/11 narrative put the accent on the former. OLC's role was to check the executive itself, to help instantiate an “internal separation of

criticizing OPR for adopting an analytical framework that “depends on application of a known, unambiguous obligation or standard,” *id.*, while failing to identify such a standard).

²⁵⁵ See Fallon, *supra* note 185, at 1794–801 (elaborating the concept of moral legitimacy).

²⁵⁶ Legal scholarship on OLC began in earnest in the 1990s. In 1993, the *Cardozo Law Review* featured a series on Executive Branch legal interpretation, with five pieces specifically on OLC from the Office's alumni. See *supra* note 28. In contrast to today's attention to the work of the Office, Frank Wozencraft, who headed OLC under President Lyndon Johnson, described OLC in 1971 as “the unfamiliar acronym,” an office of able lawyers toiling “quietly behind the scenes.” See Wozencraft, *supra* note 99, at 37.

²⁵⁷ See, e.g., McGinnis, *supra* note 28, at 381–82 (“The strongest argument for executive independence with respect to the analytical judgments of the Court rests on the notion that even these judgments need to be subject to challenge by another institution with a different perspective.”).

²⁵⁸ See *id.*

powers” through the formalist structure.²⁵⁹ An internal separation of powers, this narrative suggested, could check the executive even under conditions where the traditional, or Madisonian separation of powers had faltered. That is, OLC could provide a law-based, structural check on the president, even if the courts and Congress had ceased, in practice, to effectively constrain him.²⁶⁰

Tying OLC’s reputation to this conception of its power creates a challenge for OLC, however: It makes it more difficult for the Office to credibly say “yes”—that is, to conclude that controversial operations of government are lawful. But the Office usually *does* say yes.²⁶¹ And it has developed a more executive-leaning view of the law than the courts. This might be appropriate to the extent that OLC’s role is to develop a distinctly executive brand of constitutionalism. But it is difficult for OLC to preserve its sociological legitimacy when its opinions are assessed against the “internal separation of powers” baseline. Against that baseline, OLC’s sometimes aggressive findings of legality in a wide range of difficult and fundamentally ambiguous legal questions (an approach that permeates OLC’s opinions practice) further erodes its reputation and sociological authority.

* * *

The tradeoffs inherent in the design of executive branch legalism have changed considerably. The president has greater incentives to augment retail-level control over legal policy, and he generates less credibility by using the formalist structure. He also has less control over the disclosure of legal opinions when he does resort to the formalist structure. As a

²⁵⁹ Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 *Yale L.J.* 2314, 2316–19, 2336–40 (2006); see also, e.g., Johnsen, *supra* note 109, at 1604.

²⁶⁰ See, e.g., Johnsen, *supra* note 109, at 1562 (noting that “[o]ur recent history . . . has demonstrated the inherent inadequacies of the courts and Congress as external checks on the President” and proposing greater attention to “an essential source of constraint that often is underappreciated and underestimated: legal advisors within the executive branch”).

²⁶¹ In a study of all publicly released OLC opinions from the Carter Administration to the beginning of the Obama administration, Professor Trevor Morrison found that, among opinions issued to a component of the White House, for those “issues upon which the White House had a readily discernable position,” 13% of the OLC opinions went “predominantly against the White House,” while 79% found in its favor “without significant limitation.” Morrison, *supra* note 1, at 1717–18.

result, the institutions underlying the formalist structure are more vulnerable.

Indeed, as a general proposition, the president is perhaps least likely to select the formalist structure in those instances when normative legal theorists most desire it: when formal legal review by a centralized OLC would cabin or impose significant legal limits on presidential discretion.

Some conditions, however, will heighten the president's need for internal control over the bureaucracy. And, in those circumstances, the president is more likely to rely on the formalist structure to resolve specific legal-policy questions. An important example would be government conduct that implicates potential criminal penalties. A bureaucracy operating against the backdrop of potential criminal liability is more likely to insist on a formal opinion from OLC. Indeed, this might be one of the more significant effects of such criminal liability statutes on the ground. Prosecution of government actors for conduct directed from above is exceedingly rare. But the possibility of criminal sanction drives legal decisionmaking toward a more formal institutional apparatus inside the Justice Department.

B. Presidential Decisionmaking in Legal Context

The foregoing has explored executive branch legalism as a structure that reflects the perceived needs of the presidency to govern effectively. This Section turns to law itself, and offers a concurrent “internal” account.²⁶² The shift from an articulated and centralized institutional structure to a more porous and diffuse one results in part from executive branch lawyers’ *own* understanding of their role as lawyers—of the objectives and limits of law and legal advice. Just as the politics presidents make is the product, in part, of the political time in which any particular president comes to power,²⁶³ the law presidents make is in part a product of the legal time in which they govern.

²⁶² See Vermeule, *supra* note 184, at 2–8 (outlining a methodology that seeks to understand the development of legal doctrine from an “internal standpoint,” *id.* at 2, a lawyer’s standpoint, see *id.* at 8, rather than from an external standpoint provided by economics or political science).

²⁶³ See Skowronek, *supra* note 6, at 30 (positing that recurring structures of presidential authority are situated in both ordinary time and political time).

1. Chevron All the Way Down

The prominence of the formalist model under President Carter resulted in part from a conception of law or legal advice, as experienced by executive branch lawyers. The influence of the Legal Process tradition is palpable in the approach to legal advice articulated by Bell and his OLC leadership. These lawyers conceived of legal counsel as a process of uncovering legal meaning that is disinterested,²⁶⁴ “neutral,”²⁶⁵ and soluble through legal craft and legal reasoning.²⁶⁶ Articulated governance protected a space for lawyers to engage in a method of reasoning that was understood to be distinct from other institutional processes and worthy of insulation from policymakers and political leadership.

That conception of law was already being challenged by overlapping threads of intellectual thought, doctrinal development, and professional practice.²⁶⁷ Sociological conceptions of public law increasingly understand legal questions in terms of permissible ranges, rather than

²⁶⁴ See, e.g., William W. Fisher III, *Legal Theory and Legal Education, 1920–2000*, in 3 *The Cambridge History of Law in America* 34, 41 (Michael Grossberg & Christopher Tomlins eds., 2008) (“[A] judge must assume a posture of ‘intellectual disinterestedness in the analysis of the factors involved in the issues that call for decision. This in turn requires rigorous self-scrutiny to discover, with a view to curbing, every influence that may deflect from such disinterestedness.’” (quoting Letter from Felix Frankfurter to the Justices of the Supreme Court (Sept. 28, 1962))).

²⁶⁵ The conception of law as “neutral” is most closely associated with Professor Herbert Wechsler. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1, 19 (1959) (stating that legal “reasons . . . in their generality and their neutrality transcend any immediate result that is involved”); see also William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law*, at li, cxvi (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (tracing scholarly foundation of the Legal Process school); Fisher, *supra* note 264, at 41–42 (describing neutrality as one of the most controversial propositions associated with, though not universally embraced by, Legal Process theorists).

²⁶⁶ See Eskridge & Frickey, *supra* note 265, at cxiii–cxviii.

²⁶⁷ Critiques of the Legal Process school were already in full swing among some academics and intellectual elites. See *id.* at cxiii–cxix. But this was a generation of government lawyers that came of age in the throngs of the Legal Process movement and whose conception of law and the lawyer’s role was deeply shaped, if indirectly, by those teachings. For the influence of critical legal studies and law and economics on the “fall” of the Legal Process, see Edward L. Rubin, *Commentary, The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 *Harv. L. Rev.* 1393, 1394–1402 (1996); see also Eskridge & Frickey, *supra* note 265, at cxix–cxxv (discussing the development of critiques of the Legal Process theory).

“point estimates” or a singular right answer.²⁶⁸ Within a “zone” of reasonable legal answers is a policy-drenched process of giving law meaning.²⁶⁹ Without attempting to document that transformation in full, I offer *Chevron* doctrine as an analogy for that sociological shift.²⁷⁰ *Chevron* is grounded in the idea that a zone of legal indeterminacy exists in many pressing legal questions confronting the administrative state.²⁷¹ Legal analysis can help to identify the boundaries of that zone. But inside those boundaries is a space for policy judgment that is flexible and adaptable. Doctrinally, *Chevron* is cabined by cases like *United States v. Mead* and potentially even vulnerable at the Court.²⁷² But as an idea about law, *Chevron* has a deeper resonance. In contemporary legal culture, *Chevron* reflects and, in turn, reinforces an idea that the law “runs out” before an interpretation of enacted text is complete.²⁷³ Legal reasoning and the tools of law-based interpretation can only get you so

²⁶⁸ See Elliott, *supra* note 133, at 11 (suggesting “point estimate” conception); Magill & Vermeule, *supra* note 13, at 1044–48, 1079–80.

²⁶⁹ See Stephenson & Vermeule, *supra* note 132, 601–02 (proposing conception of “zone of ambiguity”).

²⁷⁰ Professor Adrian Vermeule has argued that law’s arc toward deference “is ultimately sociological: it is the decision by one profession, lawyers, to shift some of their own powers to nonlawyers.” See Vermeule, *supra* note 184, at 197. Vermeule traces this phenomenon through “[m]ajor doctrines of administrative law, including the principles underlying *Chevron* . . . and other controlling decisions.” *Id.*; cf. Edward L. Rubin, *The Concept of Law and the New Public Law Scholarship*, 89 Mich. L. Rev. 792, 792–807 (1991) (describing a policy-driven “conception of law that emerged from our modern, administrative state,” *id.* at 806).

²⁷¹ See Stephenson & Vermeule, *supra* note 132, 601–02.

²⁷² See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (limiting the application of *Chevron* to circumstances where Congress has authorized an agency to make rules with the force of law, and the agency has exercised that authority); see also Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 Geo. L.J. 833, 873 (2001) (dubbing this threshold question “step zero”). Scholars similarly debate the desirability and stability of *Chevron* as a doctrine of administrative law. Compare, e.g., Philip Hamburger, *Is Administrative Law Unlawful?* (2014) (arguing that administrative law is unconstitutional and illegitimate), and Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 782 (2010) (arguing that *Chevron* “has proven to be a complete and total failure, and . . . [should be] overrule[d]”), with Adrian Vermeule, No, 93 Tex. L. Rev. 1547 (2015) (reviewing Hamburger, *Is Administrative Law Unlawful?*, and defending the legality of *Chevron*), and Thomas W. Merrill, *Step Zero After City of Arlington*, 83 Fordham L. Rev. 753, 755 (2014) (“*Chevron* has now been invoked in far too many decisions to make overruling it a feasible option for the Court.”).

²⁷³ But see Saiger, *supra* note 133 (arguing that, in contexts where judicial deference is to be expected, the agency has an ethical and jurisprudential obligation to adopt the best interpretation of its governing statute pursuant to strictly interpretive criteria).

far. There is a space for policy and political judgment, a power shared with nonlawyers.²⁷⁴

In the judicial context, the concept of legal indeterminacy or a zone of “reasonable disagreement” is at the crux of many prescriptive theories of constitutional law as well, not just statutory interpretation.²⁷⁵ The idea is not that lawyers and legal reasoning could not get you to *an* answer. In the judicial context, constitutional theorists debate how legal analysis and legal craft *should* get one to an answer—developing, for example, contrasting visions of constitutional “implementation” and “construction” by the Supreme Court.²⁷⁶ Yet conceptions of law as indeterminate in important, high-stakes national strategic decisions work to undermine an OLC-centric, quasi-judicial approach as the preferred way to arrive at such answer inside the executive.²⁷⁷ Within a zone of reasonable disagreement, lawyers (not just politicians or policymakers) recognize a role for nonlawyers and nonlegal considerations in the exercise of legal judgment.²⁷⁸

To be clear, the argument is not that the White House Counsel, presented with a question such as whether military operations in Libya constitute “hostilities” under the War Powers Resolution, sits at his desk and thinks about what academics think about *Chevron*. It is that legal

²⁷⁴ See Magill & Vermeule, *supra* note 13, at 1044–46 (describing how *Chevron* allocates power to non-lawyers inside the agencies).

²⁷⁵ A preoccupation of prescriptive constitutional theories—including originalism and various strands of living constitutionalism—is this question: “In a world in which no one has perfect factual knowledge and in which we must anticipate and respect legal and moral disagreement, how do we mark the boundaries of legitimate and illegitimate decisionmaking?” Richard H. Fallon, Jr., *Constitutional Theory in Law, Language, and Legitimacy in the Supreme Court*, 1 (2016) (unpublished manuscript) (on file with author); see Richard H. Fallon, Jr., Foreword: Implementing the Constitution, 111 *Harv. L. Rev.* 54, 58, 141–48 (1997) [hereinafter Fallon, *Implementing the Constitution*]; Lawrence B. Solum, Originalism and Constitutional Construction, 82 *Fordham L. Rev.* 453, 457, 481–83 (2013).

²⁷⁶ See Jack M. Balkin, Framework Originalism and the Living Constitution, 103 *Nw. U. L. Rev.* 549, 550–51 (2009); Fallon, *Implementing the Constitution*, *supra* note 275, at 57; Solum, *supra* note 275, at 455–57.

²⁷⁷ With respect to the Supreme Court, Justice Jackson famously remarked: “There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result).

²⁷⁸ In this sense, the argument shares Professor John Manning’s skepticism of a rigid distinction between methods of constitutional and statutory interpretation. See John F. Manning, Separation of Powers as Ordinary Interpretation, 124 *Harv. L. Rev.* 1939, 1949–50 (2011).

culture and professional training today embrace an idea that law—statutory law, but really public law more generally—is indeterminate in a range of hard cases and that there are strong reasons to permit policy and politics to inform the legal answer among reasonable alternatives.²⁷⁹

The idea of a court-like structure inside the executive resolving the most challenging questions (legally, morally, and politically) confronting the presidential team is increasingly undesirable not just to the president and his political team, but also to the lawyers themselves.²⁸⁰

The sociological acceptance of a more porous legal judgment is bolstered by skepticism—fueled in part by the torture memos and the uses of strong OLC supremacy under President Bush—that disinfecting legal judgment from moral, policy, or national strategic judgment is either valuable or desirable.²⁸¹ As some of the lawyers who served in the

²⁷⁹ See, e.g., Cornell W. Clayton, Introduction: Politics and the Legal Bureaucracy *to* Government Lawyers: Federal Legal Bureaucracy and Presidential Politics 1, 12–24 (Cornell W. Clayton ed., 1995) (“Today most government action takes place in a twilight zone that exists between what the clear commands of law authorize and what they prohibit. Within this zone, custom, convention, professional norms, and institutional cultures merge to authorize and constrain discretionary conduct. . . . It is the work of government attorneys . . . to construct and define these informal understandings and to assist their political superiors in navigating through them.” *Id.* at 13.); Rubin, *supra* note 270, at 815 (“[A]dministrators do not see law as an embodiment of general principles, but as an instrumentality for achieving policy goals.”); Peter H. Schuck, Lawyers and Policymakers in Government, *L. & Contemp. Probs.*, Winter 1998, at 7, 10–12 (noting that “public decisionmakers have some choice among competing rules” and arguing that a government lawyer must “evaluate the competing rules from some broader normative perspective so that she (or the policymakers whom she advises) can choose among them,” *id.* at 11 (emphasis omitted)); see also Thomas W. Merrill, High-Level, “Tenured” Lawyers, *L. & Contemp. Probs.*, Spring 1998, at 83, 88–93 (discussing how the “declining faith in law as something that exists and can be discovered independently of political values” supports those who argue for more politically appointed lawyers, *id.* at 93); James J. Brudney, Legislation and Regulation in the Core Curriculum: A Virtue or a Necessity?, 65 *J. Legal Educ.* 3, 9 (2015) (arguing that legal education should not “promote[], however subconsciously, a false dichotomy between politics and law, compromise and principle, a dichotomy the legal profession has long ceased to accept,” and emphasizing that, “[i]n the modern era, legal practice requires an ability to utilize skills and integrate mindsets associated with legislatures and agencies: the virtues of responsiveness to voter policy preferences, regard for interest group participation, deference to bureaucratic expertise, and success at consensus building in often-volatile circumstances”).

²⁸⁰ But see Ackerman, *supra* note 1, at 141–79 (proposing a “Supreme Executive Tribunal” composed of nine “judges for the executive branch” serving staggered twelve-year terms, *id.* at 143, whose decisions would be “binding on the executive branch,” *id.* at 146).

²⁸¹ See, e.g., Goldsmith, *supra* note 114, at 38–39; Margo Schlanger, Intelligence Legalism and the National Security Agency’s Civil Liberties Gap, 6 *Harv. Nat’l Security J.* 112, 113 (2015); Philip Zelikow, Legal Policy for a Twilight War, 30 *Houston J. Int’l L.* 89, 92 (2007); Bauer, *supra* note 136, at 49–53.

Bush administration would soon write, considerations of legality had consumed considerations of morality or of sound legal policy; questions of “can” displaced questions of “should,” with insufficient attention to the moral dimensions or cost-beneficial implications of the policies chosen.²⁸²

At the same time, legal expertise itself has become increasingly technocratic and specialized. A labyrinth of statutes and administrative rules govern most facets of high-stakes legalism, from intelligence gathering to healthcare to immigration. Specialized lawyers live in these labyrinths; they understand where there is more and less discretion, more and less ambiguity given the accumulation of text and legal meaning over time.

The moral and national strategic dimensions of legal policy regularly converge with the deeply technocratic minutiae of complex legal frameworks. The diffusion of legal power, through structures like the Lawyers Group, thus constitutes in part a response *by the lawyers* to a felt need to integrate both a range of legal expertise and a space for presidential judgment in the making of legal policy.

2. Opinion-Writing Decoupled from the Attorney General

There is another development that has, over time, destabilized the formalist model from “inside” legal practice: changes in the role of the attorney general, and his relationship to opinion writing. Attorneys general historically played a significant role in resolving high-stakes legal questions for the president through opinion writing.²⁸³ Over time, the role of the attorney general has become increasingly decoupled from the formalist structure. As the attorney general’s priorities shifted to prosecution, his stake in the formalist structure receded.²⁸⁴ The gradual disappearance of the attorney general from the opinion-writing practice,

²⁸² See Zelikow, *supra* note 281, at 91–95, 101–03; see also *id.* at 106 (arguing that “the problem was not properly framed, and [so] lawyerly interpretation was often substituted for thorough policy analysis at the critical and formative subcabinet and expert level”); Goldsmith, *supra* note 114, at 130–31.

²⁸³ See, e.g., Barron, *supra* note 201, at 119, 230–32.

²⁸⁴ Writing in 1993, shortly after his tenure as head of the OLC under President Reagan, Douglas Kmiec suggested, “OLC was not created to separate the Attorney General from his opinion function. However, this separation has largely occurred.” Kmiec, *supra* note 28, at 373.

in turn, has affected the stature of formal opinions and the sociological legitimacy of a formalist OLC.

Under President Carter, Attorney General Bell used opinion writing by OLC to enhance his own reputation as a neutral lawyer and the Justice Department's reputation as a unique law expositor. For Bell, the formalist model was a way to emphasize and augment the neutrality of the Justice Department—something that Bell believed was fundamental to his own legitimacy as Attorney General. A formalist OLC also enhanced the reputation of the Justice Department itself as a singular source of legal authority. Confronting an increasingly diffuse set of legal advisors in the agencies, Bell sought to strengthen what made DOJ unique: its ability to issue formal legal opinions binding on the executive.

By the Obama administration, a formalist OLC had become largely disconnected from the attorney general in ways that likely diminished the attorney general's commitment to or investment in the formalist model. Indeed, Attorney General Holder himself opted at times for a diffusion of legal decisional power, even inside the Justice Department, to enhance his discretion.²⁸⁵ The attorney general's separation from opinion writing and his reduced stake in the formalist structure diminishes both the effective power of a formalist OLC inside the executive and its sociological authority beyond.

3. Feedback Effects

There is, finally, an interplay between executive branch legalism's two models—a set of perhaps unintended consequences resulting from earlier institutional moves. To signal credibility, a formalist OLC must be a relatively stable institutional choice.²⁸⁶ If a president could use the formalist model only when it suits him—and avoid OLC when it does not—then a formal OLC opinion would have less sociological authority. It is precisely because the president forfeits some control over legal policy that the formalist model works as a credibility signal to elites, engaged actors in civil society, or congressional overseers.²⁸⁷

²⁸⁵ See *supra* note 164 and accompanying text.

²⁸⁶ See generally Levinson, *supra* note 3, at 672–80 (discussing and collecting literature on credible commitments).

²⁸⁷ See Posner & Vermeule, *The Credible Executive*, *supra* note 197, at 910 (“The presence of a cost is what distinguishes ill-motivated mimics, who are unwilling to incur the cost, from genuine good types.”).

No president has ever embraced the formalist model completely. Presidential commitments to use a formalist OLC are always partial. But the more sporadic the president's reliance on a formalist OLC, the less the model appears to its relevant audiences as a credible commitment. So too, if an OLC opinion is requested only when it will be used to justify a chosen course of conduct in public, then it may become less capable of signaling credibility. This is not to suggest that OLC will only tell the president what he wants to hear. Rather, the president may only ask OLC to formalize its advice when he has received a desirable response. By producing relatively *ad hoc* opinions generally supportive of the administration, OLC itself becomes less capable of generating credibility.

There is a final potential feedback effect. The current approach—presidential choice between the models with a growing reliance on porous legalism—seems to depend on OLC's ability to maintain its distinctive stature in executive branch legalism even as it loses the prevalence of a signature institutional tool: the formal legal opinion. The question, then, is how dependent is OLC's sociological legitimacy on the formalist structure?²⁸⁸ OLC's work has always been a mix of opinion writing and informal, sometimes purely oral advice. And its day-to-day work includes additional tasks such as reviewing presidential executive orders for legality and providing constitutional analysis on bills pending in Congress.²⁸⁹ Perhaps the decline of formality is not relevant to OLC's centrality to executive branch legalism.

I want to suggest a different interpretation: that the institutions of the formalist model are at the crux of OLC's sociological authority. The OLC opinion is not simply an instrument of OLC's directive power. It has also been a symbol of the Office's prominent role in the president's legal advisory apparatus. The institution of opinion writing has forged the norms and craft of the Office. It has shaped and, in prior periods,

²⁸⁸ See Fallon, *supra* note 185, at 1795–96 (on sociological legitimacy). Cf. Carpenter, *supra* note 10, at 33 (on “conceptual facets” of regulatory power).

²⁸⁹ OLC began to review proposed proclamations and executive orders for form and legality in 1962, and has long played an important role reviewing enrolled bills for constitutional concerns. See Wozencraft, *supra* note 99, at 35–36. It has also been instrumental in reviewing proposed administration bills “to assure that . . . the bills conformed to the basic legal positions of the executive branch.” *Id.* at 36.

enhanced OLC's reputation, even vis-à-vis the attorney general.²⁹⁰ The comparison to courts and judicial decisionmaking has helped to establish a set of professional and public expectations about the content of OLC's work product and the processes of OLC review.

The formalist structure also enables OLC to control both the process and method of legal decisionmaking by other executive branch actors.²⁹¹ When OLC is asked by an agency to provide a formal legal opinion, it has a long tradition of soliciting views in writing from other agencies.²⁹² OLC thus becomes a gatekeeper for legal positions otherwise diffused across the bureaucracy.²⁹³ OLC's power over legal decisionmaking, under the formalist model, also extends to methodology. Through the legal opinion, OLC decides what types of legal argumentation are compelling, and it is able to rely on and in turn bolster the significance of its own prior precedent. Finally, OLC is able to decide (or at least be a first mover) on difficult questions involving the standards of executive branch legalism: Is the role for law in executive decisionmaking a "best" view of the law,²⁹⁴ or is it a question of reasonableness—of staying within a respectable zone of legal ambiguity?

When the symbol of OLC's power—the churn of legal opinions—fades, then the Office's sociological legitimacy, as the executive's legal decider-in-chief, is likely to diminish. OLC's power is linked to a perception of OLC, both internal to the executive and externally, that what OLC does is something distinctive. It creates the formal, binding common law of the executive branch.²⁹⁵ The diminished use of the formalist model, over time, may itself fuel porous legalism. The absence of a robust opinion-writing practice creates opportunities for more

²⁹⁰ See, e.g., Kmiec, *supra* note 28, at 373 ("OLC's quasi-judicial stance allows OLC to regularly rebuff the inquiries of curious members of the Attorney General's personal staff and certainly 'lesser mortals' in other departmental divisions or outside the Department.").

²⁹¹ See Carpenter, *supra* note 10, at 17, 73–117 (labeling and describing a "gatekeeping" facet of regulatory power).

²⁹² This practice has not generally extended to requests for opinions from the Attorney General or the White House complex. See *supra* note 25.

²⁹³ Carpenter, *supra* note 10, at 17, 73–75 (on "gatekeeping" power).

²⁹⁴ See Barron Memorandum, *supra* note 170; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel to Att'ys of the Office (May 16, 2005) [hereinafter Bradbury Memorandum], <https://www.justice.gov/sites/default/files/pages/attachments/2014/07/11/olc-best-practices-2005.pdf> [<https://perma.cc/G4YF-WT3W>]; see also *infra* notes 349–50 and accompanying text.

²⁹⁵ See Carpenter, *supra* note 10, at 54 ("[V]arious audiences often attempt to evaluate or make sense of an organization by trying to define what is unique about it.").

ambiguously overlapping, less differentiated authority among legal advisors. And the diminished public expectation for OLC to produce formal legal opinions reduces the political costs of not seeking an opinion from OLC.²⁹⁶ Meanwhile, the prominence of porous legalism, over time, may itself diminish the availability of the formalist model for the president. By whittling away at the distinctive stature of OLC inside the executive branch, porous legalism diminishes the president's ability to use a formalist OLC to enhance credibility.

At its core, then, the transformation explored on these pages might suggest a loss of legalistic credibility as a source of public trust. That is, the formalist structure is itself less capable of generating credibility in our current legal culture. The desirability of a detached legal adjudicator inside the executive may be contingent on an earlier intellectual age. In a time of suspicion even of courts and among jurists²⁹⁷ a quasi-judicial OLC might simply be less capable of generating sociological legitimacy. At the same time, intellectual conceptions of public law itself have become more sanguine about the role of politics and policy in influencing legal analysis. While there is greater suspicion of the idea of "pure law" insulated from politics and policy, there may also be greater sociological acceptance of a more porous legal judgment.

III. PRESIDENTIAL CONTROL THROUGH DIFFUSION

Executive branch legalism's changed institutional landscape has both normative and theoretical implications. Before turning to the normative stakes (in Part IV), this Part elucidates a theoretical payoff. Analyzing executive branch legalism as a form of presidential power brings into view a distinct variant: *control through diffusion*.

The standard account of presidential control identifies two institutional moves of the modern presidency: centralization and

²⁹⁶ In his study of institutional entrenchment, Daryl Levinson observes that rationalistic mechanisms are supported by a variety of nonrationalistic mechanisms that can make political arrangements "psychologically and sociologically embedded in such a way that they are no longer experienced by actors as constraints or even as matters of choice." Levinson, *supra* note 3, at 690–91; see, e.g., Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 *J. Econ. Persp.* 193 (1991). These psychological and sociological explanations of entrenchment also help to explain why, over time, the fragility of the formalist structure builds on itself.

²⁹⁷ See, e.g., Duncan Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, 25 *Law Critique* 91 (2014); Merrill, *supra* note 279, at 88; David E. Pozen, *Constitutional Bad Faith*, 129 *Harv. L. Rev.* 885, 940–47 (2016).

politicization. Presidents shift the work of administration to White House structures (like OIRA)—what political scientist Terry Moe termed “centralization.”²⁹⁸ And presidents add a layer of political loyalists over the bureaucratic experts inside the agencies—what Moe termed “politicization.”²⁹⁹ In these two ways, presidents enhance their ability to govern through the bureaucracy.³⁰⁰ This is Terry Moe’s presidency, and the conceptualization has proven both influential and exceptionally enduring in the literature.

The story of executive branch legalism in some ways resists, in some ways refines this account of presidential power. Executive branch legalism under a presidency like Carter’s was designed *to limit* presidential control at the retail level.³⁰¹ Legalism cabined presidential discretion in specific legal-policy disputes in an effort to make more legitimate presidential policymaking writ large.³⁰² While legalism served a presidential interest, that interest was advanced through a loss of retail-level control.³⁰³

The rise of porous legalism, meanwhile, extends Moe’s thesis. The president has turned to institutional structures that better enable his political and policy preferences to inform administrative judgment. This was Moe’s central insight. As with regulatory review and other facets of administrative policymaking, the president’s priorities for executive branch legal review have shifted over time to more retail-level influence. In legal review as in other types of administrative decisions, the

²⁹⁸ See Moe, *supra* note 12, at 235.

²⁹⁹ See *id.*

³⁰⁰ Moe conceptualized the president’s overriding objective in terms of leadership. See Moe & Wilson, *supra* note 12, at 11; see also Jacob S. Hacker & Paul Pierson, *After the “Master Theory”: Downs, Schattschneider, and the Rebirth of Policy-Focused Analysis*, 12 *Persp. on Pol.* 643 (2014) (advancing a policy-focused perspective).

³⁰¹ Cf. Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 *Va. L. Rev.* 801, 801 (2011) (examining case studies “that involve the Executive, on its own initiative, relinquishing control over essential national-security responsibilities by way of institutional redesign”).

³⁰² The idea that lawyers and legal process can legitimate national governance has historical and intellectual roots. See, e.g., Kessler, *supra* note 8, at 757 (describing the New Deal consensus that emerged on the “rule of lawyers”—“the ‘policing’ of ‘administrative discretion’ by the ‘legal profession,’ operating both inside and outside the federal bureaucracy”—as a method of legitimizing the newly expanded administrative state (quoting Ernst, *supra* note 8, at 125, 143)). On the Legal Process tradition, see Eskridge & Frickey, *supra* note 265, at liii–liv.

³⁰³ See Posner & Vermeule, *The Credible Executive*, *supra* note 197.

relationship between administrative judgment and presidential politics has become more porous.

But the *form* of presidential control at work illuminates a surprising variant. Professor Bruce Ackerman has suggested that the White House Counsel's Office will soon displace OLC as the central site of legal power inside the executive.³⁰⁴ This is where Terry Moe's presidency would have us look—a centralized, OIRA-like structure for legal review inside the Executive Office of the President. An expanded White House Counsel's Office on its own, however, is unlikely to reshape executive branch legalism. The White House Counsel's Office is a relatively small office (even as its size has grown in recent administrations) generally engaged in a variety of tasks, including executive and judicial nominations, congressional oversight, ethics-related compliance work, and other responsibilities related to the White House's daily operations.³⁰⁵ The White House Counsel and his staff turn over from administration to administration, and therefore are ill-suited to serve as repositories of institutional knowledge about how the executive branch has handled legal-policy questions in the past. And the White House Counsel is perceived to be an arm of the White House, and the president specifically.³⁰⁶

If a White House structure has these limitations, why not coopt the formalist structure—put loyalists in charge of OLC and direct them to issue desirable opinions? For a president seeking to maximize immediate-term, retail-level control, this might be a desirable strategy. As detailed above, however, the president has a plurality of goals in structuring executive branch legalism.³⁰⁷ Rather than maximizing control, presidential design might be characterized as “roughly optimizing” a set of objectives.³⁰⁸ Even on purely rationalist or strategic grounds, sound legal advice remains valuable for the president.³⁰⁹ Presidents thus desire a legal apparatus that can augment discretion without eliminating capable counsel. Reputation is an additional

³⁰⁴ See Ackerman, *supra* note 1, at 114–16.

³⁰⁵ See Morrison, *supra* note 1, at 1731–32.

³⁰⁶ As Trevor Morrison has argued, “The very institutional factors that make the Counsel's Office more likely to say yes to the President also makes its advice dramatically less valuable when trying to defend an action to a skeptical third party—whether Congress, the press, or perhaps ultimately a court.” See *id.* at 1741.

³⁰⁷ This model assumes a rational political actor. See *supra* note 183.

³⁰⁸ See Vermeule, *supra* note 111, manuscript at 2.

³⁰⁹ See *supra* notes 203–204 and accompanying text.

consideration. A formalist OLC dispensing badly reasoned and poorly crafted opinions has long-term costs—to the presidency, to the Justice Department, and to the individual lawyers signing their names to these pronouncements of executive branch law.³¹⁰ Finally, the institutions underlying the formalist model generate their own norms, customs, and practices. Those norms can be breached. But they can also help an OLC official, so motivated, to push back against presidential efforts to coopt the formalist structure.³¹¹

The diffusion of legal expertise across the agencies presents an important resource for a presidential team seeking to enhance its influence and diversify legal options.³¹² Diffusion, first, can help the president to unseat an institutional incumbent.³¹³ OLC's legal review under the formalist model is singular and authoritative.³¹⁴ By contrast, when it is one participant among many in an ongoing and exploratory process, OLC becomes a reference point in legal discussions rather than a decider. It is not only OLC that is capable of giving informed, candid (and creative) legal analysis; there are high-ranking and well-respected legal experts across the agencies. These are well-regarded professionals under any metric, sometimes Senate-confirmed (or at least filling what should be a Senate-confirmed role).³¹⁵ Through diffusion, the president

³¹⁰ See Morrison, *supra* note 1, at 1726–30.

³¹¹ See Goldsmith, *supra* note 1, at xi–xii.

³¹² See Daphna Renan, Pooling Powers, 115 *Colum. L. Rev.* 211 (2015) (exploring how the executive augments discretion by sharing power and “pooling” resources among different institutional actors).

³¹³ For analogues in administrative policymaking, see Jody Freeman, The Obama Administration's National Auto Policy: Lessons from the “Car Deal,” 35 *Harv. Envtl. L. Rev.* 343, 358–64 (2011) (describing impact of Environmental Protection Agency on National Highway Traffic Safety Administration in joint rulemaking on fuel efficiency standards); Jason Marisam, The President's Agency Selection Powers, 65 *Admin. L. Rev.* 821, 868–71 (2013) (describing the Bush Administration's involvement of the Treasury Secretary in decisionmaking by the SEC during the 2008 financial crisis).

³¹⁴ On the traditionally binding nature of OLC decisionmaking, see Baker, *supra* note 33, at 8–11. For exploration of the binding nature of OLC advice and the roots of this custom, see Moss, *supra* note 28, at 1318–21.

³¹⁵ In the national security context, for example, the General Counsels of the Central Intelligence Agency, the Department of Defense, and the Office of the Director of National Intelligence, as well as the Legal Adviser at State, are all Senate-confirmed leadership positions drawing talented and well-regarded legal professionals, including Jeh Johnson, a General Counsel of the Department of Defense, who would go on to head the Department of Homeland Security, and Caroline Krass, who went from the acting head of OLC to the General Counsel post at CIA.

can “soften” OLC’s legal power, while retaining the benefit of its legal input.

Second and relatedly, diffusion alters the institutional terrain in which decisionmaking occurs. It can integrate into the decisional process a variety of administrative perspectives different from a particular institutional incumbent. And it can eliminate the presumptive institutional tools of the incumbent (such as opinion writing), or supplement those tools with others.³¹⁶ Diffusion also changes who has agenda setting power, and how it is exercised.³¹⁷

Confronted with complex and novel legal questions, lawyers will disagree. Diffusion can enable the president to choose a source of legal interpretive power for this ride only, and then to choose again.³¹⁸ Such forum shopping has political costs, however, both for the credibility of the president and for the credibility of the legal interpreter who stands against a consensus view. Forum shopping is likely to occur, then, only with respect to questions of considerable importance to the president. But those same political constraints may not extend to the use of more routinized structures of diffusion like the Lawyers Group. By rewriting the institutional architecture of legal decisionmaking, the presidential team can influence legal decisions in a more subtle, and potentially more pervasive way. Working iteratively to identify and assess legal risks, lawyers can bring into view legal and technical dimensions of complex legal-policy questions, without deciding those legal-policy questions through a quasi-judicial opinion from a particular institutional actor.

This points to a final benefit of diffusion for the president. Because it alters the configuration of decisionmaking, diffusion can change the social influences that affect decisionmaking.³¹⁹ Some first-hand accounts of the Lawyers Group, for example, have emphasized the group’s general efforts to reach a consensus-based position supportive of the

³¹⁶ See Renan, *supra* note 312, at 214.

³¹⁷ See generally Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 *Admin. L. Rev.* 93, 95–99 (2016) (elaborating the concept of agenda-setting). Cf. Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 *Calif. L. Rev.* 1401 (2016) (exploring agenda control power, as allocated among the branches).

³¹⁸ Cf. Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch is a “They,” Not an “It,”* 96 *Minn. L. Rev.* 194, 228–29 (2011) (summarizing the stakeholders in executive branch interpretation of international law and explaining how they “may compete for the attention and trust of the President”).

³¹⁹ See *infra* note 331 and accompanying text.

president's desired policies.³²⁰ This may mean that legal arguments are rejected when specific participants are uncomfortable with them. But the group effort appears also to be geared towards finding a legal path forward for the president's policy priorities.

Diffusion, then, accretes discretion to the president—at least within what the lawyers determine to be reasonable bounds.³²¹ The president did not create the diffusion of legal expertise inside the executive branch. But he is well-positioned to capitalize on it. Porous legalism thus reveals an institutional structure unfamiliar to the traditional account of presidential administration, but empowering for the president: centralized decisionmaking through diffusion and ambiguous overlap. It suggests a fallacy of division in the traditional conception of presidential power; what is true of the collective need not be true of the constituent parts.

As a form of presidential power, diffusion extends beyond legal review. In prior work, I have shown how the president can augment effective power by pooling legal authorities and administrative resources initially allocated to different institutional actors.³²² Pooling destabilizes the institutions through which participating agencies would otherwise operate by blending governance regimes in ambiguous ways and blurring organizational boundaries.³²³ For a president seeking to effectuate policy with limited capacity to amend formal law or to alter the conditions of partisan polarization, diffusion presents a significant variant of control—one that might well be on the rise.³²⁴

³²⁰ See Hathaway, *supra* note 140, at 14–16.

³²¹ There will inevitably be some disagreement among lawyers (or scholars or jurists) on the boundaries of reasonableness.

³²² See Renan, *supra* note 312, at 213, 234–43.

³²³ See *id.* at 216–17.

³²⁴ See *id.* at 234–43. Scholars of federalism, privatization, and local government law similarly have demonstrated that diffusion of authority can redound to the effective power of the center. See Jessica Bulman-Pozen, *The Rites of Dissent: Notes on Nationalist Federalism*, 59 *St. Louis U. L.J.* 1133, 1136–38 (2015); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *Yale L.J.* 1256, 1262–63 (2009); Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 *St. Louis U. L.J.* 997, 998, 1001–07 (2015); Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 *Yale L.J.* 1889, 1892–93 (2014); Abbe R. Gluck, *Our [National] Federalism*, 123 *Yale L.J.* 1996, 1997–2002 (2014); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 *Mich. L. Rev.* 813, 816 (1998); see also Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 *Harv. L. Rev.* 1285, 1285 (2003) (suggesting that privatization can be a means of “publicization,” “expanding government’s reach into realms traditionally thought

IV. A PRELIMINARY ASSESSMENT

Either the formalist model or porous legalism can work in theory; each can contribute valuably to presidential decisionmaking. Each also can be corrupted. Neither, in the end, can compensate for the absence of sound presidential judgment. We better understand the vulnerabilities of each model, however, by reference to the other. What's more, each reflects a very different view of the role of law and lawyers in presidential decisionmaking. The normative question, then, is what should a reader concerned with the public interest desire from executive branch legalism? Without attempting a full resolution, the remainder of the Article marks a set of questions and considerations. One's view on how those questions should come out is likely to be informed by deeply contested normative priors that this brief discussion does not attempt to engage. Instead, I offer a preliminary framework to assess the two structures of executive branch legalism at work in presidential decisionmaking.

My own priors lead me to this set of goals for the development of legal policy by the president: a publicly accountable and, where possible, transparent presidential judgment, informed by the legal assessment of capable lawyers engaging in rigorous legal analysis. Ultimately, constraint on presidential power is less about static boundaries of the legally permissible than it is about legal-policy development in a system with available moves and countermoves. Rather than a detached adjudicator using law to decide among reasonable alternatives, there is value in a more iterative and integrated process.³²⁵ Capable lawyers should assess legal sources conscientiously and provide honest counsel about the boundaries of discretion, as they understand them. But the process should not be designed to foreclose reasonable legal options because a quasi-judicial actor inside the executive has deemed one to be preferable. Ambiguity in legal sources *should* rebound discretion to the president, not the lawyers. But legal texts (constitutional, statutory, and regulatory) should be thoroughly

private"); Jon D. Michaels, *Privatization's Progeny*, 101 *Geo. L.J.* 1023, 1026–30 (2013) (arguing that privatization can enable government actors to work around legal limits on their power); Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 *Mich. L. Rev.* 843, 845 (1999) (“[T]he production of local difference can be an effective strategy for consolidating and maintaining centralized power.”).

³²⁵ For a contrary view, see Ackerman, *supra* note 1, at 141–79 (advocating for a court-like Supreme Executive Tribunal).

examined, forthrightly discussed, and responsibly incorporated into presidential decisionmaking. There will inevitably be presidential decisions that fall short of these goals. But the structure of executive branch legalism should be designed to help realize them. And, as important, executive legalism should help to create the conditions for other actors, both inside and outside the executive, to assess the president's decision and hold the president to account.

With these goals in mind, Part IV assesses both models of executive branch legalism along three dimensions: capable legal analysis, presidential judgment, and accountable legal-policy change. Section IV.A rejects the idea that either model is inherently more likely to improve the quality of legal analysis. Each poses distinct risks and embeds distinct biases. The two models do, however, privilege two very different approaches to governance. With porous legalism, lawyers are in some ways more pervasively infused in the apparatus of governance, but law plays a more "marginal" role in any given legal-policy decision.³²⁶ Legal advice remains significant, but lawyers consult on rather than drive legal policy. Section IV.B defends this more porous role for law in the exercise of presidential judgment. Finally, Section IV.C turns to accountable adaptation. Neither model, to date, has achieved a desirable and durable approach to transparent and accountable legal-policy change. In setting out my concerns, I hope to suggest some directions for future normative and prescriptive work.

A. Capable Legal Analysis

Porous legalism and the formalist structure each have distinct risks, and there are forms of potential bias embedded in each. This Section seeks to clarify the vulnerabilities of each model in policing legal limits on discretion. It first explores the effects of organizational structure on the quality of legal advice and then turns to the tradeoffs of formal opinion writing.

The formalist structure can motivate a president to seek to "capture" OLC. The president can select OLC leadership that is closely aligned with controversial and aggressive views of legality, or design internal

³²⁶ See Vermeule, *supra* note 184, at 209 (exploring "law [as] a marginal phenomenon").

processes to better control OLC's opinion writing.³²⁷ Those efforts to control a formalist OLC might also work to limit the Office's access to the legal and technical expertise of other agencies (or other components inside the Justice Department)—as, for example, in the “close hold” policy implemented in the aftermath of 9/11.³²⁸ As discussed above, the legal questions at the crux of presidential decisionmaking are often highly complex and technical. Other administrative actors have accrued expertise crucial to their thoughtful resolution. A diffuse structure might better track how legal expertise is developed inside the executive. According to participants, these concerns with the Bush administration's use of the formalist structure in the aftermath of 9/11 informed the Obama administration's decision to rely on the Lawyers Group instead of an OLC-centric process.³²⁹

Porous legalism, however, can facilitate forum shopping. Presented with a range of legal views, the president might decide for extralegal reasons to rely on a less thorough, less capable, or even unavailing legal ground. Diffusion also might generate competition among legal advisors for presidential favor, which could in turn lead to more accommodating and potentially less competent legal analyses. This is so even if a principal (like the president) desires careful and thorough legal analysis. As Professors Jacob Gersen and Matthew Stephenson argue, “a less-competent agent's interest in appearing competent [may] lead her to ‘pander’ by choosing the popular [for the principal] action, even though the agent thinks that some other, less popular action would better serve the principal's interests.”³³⁰ Pandering is representative of a collection of principal-agent problems that exist in any design of executive branch legal review, but might be exacerbated to the extent that actors are competing for primacy or even relevance.³³¹

³²⁷ See generally Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 *Tex. L. Rev.* 15 (2010) (discussing how institutional design can avoid or enhance the risk of capture).

³²⁸ See *supra* notes 122–123 and accompanying text.

³²⁹ See Savage, *supra* note 138, at 63–65.

³³⁰ Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 *J. Legal Analysis* 185, 195–96 (2014). An agent (such as a legal advisor) may pander because she is “tr[ying] to signal [to her principal] that she is a ‘good type’ by choosing the popular action, even when the agent believes that the unpopular action is more likely to be the one that the principals . . . , if fully informed, would have preferred.” *Id.* at 195.

³³¹ For example, Gersen and Stephenson explain how “posturing” might similarly lead to less desirable outcomes by driving agents to “do what is bold and attention-grabbing rather than what is conventional and sensible.” *Id.* at 198.

Such competition might be blunted to the extent that the decisional structure strives for consensus. Where a diffusion of legal advisors results in a consensus-oriented structure, however, the organizational design might give rise to social processes that diminish the quality of the collective decision.³³² For example, a legal analyst with concerns about a proposed course's legality might be influenced by a perceived lack of concern among other group participants.³³³ As a result, "a consensus . . . [may be] less epistemically robust than the sheer number of adherents to it might suggest."³³⁴ This concern with group decisionmaking resonates with some first-hand accounts of the Lawyers Group process.³³⁵

Porous legalism does not just diversify the legal advisors available to the president. It also diversifies the instruments through which legal decisionmaking occurs. A decision not to rely on an OLC opinion alters the tools—and, in turn, the institutional arrangements—through which legal analysis will be conducted.³³⁶ Porous legalism enables a choice among those instruments and arrangements anew, each time a legal-policy question arises.

The decline of formal opinion writing thus raises important questions about the value of a written opinion from OLC as a bulwark of sound

³³² See, e.g., Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 *J. Legal Analysis* 1, 26 (2009).

³³³ See Luis Garicano & Richard A. Posner, *Intelligence Failures: An Organizational Economics Perspective*, *J. Econ. Persp.*, Fall 2005, at 151, 154 ("In the economics literature, a problem of herding is said to arise when a rational agent decides that a (coarse) body of public information outweighs his own contradictory private information." (citing Abhijit V. Banerjee, *A Simple Model of Herd Behavior*, 107 *Q.J. Econ.* 797 (1992), and Ivo Welch, *Sequential Sales, Learning, and Cascades*, 47 *J. Fin.* 695 (1992))). As Garicano and Posner explain in the context of designing foreign intelligence collection, "This herding, or information cascade, occurs because each individual is rationally weighing evidence that seems to be based on several individual judgments against personal first-hand information and acting accordingly." Garicano & Posner, *supra*, at 155. See also Canice Prendergast, *A Theory of "Yes Men"*, 83 *Am. Econ. Rev.* 757, 767 (1993).

³³⁴ Garicano & Posner, *supra* note 333, at 155; see Vermeule, *supra* note 332, at 28, 30; see also Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 *Yale L.J.* 71, 85, 94 (2000) (arguing that "groups and group members move and coalesce, not toward the middle of antecedent dispositions, but toward a more extreme position in the direction indicated by those dispositions," and "where views are not firmly held, but where there is an initial predisposition, group polarization is the general rule").

³³⁵ See Hathaway, *supra* note 140, at 12, 15–16 (arguing that the Lawyers Group's preference for consensus worked, in practice, to dissuade dissent).

³³⁶ See Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 *Yale J. Int'l L.* 359, 374 (2013).

legal analysis. In the judicial context, Professor Karl Llewellyn described the precedential legal opinion as a “compelling pressure[] toward steadiness.”³³⁷ The process of writing a legal opinion can give rise “not only [to] back-check and cross-check on any contemplated decision by way of continuity with the law to date but . . . also [to] a due measure of caution by way of contemplation of effects ahead.”³³⁸ The knowledge that one is creating authoritative precedent for a future president with potentially opposing policy or political preferences might temper the desire to develop legal standards permissive of a sitting president’s desired policy.³³⁹ Formal precedent might also enhance legal analysis by creating a body of legal judgments that have withstood the test of time.³⁴⁰

A formal, written body of executive branch common law might impose limits on presidential and agency action even in the course of approving a desired course of conduct. While opinions from OLC that prohibit a presidential policy preference are rare and perhaps increasingly unlikely, OLC opinions do routinely cabin the “yes” within a legal framework that imposes legal or institutional checks. In so doing, even a permissive legal conclusion might impose constraints on future conduct—to the extent that those constraints are preserved in future legal analysis.

At the same time, however, the pressure to make decisive legal policy—even as an executive branch structure is conducting legal analysis, as in the formalist model—might thwart fully candid or analytically rigorous exposition of the legal question at issue. It might put a thumb, a very heavy thumb, on the scale for finding legality. A body of written executive branch common law might, over time, become

³³⁷ Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 27 (1960).

³³⁸ *Id.* at 26.

³³⁹ See Frederick Schauer, *Precedent*, 39 *Stan. L. Rev.* 571, 589 (1987) (“Even without an existing precedent, the conscientious decisionmaker must recognize that future conscientious decisionmakers will treat her decision as precedent, a realization that will constrain the range of possible decisions about the case at hand.”).

³⁴⁰ See David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. Chi. L. Rev.* 877, 891 (1996) (noting that the traditionalist component of the common law method suggests that prior legal decisions “should be followed because [they] reflect judgments that have been accepted by many generations in a variety of circumstances”). On the connection between these dimensions of the common law method and Burkean incrementalism, see *id.* at 894; Cass R. Sunstein, *Burkean Minimalism*, 105 *Mich. L. Rev.* 353, 371–72 (2006).

less constraining of presidential power because it will be institutionally oriented to protect it.³⁴¹

Competent legal review also requires candid disclosure of relevant information from the operational agencies (and the White House complex).³⁴² When OLC's legal analysis creates binding legal policy, it might be that those administrative and White House actors fall into advocacy mode, litigating their case to OLC rather than engaging with OLC in a comprehensive and fully candid discussion. It is possible that in some cases a less binding, more consultative apparatus would result in a more fulsome exchange of information relevant to the legal question at issue.

While OLC supremacy inside the executive has real costs, the decline of formality has implications beyond the primacy of a particular legal decider. Informal mechanisms of decision may undervalue aspects of legal craft that can help to sharpen legal-policy judgment. The work of writing and rewriting a legal-policy assessment can reveal gaps and vulnerabilities in one's argument, point to previously under-examined legal sources, force a deeper exploration of counterarguments, and otherwise benefit from the disciplining force of reason giving.³⁴³

This is only a relative point. Professor Abram Chayes, reflecting on the role of lawyers and legal analysis in the Cuban Missile Crisis, emphasized that "the requirement of [legal] justification suffuses the basic process of choice. There is continuous feedback between the knowledge that the government will be called upon to justify its actions and the kind of action that can be chosen."³⁴⁴ Similarly, Professors Curtis Bradley and Trevor Morrison have suggested that "[t]he pervasive existence of public 'law talk' may itself be . . . a mechanism promoting . . . law's constraining effect."³⁴⁵ The constraining force of legal justification, even for secret and security-related government operations, might be even more significant today than in the past, for the digital age has made disclosure (both warranted and unwarranted) of

³⁴¹ See Ingber, *supra* note 140, at 689–92; Morrison, *supra* note 1, at 1717 (explaining why "at least on close questions, OLC's view may . . . tilt in a more pro-executive direction").

³⁴² Cf. Stephenson, *supra* note 3, at 1453–61 (analyzing the effects of varying levels of information transparency on ex post oversight or review of agency action).

³⁴³ See, e.g., Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. Chi. Legal F. 179, 180–81.

³⁴⁴ Chayes, *supra* note 1, at 103.

³⁴⁵ Bradley & Morrison, *supra* note 1, at 1140.

government operations more likely.³⁴⁶ While the expected need to justify action in legal terms might promote a type of constraint, however, this is a very different role for law, lawyers, and legal craft than that which results from opinion writing.

The foregoing highlights a final consideration: the importance of legal professionalism under either model.³⁴⁷ A crucial question, however, is what legal professional standards should look like.³⁴⁸ Is the executive branch lawyer's charge to determine what he or she believes is the single best view of the law?³⁴⁹ Or is it a more flexible requirement—is a

³⁴⁶ See Renan, *supra* note 206, at 1107 & n.322; Peter Swire, *The Declining Half-Life of Secrets and the Future of Signals Intelligence* 1–4 (2015). Indeed, this has led some scholars and policy analysts to urge the intelligence agencies to adopt the “Front-Page Rule” in making surveillance decisions, at least in some contexts. See Jack Goldsmith, *A Partial Defense of the Front-Page Rule*, Hoover Institution: The Briefing, Jan. 29, 2014 (emphasis omitted), <http://www.hoover.org/research/partial-defense-front-page-rule> [https://perma.cc/9YP3-CLFW]; The President's Review Grp. on Intelligence and Commc'ns Techs., *Liberty and Security in a Changing World* 170 (2013) [hereinafter *President's Review Group Report*]. But see Walter Pincus, ‘Front-Page Rule’ Is Unprecedented in U.S. Intelligence Community, *Wash. Post* (Dec. 25, 2013), https://www.washingtonpost.com/world/national-security/front-page-rule-is-unprecedented-in-us-intelligence-community/2013/12/25/2ddb25f8-6c0a-11e3-b405-7e360f7e9fd2_story.html?utm_term=.d6089e58f2db [https://perma.cc/J4FH-J3RB] (arguing that the “Front-Page Rule” “run[s] contrary to past and present operations”).

³⁴⁷ In Professor James Landis's classic defense of the administrative state, professionalism (from inside the administrative tribunal) would provide the crucial counterweight to expansive presidential power. See James M. Landis, *The Administrative Process* (1938). For an account of Landis's theory of administrative legitimacy centered on this facet of Landis's argument, see Vermeule, *supra* note 111, at 4, 8–10.

³⁴⁸ A striking feature of the Justice Department review of the torture memos is that the Department itself could not agree on the relevant professional standards. In rejecting the DOJ Office of Professional Responsibility's (“OPR”) findings of professional misconduct, Associate Deputy Attorney General David Margolis wrote, “[A] finding of misconduct depends on application of a known, unambiguous obligation or standard to the attorney's conduct. I am unpersuaded that OPR has identified such a standard.” Margolis Review, *supra* note 119, at 2. Margolis declined to apply standards contained in the OLC Best Practices memoranda in part because those memoranda did not exist at the time that the torture memos were authored. See *id.* at 15–16; see also *infra* note 349 and accompanying text. But his critique is deeper. He draws on extensive exchanges between OPR investigators and former heads of OLC to demonstrate a shared inability among those interviewed to identify concrete criteria for the formulation of sound legal counsel. See, e.g., Margolis Review, *supra* note 119, at 17–20.

³⁴⁹ See, e.g., Johnsen, *supra* note 109, at 1581–82 (explaining and defending the “best view” position); Moss, *supra* note 28, at 1306 (same); Morrison, *supra* note 1, at 1713 (refining and defending the “best view” position). At least in part in response to the torture memos, OLC has adopted a set of “guiding principles” that “reaffirms the longstanding principles that have guided” the Office's work. Barron Memorandum, *supra* note 170, at 1.

reasonable basis in law sufficient?³⁵⁰ Does the professional standard change depending on the extralegal stakes of the question presented, the form in which the advice is rendered, or the time within which the advice is needed? Should professional standards differ for an institutional structure like OLC than for the general counsel to the Director of National Intelligence or the White House Counsel?

Implicit in some defenses of a formalist OLC seems to be an idea that OLC's professional role is somehow distinct from these other legal advisors—that lawyers working in the White House Counsel's Office or the Defense Department's General Counsel, for example, will and should press hard for the president's preferred policy views, while OLC lawyers should say "no" when the legal argument goes too far. But this idea of different professional standards for legal counselors serving in different organizational roles is difficult to justify in practice. And it can create systemic problems for executive branch legalism.³⁵¹ It can heighten the appeal of forum shopping for the president. And it can reduce the ability of professionalism to operate as a meaningful constraint *on the lawyers*.

Finally, if legal professionalism is to help discipline presidential power, it might be that structures that preserve individual accountability are at least as significant as those that support institutional independence. For example, structures like the Lawyers Group might be concerning from a rule-of-law perspective to the extent that they obscure individual responsibility by creating unsigned and undated working papers from unidentified and shifting collectives of lawyers.³⁵² How the decisions of a diffuse legal structure are memorialized and when they will be revealed are significant, understudied questions.

The Barron memorandum updates an earlier memorandum from Principal Deputy Assistant Attorney General Steven Bradbury, which had focused on best practices for opinion writing. See generally Bradbury Memorandum, *supra* note 294. The Guiding Principles call for "candid, independent, and principled" legal advice that is "clear, accurate, thoroughly researched, and soundly reasoned." Barron Memorandum, *supra* note 170, at 1.

³⁵⁰ See Bauer, *supra* note 136, at 63–75 (outlining and defending an alternative to the "best view" position).

³⁵¹ Cf. David B. Wilkins, Legal Realism for Lawyers, 104 Harv. L. Rev. 468, 515–19 (1990) (arguing that "legal ethics must develop a set of 'middle-level principles' that both isolate and respond to relevant differences in social and institutional context while providing a structural foundation for widespread compliance in the areas where they apply," *id.* at 516).

³⁵² See Hathaway, *supra* note 140, at 16.

B. Presidential Judgment

The formalist structure rationalizes a central role for lawyers—and legal professional training more generally—in resolving questions of national governance.³⁵³ But the primacy of lawyers and legal craft can also subjugate a type of blended judgment—the ability to combine legal and extralegal (moral, policy, and political) considerations in the making of presidential judgment. A strongly articulated process of formal OLC review creates the risks either that legal analysis will be insufficiently attentive to policy and moral concerns, or that the policy preferences of a small set of lawyers will unduly drive presidential decisionmaking.

Inside the executive, the formalist model can shift the terrain of contestation away from the messy politics of morality or policy to a more anodyne trek through ambiguous legal precedent and structural constitutional theory.³⁵⁴ A formalist OLC is expected, by its executive branch audiences, to “do law,” not policy. But indeterminate legal sources necessarily implicate difficult policy choices. In the courts, judges (whether implicitly or explicitly) regularly evaluate legal sources with an eye to moral and policy consequences.³⁵⁵ And when judges conclude that legal analysis of legal sources provides a poor set of tools to resolve the question at issue, they have doctrines available to decide not to decide.³⁵⁶ Executive branch lawyers, by contrast, regularly decide legal questions that the courts would deem nonjusticiable. And a formalist OLC is in some ways more limited than a court in its ability to

³⁵³ See Strauss, *supra* note 340, at 931 (“[T]he common law approach . . . give[s] a very prominent role to characteristic lawyers’ methods of reasoning and to the professional training of lawyers.”).

³⁵⁴ See Zelikow, *supra* note 281, at 92–95.

³⁵⁵ See, e.g., Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 *Colum. L. Rev.* 359, 362, 391–94, 396–98 (1975) (defending the position that judges have discretion that must be informed by moral and policy considerations). The claim that judges should draw on some moral or policy consideration enjoys broad support. See, e.g., Ronald Dworkin, *Taking Rights Seriously* 81–86 (1977) (arguing that judges must draw on nonlegal moral principles but not on considerations of “policy”); Richard A. Posner, *How Judges Think* 5 (2008) (defending the position that judges must draw on policy considerations); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 *Duke L.J.* 511, 515 (“To begin with, it seems to me that the ‘traditional tools of statutory construction’ include not merely text and legislative history but also, quite specifically, the consideration of policy consequences.”). As these examples suggest, however, the questions when and how judges should draw on such considerations is deeply contested.

³⁵⁶ See Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 *Harv. L. Rev.* 40 (1961).

exercise moral and policy judgment: inside the executive, it is not clear why a moral or policy preference should come from the lawyers rather than the president and his policy advisors.

The concern is both that lawyers and legal analysis might, in some instances, unduly constrain presidential discretion and, in other contexts, not constrain it enough. On the one hand, a strongly formalist OLC might cabin presidential discretion based on the legal judgment of one or two lawyers, even if the legal question is genuinely contestable and nonlegal considerations are especially weighty.³⁵⁷ On the other hand, lawyers and questions of legal compliance might “crowd out” extralegal considerations weighing in favor of greater presidential restraint.³⁵⁸ Just as a “no” from OLC might terminate discussion even in contexts where the law is ambiguous, and policy considerations are weighty, the lawyer’s “yes” might overtake or short circuit decisionmaking, especially in the national security context, with insufficient attention to national strategic or humanitarian considerations.³⁵⁹

Porous legalism, by contrast, enables a more blended legal-extralegal judgment. It might be understood as a corrective for the collapse of questions of national strategy into questions of legality.³⁶⁰ Through porous legalism, lawyers evaluate legal sources and inform the decisionmaking process. But the institutional apparatus is designed to facilitate presidential judgment and, at least implicitly, to recognize the possibility of more than one potential “right” answer.³⁶¹

A more porous legal judgment might also include policymakers’ assessment of the political environment, and whether there is room to work with Congress rather than to rely on a more vulnerable legal interpretation. These concerns appear significant in legal-policy decisionmaking under Obama, spanning legal questions under the War

³⁵⁷ See Bauer, *supra* note 136, at 73.

³⁵⁸ Schlanger, *supra* note 281, at 113; see *id.* (arguing that a “relentless focus on rights, and compliance, and law,” growing out of the 1970s approach to intelligence “obscure[s] the absence of what should be an additional focus on interests, or balancing, or policy”); see also Blum, *supra* note 192, at 278–79 (2009) (cautioning against the “confluence of legality and legitimacy” in executive legal review).

³⁵⁹ See Zelikow, *supra* note 281, at 92 (arguing that “[h]abits of thinking in legal terms . . . decisively framed” debates in the Bush administration and, in so doing, “deformed” them).

³⁶⁰ See Goldsmith, *supra* note 114, at 131–32; Blum, *supra* note 192, at 286–87.

³⁶¹ Cf. Rubin, *supra* note 270, at 814–15 (arguing that “[t]he task of the New Public Law is . . . to develop a theory for translating policy into law,” rather than creating a court-centered conception of law separate from policy).

Powers Resolution,³⁶² the Affordable Care Act,³⁶³ immigration,³⁶⁴ and environmental policy.³⁶⁵ In this sense, porous legalism might enable modes of inter-branch compromise, perhaps especially well-suited to polarized governance.³⁶⁶

A danger of porous legal judgment is that strong political or policy preferences will push legal decisionmaking outside a zone of reasonableness or legitimate indeterminacy—that is, beyond what a legitimate legal construction of the available sources would permit.³⁶⁷ This is a significant concern. But I am not convinced that it is limited to porous legalism. The formalist model also can result in unreasonable legal conclusions by privileging the legal views of a particular government lawyer (himself a political appointee), as reflected in the Office’s opinions on executive power in the aftermath of 9/11.

To be effective, either model ultimately depends on a plurality of institutions for holding the president to account.³⁶⁸ Executive branch legalism can help to shape a responsible presidential judgment. But executive branch legalism alone cannot prevent an irresponsible one.

³⁶² Although the facts in connection to Libya decisionmaking are murky and appear contested, Savage describes the perception among President Obama’s policy advisers that congressional leaders both desired the operations in Libya to continue and signaled to the administration that “there was no political appetite to enact an authorization.” See Savage, *supra* note 138, at 641–643.

³⁶³ See Bagley, *supra* note 163, at 1734–35 (describing the Obama administration’s legal interpretation concerning cost-sharing subsidies as a “willingness to bend the law [in response to] . . . a breach of longstanding convention” by Congress, *id.* at 1734, and suggesting that the Obama administration’s decision “may provide an opening to reevaluate the formalism that has long characterized appropriations law, at least where Congress has refused to appropriate money that it has already committed to pay,” *id.* at 1735).

³⁶⁴ See Savage, *supra* note 138, at 659–66 (describing the Obama administration’s increasingly aggressive legal positions on executive authority over immigration reform in response to the collapse of negotiations with Congress).

³⁶⁵ See Freeman & Spence, *supra* note 215, at 2–7, 64–67 (arguing that “in an era of unprecedented congressional paralysis,” *id.* at 4, agencies must adapt old statutes to new problems, and that agencies do so “strategically, cognizant of the preferences of their political overseers and the risk of being overturned in the courts,” *id.* at 3).

³⁶⁶ Cf. Bulman-Pozen, *supra* note 217, at 1001–09 (arguing that “executive federalism” creates “new routes to bipartisan compromise,” in times of polarized governance, *id.* at 1003.)

³⁶⁷ See Fallon, *supra* note 185, at 1818–19 (noting that one way to think about “legal legitimacy,” *id.* at 1819, is whether the decisionmaker exceeded their discretion—that is, “act[ed] for the wrong kind of reason” by “bas[ing] their decisions on considerations that they have no lawful power to weigh,” *id.* at 1818, or by “show[ing] particularly bad judgment in assessing relevant considerations,” *id.* at 1819).

³⁶⁸ See Goldsmith, *supra* note 1.

When presidential decisionmaking is transparent, courts and other institutional actors can calibrate their roles in response to concerns of executive overreach.³⁶⁹

C. Accountable Adaptation

Legal constraint on presidential power may be less about static boundaries of the legally permissible or institutional actors exercising rigid institutional roles than it is about legal development in a system with available moves and countermoves. Legal understandings must be able to change over time.³⁷⁰

A problem inside the executive, however, is that legal understandings can change in secret—through unpublished, sometimes close-hold decisions that prevent public notice or democratic feedback as to those altered understandings. A value of the common law method in the courts can become a vice of a formal, written body of precedent inside the executive, when legal meaning changes without publicity. A significant concern in the national security context, for example, has been the common law–like evolution of the meaning of legal terms and standards without public awareness of those changed understandings.³⁷¹ The same interpretive method that guards against legal ossification in the courts prevents democratic accountability and, on occasion, even judicial review of aggressive or controversial legal interpretations by the executive.

³⁶⁹ See *id.* Judicial and congressional responses to President Trump’s “entry ban” and other early actions of the administration, unfolding as this Article goes to print, illustrate these dynamics. See Jack Goldsmith, *Yes, We Are Holding Trump Accountable*, N.Y. Times, Mar. 15, 2017, at A23.

³⁷⁰ David Strauss has suggested that a legal system must accommodate three institutional interests or lodestars: adaptation, settlement, and sovereignty. See Strauss, *supra* note 20, at 53–55; see also Benjamin N. Cardozo, *The Nature of the Judicial Process* 20–21 (1921) (“[N]o system of living law can be evolved by” simply matching “[t]he sample [color] nearest in shade” to the case at hand; “[i]t is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins.”).

³⁷¹ Professor Shirin Sinnar has argued that the executive has used “legal terms of art that are drawn from constitutional or international law but that deviate, at least partly in secret, from prevalent understandings of those terms.” Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 Harv. L. Rev. 1566, 1570 (2016). The executive’s use of these “rule of law tropes,” Sinnar argues, diminishes the potential for public accountability and undermines the legitimacy of accepted legal standards. See *id.* at 1609–10.

The imperative for actors outside of the executive to see and respond to law's changing meaning helps to explain why Congress (sometimes as a body, sometimes as members or committees) and an engaged public (including journalists, scholars, and civil liberties groups) have pressed so hard for the disclosure of secret OLC opinions. Because legal advice and legal policymaking are bundled together in the formalist structure, OLC's authoritative precedent, elaborated and altered in secret, can undermine core interests of democratic and legal accountability. Indeed, those pressures for publicity have revealed highly controversial and deeply contested legal understandings of the executive.

There is an under-appreciated tension, however, between legal accountability and political accountability. The transparency necessary to hold decisionmakers to account (by civil society, the media, voters, or bureaucrats³⁷²) also makes it more difficult for legal-accountability institutions like OLC to function as they used to. The threat of compelled disclosure diminishes the desirability of opinion writing for the presidential team.

If compelled disclosure through FOIA contributes to a decline in formal, written executive branch common law, then two questions regarding the formalist structure warrant further study. First, as between fewer public OLC opinions and more numerous secret ones, which should a citizen concerned with the public interest prefer? If formal and secret OLC law entrenches and, over time, expands the boundaries of legality without the potential for democratic or judicial response, then one benefit of informality might be that it is simply less capable of such entrenchment.³⁷³

Second, if there is value in public and formal opinions, at least in some decisional contexts, do Congress or the courts have mechanisms to encourage it? Criminal penalties provide one such mechanism. Operating against the backdrop of criminal liability, the president is more likely to turn to OLC for a formal opinion. And, given the president's stronger need for OLC approval, an OLC that is so inclined has more leverage to push back on what it perceives to be an excessive claim of legality. The question in such contexts is how to ensure sound legal analysis. Here, the pressures to disclose a formal opinion from

³⁷² See Goldsmith, *supra* note 1, at xi–xii.

³⁷³ Cf. Shane, *supra* note 1, at 114 (cautioning against “a tendency [among government lawyers] toward conceptually rigid [and expansive] interpretations of executive power and a penchant for minting its own currency of formal legal legitimacy”).

Congress and civil society and the threat of compelled disclosure from the courts might do crucial work to police analytic rigor and legal craft, while the pressures for immunity (coming from line-level personnel) will ensure that the legal question still comes before a Justice Department structure like OLC for formal resolution. Even still, the reputational effects explored above might mean that a formal opinion from OLC will carry less weight as a source of internal control for the president. This, too, might be valuable to the extent that bureaucratic resistance broadens the types of moves and countermoves available to shape legal constraint on the ground.³⁷⁴

Meanwhile, porous legalism also has failed to fully realize the goal of transparent and accountable adaptation. As institutionalized under Obama, porous legalism in the national security context tended to rely extensively on speeches as an instrument to convey legal decisions.³⁷⁵ A reliance on speeches, however, leads to a very different form of executive branch “precedent.”³⁷⁶ Speeches are often disconnected in time from the decisional process itself, and they are entirely discretionary. They also do not carefully engage legal sources or explore significant counterarguments. And speeches need not be retracted or rescinded when a new administration makes a different decision, thus obscuring legal-policy change. Finally, as an instrument of decision, speeches privilege a distinct form of reason giving. They put the lawyer in the familiar role of advocate. Rather than evaluating the strength of a legal argument, the lawyer defends or justifies the action in legal terms. The two modes of legal reasoning implicate different professional expectations and craft values.³⁷⁷

³⁷⁴ See, e.g., Heather K. Gerken, Foreword: Federalism All the Way Down, 124 Harv. L. Rev. 4, 40 (2010) (suggesting that “introducing dissent and resistance into an administrative structure” may “cultivate a healthy tension” and spur debate).

³⁷⁵ Recognizing the administration’s reliance on speeches to set forth its legal positions, scholars and policy analysts have begun to compile and analyze those speeches. See Kenneth Anderson & Benjamin Wittes, Speaking the Law: The Obama Administration’s Addresses on National Security Law 10–16 (2015).

³⁷⁶ For a description and evaluation of the role of historical practice in separation of powers jurisprudence, see Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411, 417–32 (2012).

³⁷⁷ They also may be temporally distinct, for testimony, speeches, and brief writing generally follow a legal-policy decision, whereas a legal opinion (in theory, though certainly not always in practice) tends to precede it. For discussion of this temporal significance in the judicial context, see Carlos M. Vázquez, “Not a Happy Precedent”: The Story of *Ex Parte Quirin*, in *Federal Courts Stories* 219 (Vicki C. Jackson & Judith Resnik eds., 2010).

Perhaps recognizing some of the limitations of the instruments on which it relied, the Obama administration, eight years into its term and weeks before it left office, issued a report on the legal-policy frameworks governing national security.³⁷⁸ A foreword, signed by the President, emphasized that it is:

critical [that national security decisions] are made pursuant to a policy and legal framework that affords clear guidance internally, reduces the risk of an ill-considered decision, and enables the disclosure of as much information as possible to the public, consistent with national security and the proper functioning of the Government, so that an informed public can scrutinize our actions and hold us to account.³⁷⁹

An accompanying presidential memorandum directed that the report be revisited and updated on a regular basis.³⁸⁰

The report is a laudable attempt to further transparency and accountability in national security legal policy. But it falls short. As can only be expected in a document that seeks to set forth every significant legal and policy decision reached over eight years in office, the discussion of any particular legal policy is cursory and conclusory. Without the eight years of public speeches that underlie these decisions, the report would shed little light on the administration's understanding of its legal authorities and legal constraints.³⁸¹ As with those speeches, there is no elaboration of the underlying legal and policy sources or an examination of significant counterarguments. While the Report is a worthwhile development, then, it also serves to underscore the need for the executive to develop better instruments of public law-making under a porous legalism model.

* * *

There is no perfect, feasible design of executive branch legalism. In a world of second bests, it might be fruitful to take seriously the work of

³⁷⁸ See The White House, Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, at i–ii (2016).

³⁷⁹ See *id.* at i.

³⁸⁰ See Steps for Increased Legal and Policy Transparency Concerning the United States for Military Force and Related National Security Operations, 81 Fed. Reg. 94213 (Dec. 5, 2016).

³⁸¹ Perhaps in recognition of this, the Report includes a comprehensive appendix of those speeches. See *id.* at 44–48.

unbundling institutional practice.³⁸² That work might take two possible directions.

One potential approach would be to consider whether there are specific types of legal decisions or legal-policy contexts that are better suited for porous legalism or the formalist structure.³⁸³ One might argue, for example, that the question whether the president may lawfully target a U.S. citizen overseas using drone warfare should be decided with greater formality, lawyerly deliberation, and relatively more remove from operational interests. The institutional process inside the executive must comport with understandings of due process, and the executive's decision will have grave consequences, likely without an opportunity for judicial review.³⁸⁴ Perhaps unintentionally, Congress *has* indirectly channeled some such questions to OLC's more formal, opinion-writing practice (notwithstanding the proliferation of diffusion and informality elsewhere) by creating the possibility of individual criminal liability. One potential approach, then, would be to explore the types of legal questions that should be funneled to the formalist structure and the types of mechanisms that Congress or the courts have to do so.

Another direction would be to unbundle the institutional characteristics of the two models and work toward something of a synthesis. An institutional structure that embraces a more porous legal judgment but looks to more formal mechanisms of decision might combine desirable characteristics from each. Porous legal judgment might be a more honest descriptive account of presidential decisionmaking in contexts of high salience to the presidential team, and

³⁸² Cf. Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 3–6 (1994) (highlighting the importance of institutional choice and proposing a framework for making institutional selections); Rubin, *supra* note 267, at 1412 (“[T]here are no purely rational decisions, ideal institutions, or optimal solutions, but only second bests.”).

³⁸³ See Schauer, *supra* note 339, at 603 (“It may be better to think in terms of decisional domains, recognizing that certain institutions may contain several such decisional domains working in parallel.”); see also Sunstein, *supra* note 340, at 359–60 (noting that “in law and politics, Burkeanism operates as a kind of heuristic, one that might be justified in some domains on rule-consequentialist grounds,” *id.* at 359, but not in others).

³⁸⁴ Cf. Laurence H. Tribe, *Transcending the Youngstown Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine*, 126 *Yale L.J. F.* 86, 105 (2016) (“[T]here is an underappreciated structural dimension to the due process requirement, mandating that in identifiable areas ‘governmental policy-formation and/or application are constitutionally required to take a certain form, to follow a process with certain features, or to display a particular sort of structure.’” (quoting Laurence H. Tribe, *Structural Due Process*, 10 *Harv. C.R.-C.L. L. Rev.* 269, 291 (1975))).

it might have normative appeal to the extent that it recognizes an important role for moral and policy judgment in the public law of the executive. A significant cost of porous legalism, at least as institutionalized under Obama, is the decline of craft and reason giving and an *ad hoc* mode of transparency around national security legal policy. As detailed above, the work of writing and rewriting a legal assessment reveals gaps and vulnerabilities in one's legal argument. The process of reason giving itself can construct limits on discretion, with which future decisionmakers must at a minimum grapple.³⁸⁵ When it is made public, an opinion provides crucial clarity about what the public law of the executive actually is. And it can facilitate more nuanced engagement by congressional overseers and civil society. There might be value, then, in porous legal judgment, exercised through a transparent and more formal instrument of decision.³⁸⁶

In the domestic policy context, notice-and-comment rulemaking might, in practice, be an instantiation of this approach. On legal-policy questions of special salience to the president, rulemaking often involves the presidential team, working together with the relevant agency or agencies, to exercise porous legal judgment with the benefit of a written, published legal and policy analysis. Understanding agency rulemaking as, on occasion, a form of presidential legalism, not just technocratic administrative practice, has normative implications both for the types of legal-policy rationales that are appropriate on the public record and for those that might be relevant to judicial review under the Administrative Procedure Act.³⁸⁷

In other contexts, such as national security, it might be worthwhile to explore how best to institutionalize porous legal judgment through a more formal decisional mechanism than currently exists. The conception of a quasi-judicial OLC protecting law from policy or politics would have to give way to a conception of a more intermingled legal-policy

³⁸⁵ See, e.g., Shapiro, *supra* note 343, at 180–81.

³⁸⁶ I use formal here to emphasize a written, more formal instrument (in contrast, for example, to speeches). I do not mean to embrace, but rather to reject a conception of law that is “in form only”—i.e., a hollowed-out sense of the rule of law. See Shane, *supra* note 1, at 112–42 (cautioning against “[f]orm over [a]ccountability” in government lawyering, *id.* at 112).

³⁸⁷ See Watts, *supra* note 191 (arguing for legal doctrines that facilitate judicial supervision of certain forms of presidential control through administrative law); Kagan, *supra* note 4, at 2372–83 (arguing that proper recognition of the President's role in agency policymaking should bear on judicial review of agency action).

apparatus, but one that results in a fleshed out public opinion on significant legal-policy decisions. Such an opinion could provide a thorough analysis of the relevant legal sources as well as the policy considerations that inform the president's judgment.

A more porous interplay for law, policy, and politics on questions of special salience to the president is, I think, inevitable. There is value, however, in careful reasoning, in the work of writing and rewriting a legal argument, and in developing more durable instruments for the public law of the executive. Indeed, there may be lessons in the emergence of the administrative state itself.³⁸⁸ At a minimum, it is perhaps noteworthy that the trajectory of executive branch legalism has analogues in the field of administrative law, which has evolved away from an adjudicatory common law approach to constraining discretion and constituting legitimate governance.³⁸⁹

CONCLUSION: LAW AND CONSTRAINT REDUX

Presidential power is deeply intertwined with questions of legality. But presidents are active participants in shaping the institutions through which law gets made, especially inside the executive where many legal questions will be definitively resolved. This Article has challenged a conception of executive branch legalism as a quasi-judicial system, with OLC as its organizational hub. Legal review inside the executive is today less insulated, at the retail level, from presidential control. Presidents turn to diffusion to augment presidential influence over legal analysis—at least in those contexts where extralegal considerations are most salient. Executive branch legal review is also more informal. These changes are not coextensive, but they are related. A more informal advisory structure is also more susceptible to certain forms of presidential control. Thus, while the formalist model continues to persist in some corners, its underlying institutions are increasingly unstable. That institutional fragility is likely to build on itself, for the decline of a formalist approach to legal decisionmaking generally makes it easier for

³⁸⁸ See, e.g., Martin Shapiro, *APA: Past, Present, Future*, 72 *Va. L. Rev.* 447 (1986).

³⁸⁹ See Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 *Sup. Ct. Rev.* 41; see also Vermeule, *supra* note 111, at 6 (arguing that the “defining feature” of the administrative state is “ongoing supervision rather than reactive common-law adjudication”).

presidents to depart from its institutions in any particular high-stakes decision.

A familiar adage understands the Constitution's structural commitments to be more enduring than rights-based protections. On one telling, this is because ambition counteracts ambition among rivals for power.³⁹⁰ As this traditional conception has unraveled, scholars have suggested an alternative: structure is more enduring than rights for the reasons that institutions are more resilient than policies.³⁹¹ "If constitutional structure means roughly the same thing as a set of political decisionmaking institutions," argues Professor Daryl Levinson, "and constitutional rights are understood to specify a type of (prohibited) policy outcome, there might indeed be good reasons to expect structure to be more durable and constraining than rights."³⁹² This is in part because decisionmaking institutions (that is, structure) create stability by "bundling" policies, where the outcome of each policy, *ex ante*, is uncertain.³⁹³ The focus on constitutional structure in contemporary legal theory has increasingly honed in on the executive itself, looking to "internal separation of powers" through decisional structures and procedures like OLC opinion writing to check the executive from within.³⁹⁴

Yet the story of executive branch legalism recounted in these pages reveals a push to unbundle decisions—to separate out those legal questions of special salience to the president and the public and to shift them to a different institutional mold, even as a model of technocratic coordination continues to prevail in less politically tinged contexts. The president or agency leadership's relative willingness to tolerate uncertainty (in how an actor like OLC will decide the legal question) shapes the willingness of those actors to resort to an institution like OLC to make the decision in the first place. Rather than output uncertainty

³⁹⁰ See *The Federalist* No. 51 (James Madison).

³⁹¹ For accounts challenging this Madisonian separation of powers, see, for example, Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 *Harv. L. Rev.* 915 (2005); and Bradley & Morrison, *supra* note 376, at 438–47.

³⁹² Levinson, *supra* note 3, at 730.

³⁹³ See *id.* at 694.

³⁹⁴ See, e.g., Katyal, *supra* note 259, at 2316; Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 *Emory L.J.* 423, 425 (2009); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 *Colum. L. Rev.* 515, 536–37 (2015).

helping to forge institutional stability, it contributes to institutional vulnerability.

In this unbundled terrain, it is possible that rights or substantive values are ultimately more durable than structure. For example, it was a public outcry against substantive policies—opposition to torture, to unauthorized surveillance—that helped to destabilize the institutional structure of legal review that initially sanctioned those practices. The vitality of porous legalism might itself depend on the ability of a more porous, diffuse, and informal brand of legalism to safeguard core substantive policies or values of American governance—a question that will be tested anew in the current administration.