

# TRANSPARENCY AND THE OFFICE OF LEGAL COUNSEL

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*Recent scrutiny of the Office of Legal Counsel (OLC) in the Department of Justice has led to a consensus across ideological lines that its work must become more transparent. Commentators both sympathetic to and skeptical of the OLC's role have recommended greater publication of its written legal opinions. Insufficient attention has been paid, however, to the inherent functions of public written legal opinions, and their suitability (or lack thereof) for the OLC. Examining the existing comparison point of judicial written opinions reveals several core functions served by public written legal opinions, including efficiency, guidance, persuasion, authority, and accountability. Yet the purposes served by publishing written opinions are either met by existing OLC practices or would conflict with the OLC's institutional responsibilities, in ways deleterious to its value and effectiveness. Given the importance of the OLC's work, an opaque status quo is therefore preferable to a more transparent future. Appreciating the limits of transparency as a tool for governance can also point toward more productive roads for institutional reform.*

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## INTRODUCTION

On September 30, 2011, Anwar al-Awlaki, an American citizen, was killed by an American drone strike in Yemen.<sup>1</sup> The Obama Administration had authorized targeting him since 2010, asserting that al-Awlaki was a senior member of Al Qaeda in the Arabian Peninsula, an affiliate of the organization that carried out the terrorist attacks of September 11, 2001.<sup>2</sup> The targeting and killing of al-Awlaki ignited considerable controversy about the legal basis for the Executive Branch to kill an American citizen without recourse to judicial process, both before and after his death.<sup>3</sup>

The Obama Administration's legal authority to conduct the strike relied on a memorandum prepared by the Department of Justice's Office of Legal Counsel (OLC).<sup>4</sup> Involvement in contentious issues of constitutional law and executive power is not new for the OLC and its institutional predecessors within the Department of Justice.<sup>5</sup> In the national security context, the al-Awlaki case is one of the most recent examples of the OLC's significant role in defining the scope and limits of presidential power.<sup>6</sup> The Attorney General has long provided

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1. Mark Mazzetti, Eric Schmitt, & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant In A Car In Yemen*, N.Y. TIMES, Oct. 1, 2011, at A1.

2. Scott Shane, *U.S. Approves Targeted Killing of Radical Muslim Cleric to Domestic Terror Suspects*, N.Y. TIMES, Apr. 7, 2010, at A12.

3. E.g., Editorial, *To Kill an American*, N.Y. TIMES, Feb. 6, 2013, at A24; Steve Coll, *Kill or Capture*, THE NEW YORKER (Aug. 2, 2012), <http://www.newyorker.com/online/blogs/comment/2012/08/kill-or-capture.html>. Perhaps the most dramatic demonstration of popular outcry was a filibuster by Senator Rand Paul of the nomination of John Brennan to be Director of the CIA. Paul's thirteen-hour filibuster, joined by various other senators, had a wide-ranging focus, but repeatedly returned to the constitutionality of strikes against American citizens. See Michael A. Memoli, *Sen. Rand Paul ends marathon filibuster of John Brennan*, L.A. TIMES (Mar. 6, 2013), <http://articles.latimes.com/2013/mar/06/nation/la-na-pn-rand-paul-john-brennan-filibuster-20130307>.

4. See Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill A Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1.

5. See, e.g., David Fontana, *Executive Branch Legalisms*, 121 HARV. L. REV. F. 21, 23 n.9 (quoting C. Boyden Gray, White House Counsel in the George H.W. Bush Administration, that the "OLC is the single most important legal office in the government").

6. Andrew Kaufman, *Lochner for the Executive Branch: The Torture Memo As Anticanon*, 7 HARV. L. & POL'Y REV. 199, 200 (2013) (pointing to the "flurry of legal

legal advice to the President,<sup>7</sup> and the recent publication of a selection of opinions from OLC and the Attorney General from 1933-1977 underscores how the OLC has played a role in navigating significant legal questions for the Executive Branch.<sup>8</sup> In the mid-twentieth century legal opinions from the OLC “address[ed] legal issues related to significant historical events, including presidential action during World War II, the blockade of Cuba, U.S. incursions into Cambodia during the Vietnam War, and Watergate.”<sup>9</sup> The OLC also helped to develop the legal rationales for a number of major national security efforts, including the Bush Administration’s detention and interrogation programs<sup>10</sup> and the Obama Administration’s decision making prior to the Libyan intervention in 2011.<sup>11</sup>

Yet while the OLC has since 1977 published some of its opinions,<sup>12</sup> most OLC opinions, including many of its most important declarations, are not available to the public.<sup>13</sup> In response, many have called for greater disclosure of the OLC’s written opinions.<sup>14</sup> Invoking the dangers of “secret law” and the need to understand the legal conclusions the Executive Branch will be following, transparency advocates have called for more aggressive publication of the OLC’s legal determinations.<sup>15</sup> The OLC has already adopted some of these advocates’ proposals, including a loose presumption that it will disclose its

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activity” following the terrorist attacks of September 11, 2001 and the United States’ military response, especially on matters relating to the rights of detainees).

7. For a historical overview of the Office of the Attorney General, see NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL’S OFFICE, 1789–1990* (1992).

8. See generally U.S. DEP’T OF JUSTICE, 1 SUPPLEMENTAL OPINIONS OF THE OFFICE OF LEGAL COUNSEL (Nathan A. Forrester, ed. 2013), available at <http://www.justice.gov/olc/docs/op-olc-suppl.pdf> [hereinafter SUPPLEMENTAL OPINIONS].

9. *OLC FOIA Reading Room*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/olc/olc-foia1.htm> (last visited Aug. 11, 2013).

10. See generally JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007) [hereinafter GOLDSMITH, *THE TERROR PRESIDENCY*] (recounting the author’s experiences as the head of the Office of Legal Counsel in 2003-04, and his involvement in many controversial aspects of Bush counterterrorism policy).

11. Charlie Savage, *2 Top Lawyers Lost Argument on War Power*, N.Y. TIMES, Oct. 18, 2011, at A1 [hereinafter Savage, *2 Top Lawyers*] (describing consultation with the OLC prior to the Libyan intervention).

12. *OLC FOIA Reading Room*, *supra* note 9.

13. See *infra* Part I-C; see also Ryan J. Reilly, *Obama Justice Department Won’t Disclose Number of Classified OLC Opinions*, HUFFINGTON POST (Feb. 25, 2013), [http://www.huffingtonpost.com/2013/02/25/obama-classified-olc-opinions\\_n\\_2759878.html](http://www.huffingtonpost.com/2013/02/25/obama-classified-olc-opinions_n_2759878.html).

14. See *infra* Part II.

15. *Id.*

written opinions absent countervailing considerations.<sup>16</sup> Pressure in favor of transparency is also likely to continue as arguments for the value of transparency for the OLC have earned a consensus of support from both those generally sympathetic to presidential power and those more skeptical of its potential abuses.

The case for public access to OLC opinions has immediate, intuitive appeal, especially for legal scholars and practitioners who are used to accessing public legal materials. And calls for publication have often effectively rebutted arguments against transparency—including a “pragmatic” approach to national security needs, and recourse to the authority of the President.<sup>17</sup> Yet transparency, though an important value, is not a cure-all for problems of government.<sup>18</sup> Despite observations that “the value to be gained from heightened disclosure of OLC analysis is largely self-evident,”<sup>19</sup> further attention to the potential effects of transparency upon the OLC is of integral importance.

One way to direct an inquiry into the relationship of transparency to the OLC, and the impact of publishing its written opinions, is to turn to the two leading comparison points that have helped to define the OLC’s institutional role. The OLC has often been thought to resemble, but not fully inhibit, two competing conceptions of legal practice: to serve the President as its client, in a manner akin to an in-house counsel, or to serve the President as a neutral expositor of the law, in a manner akin to a judicial court.<sup>20</sup> These two models also stand on two ends of a spectrum of transparency, with the former envisioning legal conclusions opaque to the public, and the latter anticipating written opinions for public consumption. Though the OLC’s place within the constitutional order ensures that it will always share aspects of both roles, publishing its legal interpretations means adopting a dis-

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16. See *infra* Part I-C.

17. See Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn’t Let the Terrorists Win*, 57 U. KAN. L. REV. 579, 581 (2009) (describing “two typical rebuttals offered by U.S. administrations: the pragmatic argument that secrecy and non-disclosure are necessary to maintain the integrity of the national security efforts, and that the lack of disclosure is consistent with the President’s powers, particularly during wartime.”).

18. See Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 936 (2006) (criticizing the excessive abstraction in discussions of the value of transparency, and noting that “transparency’s goals require a context-specific definition of transparency, viewed in terms of specific policy objectives, system constraints, and the costs and benefits of open government requirements, rather than an approach that regulates secrecy based on the presumed motivations of officials in the abstract.”).

19. Daniel Cluchey, *Transparency in OLC Statutory Interpretation: Finding a Middle Ground*, 1 CORNELL P. REV. 57, 58 (2011).

20. See *infra* Part I.B.

tinctively “court-like” practice. This, in turn, invites comparisons between the uses of transparency within the judicial system and its likely effects for the OLC.

With this comparison at hand, this Note aims to critique the arguments for greater OLC transparency through an examination of the relationship between public legal opinions and core values of good governance. It approaches the publication of legal opinions as a tool of transparency with distinctive functions and effects, and concludes that it is not a tool appropriate for the institutional limitations of the OLC. In the context of the judiciary, publishing legal opinions serves certain clear purposes which address the interests of courts and the public at large. The OLC, however, does not stand to benefit from these functions and effects. Instead, publishing written opinions would erode the Office’s value to the public and the Executive Branch alike. These implications should be of concern to both those generally supportive of the OLC and those skeptical of its role in our government. And examining these implications can provide a framework for how to think more carefully about ambitions for (and limitations of) the OLC’s role in government. The status quo for the OLC is preferable to a shift toward publishing more opinions, even in the face of compelling calls for greater transparency.

Part I provides an overview of the OLC’s responsibilities, and its current practices for transparency and limited publication of written opinions. Part II outlines a push for increased disclosure of written opinions by Executive Branch officials, academic commentators, public interest groups, and Congress, premised on calls for accountability and monitoring OLC independence from political influence. Part II also establishes that transparency is not an independent virtue, but a tool with instrumental value in certain contexts. Part III notes that greater public disclosure of written opinions would shift the OLC toward a more “court-like” posture, and turns to judicial opinions, the primary existing body of written legal opinions provided to the public, as an invaluable reference for analyzing the effects and functions of public legal opinions. Part III further demonstrates that the practice of publishing opinions advances core purposes of efficiency, guidance, persuasion, authority, and accountability. Part IV, in turn, argues that pursuing these goals via public legal opinions would, in the context of the OLC, be likely to imperil both its societal value and its institutional effectiveness. The Note concludes by arguing that rather than adopting proposals ill-suited to the OLC’s institutional limitations, we must accept and appreciate what it can currently provide. If the OLC falls short of the goals of independence and accountability espoused

by transparency advocates, then a more rigorous attention to institutional design and reform may provide other, more effective means of realizing their ambitions.

## I.

### THE TRANSPARENCY STATUS QUO FOR THE OFFICE OF LEGAL COUNSEL

#### A. *The OLC's Role and Responsibilities*

Under Article II of the Constitution the President has the responsibility to “take care that the Laws be faithfully executed”<sup>21</sup> and the right to “require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”<sup>22</sup> The Opinions Clause, by satisfying the need for legal advice, aids the President in upholding his obligations under the Take Care Clause.<sup>23</sup> These related constitutional provisions establish the Attorney General’s opinion-writing function as a means to assist the President in fulfilling his legal responsibilities.<sup>24</sup>

The Attorney General has delegated this advisory function to the Office of Legal Counsel (OLC), formally established in 1950 and named in 1953.<sup>25</sup> The OLC fulfills a variety of responsibilities, including constitutional review of legislation and proposed executive orders, and the resolution of legal disputes between agencies.<sup>26</sup> Its “core work,” however, involves providing legal advice to Executive Branch

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21. U.S. CONST. art. II, § 3.

22. U.S. CONST. art. II, § 2, cl. 1.

23. John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 380 (1993) (“This combination of authority and obligation gives [the President] both the means and the responsibility to conduct an administration under the rule of law.”).

24. *Id.* (“Thus, it would appear that a model of the Attorney General as opinion writer would begin with the notion that he is aiding the President in carrying out the legal responsibilities, including that of constitutional interpretation, with which the President has been entrusted by the Constitution itself.”).

25. Cornelia T. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 710 (2005). Under current regulations, the OLC is responsible for, in part, “preparing the formal opinions of the Attorney General; rendering informal opinions and legal advice to the various agencies of the Government; and assisting the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet.” 28 C.F.R. § 0.25(a).

26. Pillard, *supra* note 25, at 710–13. For criticism of the OLC’s role as an “adjudicator” of inter-agency legal disputes, see Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2336–37 (2006).

departments, the Attorney General, and the President.<sup>27</sup> And when this advice comes in the form of a written opinion, by custom, the OLC provides controlling legal advice for the Executive Branch.<sup>28</sup>

Because of its role as the primary interpreter of law within the Executive Branch, the OLC is one of the most important sources of legal authority in American government. Written opinions from the OLC (and, historically, the Attorney General), “comprise the largest body of official interpretation of the Constitution and statutes outside the volumes of the federal court reporters.”<sup>29</sup> The OLC helps to guide and shape legal authority in areas where courts will often not provide direct review, and it is “extraordinarily rare” for the President not to follow the advice of the OLC.<sup>30</sup> The Office can also provide legal protection for actions taken out in reliance upon its opinions; as one senior Justice Department prosecutor noted, “it is practically impossible to prosecute someone who relied in good faith on an OLC opinion, even if the opinion turns out to be wrong.”<sup>31</sup>

### B. The Two Prevailing Reference Models for the OLC’s Work

The importance of the OLC’s function has emerged despite some uncertainty of its institutional responsibilities. The OLC sets out to “provide the President and executive agencies with advice on ques-

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27. Pillard, *supra* note 25, at 710–11. The provision of this advice is rarely mandatory. Fontana, *supra* note 5, at 42 n.122 (noting that “[c]ivil service lawyers have the final word on Executive Branch law in a large number of situations . . . [and] there are very few legal issues that must be decided by OLC”) (citing Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1460 (2010) [hereinafter Morrison, *Stare Decisis*] (“With a few exceptions, there is no formal requirement that legal questions within the Executive Branch be submitted to OLC.”).

28. Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, to Attorneys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions 1 (July 16, 2010) [hereinafter Best Practices Memorandum], available at <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf>.

29. McGinnis, *supra* note 23, at 376 (1993).

30. Trevor W. Morrison, *Libya, “Hostilities,” the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 73 (2011) [hereinafter Morrison, *Libya*] (“OLC does not have the power to impose conclusive, binding legal obligations on the President, but by longstanding tradition its opinions are treated as presumptively binding and are virtually never overruled by the President or Attorney General.”); Savage, *2 Top Lawyers*, *supra* note 11, at A1 (“Presidents have the legal authority to override the legal conclusions of the Office of Legal Counsel and to act in a manner that is contrary to its advice, but it is extraordinarily rare for that to happen. Under normal circumstances, the office’s interpretation of the law is legally binding on the Executive Branch.”).

31. GOLDSMITH, THE TERROR PRESIDENCY, *supra* note 10, at 96 (noting that “OLC speaks for the Justice Department, and it is the Justice Department that prosecutes violations of criminal law.”).

tions of law,”<sup>32</sup> but commentators often take note of the ambiguity inherent in the OLC’s role. These challenges are unique even compared to those of other crucial Executive Branch legal offices, such as the Solicitor General or the Office of the Legal Adviser in the State Department, because of its relatively high proportion of politically appointed lawyers, as opposed to civil servants, a rare feature shared only by the Office of the White House Counsel.<sup>33</sup> As David Fontana notes, “we might expect that offices with more rather than fewer political lawyers will be different from offices with fewer rather than more political lawyers.”<sup>34</sup>

In making sense of its unique role in the absence of precisely analogous comparison points, the OLC has traditionally drawn upon two very different models for legal practice, which are in considerable tension.<sup>35</sup>

The first model conceives of the relationship between the OLC and the President as that of a lawyer to a client.<sup>36</sup> This “client-driven” approach would have the OLC act in a manner similar to an in-house counsel, or an advocate for the President’s interests.<sup>37</sup> The strongest articulation of the “client-driven” approach defines the OLC’s role through reference to the unitary executive.<sup>38</sup> The second model con-

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32. Best Practices Memorandum, *supra* note 28, at 1.

33. Fontana, *supra* note 5, at 40 (noting that “[t]he overwhelming majority of Executive Branch legal offices have a quite different proportion of political lawyers than OLC”, with the prominent exception of the White House Counsel, which consists entirely of politically-appointed lawyers). Fontana notes, for instance, that “[t]he Office of the Legal Adviser at the State Department, perhaps an equally prestigious Executive Branch legal office, has one presidential appointment out of approximately 175 lawyers, and usually around one special assistant.” *Id.* The OLC, conversely, has only two or three career lawyers. *Id.* at 34.

34. Fontana, *supra* note 5, at 34–35.

35. Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1305 (2000) (“While the role of the Executive Branch lawyer cannot be reduced to any single model, it is helpful to consider two fundamentally distinct conceptions of how Executive Branch lawyers might approach legal interpretation.”).

36. Pillard, *supra* note 25, at 719–22 (discussing the theoretical model of the OLC as serving a “client.”).

37. Moss, *supra* note 35, at 1305–06 (“Under the first model, the Executive Branch lawyer acts as an advocate, proffering any reasonable argument in support of his client’s policy objectives. Only when no reasonable argument may be formed should the lawyer opine that action should not be taken. The lawyer may candidly assess the relative merits of competing arguments for his client, but ultimately should not stand as a roadblock to the effectuation of administration policy unless the legal hurdles are clearly insurmountable.”) (internal citation omitted).

38. See, e.g., Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 451–52 (1993) (“[T]he analogy between the Attorney General’s opinion function and the advisory role of a private lawyer seems to capture

ceives of the OLC as a “neutral” expositor, providing advice in the form of its best view of the law, independent of the preferences of the President.<sup>39</sup> In this conception, the OLC acts in a manner more similar to an independent court.<sup>40</sup>

These two paradigmatic reference points for the OLC’s role also represent the extreme ends of the spectrum of transparency in written opinions. On the one hand, legal counsel almost never reveal publicly the advice they provide to their clients. Even when the legal system has the highest possible interest in the disclosure of information, attorneys’ written legal conclusions are protected (within limits) by attorney-client privilege and work-product doctrine.<sup>41</sup> On the other hand, neutral judges are in the business of publishing their written opinions on matters of law.

Though defining the role and responsibility of the OLC is an important and ongoing project,<sup>42</sup> there is clearly no “right” answer as to which model is preferable for the OLC to follow. The OLC can fully embody neither model, as it has functions and responsibilities that combine aspects of both. The value of these models is conceptual.<sup>43</sup> And of course, the issues confronting the OLC are not entirely unique, as government lawyers face a number of the same challenges in their work. Definitions of institutional role tend to be ambiguous, and the OLC’s delegated power flows from an Attorney General whose own

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adequately the normative implications of the doctrine of the unitary executive as it is reflected in our law.”).

39. See Pillard, *supra* note 25, at 717, 758.

40. Moss, *supra* note 35, at 1306 (“Under the second model, the Executive Branch lawyer acts more as a judge than as an advocate. He rejects legal arguments, even if reasonable, that do not represent the best view of the law. Like a judge, the lawyer shuns consideration of his client’s desired policy goals and acts instead with complete impartiality.”).

41. See FED. R. EVID. 501–02, *Hickman v. Taylor*, 329 U.S. 495 (1947) (establishing work-product doctrine).

42. Defining the role of the OLC is a core part of determining the ethical responsibilities of its lawyers, which has sustained interest in this question. See Michelle Querijero, *Without Lawyers: An Ethical View of the Torture Memos*, 23 GEO. J. LEGAL ETHICS 241, 249 (2010) (“Whatever the answer, the resolution of this question is critical to an understanding of the professional obligations of government lawyers, because advisors and advocates shoulder different responsibilities under the rules of ethics.”). Some scholars have questioned the relative difficulty of the theoretical problems posed by the OLC, however. See H.W. Perry, Jr., *Foreword: Government Lawyering*, 61 LAW & CONTEMP. PROBS. 1, 3 (1998) (observing that “[I]lawyers on Capitol Hill, for example, have a much harder time identifying who their client is than, say, attorneys in the Office of Legal Counsel.”).

43. Moss, *supra* note 35, at 1305–06 (noting that “the role of the Executive Branch lawyer cannot be reduced to any single model,” and stating that “[e]ach of these models is, of course, a caricature, both overstating and understating the obligations of the Executive Branch lawyer.”).

role is constitutionally unique.<sup>44</sup> Even if a lawyer's duty is to serve the government institution and not its chief executive, for instance, “[o]ften, the lawyer will represent the entity's interests as they are defined and articulated by the chief executive.”<sup>45</sup>

The internal tension between these two models has nonetheless posed a theoretical challenge for the OLC's work. Former members of the OLC and others experienced in Executive Branch legal interpretation have thus expended considerable effort in providing more completely theorized guidance for the office.<sup>46</sup> Much of this work and attention to the OLC came in the wake of public revelations of OLC-authored opinions sanctioning the use of torture by the American government, which have received substantial criticism.<sup>47</sup>

This renewed scrutiny of the role and responsibilities of the OLC has led to the articulation of a more detailed self-conception of the OLC's role. A central result of this emerging scrutiny of the OLC is the advocacy of greater transparency, particularly in the disclosure of the Office's written opinions.

### C. Current Practices for Disclosure of OLC Written Opinions

In the mid-twentieth century, the Department of Justice published many opinions written (or signed) by the Attorney General, but the Attorney General's decreasing involvement in generating legal opin-

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44. William R. Dailey, *Who is the Attorney General's Client?*, 87 NOTRE DAME L. REV. 1113, 1114 (2012) (advancing a “model of understanding the responsibility and accountability of the Attorney General”); see Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 561 (1989) (“The Office of the Attorney General, created by the First Congress in the Judiciary Act of 1789, occupies a unique position in our tripartite government.”).

45. Frederick A. O. Schwarz, Jr., *Lawyers for Governments Have Unique Responsibilities and Opportunities to Influence Public Policy*, 53 N.Y.L. SCH. L. REV. 375, 377 (2008–09).

46. David Fontana has argued, not unpersuasively, that the OLC (among other offices with a high proportion of political appointees) have received undue attention, while scholars have overlooked the impact and theoretical importance of legal advice provided by thousands of civil servant lawyers in government. Fontana, *supra* note 5, at 49. Fontana's concern about a narrow view applies to this Note's focus on the practices of one Executive Branch legal office, but his critique is also compatible with the Note's attention to the OLC within a broader political and institutional context, and the OLC's inherent limitations.

47. Morrison, *Stare Decisis*, *supra* note 27, at 1451–52 (noting that criticism of the Torture Memos premised on the “OLC's proper role . . . in turn prompted broader discussion of the procedures OLC should follow when providing legal advice.”); see Kaufman, *supra* note 6, at 214 (arguing that one OLC torture memorandum has “serve[d] as a space for debate about hard questions about the proper role of the OLC and the responsibilities of OLC lawyers.”).

ions made for a relatively small amount of disclosure.<sup>48</sup> The OLC and its institutional predecessors increasingly came to take over responsibility for providing formal written opinions, but until 1980 the OLC did not publish any opinions from itself or its institutional predecessors within DOJ.<sup>49</sup> The decision to begin publishing came from Attorney General Griffin Bell, who “recognized the value of the accumulating body of precedent within OLC and directed the Office to begin publishing certain of its opinions in a new series separate from the main line of Attorney General opinions.”<sup>50</sup>

Nonetheless, while there are twenty-six volumes of OLC opinions published, through 2002, the OLC has not published its opinions regularly or comprehensively, especially regarding present legal controversies. The idea of increasing both the disclosure of these opinions and the overall transparency of the OLC has attracted interest as part of a growing institutional self-awareness in the 2000s, and the efforts of former and current OLC attorneys to regularize practices by the Office. In 2004, a group of nineteen former lawyers from the OLC authored a set of *Principles to Guide the Office of Legal Counsel*, proposing model standards for the OLC to follow when providing legal advice.<sup>51</sup> In 2005, the OLC set forth an internal account of “Best Practices” for the Office to follow,<sup>52</sup> which were subsequently updated in 2010.<sup>53</sup> The 2004 Guidelines and the 2005 and 2010 “Best Practices” memoranda “are in substantial agreement on a number of points,” and help define the OLC’s institutional consensus on its role.<sup>54</sup> Most importantly, all three documents recommend greater transparency on the part of the OLC.

Among the 2004 Principles’ “ten basic principles” are two proposals for greater transparency. The first states, in part, that “on the

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48. SUPPLEMENTAL OPINIONS, *supra* note 8, at viii (“As their administrative responsibilities multiplied in the post-World War II era, however, it became increasingly difficult for Attorneys General to devote personal attention to writing opinions, and the rate of publication of Attorney General opinions declined accordingly.”).

49. *Id.*

50. *Id.*

51. Walter E. Dellinger et al., *Principles to Guide the Office of Legal Counsel* 3 (2004) [hereinafter Dellinger, Principles], available at [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2927&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2927&context=faculty_scholarship); see also Dawn E. Johnsen, *Guidelines for the President’s Legal Advisors*, 81 IND. L.J. 1345, 1346 (2006) (an introduction to the 2004 Principles by one of the nineteen authors).

52. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, to Attorneys of the Office, Re: Best Practices for OLC Opinions (May 16, 2005), available at <http://www.fas.org/irp/agency/doj/olc/best-practices.pdf>.

53. Best Practices Memorandum, *supra* note 28.

54. Morrison, *Stare Decisis*, *supra* note 27, at 1453.

very rare occasion when the Executive Branch—usually on the advice of OLC—declines fully to follow a federal statutory requirement, it typically should publicly disclose its justification.”<sup>55</sup> The second states more generally that “OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.”<sup>56</sup>

In advancing a general disclosure presumption, the “Principles” authors supply several principal justifications, arguing that public legal advice will make the Executive Branch more likely to follow the law and constrain itself to its constitutional limits while enhancing public trust in the lawfulness of its conduct and allowing the executive to participate in public discourse over constitutional interpretation.<sup>57</sup>

The “Principles” also note built-in exceptions to the transparency presumption, including some situations involving “advice regarding classified and some other national security matters,” where the OLC should take into consideration the client agency’s views toward disclosure.<sup>58</sup> This includes confidentiality if the OLC advises that action will be unlawful and the client subsequently declines to take the action, out of a concern for deterrence in advice-seeking.<sup>59</sup>

Finally, the “Principles” authors recommend that “publication policy and practice should not vary substantially from administration to administration,” because “[t]he values of transparency and accountability remain constant, as do any existing legitimate rationales for secret Executive Branch law.”<sup>60</sup>

The 2010 “Best Practices,” the current policy for the OLC, state that the Office “operates from the presumption that it should make its significant opinions fully and promptly available to the public.”<sup>61</sup> The Best Practices memorandum says that furthering transparency aids “accountability and effective government,” and also encourages “pub-

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55. Dellinger, Principles, *supra* note 51, at 3. This transparency practice has also seen support in Congress; *see infra*, Part I.D.2. on the OLC Reporting Act.

56. *Id.* at 4.

57. *Id.* (arguing specifically that disclosure “helps to ensure Executive Branch adherence to the rule of law[. . .] guard[s] against excessive claims of executive authority[. . .] promotes confidence in the lawfulness of government action[. . .] and] adds an important voice to the development of constitutional meaning” within the legal community and the broader public).

58. *Id.*

59. *Id.*

60. *Id.*

61. Best Practices Memorandum, *supra* note 28, at 5 (“[T]he Office operates from the presumption that it should make its significant opinions fully and promptly available to the public.”).

lic confidence in the legality of government action,” directly echoing the language of the “Principles.”

The memorandum, however, sets forth several crucial limits on disclosure, again following recommendations made by the authors of the “Principles.” The OLC will not publish an opinion if it would reveal “classified or other sensitive information relating to national security,”<sup>62</sup> if it would interfere with federal law enforcement efforts, or if it is prohibited from doing so by law. More broadly, the OLC will decline to publish opinions if it is “necessary to preserve internal Executive Branch deliberative processes or protect the confidentiality of information covered by the attorney-client relationship between OLC and other executive offices.”<sup>63</sup>

A final relevant component of OLC disclosure practices is Executive Order 12146, issued by President Carter in 1979, which advances a general presumption for Executive Branch departments to be transparent in their legal reasoning.<sup>64</sup> The OLC considers the Order to inform its transparency responsibilities.<sup>65</sup>

Despite the formal adoption of a disclosure presumption, however, the OLC still conceals far more opinions than it has publicly disclosed.<sup>66</sup> As one data point, a mid-2012 study from the Sunlight Foundation estimated that the OLC had withheld from online publication 201 of 509 known opinions issued between 1998 and 2012, or 39% of its known opinions from that time.<sup>67</sup>

#### *D. The Lack of Coerced Disclosure of OLC Opinions*

The OLC’s internal guidance on publication practices is vital precisely because efforts to coerce disclosure of the Office’s written opinions are of minimal effectiveness. Two main avenues for coercing

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62. *Id.*

63. *Id.* at 6. Note that this language mirrors the arguments for nondisclosure in FOIA Exemption 5, *infra* note 71 and accompanying text.

64. Exec. Order No. 12,146, 3 C.F.R. 409 (1979) (“[A]ll agencies are encouraged to make available for public inspection and copying other opinions of their legal officers that are statements of policy or interpretation that have been adopted by the agency, unless the agency determines that disclosure would result in demonstrable harm.”).

65. Best Practices Memorandum, *supra* note 28, at 5.

66. See Pillard, *supra* note 25, at 712 (noting that “most OLC advice is never made public.”); see also McGinnis, *supra* note 23, at 376 (noting that published opinions are only “the tip of the iceberg.”); Morrison, *Stare Decisis*, *supra* note 27, at 1477 (noting that those opinions published by the office and accessible to outsiders represent only a fraction of all its written opinions.”).

67. Daniel Schuman & Adeeb Sahar, *39% of Office of Legal Counsel Opinions Kept from the Public*, SUNLIGHT FOUND. (Aug. 15, 2012, 10:00 AM), <http://sunlightfoundation.com/blog/2012/08/15/39-of-office-of-legal-counsel-opinions-kept-from-the-public/>.

disclosure—litigation under the Freedom of Information Act, and proposed legislation from Congress—have thus had relatively limited success in affecting the transparency of the OLC.

### *1. The Freedom of Information Act*

While the OLC has its own publishing practices, private parties have also sought to obtain specific OLC opinions of interest, or information about those opinions, via the Freedom of Information Act (FOIA). These efforts have generally not met with success because of a range of protections the OLC can employ to prevent coerced disclosure.

FOIA provides two statutory exemptions that the OLC can typically assert to resist publication of a memorandum. First, FOIA Exemption 1 protects from disclosure records that are classified in accordance with proper procedures, assuming that the classification has not been waived by public disclosure.<sup>68</sup> This exemption extends to legal analysis,<sup>69</sup> and the test for “waiver” is strict and tilts heavily in favor of the government.<sup>70</sup>

Second, and applicable to all OLC opinions rather than just classified opinions, FOIA Exemption Five<sup>71</sup> allows for the assertions of two types of privilege: the deliberative process privilege (also known as the executive privilege), and attorney-client privilege.<sup>72</sup> The deliberative process privilege applies to documents that are “predecisional” and “deliberative.”<sup>73</sup> So long as the government has not “expressly adopted nor incorporated by reference” the memorandum as “final policy,” the government can invoke Exemption Five successfully.<sup>74</sup>

In the event that the OLC fails to successfully invoke any of these arguments in the course of litigation, Exemption Five also incorporates the “presidential communications privilege,”<sup>75</sup> which applies “to communications in performance of a President’s responsibili-

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68. 5 U.S.C. § 552(b)(1) (2012).

69. *See N.Y. Times Co. v. U.S. Dep’t of Justice*, 915 F. Supp. 2d 508, 535 (S.D.N.Y. 2013).

70. *See id.* at 536–38 (noting that “it is the rare case where the Government waives Exemption 1 protection”).

71. 5 U.S.C. § 552(b)(5) (2012).

72. *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149–54 (1975).

73. *See Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep’t of Justice*, 697 F.3d 184, 194 (2d Cir. 2012) (quoting *Nat’l Council of La Raza v. U.S. Dep’t of Justice*, 411 F.3d 350, 356 (2d Cir. 2005)) (defining “predecisional” as “prepared in order to assist an agency decisionmaker in arriving at his decision,” and “deliberative” as “actually . . . related to the process by which policies are formulated.”).

74. *See N.Y. Times Co.*, 915 F. Supp. 2d at 546, 549.

75. *See id.* at 518.

ties . . . and made in the process of shaping policies and making decisions.”<sup>76</sup> This privilege requires that the OLC memoranda “were received either by the President or an immediate advisor to the President,”<sup>77</sup> and thus can act as a privilege of last resort for almost all OLC opinions that involve dialogue with the White House.

A 2013 case in the Southern District of New York provides an in-depth look at the interaction of FOIA with OLC memoranda, as well as a representative example of the difficulty in obtaining OLC memoranda without the Office’s consent. In *New York Times Co. v. U.S. Dept. of Justice*, plaintiffs sought disclosure of legal opinions relating to the United States’ targeted killing program.<sup>78</sup> Though expressing considerable skepticism about keeping the legal reasoning of the program secret, and noting the importance of the issues implicated, the court granted the government’s motion for summary judgment with regard to the OLC memoranda in question.<sup>79</sup>

Especially given that the Supreme Court has unanimously held that there is no constitutional right to access to public information,<sup>80</sup> the federal government is likely to retain substantial means to resist disclosure of many crucial OLC memoranda.<sup>81</sup>

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76. *Id.* at 543 n.33 (quoting *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 449 (1977)).

77. Elec. Privacy Info. Ctr. v. U.S. Dep’t of Justice, 584 F. Supp. 2d 65, 81 (D.D.C. 2008).

78. 915 F. Supp. 2d at 516–17.

79. *Id.* at 515 (“The FOIA requests here in issue implicate serious issues about the limits on the power of the Executive Branch under the Constitution and laws of the United States, and about whether we are indeed a nation of laws, not of men . . . [m]ore fulsome disclosure of the legal reasoning on which the Administration relies to justify the targeted killing of individuals, including United States citizens, far from any recognizable “hot” field of battle, would allow for intelligent discussion and assessment of a tactic that (like torture before it) remains hotly debated. It might also help the public understand the scope of the ill-defined yet vast and seemingly ever-growing exercise in which we have been engaged for well over a decade, at great cost in lives, treasure, and (at least in the minds of some) personal liberty.”).

80. See *McBurney v. Young*, 133 S. Ct. 1709, 1718 (2013) (noting that the Court has “repeatedly” held “that there is no constitutional right to obtain all the information provided by FOIA laws.”).

81. The government has also demonstrated an ongoing willingness to resist compelled disclosure. See, e.g., Brief for Appellee at 10, *Elec. Frontier Found. v. U.S. Dep’t of Justice*, No. 12-5363, 2013 WL 1900569, at \*10 (D.C. Cir. May 7, 2013) (“Mandatory disclosure of OLC’s opinions would chill deliberative discussions within the Executive Branch. OLC serves a valuable role in providing confidential legal advice to federal agencies as they develop their policies. Protecting the confidentiality of candid communications between OLC and policy-making agencies lies at the very core of the deliberative process privilege, which is a uniquely governmental privilege designed to promote the quality of government decision-making.”).

## 2. *Legislative Efforts to Compel Disclosure*

Members of Congress have also advanced proposals to codify reporting requirements. In 2008, members of the House and Senate both proposed legislation that would strengthen the disclosure requirements of the OLC.<sup>82</sup> The “OLC Reporting Act” would have specifically required the Attorney General to release legal conclusions that the Executive Branch would not comply with an aspect of a federal statute.<sup>83</sup> The bill was reported out of the Senate Judiciary Committee in September 2008, but did not become law. It was reintroduced in the House in the first days of the 111th Congress.<sup>84</sup>

Neither legislative chamber, however, voted on any version of the bill, and unlike popular and academic commentary, legislative efforts regarding the OLC are now dormant. The impetus for and momentum behind the legislation likely related to the transition between presidential administrations, and current prospects for the legislation’s reintroduction and passage are minimal. The bills nonetheless captured a popular sentiment, still ongoing, in favor of pushing back in some measure against the OLC’s lack of transparency. And in early 2013, significant pressure from members of both parties in Congress to release OLC opinions emerged in the context of President Obama’s nomination of John Brennan as CIA Director.<sup>85</sup>

### E. Conclusion

The outcomes of private lawsuits and congressional proposals demonstrate the difficulty for anyone outside of the Executive Branch to force the publication of the OLC’s written opinions. The government can release OLC opinions, however, if it so chooses. Exercising this discretion, the OLC has made sustained efforts to provide written opinions of scholarly or historical value to the public. And increasingly, it has moved toward publishing opinions closer to the present

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82. The OLC Reporting Act of 2008, S. 3501, 110th Cong. (2008), was introduced on September 16, 2008 by Senator Feingold and Senator Feinstein. Representative Brad Miller introduced an identical measure as part of a larger bill, H.R. 6929, 110th Cong. (2008), on September 17 in the House of Representatives.

83. SEN. LEAHY, OLC REPORTING ACT OF 2008, S. REP. NO. 110-528, at 1 (2008) (“The purpose of the OLC Reporting Act of 2008 (‘the Act’) is to provide a targeted response to a particularly problematic manifestation of ‘secret law’—secret legal opinions issued by the Department of Justice (DOJ) that effectively exempt the Executive Branch from compliance with federal statutes. The Act requires the Attorney General to report to Congress when DOJ issues such an opinion, thus allowing Congress to assess the Department’s interpretation and respond, where necessary, through legislation or oversight.”).

84. OLC Reporting Act of 2009, H.R. 278, 111th Cong. (2009).

85. See Memoli, *supra* note 3.

day, through its adoption of a disclosure presumption. This voluntary move toward greater publication on the part of the OLC has emerged in no small part because of significant outside embrace of the value of transparency for the OLC. Significant momentum has built up in this direction, exemplified in the growing consensus of commentators in favor of increased disclosure as an institutional practice integral to addressing perceived failures.

## II.

### ADVOCACY FOR GREATER DISCLOSURE OF OLC WRITTEN OPINIONS

Complementing (and contributing to the development of) the OLC's own internal guidance, a broad consensus in favor of greater disclosure of OLC opinions has emerged over time,<sup>86</sup> drawing momentum from concerns over the OLC's practices in recent presidential administrations.<sup>87</sup> This growing literature has emerged out of two very different initial premises about what role disclosure would play, informed by contrasting assessments of the OLC's legitimacy.<sup>88</sup> Though these two types of transparency arguments differ greatly in their normative views of executive power, both reach the conclusion that greater disclosure would serve desirable goals. Thus, on a prescriptive level, their conclusions are quite similar. Their underlying attitudes toward the OLC, however, will play an important role in assessing the potential effects (and desirability) of disclosure, as discussed later in the article.

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86. Morrison, *Stare Decisis*, *supra* note 27, at 1478 (“There have been numerous calls over the years for OLC to publish more of its opinions (subject to legitimate national security and other constraints), and to do so promptly after the opinions are issued.”) (footnotes omitted); *Id.* at 1518 (“The idea that public disclosure is critical to the legitimacy of Executive Branch legal interpretation is, by now, quite familiar. So too are the more targeted arguments in favor of increasing public transparency at OLC.”) (footnotes omitted); Setty, *supra* note 17, at 580 (“[S]cholars have promoted disclosure of Executive Branch legal policy as one of many potential means of countering the effects of a politicized environment within the Department of Justice.”) (footnotes omitted).

87. See Dailey, *supra* note 44, at 1117 (“[R]ecent years have seen a marked increase in the frequency and intensity of expressions of concern over the independence of the Attorney General [and the OLC] from the President in particular and the political activity of the White House in general.”).

88. Cf. Kaufman, *supra* note 6, at 205–08 (distinguishing between views of the root error behind the torture memo, including those who viewed it as a product of “structural error” (as exemplified by Bruce Ackerman) and those who viewed it as a “procedural error” (as exemplified by the group of former OLC attorneys who authored the 2004 *Principles*)).

### A. The Executive-Sympathetic Perspective on Greater OLC Transparency

One prominent perspective on the Office of Legal Counsel and the value of transparency for its work has begun with the view that the OLC can generally be relied upon to uphold its constitutional responsibilities.<sup>89</sup> Transparency advocates who begin from this premise include the nineteen former OLC attorneys who authored the 2004 “Principles”<sup>90</sup>—such as Dawn E. Johnsen, who was nominated to lead the OLC in the Obama Administration<sup>91</sup>—as well as other executive law scholars who have served in presidential administrations, such as New York University School of Law Dean Trevor Morrison, who was an attorney-adviser in the Office of Legal Counsel in 2000–01, and Harvard Law School Professor Jack Goldsmith, who directed the Office of Legal Counsel from July 2003 to August 2004.<sup>92</sup> Asserting their faith in the OLC to uphold its responsibilities, they also generally believe that the legal reasoning and continued legitimacy of the Office would benefit from outside review.<sup>93</sup> Arguments from this perspective rely upon the idea that the scrutiny of academics and other legal experts would lead the OLC to produce better work product, and also

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89. See, e.g., Jack Goldsmith, *President Obama Rejected DOJ and DOD Advice, and Sided with Harold Koh, on War Powers Resolution*, LAWFARE (June 17, 2011, 11:38 PM), <http://www.lawfareblog.com/2011/06/president-obama-rejected-doj-and-dod-advice-and-sided-with-harold-koh-on-war-powers-resolution/> (describing the OLC as “institutionally best suited to provide relatively detached legal advice to the President as well as the advice most consonant with Executive Branch precedents and traditions.”); see Morrison, *Libya*, *supra* note 30, at 63 (noting that “in spite of episodes like the notorious ‘torture memos,’ OLC has earned a well-deserved reputation for providing credible, authoritative, thorough and objective legal analysis.”); see also Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 517 (1993) (arguing that there is a “pressing need to publish OLC opinions promptly and to make them widely available.”). Koh states that publication allows for accessibility, identification of the underlying factual premise of an opinion, and preventing Executive Branch actors from being able to over-simplify opinions so as to treat them as less nuanced than they actually are; the latter justification relies upon the idea that the OLC opinion will be good work product.

90. Dellinger, Principles, *supra* note 51.

91. Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1596–97 (2007) (“Perhaps most essential to avoiding a culture in which OLC becomes merely an advocate of the administration’s policy preferences is transparency in the specific legal advice that informs executive action, as well as in the general governing processes and standards.”). Johnsen’s nomination met heavy resistance from the Republican Party, and was ultimately withdrawn. See Charlie Savage, *Obama Nominee to Legal Office Withdraws*, N.Y. TIMES, Apr. 10, 2010, at A16.

92. See GOLDSMITH, THE TERROR PRESIDENCY, *supra* note 10.

93. E.g., Morrison, *Stare Decisis*, *supra* note 27 (arguing for the importance of disclosure to aiding outside review).

strengthen the Office's sense of professional responsibility.<sup>94</sup> Commentators who are confident in the overall legitimacy and effectiveness of the OLC are also generally sympathetic to the idea that the OLC, as a representative of the Executive Branch, has a role to play in constitutional dialogue.<sup>95</sup>

Of these voices, Trevor Morrison has been perhaps the most prominent and repeated advocate for greater transparency on the part of the OLC, and increased publication of opinions.<sup>96</sup> Morrison believes that "publicity may be the best means of motivating OLC's lawyers to preserve the independence and integrity of the office."<sup>97</sup> Morrison especially stresses the importance of disclosing OLC opinions that depart from existing OLC precedent. He argues that these departures must pay the price of "public notice."<sup>98</sup>

Morrison bases his view on three core premises. First, in the case of an unclassified opinion, notifying members of the Executive Branch and Congress affected by the change in opinion is tantamount to public disclosure, as operationalizing a shift in course will require informing relevant actors of the change.<sup>99</sup> Second, Morrison argues that the disclosure of opinions where the OLC is going against the office's own prior precedents will have a restraining effect upon temptations to overreach.<sup>100</sup> In particular, the impact upon the public and

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94. *Id.* at 1519 ("Public notice . . . implicates the professional reputation of OLC's lawyers, especially those in leadership positions. To be sure, disclosure of an OLC decision to overrule is likely to go largely unnoticed by the general public. Yet those most likely to take notice—scattered legal academics and Washington lawyers, some congressional staffers, an intrepid journalist or two—are among the key opinion makers driving the professional reputations of OLC's lawyers. Their "oversight" is thus critical. The fear of reputational harm from being seen to depart from OLC's best practices should itself encourage OLC lawyers not just to observe minimal standards of professional responsibility but to strive for the highest standards of professional excellence."). The reputational harm may be of particular weight because of the generally high level of credentials and pedigree of lawyers working within the OLC. See Fontana, *supra* note 5, at 27 n.48 (observing that "[e]very single head of OLC during its existence either attended a top-five law school, clerked on the lower courts or Supreme Court, or was a law professor.").

95. E.g., Pillard, *supra* note 25 (arguing for institutional design reforms in the Executive Branch so as to allow it to play a more robust and effective role in constitutional dialogue, in line with the visions of many leading departmentalist theorists); *see also* Querijero, *supra* note 42, at 263.

96. E.g., Morrison, *Stare Decisis*, *supra* note 27, at 1525 (noting "the calls for greater publicity of OLC's work generally" in the course of offering his own recommendations that go "above and beyond" them).

97. *Id.* at 1470.

98. *Id.* at 1518.

99. *Id.* at 1518–19 (calling release to members of the Executive Branch and Congress "the practical equivalent of public release.").

100. *Id.* at 1519.

professional reputation of OLC lawyers from disclosing these kinds of opinions will provide a counterweight to internal pressures from Executive Branch actors to contradict precedents for short-term policy goals. Morrison has made explicit that he envisions transparency as a means toward “reputational” regulation by the very community of voices who have advocated for transparency—namely, Executive Branch scholars and those who have served within the Executive Branch.<sup>101</sup> Morrison believes that “[a]lthough the general public is unlikely to pay attention, the key drivers of many OLC lawyers’ reputations—Washington lawyers, legal academics, the legal press—are more likely to take notice.”<sup>102</sup> Thus, lawyers would avoid any opinions that may threaten their professional standing and reputation—and therefore, necessarily, stick to providing legal advice they are capable of defending to outside scrutiny.

Finally Morrison points to the disclosure as a necessary aspect of a President taking ownership of their particular constitutional views and vision, aiding important values of democratic accountability.<sup>103</sup> This is in line with his belief that disclosure relates generally to Madisonian separation-of-powers concepts. Thus, disclosure (or lack thereof) of OLC opinions can be a vital factor in determining whether Congress has acquiesced to a claim of executive power, on the theory that notice is necessary for such consent.<sup>104</sup>

### B. *The Executive-Skeptical Perspective on Greater OLC Transparency*

While arguments premised upon the legitimacy and effectiveness of the OLC have gained significant traction, including in the adoption by the OLC of internal self-guidance, it is not the only perspective of those who favor greater OLC transparency. Other commentators begin their analysis from a vantage point of intense distrust of the OLC, informed by the OLC’s actions and practices in the years following the 9/11 attacks.<sup>105</sup> This skepticism-driven case for the need for dis-

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101. Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1725 (2011) [hereinafter Morrison, *Constitutional Alarmism*] (book review) (“Disclosing OLC’s work implicates its lawyers’ professional reputations, which in turn encourages them to avoid behavior that would cast them in a bad light.”).

102. *Id.*

103. Morrison, *Stare Decisis*, *supra* note 27, at 1520.

104. See, e.g., Morrison, *Constitutional Alarmism*, *supra* note 101, at 1714–16; Morrison, *Stare Decisis*, *supra* note 27, at 1499–1501.

105. BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010) (heavily criticizing the OLC); FREDERICK A.O. SCHWARZ, JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR (2007). Schwarz was the chief counsel for the Church Committee in the 1970s, which was a

closure has most typically come from more liberal academic commentators like Yale Law Professor Bruce Ackerman and University of Chicago Law Professor Aziz Huq, as well as many public interest groups. Whereas former OLC lawyers in academic positions have generally characterized the era of the Torture Memos as a historical aberration—possible to prevent, for instance, through a renewed commitment to professionalism—those in this second constellation have tended to view the OLC as inherently untrustworthy.<sup>106</sup> In keeping with this view, they point to public disclosure as a means to prevent abuses, or at least increase awareness of purported executive overreach.<sup>107</sup>

Representative of this second camp are proposals from scholars like Sudha Setty, a law professor at the Western New England School of Law, who has argued at length for the need for Congressional action to compel transparency:

OLC memoranda, as a general rule, should be disclosed by the administration. The politicization of the Office of Legal Counsel during the Bush administration, when combined with the predictable self-interest of any administration in not voluntarily disclosing its own legal policies, means that institutional steps must be taken to ensure greater transparency and adherence to the rule of law. To that end, Congress should require publication of OLC-generated legal policies in order to ensure the long-term integrity of Executive Branch constitutional interpretation.<sup>108</sup>

Setty roots her argument in the tension between “secret law” and democracy, and a deep concern with the politicization of the OLC and the potential for future abuse.<sup>109</sup> Her argument demonstrates a deep

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landmark in scrutiny of the Executive Branch. The ACLU has also made efforts to FOIA OLC memos. *See, e.g.*, Am. Civil Liberties Union v. U.S. Dep’t of Justice, 681 F.3d 61 (2d Cir. 2012).

106. *E.g.*, Katyal, *supra* note 26, at 2327 (arguing that the OLC “has been structurally compromised” in some of its functions); *see* Fontana, *supra* note 5, at 39 (suggesting that “Ackerman and Morrison might disagree about how much OLC’s . . . commitment to legal principle has been compromised”). For discussion of the specific differences in opinion over the torture memos, see Kaufman, *supra* note 6, at 216 (“The torture memo, by providing a reference point and site for discourse for an otherwise obscure issue, engages more people—lawyers, academics, senators, and the media—in a debate that was previously limited to the small community of OLC alumni. This debate is a critical piece of a larger argument—whether and how the Executive Branch should be bound by law.”).

107. *See, e.g.*, Jameel Jaffer, Opinion, *The Drone Secrets We Should See*, POLITICO (Mar. 29, 2013, 10:29 AM), <http://www.politico.com/story/2013/03/the-drone-secrets-we-should-see-89461.html?hp=r4>. Jaffer is the ACLU’s deputy legal director.

108. Setty, *supra* note 17, at 630.

109. *Id.*

skepticism that the OLC can in any way effectively self-regulate—which is, by contrast, perhaps the central assumption of the Executive Branch veterans who helped to develop the “Principles.” Nonetheless, these two very different perspectives have arrived at the shared conclusion that greater disclosure of OLC opinions would be a positive development. This convergence is especially noteworthy in light of the highly contentious issues of national security and executive power with which debates over the OLC have often been associated.

### C. Specific and Continuing Calls for Publication: Ongoing Ascendance of Transparency

Present-day controversies, especially in the national security context, have also ensured that the adoption of the general disclosure presumption by the OLC has not quieted more specific calls for the publication of legal memoranda.

Thus, to take one example, the Obama Administration has seen steady calls for the release of legal opinions issued by the OLC related to various efforts to combat terrorism. Particular attention has been paid to the legal memoranda relating to the “targeted killing” program.<sup>110</sup> While many of the bases for the administration’s legal reasoning as to its powers to target suspected terrorists, including American citizens, have been discussed in public remarks, the actual memoranda have not been publicly released.

In a representative call for public disclosure of these opinions, Jack Goldsmith argued (prior to the death of Anwar al-Awlaki) that the administration should release its legal justification for the power to target him, given that he was a United States citizen. Goldsmith argued that because “the killing of a U.S. citizen in this context is unusual and in some quarters controversial,” the case for disclosing the opinion was “easy”:

A thorough public explanation of the legal basis for the killing (and for targeted killings generally) would allow experts in the press, the academy, and Congress to scrutinize and criticize it, and would . . . permit a much more informed public debate.<sup>111</sup>

Goldsmith went on to argue that, provided measures were taken to protect classified information, the benefits of “robust debate” for an understanding of both the executive’s own conception of its power,

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110. See, e.g., Editorial, *Misplaced Secrecy on Targeted Killings*, N.Y. TIMES, Jan. 4, 2013, at A22.

111. Jack Goldsmith, *Release the al-Aulaqi OLC Opinion, or Its Reasoning*, LAWFARE (Oct. 3, 2011, 7:45 AM), <http://www.lawfareblog.com/2011/10/release-the-al-aulaqi-olc-opinion-or-its-reasoning/>.

and the limits of that power, cut in favor of disclosing the memorandum.<sup>112</sup> Senators and representatives have also pressured the Executive Branch to share relevant OLC opinions with either individual committees of Congress or the body as a whole.

These specific calls demonstrate that the push for transparency has continued even after the adoption of the disclosure presumption in the 2010 “Best Practices,” and indicates that transparency will continue to be a central cause for advocates concerned with the work of the OLC.

#### *D. Grounding Discussions of the Value of Transparency*

In contextualizing these calls from leading academics for further transparency, George Washington University Law Professor David Fontana has described the focus on OLC (and high-level Executive Branch legal deliberation generally) as “predictable outgrowths of developments in our legal intellectual culture.”<sup>113</sup> Fontana has noted that “not only is the Executive Branch a natural topic for academic focus,” but that OLC and other offices are “familiar institutions for law professors.”<sup>114</sup>

These calls have also gained energy from the noticeable trend toward a preference for transparency as a mechanism to ensure good governance.<sup>115</sup> Excessive classification of national security information, for instance, may erode accountability with minimal benefits for national security.<sup>116</sup> Claims of state secrets can just as easily be used to mask potential abuses as to ensure vital national interests.<sup>117</sup> In the context of OLC opinions, the argument goes, a strong presumption toward disclosure will serve important benefits, and help reduce the chance that the OLC will engage in untoward behavior.

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112. *Id.*

113. Fontana, *supra* note 5, at 27.

114. *Id.*

115. Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 181 (2008) (“Transparency is hot—it has emerged as an increasingly prevalent concept in legal scholarship over the past fifteen years.”).

116. ELIZABETH GOITEIN & DAVID M. SHAPIRO, BRENNAN CTR. FOR JUSTICE, REDUCING OVERCLASSIFICATION THROUGH ACCOUNTABILITY (2011), available at [http://www.brennancenter.org/sites/default/files/legacy/Justice/LNS/Brennan\\_Overclassification\\_Final.pdf](http://www.brennancenter.org/sites/default/files/legacy/Justice/LNS/Brennan_Overclassification_Final.pdf).

117. See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1085, n.8 (9th Cir. 2010) (noting that “skepticism” toward government assertions of the state secrets privilege “is all the more justified in cases that allege serious government wrongdoing. Such allegations heighten the risk that government officials may be motivated to invoke the state secrets doctrine not only by their obligation to protect national security but also by a desire to protect themselves or their associates from scrutiny.”).

Thus, one can expect that calls for disclosure will continue, and will continue to come from a broad spectrum of perspectives. Given the clear traction these arguments have already made, it is worth examining in detail the value of transparency for the Office of Legal Counsel. And this examination requires first establishing the principles from which any argument in favor of (or against) transparency must proceed.

#### *E. Transition: The Instrumental Value of Transparency for Achieving Certain Goals*

Greater release and disclosure of OLC memoranda would represent a significant shift from existing practice. As discussed, many commentators applaud such a shift in the direction of more transparency, believing that transparency can play a crucial role in the OLC's institutional integrity and reputation.<sup>118</sup> Precisely because all commentators appear to agree that transparency will have effects upon the OLC, however, assessments of its value must take a comprehensive view of all relevant considerations.

Assessing the reasoning behind these calls for transparency, however, and discerning their likely effects, should not take place in a vacuum. To assess the value of transparency for the OLC, it is insufficient merely to offer disclosure as a response to the perceived institutional problems of the OLC. Moreover, because of the novelty of the solution being advanced, it is integral to be cautious in assumptions about transparency's value.

Transparency in the Executive Branch, after all, does not directly equate with generating more desirable outcomes, as case law and commentary have recognized. The Supreme Court's treatment of the Federal Advisory Committee Act (FACA),<sup>119</sup> for instance, appeared to rest on a cost-benefit calculation that the costs of "chilled candor" could not justify the perceived benefits of transparency.<sup>120</sup> In the

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118. See, e.g., Rachel Ward Saltzman, *Executive Power and the Office of Legal Counsel*, 28 YALE L. & POL'Y REV. 439, 480 (2010) ("[T]he Obama OLC appears generally to have demonstrated commendable transparency, a trend that will be important to proving its ethical and professional integrity and ultimately to restoring the office's reputation . . . . Procedurally, the Administration's increased transparency is an important component of restoring the professional, ethical, and institutional integrity of the OLC.").

119. Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989) (narrowing FACA).

120. See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2405 (2003) ("[T]he Court apparently perceived an unmistakable social or political consensus that FACA's procedural costs (bureaucratization and chilled candor) overwhelmed

landmark case of *United States v. Nixon*, the Court also noted that “[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process.”<sup>121</sup> Even political negotiations may benefit more from discussions behind closed doors than general pro-transparency impulses might suggest;<sup>122</sup> as the *Nixon* court noted, with particular resonance, the Constitutional Convention of 1787 was carried out in “complete privacy” and with its records sealed for more than thirty years.<sup>123</sup> Though the resulting Constitution may lack “any explicit reference to a privilege of confidentiality . . . to the extent this interest relates to the effective discharge of a President’s powers, it is constitutionally based.”<sup>124</sup> Furthermore, our legal system continues to recognize evidentiary privileges as social goods worth the associated informational costs.<sup>125</sup>

Transparency can also run up against important competing values, including, prominently, the need for governmental secrecy regarding classified information implicating national security.<sup>126</sup> Sincere concerns of the security consequences of disclosure may often rest on

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its apparent benefits (transparency and accountability) as applied to such private groups.”).

121. 418 U.S. 683, 705 (1974).

122. See, e.g., Dylan Matthews, *What Negotiation Theory Can Teach Us About the Fiscal Cliff Talks*, WASH. POST WONKBLOG (Dec. 21, 2012, 12:37 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/21/what-negotiation-theory-can-teach-us-about-the-fiscal-cliff-talks/> (quoting a negotiation expert saying “[w]hat seems counterintuitive for a lot of people who believe in democracy and transparency is that some kinds of really touchy negotiations like this have to take place behind closed doors.”).

123. *Nixon*, 418 U.S. at 705 n.15 (“Most of the Framers acknowledge[d] that without secrecy no constitution of the kind that was developed could have been written.”).

124. *Id.* at 711; see also Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. PA. J. CONST. L. 77, 96 (2011).

125. FED. R. EVID. 501–02; see Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1545 (1999) (discussing the “external costs” of privileges, as well as exclusionary rules, but noting that one “strong argument” in favor of their retention is that they “would not produce a rich harvest of evidence but rather would discourage people from talking to spouse, lawyer, priest, and so on”).

126. See *Dep’t of Navy v. Egan*, 484 U.S. 518, 527 (1988) (noting the long-recognized “‘compelling interest’ in withholding national security information from unauthorized persons in the course of executive business.”); Peterson, *supra* note 124 (discussing *Egan*). Sudha Setty has countered these kinds of arguments as they pertain to the OLC, and this Note does not rely upon them. See Setty, *supra* note 17.

considerations not easily evident to outside observers, such as agreements with foreign governments not to disclose “secret protocols.”<sup>127</sup>

The need to assess transparency as something other than an absolute good, of course, is a noncontroversial point for transparency advocates. Commentators have already specifically recognized the need for a national security exception to the disclosure presumption.<sup>128</sup> And if even transparency advocates are recognizing limits to OLC disclosure, in the context of classified information, then it is clear that transparency is not a prevailing value in all circumstances. Recognizing transparency as a value with a potential for good does not extend to believing it necessarily must prevail over competing considerations. Even if one believes that, all other things being equal, more transparency is better than less, in the context of clear trade-offs this belief does not get us very far.<sup>129</sup>

Whatever one’s assessment of the likely impact of greater disclosure on the OLC, therefore, transparency is not a value that can be assessed in isolation. If there are any downsides to disclosure, then they must be squarely addressed in weighing the desirability of shifting existing practices. There may be contexts in which transparency is an absolute good in and of itself, but this is not such a situation.

Proper analysis thus requires, and depends upon, contextualization. In this vein, the discussion opened by transparency advocates would benefit from a grounded point of comparison. And from this perspective, one rich source of data for both the theory behind and effects of disclosure of legal reasoning are the use of judicial opinions within the common law court system. In Part III, we confront the need to examine the instrumental value of transparency in legal opinions as

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127. See Michael Hirsh & Kristin Roberts, *What’s in the Secret Drone Memos*, NAT’L J. (Feb. 22, 2013), <http://www.nationaljournal.com/nationalsecurity/what-s-in-the-secret-drone-memos-20130222> (claiming that a “key reason” for “reticence” on disclosure of targeted killing memoranda is that they “contain secret protocols with foreign governments, including Pakistan and Yemen, as well as ‘case-specific’ details of strikes”).

128. See Note, *Mechanisms of Secrecy*, 121 HARV. L. REV. 1556, 1558 (2008) (“[E]ven strongly committed transparency advocates recognize that sometimes the government must be able to operate in secret (for example, in the national security context), implicitly conceding that other interests can outweigh the need for transparency. Thus, even if there is much disagreement about the optimal level of transparency, there is a general consensus that maximizing social welfare is the more important goal, to which transparency must yield if necessary.”).

129. See Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 923 (2006) (“Every . . . living democracy must make choices about what to reveal and what to conceal, understanding that disclosure might threaten vital objectives while secrecy might threaten government legitimacy.”).

a tool for governance, and turn to the existing reference point of judicial opinions.

### III.

#### RATIONALES FOR PUBLIC JUDICIAL OPINIONS

##### A. *Comparison: Rationales for the Disclosure and Publication of Judicial Opinions*

Recall the two primary reference points for the OLC's institutional role, the "client-driven" and "neutral-expositor" models.<sup>130</sup> As we saw, one way to understand the push for greater disclosure is as a call for the OLC to adopt court-like behavior. From this vantage point, judicial opinions have great value for assessing the instrumental value of transparency—an entire branch of government already publishes timely written opinions, a practice which transparency advocates want the OLC to adopt. And legal scholars have the comparison point of judicial opinions readily at hand when they analyze (and make recommendations about) the OLC's practices regarding its opinions.<sup>131</sup> Therefore, it is worth examining the premises behind the practice so many want the OLC to engage in: why do courts publish written opinions at all?<sup>132</sup>

Whatever else they provide, written opinions do not directly relate to the binding effect of a court's actions and orders concerning a case.<sup>133</sup> Requirements that a court provide its orders in writing do not

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130. See *supra* Part I.B.

131. See Fontana, *supra* note 5, at 27 ("OLC produces written decisions similar to the court decisions that law professors learn to master."); Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1285 (2008) ("From the perspective of the legal academy, the written opinion represents the archetypal judicial act—the principal mode of legal instruction involves the study of judicial opinions, and a substantial portion of legal scholarship focuses almost exclusively on the analysis and critique of opinions. This same instinct extends into the profession more generally, evidenced by strands of the recent debate over unpublished opinions and the occasional scoldings by appellate courts of trial court judges who have failed to justify a decision.").

132. See, e.g., Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1371 (1995) ("Why do judges write? Why do we not simply decree results in individual cases and, as necessary, announce broader commandments about what the law requires? From where does the imperative come to tell why we rule as we do in every case?").

133. See Peter Friedman, *What Is A Judicial Author?*, 62 MERCER L. REV. 519, 521 (2011) (explaining the important and traditional common law distinction "between judicial judgments on the one hand and the opinions justifying those judgments on the other.").

necessarily require a court to provide an opinion alongside them.<sup>134</sup> Nor are written opinions necessary in order for a judicial decision or a trial to have legal effects.<sup>135</sup> A jury, for instance, renders its verdict in a criminal trial, and determines a defendant's guilt, without offering any justification for the decision it reaches. Even special interrogatories heavily cabin or structure the jury's "opinion" as to why it reached a result.<sup>136</sup>

Written opinions must therefore serve a different function from how the court acts upon the parties bound by its decision. The practice must also have significant value, in light of its clear burdens; opinion writing is a significant exercise, and not merely incidental to court activity. The publishing of written opinions by judges carries with it significant costs in time and resources, and these costs have sometimes led to efforts to rein in the volume of publication.<sup>137</sup> To take just one example, while written opinions from trial courts are useful for appellate review, appellate *courts* do not always have to write opinions, as in situations when "the decision merely reaffirms previous decisions, or only relates to questions of fact, or when the case decided would serve no useful purpose as a precedent."<sup>138</sup>

Written opinions are called for, then, when there is a *need* to explain a court's reasoning. This relates in part to discomfort with "secret law"—for instance, the controversial practice of citing unpublished judicial opinions.<sup>139</sup> As Alexander Volokh writes, "[i]n our ju-

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134. 21 C.J.S. *Courts* § 241 (2012) ("A rule that decisions must be in writing does not require that the court state its reasons, although doing so is the better practice.").

135. See Oldfather, *supra* note 131, at 1285 ("Many judicial decisions of unquestioned legitimacy are unaccompanied by a written opinion, ranging from evidentiary rulings made on the fly by a trial court judge to the Supreme Court's decisions not to grant certiorari.").

136. See 89 C.J.S. *Trial* § 1104 (2012) ("Trial courts are encouraged to make use of interrogatories upon factual issues essential to a general verdict but must exercise extreme care in drafting those interrogatories. Where not required by statute, special interrogatories in aid of a general verdict should be used cautiously and only to clarify rather than to obfuscate the issues involved since permitting a jury to return special findings where they are unnecessary can create misleading issues and defeat justice.").

137. See, e.g., COMM. ON USE OF APPELLATE COURT ENERGIES, ADVISORY COUNCIL FOR APPELLATE JUSTICE, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS 5 (1973) (recommending that appellate courts publish fewer opinions); see also Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 122 (1994) (discussing the Advisory Council's 1973 report).

138. 21 C.J.S. *Courts* § 241 (2012).

139. There has been lively controversy over the genesis and adoption of Federal Rule of Appellate Procedure 32.1, which deals with the citation of opinions not published in the Federal Reporter. See, e.g., David R. Cleveland, *Local Rules in the Wake of Federal Rule of Appellate Procedure 32.1*, 11 J. APP. PRAC. & PROCESS 19, 20 (2010)

dicial culture, decisions have to be explained.”<sup>140</sup> This norm, however, is not arbitrary, and implicates important values. Written opinions serve particular purposes, both for the judiciary and for society at large. These rationales are possible to identify and delineate: they relate to efficiency, guidance, persuasion and authority, and accountability. They are best examined in turn.

### B. *Aiding Courts in Efficiently Carrying out their Duties*

Publishing opinions first and foremost helps courts in conducting their own tasks, by helping to recoup the investment of a trial or appeal and thereby maximizing efficiency in the court system. Judicial proceedings take significant time and expense, and a bare court order binds only the parties involved. Given the time and energy of factual findings and legal determination, it is better for courts not to duplicate efforts. On the one hand, if a judge can reach a decision in a case in a satisfactory way without issuing an opinion, then it is desirable to forgo writing one.<sup>141</sup> On the other hand, if a judge must set forth onto novel territory, it is better to provide a written opinion tracing their path, in order to save future deliberations from needlessly repeating the steps in question. The written opinion also provides a means for appellate courts that cannot immediately discern the reason for a result to follow the trial court’s reasoning, and assess whether it was sound. A world where courts did not offer reasons for their decisions would obligate these courts to decide many more cases in order to achieve the same level of legal resolution.<sup>142</sup>

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(arguing that Rule 32.1 has failed to promote uniformity and leaves unresolved important issues regarding the precedential value of unpublished opinions). Patrick Schlitz, the Reporter to the Advisory Committee on the Federal Rules of Appellate Procedure, said, “I have devoted more attention to the unpublished-opinions issue than to all of the other issues the Advisory Committee has faced—combined.” Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1429–30 (2005).

140. Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 794 (2008).

141. This observation is commonplace, especially given the volume of legal information in the modern era. For a succinct description, see Steve Sheppard, *The Unpublished Opinion Opinion: How Richard Arnold’s Anastasoff Opinion Is Saving America’s Courts from Themselves*, 2002 ARK. L. NOTES 85, 94 (2002) (“Writing a good opinion takes time, and if a decision in a case can be accurately rendered without taking such time, and if the opinion is not necessary as a precedent, the judiciary is better off without the opinion.”).

142. See James Boyd White, *What’s an Opinion For?*, 62 U. CHI. L. REV. 1263, 1364 (1995) (describing how legal resolution of controversies and the promotion of societal order through a court system does not *depend* upon the use of opinions, with reference to the system employed in ancient Athens).

This attention toward the value of efficiency is a familiar feature of core concepts of precedent and common law decision making. Various doctrines like *res judicata*, or even the basic premises of the appellate system, intrinsically rely upon previous written opinions in order to aid efficient review and focus upon issues not previously settled.<sup>143</sup> States with three-tiered court systems also commonly allow the highest court to choose which cases it wants to hear.<sup>144</sup> In choosing which cases to take up, the highest court in a state—or the Supreme Court itself—is often selecting the discrete controversies it finds most desirable as vehicles for carrying out its goals.<sup>145</sup> In this way, the efficiency provided by written opinions provides courts with power. The Supreme Court can wield its immense influence upon American public and private life through deciding fewer than a hundred cases a year.

### C. Providing Guidance to Private and Public Actors

In addition to helping courts be efficient in their own actions, opinions can help guide non-court actors in their conduct. Written opinions allow courts to do more than bind the parties directly involved in the lawsuit. The efficient use of this opportunity also affords guidance to other actors in the legal system. By presenting the controlling legal logic behind a particular result, courts can dispose of the controversy between the present parties and also reach out to affect the outcomes in a number of other cases. Even better, potential litigants may (and do) alter their own behavior to conform to the controlling law. Consciousness of the contours of the law, and their likely impact

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143. See Michael A. Ritscher, et al., *The Status of Dual Path Litigation in the ITC and the Courts: Issues of Jurisdiction, Res Judicata and Appellate Review*, 18 AIPLA Q.J. 155, 172 (1990) (“A policy favoring economic efficiency underlies the doctrine of *res judicata*. The relitigation of questions and disputes that have already been decided imposes needless costs on the parties and on the judicial system, diverting time and money of the parties, of the judicial system and of society, resulting in an economically undesirable misallocation of resources.”) (citations omitted). For an illustrative example of a court employing economic rationales to the treatment of *res judicata* issues, see *Mendenhall v. Barber-Greene Co.*, 26 F.3d 1573, 1585 (Fed. Cir. 1994) (Mayer, J., dissenting).

144. See Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 64 (1985) (“In jurisdictions with a three-tiered court system, the highest court typically picks and chooses which cases to hear.”).

145. See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1712 (2000) (“The Court has acted to maximize its power to set its own agenda . . . .”); see also Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 430–31 (1996) (“[T]he Justices who have joined in the Court in the last 10 years . . . believe that a relatively small number of nationally binding precedents is sufficient to provide doctrinal guidance for the resolution of recurring issues.”).

upon the result of judicial resolution of a controversy, provides valuable information to litigants. The guidance value in precedent depends upon the existence of a written opinion, for the reasoning behind a decision can often prove as important as the result itself.<sup>146</sup> This information, in turn, can help to encourage and structure settlements, reducing uncertainty for parties and the costs they incur, as well as reducing the caseload for the court system.<sup>147</sup>

The guidance rationale is also vital for courts' communication with other branches of government. Courts are able through written opinions to signal a problem with existing law,<sup>148</sup> directing Congress or the President to pay attention to it.<sup>149</sup> Alternately, courts can make clear to the political branches that a certain type or class of controversy will not be amenable to judicial resolution, rendering it a "political question" to be resolved by other actors within the constitutional structure.<sup>150</sup> This provides equally valuable guidance, as the President and Congress thus know that they need not fear (and cannot rely upon) judicial intervention in certain kinds of decisions.

More importantly, those written opinions have power over those not a party to the case. The Supreme Court's "broader influence lies in the messages they send, through published opinions, to the vast number of federal and state judges and other governmental officials, as well as to lawyers and the public generally."<sup>151</sup> They only have direct authority over "the relatively few cases which they actually hear and decide."<sup>152</sup> This observation applies to the judiciary more generally.

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146. See White, *supra* note 142, at 1364 ("[W]hy could we not use prior decisions as precedent even without the aid of judicial opinions? One reason . . . is that we would find it difficult to reason from such precedents with confidence, for we would not know how the judges perceived the cases they decided or why they decided them as they did. We would not know which of the arguments made in a prior case worked and which ones did not. We would not know what the cases meant. Yet might our legal system work, and perhaps work well enough, even without precedent?").

147. See SAMUEL ISSACHAROFF, CIVIL PROCEDURE 188–211 (2d ed. 2009).

148. Randy Beck, *Transtemporal Separation of Powers in the Law of Precedent*, 87 NOTRE DAME L. REV. 1405, 1427 (2012) ("A written opinion can also highlight options available to political actors with means of responding to a court's decision.").

149. See, e.g., Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203–11 (2009) (expressing serious constitutional reservations about Section 5 of the Voting Rights Act, but employing constitutional avoidance principles to uphold the statute).

150. See Baker v. Carr, 369 U.S. 186, 217 (1962) (outlining various types of political questions).

151. Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 287 n.91 (1987).

152. *Id.*

#### D. Persuading Other Actors to Follow Judges' Views of the Law

Written opinions also offer courts an opportunity to persuade. This may seem unnecessary in some instances. Given that courts can offer or deny relief without explaining themselves at all, one would not expect them to be unable to do so if they *poorly* explain themselves. Even dubiously written opinions accompany judicial edicts that have the force of law.

Yet there is often a need for courts to justify themselves. Trial courts may take legally binding actions, but may also fear their reversal upon appellate review. By providing arguments and reasons for their actions, these actors can protect their decisions.<sup>153</sup> Intermediate appellate courts, in turn, can protect *their* decisions from high courts, whether state high courts or the Supreme Court. And judges and justices at all levels can also help protect the decisions of the present from the potentially differing views of future members of their own court.

Further, opinions can offer persuasive value *within* a court, if several judges must weigh in on the case. Within an appellate panel, for instance, an opinion writer can earn further endorsement for their views, or simply ensure the desired outcome for a given case; the non-writer joining an opinion can, for their part, affect the content of the controlling opinion.<sup>154</sup> Supreme Court justices navigate a similar process.

Most importantly, however, written opinions can also help courts to persuade non-judicial actors to follow their judgments. As often remarked, courts lack the power over either the purse or the sword.<sup>155</sup> Given their tenuous position, and their relative powerlessness if, for instance, an executive officer simply refuses to carry out their orders, courts need to maximize the chances that their instructions will be followed.<sup>156</sup> While particular decisions may not present the danger of

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153. See Jeffrey A. Lefstin, *Claim Construction, Appeal, and the Predictability of Interpretive Regimes*, 61 U. MIAMI L. REV. 1033, 1043, n. 46 (2007) (noting that in the context of “legal indeterminacy” over novel issues, “one might imagine legal principles that are very difficult for observers to perceive but yield agreement once they become perceptible.”). Analogous principles apply to litigants, who in novel legal terrain will advance a theory of the case that they hope will hold sway.

154. See John T. Noonan, Jr., *The Relation of Words to Power*, 70 ST. JOHN'S L. REV. 13, 19–20 (1996) (noting that “[t]he first audience for a judge writing on an appellate court is comprised of the other judges on the court on his panel,” and describing the interplay within a panel).

155. See THE FEDERALIST NO. 78 (Alexander Hamilton).

156. See Gerald Lebovits et al., *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 237 (2008) (“The judiciary’s power comes from its words alone—judges

outright revolt, written opinions in the aggregate help to establish credibility.<sup>157</sup> And in situations where rulings have momentous political consequences, particularly from the Supreme Court, flimsy or unpersuasive reasoning carries a significant risk of non-compliance.<sup>158</sup> If the Supreme Court were to strike down a major piece of legislation without explanation, for instance, one might genuinely question whether the political branches would recognize, respect, and comply with the decision.<sup>159</sup>

By serving as the “voice” of the judge or court in question, written opinions also help to contribute to the authority of the judiciary. When opinions are the products of multiple members, the issuing of a solemn judicial declaration helps to add legitimacy to a process that might have been characterized by processes less likely to confer legitimacy. As one commentator puts it, “courts generally, and especially the highest appellate courts, create rituals and symbols designed to convey the impression that their decisions are the product of a unified entity—‘this Court’—and not the products of bargaining and backroom deal-making among its constituent judges or justices.”<sup>160</sup>

Issuing a written opinion does not directly conceal these deliberations, but provides a focal point for public and professional observers, indirectly shielding the court from scrutiny regarding its internal processes. In multi-member settings, opinions offer a more solemn garb for judicial communications with the outside world, and thus a means to conceal what may be strong disagreement within a court.<sup>161</sup> Opinions thus provide a form of public communication well-suited to

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command no army and control no purse. In a democracy, judges have legitimacy only when their words deserve respect . . . ”).

157. Beck, *supra* note 148, at 1426–27 (“When a court offers persuasive explanations for its decisions, its opinions tend to bolster the court’s legitimacy in the eyes of the public.”) (footnote omitted).

158. *Id.* at 1427 (“[T]he efficacy of courts in fulfilling their functions depends to a large extent on public acquiescence. Courts have only limited capacity to compel submission, so voluntary compliance by the public is critical. Widespread doubt about the legitimacy of the courts would profoundly impact their ability to perform their public functions.”) (footnotes omitted).

159. As a thought experiment, consider what the reaction would have been if the Supreme Court in 2012 had struck down the Affordable Care Act, in full, in a single-sentence opinion.

160. Paul R. Bernard, *Transparency and Authority in Appellate Decision-Making*, 87 MICH. B.J., 45, 46 (2008).

161. See generally Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 290 (2005) (discussing the complex incentives faced by justices of the Supreme Court in reaching a five-member majority, and noting that justices may ask whether it is “the right thing to join in others’ opinions, even if they deviate from one’s best judgment, to put a common face on legal meaning, perhaps increasing stability if not social complacency”).

preserving and enhancing the secrecy and stature of judges, and, in turn, the authority of the judiciary to continue to exercise power over public life and the meaning of law.

The persuasion justification is also central to making sense of the existence of concurrences and dissents, which typically carry with them no legal binding power on their own (and depending on the disposition of the case, often provide no valuable guidance to future litigants). These types of opinions nonetheless can pave the way for future reconsideration of controlling opinions, or articulate views “in exile” or “in waiting,” ready to be taken up by later, more sympathetic majorities.<sup>162</sup> These markers have a valuable role to play in the common law and in our political system. Yet their value is clearly dependent not upon any impact upon the controversy at hand, but rather their capacity to convince in the future. Persuasion thus offers a value for written opinions entirely independent of the legal result in a case.

#### *E. Ensuring Judges Are Held Accountable for the Results They Reach*

Making judges give reasons for their decisions, however, is not solely a means for judges to increase their effectiveness and their power.<sup>163</sup> Opinions also allow the public to scrutinize judges and hold them accountable.<sup>164</sup> There is “little public accountability when decisions are secret.”<sup>165</sup> Providing “grounds of decision that can be debated, attacked, and defended,” to an extent, constrains judges.<sup>166</sup> This is, in fact, one of the few (and perhaps the most important) means to constrain judges.<sup>167</sup>

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162. See, e.g., Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 14 (2008) (“Dissents are important to the extent they influence the actions of judicial majorities twenty years from now or broaden the jurisprudential range (think originalism) of the next generation of law students whose imaginations are captured by particularly catchy written dissents in their law school casebooks.”).

163. Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197, 1207 (2012) (“In the American legal system, disclosure of a court’s reasoning in published opinions is both how the judiciary asserts its authority and the means through which it is monitored and controlled.”).

164. *Id.* at 1207–08 (quoting William Cranch, the second reporter for the Supreme Court, saying that “[e]very case decided is a check upon the judge.”).

165. See Katyal, *Internal Separation of Powers*, *supra* note 26, at 2343.

166. David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) (“A requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary’s exercise of power.”). Shapiro notes that this justification, however, depends upon candor.

167. Beck, *supra* note 148, at 1427. (“Issuance of written opinions also provides one of the few means of holding courts accountable, permitting review and critique of the

Because judges who publish written opinions face scrutiny from a variety of actors, including all branches of government and the broader legal community, they have incentives to make their opinions, at a minimum, plausible.<sup>168</sup> Accountability thus serves two separate, but related goals: public disclosure may cause judges to reach better, more acceptable, or more reasoned results than they would otherwise reach (though not always);<sup>169</sup> and, if not, the opinion at least provides the public the ability to respond to what they do. In this sense, even dissents serve values of accountability, by registering to the public that the “losing” view still has recognition from the court.<sup>170</sup>

#### IV.

#### THE APPLICABILITY OF JUDICIAL TRANSPARENCY JUSTIFICATIONS TO OLC OPINIONS

##### A. Comparison

However one characterizes the justifications for publishing written opinions by judges,<sup>171</sup> their use is a settled fact of the judicial landscape. Few seriously question their value, and their continued use in practice is not in doubt.<sup>172</sup> And it is clear that written opinions serve

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legal analyses judges offer in support of their decisions. The transparency afforded by judicial opinions allows the public to express disapproval and criticize judges who reach decisions the public considers poorly reasoned or legally indefensible.”) (footnotes omitted).

168. See Volokh, *supra* note 140, at 792.

169. But see Oldfather, *supra* note 131, at 1320 (pointing to a category of “negative-justification” judicial decision making in which “attempts to articulate too finely the reasons for one’s decision might lead to verbal overshadowing, in which the judge justifies the underlying decision by reference to available, plausible-sounding reasons.” Oldfather argues that this can lead to both a “mismatch between the actual reasons for the judge’s decision and the publicly provided reasons,” and, more significantly, “will distract the judge from the factors on which she would otherwise base her decision and that would form the basis of a more accurate decision, [suggesting that] the influence of the writing process will undermine decisional quality in the case at hand.”).

170. See generally Guinier, *supra* note 162.

171. Other ways to present the reasons for judicial opinions are possible. See, e.g., Wald, *supra* note 132, at 1372 (noting that “[t]radition aside, modern judges write opinions mainly for two reasons: first, to reinforce our oft-challenged and arguably shaky authority to tell others—including our duly elected political leaders—what to do” and “second . . . to demonstrate our recognition that under a government of laws, ordinary people have a right to expect that the law will apply to all citizens alike.”).

172. Even criticisms of certain *kinds* of judicial opinions base their arguments upon the desirability of traditional judicial opinions. See Robbins, *supra* note 163, at 1199 (arguing that per curiam opinions are a “misused practice” and should be employed only in a narrow set of situations).

a number of values, which stretch back to the fundamental premises of the American legal system and constitutional order.<sup>173</sup>

The relation of these values to the practice of publishing written opinions is clear; the effects of this practice in the context of the OLC, however, now deserves analysis. Publishing judicial opinions serves specific goals for courts. In many relevant respects, the OLC has similar goals. If there are goals and purposes courts serve by providing written opinions to the public, then, we might ask whether publication would serve the same goals for the OLC. Given the robust set of reasons for transparency in judicial opinions, and the way in which disclosure serves both societal goals and the interests of courts, one easily might wonder whether these justifications could provide a similar justification for transparency in the context of the OLC. If so, then the reasons why courts provide written opinions should translate to reasons for the OLC to disclose its own legal reasoning. In this way, transparency proposals draw upon a tradition that the OLC could readily adopt and reap similar gains.

Discerning whether justifications for publishing written opinions make sense in the context of the OLC, however, requires an appreciation for the differences between courts and the OLC.<sup>174</sup> These differences are best examined in light of each of the core rationales for publishing judicial opinions. Would publishing opinions work at cross-purposes with, or undermine, the values served by current arrangements?

### B. *Public Disclosure Would Make the OLC Less Efficient*

As discussed above, the efficiency rationale for having written opinions available rests on the need to conserve the time and resources

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173. See Lebovits et. al., *supra* note 156 (arguing that the importance of judicial opinion writing in American law was clear by at least the time of *Marbury v. Madison*, and arguing that *Marbury* “requires judges to give reasoned opinions, not merely judgments, in cases that call for explanation. The judicial opinion is integral to the function of the American judicial system. Opinions are the vehicles by which the judiciary elucidates, expounds upon, and creates rights for Americans.”).

174. John C. Dehn, *Institutional Advocacy, Constitutional Obligations, and Professional Responsibilities: Arguments for Government Lawyering Without Glasses*, 110 COLUM. L. REV. SIDEBAR 73, 85–86 (2010) (arguing that while “many considerations supporting judicial stare decisis are ‘portable’ to the Executive Branch, this does not mean that those considerations carry the day. Institutional and practical realities are clearly different.”). Dehn roots this difference in part upon the differing transparency of the two institutions’ work; to the extent that the OLC’s work will always be intrinsically opaque in some instances (such as in its oral advice and properly classified opinions), his observation would still apply even if transparency advocates carried the day with their proposals.

of judges.<sup>175</sup> For courts retroactively adjudicating concrete disputes, opinions may allow the first case to decide a future second, third, or fourth case, without redoing the work. Thus, in the context of the judiciary, written opinions may be viewed as secondary to, or a useful byproduct of, the dispute before the court: litigants are fighting over a case or controversy, and they primarily want the court to decide that case or controversy.<sup>176</sup> Judicial opinions are, as one commentator notes, “a smaller proportion of delivered legal outcomes than many people think.”<sup>177</sup>

Yet in stark contrast to courts, the OLC primarily issues prospective advisory opinions, except in the context of direct inter-agency disputes. The OLC will often solicit arguments or advice from other Executive Branch actors or agencies likely to be affected by its rulings.<sup>178</sup> And its staff may turn to the Office’s own body of precedents, to which its lawyers have access. It will rarely if ever, however, have to deal with the complexities of fact-finding presented by concrete cases. Its goal is to provide its best view of the law. The OLC provides “answers,” but does not reach “decisions”; its opinions are not binding judicial edicts. Thus, in the context of the OLC, the opinion is the entire point: it’s exactly what’s requested by the President or another Executive Branch official, rather than a byproduct of dispute resolution. Consequently, since OLC written opinions, when requested, will be produced anyways, efficiency rationales for producing written opinions carry far less importance.

This may ease some of the concerns that OLC resources would be excessively strained by publication; after all, the OLC is already in the business of producing written opinions. Providing legal advice for public consumption, however, may entail a different presentation of facts or legal authorities, to provide context unnecessary to an Executive Branch actor more familiar with the subject matter at hand. A robust disclosure presumption might lead to the OLC having to divert resources from providing legal advice to the Executive Branch in order to provide legal background to outside observers; and indeed, to

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175. See *supra*, Part III.B.

176. Peter Friedman, *supra* note 133, at 521 (“Common-law judging is, most importantly, judicial decision-making; the reasons advanced by a judge for those decisions—that is, for those results—are at best secondary, and as far as the prospective functioning of the judicial enterprise is concerned, they are entirely dispensable.”). Admittedly, much litigation involves a desire to generate an opinion that can provide guidance to future conduct; but the opinion is still important primarily because of its relation to the “result” reached.

177. Frederick Schauer, *Opinions As Rules*, 62 U. CHI. L. REV. 1455, 1465 (1995).

178. Best Practices Memorandum, *supra* note 28, at 3.

the extent that judicial opinions serve as a means to “educate,” this concern should be taken seriously.<sup>179</sup> Further, the process of vetting opinions for public disclosure can take significant time.<sup>180</sup> The stronger the disclosure presumption, the less likely the OLC will be able to delay the vetting process. This, in turn, may reduce the time OLC has available to serve the needs of the Executive Branch regarding new legal questions. And in the context of fast-moving developments relating to national security, for instance, delay is far less acceptable than in the slow pace of the court system.<sup>181</sup>

Finally, it is well worth considering an increased workload in light of public concern and legal commentary relating to the danger of the OLC operating under undue pressure from the Executive Branch. If the worry is that the OLC, facing political pressure from the President, is apt to take shortcuts or otherwise fail to fulfill its responsibilities, it is unclear how increased time pressures and workload would strengthen its resolve. And where courts in exigent circumstances can dispose of a case on procedural grounds, delay, rely to a greater extent on precedent, or otherwise use creative avenues to alleviate their burdens, these routes are not available to the OLC.<sup>182</sup> Its lawyers cannot justifiably shirk its responsibilities to provide direct, timely advice on the precise question put to them, ethically or constitutionally.<sup>183</sup>

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179. See Lebovits et. al., *supra* note 156, at 255 (“Although legal-writing instructors encourage their students to write concisely, the use of judicial opinions in legal education by the casebook method might contribute to the lengthening of opinions. In their indirect role as educators, judges realize that it is incumbent on them to explain fully their decision-making process. Judges may also believe that the public’s increased participation in the law warrants a complete explanation of a decision. Concerns about transparency and accountability to the public may lead judges to over-explain their reasoning, making for longer decisions.”).

180. This has been the experience within the court system. See The Hon. Gerald E. Rosen, *The War on Terrorism in the Courts*, 5 CARDozo PUB. L. POL’Y & ETHICS J. 101, 104 (2006) (“[T]errorism cases often carry with them the added burden of having to review and consider disclosure of highly sensitive classified information, the disclosure of which may implicate national security concerns that must be vetted through the CIA, FBI, and other intelligence agencies.”).

181. For a vivid and revealing representation of the fast-moving nature of legal developments in the national security space, see DANIEL KLAIDMAN, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY* 241–65 (2012) (discussing events and decisions made in 2011 involving the interrogation of Ahmed Warsame and the targeted killings of Osama bin Laden and Anwar al-Awlaki).

182. See Best Practices Memorandum, *supra* note 28, at 1–2 (noting that the OLC is “frequently asked to opine on issues of first impression that are unlikely to be resolved by the courts—a circumstance in which OLC’s advice may effectively be the final word on the controlling law.”).

183. *Id.* at 2 (noting that “the Office often operates under severe time constraints in providing advice” but taking as a given that this advice must be provided promptly when requested).

Thus, while courts can provide written opinions in order to save themselves work, disclosure of OLC opinions will likely produce *additional* work. This provides a first indication of the very different role and responsibilities of the OLC as compared to the judiciary, and the relative value of transparency in their respective institutional contexts.

### C. Guidance Goals Are Already Met by Existing Practices

#### 1. Present-Day Guidance

As discussed above, courts also rely on written opinions to provide guidance to actors throughout the legal system, whether private parties or other branches of government.<sup>184</sup> Guidance to relevant parties forms a core justification for providing written opinions to the public.

The necessity for legal guidance is the rationale for the very existence of the OLC,<sup>185</sup> and attention to meeting this need is already evident in the Office’s practices. Under its current governing practices, the OLC provides written opinions at the request of Executive Branch actors.<sup>186</sup> OLC memoranda also “frequently . . . opine on issues of first impression that are unlikely to be resolved by the courts,”<sup>187</sup> meaning that the Office’s legal advice will often not be of any practical value to parties outside the Executive Branch. To the extent that private actors need guidance as to the legal interpretations the Executive Branch is likely to advance in litigation, the Department of Justice already provides a rich source of information through the positions of the Solicitor General, the Department of Justice representative in litigation involving the Executive Branch.<sup>188</sup> OLC opinions might theoretically provide “earlier” notice, but on an issue of first impression litigants will still be confronting a court of an unknown disposition, so notice concerns won’t be entirely alleviated. Nor would OLC opinions necessarily correspond to the positions of the Solicitor General’s of-

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184. See *supra* Part III-C.

185. See *supra* Part I-A.

186. See Best Practices Memorandum, *supra* note 28, at 2–5, for a description of the procedures for fielding requests for, and drafting, written opinions.

187. *Id.* at 1.

188. See Pillard, *supra* note 25, at 704–09 (describing the role and duties of the Office of the Solicitor General); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 316 (2005) (noting that “[t]he President . . . has an agent [in the form of] the Solicitor General . . . who appears regularly before the Court and whose influence there is demonstrable.”).

fice, meaning their value as guidance in a litigation context would be misleading or even counter-productive.<sup>189</sup>

Private actors, however, may well want access to OLC opinions in part to know *what* it is opining upon, in addition to the substance of their legal advice.<sup>190</sup> Yet an inquiry of this kind does not at root seek *legal* guidance, but rather information about the actions the Executive Branch may have taken or contemplated taking. This information may very often be vital to the public interest, but it is not the responsibility of a legal office to provide it.

Thus, while written OLC opinions embody values of legal guidance equally if not more so than judicial opinions, this guidance may already be satisfactorily provided under the transparency status quo.

A major remaining question involves notice to Congress. The use of presidential signing statements, particularly those making note of constitutional objections to aspects of legislation, should adequately convey this information in most settings. And these signing statements, since at least the time of the Reagan Administration, have been made widely available to the public.<sup>191</sup> The push for the OLC Reporting Act may be evidence of a lack of congressional satisfaction with the level of notification that is happening; its failure to pass, alternately, may suggest it is not a widespread dissatisfaction.<sup>192</sup>

In situations where a change of constitutional interpretation within the Executive Branch is made without adequate notice to Congress—an event motivating proposed congressional legislation like the Reporting Act—it is less than clear that direct disclosure of an OLC opinion is the most appropriate guidance. It seems appropriate for relations between branches of government to occur between the representatives of those branches, rather than those legal advisers—

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189. McGinnis, *supra* note 23, at 426 (“For instance, OLC will not generally write an opinion about a matter in litigation because it is recognized that an argument asserted in litigation does not have to meet the same standard as one that forms the basis of an OLC opinion. Writing on matters in litigation would thus frequently force OLC to the unwelcome choice of abandoning its reputation for scrupulousness or clashing with the Department of Justice’s litigating divisions.”).

190. This may, for instance, be a driving motivation for litigants in FOIA cases who seek only indexes of opinions, or disclosure of the existence of opinions, rather than their actual contents.

191. For background, see Sofia E. Biller, *Flooded by the Lowest Ebb: Congressional Responses to Presidential Signing Statements and Executive Hostility to the Operation of Checks and Balances*, 93 IOWA L. REV. 1067, 1075–82 (2008); Memorandum from Walter Dellinger, Assistant Att’y Gen., Office of Legal Counsel, to Bernard N. Nussbaum, Counsel to the President, The Legal Significance of Presidential Signing Statements (Nov. 3, 1993), available at <http://www.justice.gov/olc/signing.htm>.

192. See *supra* Part I-D-2.

presidential signing statements, drafted in consultation with the OLC, after all, address Congress, and not the legislative counsels of senators and representatives.<sup>193</sup> Especially because legal authority within the Executive Branch ultimately rests with the President, who can ignore the advice of the OLC,<sup>194</sup> then there is a strong argument that decisions regarding a statute are the White House's responsibility to communicate to Congress, not the OLC's. The relevant "guidance" is not the OLC's to provide. And in the most fraught recent context concerning "notice" and "guidance," the Obama Administration's counterterrorism program, the Obama Administration has also made a comprehensive effort to address the public and members of Congress on the legal premises for its actions.<sup>195</sup>

## 2. *Historical Guidance*

Beyond guidance of the conduct of private parties, however, perhaps the publication of OLC opinions may serve a different sort of guidance, conceived on a broader scale. The OLC has a role to play in our nation's understanding of constitutional meaning over time, and whether or not there is any pressing need for present-day actors to know the contents of OLC opinions, we might wonder whether a reluctance to publish those opinions would diminish historical understanding of the Office's role in America's own history.

Luckily, however, there is an evident desire on the part of the OLC for providing a historical understanding of the Office, and a demonstrated commitment to the release of its opinions at an appropriate remove from contemporary controversies. The OLC's 2013 release of a volume of opinions from the 1930s and 1970s represents a positive step toward "guidance" in the broader sense of historical understanding. The release clearly sought to provide materials of historical relevance to academic researchers, the legal community and the

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193. See generally Biller, *supra* note 191 (discussing the use of presidential signing statements).

194. Again, this event is "extraordinarily rare." See Savage, 2 *Top Lawyers*, *supra* note 11. But see Jack Goldsmith, *Blaming (or Crediting) the Lawyers for Our Syria Policy*, LAWFARE (July 15, 2013, 10:38 AM), <http://www.lawfareblog.com/2013/07/blaming-or-crediting-the-lawyers-for-our-syria-policy/> (noting that "the President has overruled OLC on legal matters concerning domestic law when he wanted to continue [the 2011 Libyan] intervention . . . and could surely do the same with legal advice concerning international law in a similar context.").

195. KENNETH ANDERSON & BENJAMIN WITTES, HOOVER INST., SPEAKING THE LAW 5 (2013) (discussing a number of speeches made by Obama Administration officials, relating to legal issues in the Administration's counterterrorism program).

American public. The reception of the publication was positive,<sup>196</sup> with the General Counsel for the Air Force noting that they would “offer legal scholars and historians a great new resource for study.”<sup>197</sup> The release of the volumes also complemented the OLC’s own release of opinions from its more recent history. Yet cheering the historical value of the release of the OLC opinions, however, does not preclude serious doubts about the efficacy and appropriateness of releasing OLC opinions regarding present controversies.

More importantly, lauding the release of opinions of historical and scholarly value does not necessarily conflict with a recognition of the benefits of secrecy in the present day. The same recognition of the importance of providing transparency on a historical scale while recognizing the need for discretion in the near-term informs government guidelines about classified information generally.<sup>198</sup> Guidelines applicable to classified material could readily be adapted to the needs and circumstances of the OLC, if necessary. But the Office’s own demonstrated commitment to releasing opinions of historical interest may already sufficiently address any concern about the loss of historical understanding.<sup>199</sup>

#### D. The Audience the OLC Would Seek to Persuade Would Widen

##### 1. The Presently Narrow Audience the OLC Seeks to Persuade

Values of efficiency and guidance furthered by written legal opinions, whether issuing from the judiciary or from another institutional body like the OLC, relate to the law as a relatively static entity; they concern the administration of the legal system. Persuasion and

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196. E.g., Steven Aftergood, *Publishing Secrets is a Crime, OLC Said in 1942*, SECRECY NEWS (July 30, 2013), <http://blogs.fas.org/secrecy/2013/07/publishing-secrets/> (noting that “[t]he whole collection is an unexpected feast of historical and legal scholarship that is surprisingly accessible to non-specialist readers.”).

197. Charles A. Blanchard, *Legal History Nerds Rejoice: Release of Secret OLC Opinions*, Air Force General Counsel Blog (Aug. 1, 2013), <http://afgeneralcounsel.dodlive.mil/2013/08/01/legal-history-nerd-rejoice-release-of-secret-olc-opinions/>.

198. See Exec. Order No. 13,526, 75 Fed. Reg. 707 (Jan. 5, 2010), available at <http://www.archives.gov/isoo/pdf/cnsi-eo.pdf>. Section 1.5 of the Order concerns the “Duration of Classification,” and states flatly at 1.5(d) that “[n]o information may remain classified indefinitely.”

199. E.g., SUPPLEMENTAL OPINIONS, *supra* note 8, at ix (commenting on the publication of the 1930s-70s opinions, and noting that “[i]n some cases, they mark important signposts in the development of doctrine which will have been superseded by more recent judicial or OLC opinions. In certain opinions, we have added editor’s notes to indicate where the law may have changed. Notwithstanding that some selections may no longer be good law, our hope is that all will prove to be of value to legal practitioners and legal historians.”).

authority, however, implicate not only legal and administrative questions but also questions of policy and politics.

The judiciary must convince a multitude of actors to adopt its recommendations and keep following its orders.<sup>200</sup> Attempting to push other actors too far from their preferred outcomes, in turn, risks resistance that can undermine the judiciary's legitimacy. Trying to persuade too much, and pressing one's case too far, can work at cross-purposes with retaining credibility.

Under the institutional and transparency status quo, the OLC's interest in persuasion and authority has a circumscribed focus. The OLC has a far more narrow audience than the judiciary, and its incentives are correspondingly more clear. The OLC only has value to the President if it has a reputation for offering candid, realistic legal advice;<sup>201</sup> attempting to persuade, even when it goes against the preferences of the White House, actually increases the OLC's usefulness and legitimacy. As for its formal power to provide opinions to the White House and other Executive Branch actors, the OLC requires only the continuing approval of the Attorney General, who is likely to perceive the value of the office in direct proportion to its value to the President.<sup>202</sup> And because the OLC's power does not involve the judicial function of binding legal orders, it has no absolute authority over the President. Because the President can ultimately choose to ignore the OLC's advice, the OLC need not fear undermining a power it does not possess. Therefore, at least under the status quo, the current scope of disclosure of written opinions of the OLC serves similar values of persuasion and authority as the publication of judicial opinions. The audience is simply much smaller, and the task correspondingly easier.<sup>203</sup>

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200. See *supra* Part III-D; Volokh, *supra* note 140, at 792.

201. See Morrison, *Stare Decisis*, *supra* note 27, at 1467–68 (noting that the OLC's "reputation for providing candid, independent legal advice based on its best view of the law" provides "the reasons that lead the White House to seek OLC's legal advice in the first place.").

202. See generally William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2471 (2006) (noting that "by his power of appointment or otherwise, the President can assure that the Attorney General's and Department of Justice's primary fealty is to his administration and not to some abstract view of the law. Without any structural assurance of independence, in short, the Office of the Attorney General is only as independent as the President wants it to be.").

203. But see Bloch, *supra* note 44, at 561 (discussing how the Attorney General has to serve "three masters"—the President, the legislature, and the judiciary).

## 2. *The Pro-Executive Effects of a Widened Audience*

The change to the status quo envisioned by transparency advocates, however, dramatically complicates this picture. Published OLC written opinions undoubtedly carry persuasive authority. Yet the kind of persuasion that increasing the publication of OLC opinions is likely to achieve exposes a major tension in the rationales for transparency. If the OLC is to play an increased role in constitutional dialogue, then publication undoubtedly is useful; it has little to do, however, with the OLC's function relative to the President and other actors within the Executive Branch.

Instead, in this conception, the OLC would have an important role to play toward other branches, and the public at large. Publication provides a forum through which the OLC could serve as an ambassador for constitutional arguments from the perspective of the executive; indeed, this is a core goal of one set of transparency advocates, including the authors of the "Principles."<sup>204</sup>

It is possible to evaluate the effects of such a transition in the OLC's role without deciding whether American democracy would benefit from a more robust articulation of the legal views of the executive. The idea that publication of Executive Branch reasoning *can* serve to provide further articulation of these views, however, has a basis in recent history. The publication of presidential signing statements that began during the Reagan Administration was explicitly intended to help advance the preferred views of the President in the minds of other actors.<sup>205</sup> Thus, regardless of the normative desirability of furnishing the Executive Branch a means for greater persuasion, there is some historical basis for believing it is feasible. Further, the persuasion goals served by judicial opinions provide reason for thinking that distribution of OLC opinions to the public can serve to advance the traction of the OLC's views in prevailing legal conceptions.

This has value, perhaps, in public dialogue about the rule of law. Members of the OLC, including the authors of the "Principles," have pointed to this as a positive benefit of greater OLC transparency. They have argued that

making Executive Branch law available to the public also adds—an important voice to the development of constitutional meaning—in the courts as well as among academics, other commentators, and the public more generally—and a particularly valuable perspective

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204. See the discussion *supra*, Part II-A.

205. Dellinger, *The Legal Significance of Presidential Signing Statements*, *supra* note 191.

on legal issues regarding which the Executive Branch possesses relevant expertise.<sup>206</sup>

Yet the OLC, which will likely produce opinions generally pro-executive in nature (if not necessarily as pro-executive as the President would like),<sup>207</sup> is not likely to seem *more* critical or skeptical of presidential power than outside observers, whether legal experts or the broader public. Thus, in situations where the OLC views correspond to those of the President, the OLC will add support to the President's position. And in situations where the OLC has taken a different stance than the President, it is likely to have still moved the baseline for the "no" position in a more pro-executive direction.

This is an acceptable outcome if the concern with existing OLC practice is its failure to wield its potential as an expositor of constitutional meaning from an executive perspective, thus flouting the desires of critics of judicial supremacy and advocates of a more departmentalist tradition.<sup>208</sup> Yet this is surely *not* the concern animating many critics of the Torture Memos, or others anxious about keeping the OLC under control. Transparency here appears more in keeping with a belief that the Executive Branch already has sufficient constraints.<sup>209</sup>

### 3. *The Inter-Administration Effects of OLC Opinions*

Further, the persuasive value of OLC's written opinions could have its most impact at a moment where accountability is at a minimum. The potential persuasive value of OLC opinions extends not only to public dialogue, but to subsequent presidential administrations (and their associated Department of Justice staff). This is important to keep in mind in light of the historical spike in OLC publication at the end of presidential administrations.<sup>210</sup> It is not implausible to believe

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206. Dellinger, Principles, *supra* note 51, at 4.

207. See, e.g., *id.* at 5 ("Although OLC's legal determinations should not seek simply to legitimate the policy preferences of the administration of which it is a part, OLC must take account of the administration's goals and assist their accomplishment within the law.").

208. See, e.g., Pillard, *supra* note 25 (arguing that the ambitions of various advocates for a greater role in constitutional dialogue for the Executive Branch, vis-à-vis the judiciary, must confront the existing limitations in the institutional design of Executive Branch legal interpretation).

209. See JACK GOLDSMITH, POWER AND CONSTRAINT (2012) (arguing that the Executive Branch is significantly restrained by an ecosystem of legal and political means and actors). For a critical treatment of Goldsmith's thesis, see Elizabeth Goitein, *Unchecked and Unbalanced: Taking Issue with Jack Goldsmith*, BOSTON REVIEW, Sept./Oct. 2012, available at [www.bostonreview.net/us-books-ideas/unchecked-and-unbalanced-elizabeth-goitein](http://www.bostonreview.net/us-books-ideas/unchecked-and-unbalanced-elizabeth-goitein).

210. Morrison, *Stare Decisis*, *supra* note 27, at 1477–78.

this represents an attempt to “lock in” certain legal interpretations as the law of the executive, even if it relates to aspects of constitutional meaning that are under vigorous debate. The idea that the OLC can (or does) serve as a constraint upon presidential power has come in for skepticism.<sup>211</sup> Heavy publication at times of administration transitions, however, highlights how the OLC can help constrain the *executive officeholder* in ways that do not necessarily constrain *executive power*. Especially given that presidents tend to leave office more sympathetic to executive power than they enter, outgoing presidents and OLC staffers may be able to move the terms of constitutional debate in the direction of presidential power through release of their legal interpretation into the public domain. Whatever role the OLC has to play in this process, it would also appear that this danger is at its highest precisely when values of accountability and independence are at the lowest ebb (given the imminent White House transition). And historical practice governing the transition between presidents can be very murky, meaning the interaction of the disclosure presumption with interim transitions could lead to a far-outsized role for outgoing presidents in constitutional dialogue.<sup>212</sup>

#### 4. *The Costs of Persuasion on the OLC’s Work*

Finally, if publishing opinions provides persuasive authority for the OLC’s views, this also adds to the responsibilities of opinion authors. The relatively straightforward provision of legal advice, as a product of research, interpretation, and considered thought, now gains an additional complexity, as the opinion author must pay careful attention to the effect of their views on public conceptions. To the extent that the OLC actually serves as a constitutional ambassador for the Executive Branch—as many observers hope—then the OLC must evaluate every opinion through that lens. This would likely exert particular pressure upon opinions that would otherwise reach a conclu-

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211. Eric A. Posner, *Deference to the Executive in the United States After September 11: Congress, the Courts, and the Office of Legal Counsel*, 35 HARV. J. L. & PUB. POL’Y 213, 229 (2012) (arguing that the OLC’s “only function” is “as an ‘enabler’ or extender of executive power.”). Posner and his frequent co-writer Adrian Vermeule’s diagnosis of the OLC as an ineffective constraint includes a normative component. See Kaufman, *supra* note 6, at 216 (noting that Posner and Vermeule stand in opposition to two premises: “a general one that the executive should be constrained by some ‘neutral’ conception of ‘law’ and a specific one that OLC is an appropriate institution to effect that constraint.”).

212. See Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253, 1255 (2006) (discussing the constitutional principles of presidential transitions and the obligations of outgoing presidents to their successors).

sion that constrains the executive or limits conceptions of executive power.

Thus, accepting the potential persuasive value of OLC opinions within the dialogue of constitutional meaning carries the risk of the opinions proving too persuasive. The OLC has historically been supportive of executive power.<sup>213</sup> Ultimately, the role of the OLC as an expositor of Executive Branch legal perspectives within the public dialogue is in tension with a responsibility to constrain the Executive Branch from excessive overreach. To the extent that strengthening the OLC’s ability to constrain the executive animates much of the support for increased OLC transparency, this inconsistency may be fatal to the end goals of transparency advocates.

#### *E. Accountability and OLC Institutional Independence are in Inherent Tension*

##### *1. The Nature of Accountability in the Context of the OLC*

The role that accountability has to play in publishing written opinions has further implications for the OLC embracing greater disclosure.

On one level, of course, persuasion relates to accountability. Providing opinions to learned observers—such as judges, academics, and legislators—is in theory a means toward convincing those actors that the OLC is honoring its responsibilities. Transparency may often serve valuable ends of accountability and independence by providing the possibility of effective monitoring. Transparency as a tool for accountability thus necessarily envisions the possibility of being persuaded that things are on the level.

Accountability, however, is distinct from persuasion; you can hold someone to account whether or not they have not persuaded you of their viewpoint. If accountability is, as Jack Goldsmith defines it, to “disclose one’s activities, explain and answer for them, and subject oneself to the consequences of the institution to which one is accounting,”<sup>214</sup> then the OLC arguably fulfills this through providing written opinions to the parties who seek its advice. The OLC has no independent constitutional responsibility to explain itself to the American pub-

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213. See, e.g., Rachel Ward Saltzman, *Executive Power and the Office of Legal Counsel*, 28 YALE L. & POL’Y REV. 439, 479 (2010) (“The OLC has traditionally adopted an expansive view of executive power in contexts implicating ‘core’ executive powers, particularly when these powers are subject to encroachment by the legislature.”).

214. GOLDSMITH, POWER AND CONSTRAINT, *supra* note 209, at 235 (2012).

lic.<sup>215</sup> The President, who must “take care that the laws be faithfully executed,” retains that responsibility.<sup>216</sup>

A more nuanced argument for the accountability rationale, however, might present disclosure as a means to monitor the OLC’s advice, ensuring that the Office is indeed aiding the President in fulfilling his constitutional responsibilities. If the President relies in part on the OLC in order to fulfill his constitutional obligations,<sup>217</sup> then the American people may have an interest in ensuring that the OLC is doing its job adequately. If the OLC is failing to fulfill its responsibilities, then disclosure may provide a fast, reliable means of detection, allowing observers to respond and bring attention to actions that are cause for concern.

While this is an important goal, it is crucial to note that this kind of accountability has clear impacts upon the institutional independence of the OLC. Accountability and independence are in tension, precisely because accountability envisions a level of control over an actor that is in direct tension with keeping that actor independent.<sup>218</sup>

This scrutiny toward the OLC would not operate in a vacuum. Legal interpretations of presidential power, and their underlying theoretical justifications, are constantly evolving, and take place in a current of politics and history.<sup>219</sup> Presidential power rests in no small part on the appearance of complying with the law, which helps to confer

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215. See Dailey, *supra* note 44, at 1152 (expressing skepticism about the idea that the Attorney General (and by extension the OLC) serve as “the people’s lawyer” rather than “the President’s lawyer,” and stating that “if the truism that the Attorney General of the United States represents the United States and not just its President is not to be a recipe for mischief large and small, then we must have more than a slogan to that effect.”).

216. See *id.* at 1178 (arguing that it would be dangerous “to increase the power of the unelected Attorney General to impose debatable legal and political preferences over against [sic] the will of the people as represented by the elected and accountable head of the Executive Branch.”).

217. See *supra* Part I-A.

218. See generally John V. Orth, *Who Judges the Judges?*, 32 FLA. ST. U. L. REV. 1245, 1249 (2005) (“Judges should decide cases according to the law and without fear of retribution. Over the long history of the common law, a balance has been sought between holding the judges accountable for proper performance and protecting them from improper interference. To protect them from harassment by private plaintiffs, judges have been immune from civil actions since at least the early seventeenth century.”).

219. See Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070 (2009) (tracing the complicated historical succession of theories of presidential power in American politics).

legitimacy and enhance credibility.<sup>220</sup> Public written opinions from the OLC thus affect a factor in the nebulous equation of presidential power. In sufficient volume, they can be a significant factor. And presidents, careful to maintain their own power, will not ignore this. To alter the transparency presumption without attention to the political consequences risks opening the OLC to political struggles in which it cannot hope to compete.

Those broadly in favor of the OLC's conduct over time, among them many OLC lawyers, themselves recognize that the OLC will interpret the law with the views and interests of the President in mind, and thus differently from a neutral court.<sup>221</sup> The idea that the OLC's legal analysis interacts with politics is uncontroversial. But the *nature* of the intersections of its work with broader political disputes can be subtle, and easily unsettled.

NYU Law Professor Richard Pildes has highlighted one example of the interplay between the President and the OLC, in the context of a political dispute where the extent of the President's constitutional powers vis-à-vis Congress is not clear. Under the current disclosure regime, if the OLC reaches a legal conclusion favorable to the President, this increases the chances that the formal written opinion will become public, as the President can use the opinion to argue his position.<sup>222</sup> Publication is conversely less likely if the OLC reaches a conclusion unfavorable to the President's argument. As Pildes notes, however, this does not undermine the importance of the OLC's opinion, for "OLC's view of the law would have had a powerful effect . . . on what the President could argue and how strongly he could push back against Congress."<sup>223</sup>

This constraint, however, *depends* upon incomplete transparency. Under the status quo, the OLC can provide its legal interpretation, but the President suffers the political consequences. In a regime of complete transparency, the OLC would have faced not only the *ex ante* political pressure of the President—already considerable—but also the *ex post* scrutiny of the President's party and supporters, who now have someone to blame if they cannot successfully implement the policy.

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220. See Richard Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1424 (2012) (book review) ("In the United States, [presidential] credibility is bound up with perceptions about whether presidents are complying with domestic law . . . . Public and political responses to assertions of presidential power are, in the United States at least, inextricably tied to perceptions of whether those assertions rest on legitimate, lawful sources of authority.").

221. *Id.* at 1421–23 (discussing these arguments and the OLC's self-conception).

222. See *id.* at 1399.

223. *Id.* at 1400.

And scrutiny of this kind would be of particular resonance to the politically appointed lawyers within the OLC, who differ from career lawyers in core incentives. The OLC, with its “many lawyers with political backgrounds and future political career trajectories,” differs sharply from a legal office composed primarily of “tenured” civil servants, who share with judges a long-term relationship with their office and a degree of insulation from political pressure and the threat of removal.<sup>224</sup>

This context is vital because transparency advocates have placed particular weight on the benefits afforded by expert scrutiny, without due attention to the ecosystem beyond legal expertise. Jack Goldsmith’s call for release of the al-Awlaki memorandum argued that it “would allow experts in the press, the academy, and Congress to scrutinize and criticize it, and would . . . permit a much more informed public debate.” And at the height of the Bush Administration, Georgetown Law Professor Marty Lederman argued that expert scrutiny has a fundamental relationship with the improvement of legal reasoning:

The public ought to be able to understand, and critique, the legal basis for the most important actions of state . . . the prospect of public critique invariably tests, and sharpens, legal analysis in a manner that is not possible if only a small coterie of like-minded lawyers will ever review the opinions.<sup>225</sup>

It is unclear, however, whether the set of lawyers and commentators typically attentive to the work of the OLC in its current, less-public role would differ meaningfully from the description of a “small coterie of like-minded lawyers”; and if attention were to arrive from the public at large, it is likewise unclear that they would provide any distinct means of sharpening the *legal* analysis of the memoranda, as opposed to influencing the Office in other ways. Narrowly-cabined scrutiny risks insularity, yet broader scrutiny becomes intrinsically less “legal” in its core concerns, and it is not at all evident that the line would settle at the happy equilibrium envisioned by transparency advocates.

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224. *Id.* at 33–34 (adding that “for these reasons that we can expect that, for better or for worse, OLC . . . will be different from other Executive Branch legal offices”).

225. Marty Lederman, *Silver Linings (or, the Strange But True Fate of the Second (or was it the Third?) OLC Torture Memo)*, BALKINIZATION (Sept. 21, 2005), <http://balkin.blogspot.com/2005/09/silver-linings-or-strange-but-true.html>.

## 2. *The Tension Between Majoritarian Accountability and the OLC's Independence*

Thus, while a central premise of effective accountability is responsiveness to public opinion, in the case of the OLC, this responsiveness may actually carry significant risks for its lawyers to provide good-faith advice. Increased political responsiveness may intrinsically mean increased *politicization*, which would seem to cause the OLC more problems than it solves. If “accountability” in practice would threaten the Office’s perceived and actual independence, then transparency would appear to be a poor solution to perceived problems with the status quo. And eroding this independence is especially worrisome when the OLC has demonstrated that it is willing to take opinions at odds with Presidential preferences, as in the Libyan intervention.<sup>226</sup>

If “accountability” is to have any justification, after all, it must be that it will affect the behavior of OLC attorneys. Yet, owing to the incentives discussed above, transparency may well lead expositors of legal reasoning to trend away from their own *a priori* interpretations and toward arguments more acceptable to those scrutinizing their work. This rationale is likely to be appealing to those who believe that, absent scrutiny, the OLC will adopt interpretations that merely reflect the political preferences of the President—i.e., the set of transparency advocates skeptical of executive power.<sup>227</sup> And it is also the core premise of those sympathetic to executive power and envisioning the regulation of the OLC by a subset of legal experts, such as Goldsmith, Lederman, and Morrison.<sup>228</sup>

But disclosure will not mean that only those concerned about the politicization of the OLC will get to read the opinions; everyone will. Scrutiny will not only come from the legal community, but from the American public at large.<sup>229</sup> It is not immediately clear why the OLC

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226. See Savage, *2 Top Lawyers*, *supra* note 11; Kevin Drum, *Obama, Libya, and the OLC*, MOTHER JONES (June 18, 2011, 9:51 AM), <http://www.motherjones.com/kevin-drum/2011/06/obama-libya-and-olc>.

227. E.g., ACKERMAN, *supra* note 105 (heavily criticizing the OLC); *see supra* Part II-B.

228. *See* discussion of Morrison’s reputational arguments in Part II-A, *supra*; Trevor W. Morrison, Constitutional Alarmism, *supra* note 101, at 1724–25 (arguing that “[a]lthough the general public is unlikely to pay attention, the key drivers of many OLC lawyers’ reputations—Washington lawyers, legal academics, the legal press—are more likely to take notice.”).

229. *See* Bradley Lipton, Essay, *A Call for Institutional Reform of the Office of Legal Counsel*, 4 HARV. L. & POL’Y REV. 249, 260 (2010) (“[I]ncreased publicity might not, under certain circumstances, actually deter OLC from rendering faulty legal advice. On the contrary, publicity might sometimes encourage and exacerbate the

would not suffer from the same public pressures brought to bear upon the Supreme Court, which, according to proponents of the “majoritarian thesis,” has led the Court to trend its decisions toward the political will of popular majorities.<sup>230</sup> Moreover, OLC political appointees would face particular pressure because of their short terms in the Office and their sensitivity to the approval of party and political actors.<sup>231</sup> Even under the jaded view that it is “strategically helpful for political lawyers to neglect short-term interests to appear neutral and reap longer-term benefits,”<sup>232</sup> this neutrality, genuine or not, is surely more difficult to maintain in the face of direct political pressure. It is no reassurance, moreover, that public will simply remain indifferent, and that legal experts can keep control of the process of scrutiny. Any belief that citizens lacking legal expertise will not care about or direct attention toward legal opinions appears at odds with our historical experience of popular interaction with institutions like the Supreme Court and figures such as the Attorney General and the President.<sup>233</sup>

Of course, it might be preferable for the OLC to offer legal interpretations that reflect popular opinion, rather than what members of the office find most accurate. The motivating principle for this, however, would seem less about protecting the “independence” of the office, and more about which set of actors we want to influence the OLC. (And it would leave entirely by the wayside any commitment by the OLC to provide its own “best view of the law.”). As Benjamin J.

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politicization of OLC opinions. In cases in which the law and public opinion are at odds, a politically sensitive OLC might well choose the popular, albeit illegal option.”).

230. See Pildes, *supra* note 220, at 1405 & 1405 nn. 70–73 (citing the representative work of Jack M. Balkin, Robert Dahl, Barry Friedman, and Michael Klarman); Benjamin J. Roesch, *Crowd Control: The Majoritarian Court and the Reflection of Public Opinion in Doctrine*, 39 SUFFOLK U. L. REV. 379, 421 (2006) (concluding that “the structure of various judicial doctrines is formulated in a way that reflects public opinion, at least indirectly, *without* explicit incorporation or as some sort of extra-doctrinal influence.”).

231. Fontana, *supra* note 5, at 31–32 (pointing to politically appointed lawyers’ interest in “the legal agenda of the party coalitions they have served before and hope to serve again,” these lawyers’ “general agreement with the legal-political agenda of the political coalition selecting them,” and their likely desire to “want to keep the party sufficiently happy with them” to maintain good standing).

232. *Id.* at 32.

233. On this point, note Pildes’ discussion of the salient impact of perceptions of lawful or unlawful conduct on political opinions. Pildes, *supra* note 220, at 1408–16 (observing that in the case of the George W. Bush Administration, “[a]mong many parts of the public (as well as the Supreme Court), a reaction against the Administration emerged that was at least as much about the perception that the President refused to accept valid legal constraints as it was about the substance of these antiterrorism measures,” and the “significant role” he (persuasively) believes they played in the 2006 and 2008 elections).

Roesch observes, “When both process and result are necessary for an institution’s legitimacy, the institution has a strong disincentive to design processes that will produce outcomes that undermine what legitimacy that the regularity of process afforded it.”<sup>234</sup>

In other words, if the goal of transparency is to align OLC reasoning to conform with public attitudes, then such a goal may well be attainable; but it is in direct odds with a conception of the OLC as institutionally “independent.” It adds, rather than subtracts, from the constraints upon the OLC’s discretion.

### 3. Additional Harms Relating to Widening OLC’s Accountability

If the majoritarian thesis does not hold, however, or for other reasons does not accurately predict the conditions facing the OLC, there is another plausible story of what would occur if the OLC disclosed more opinions. This account would be even more problematic from the standpoint of independence.

Take, for instance, Trevor Morrison’s discussion of the interaction between suitable justifications for the OLC to change its mind, and depart from precedent, and the role of transparency in these deliberations. Morrison argues that a change in President could justify a departure from prior precedent, whereas a change in opinions from one OLC head to another could not.<sup>235</sup> In this process, he calls “one factor . . . critical: public disclosure.”<sup>236</sup> Morrison argues that OLC’s “decisions to depart from precedent . . . should be made public whenever possible.”<sup>237</sup>

It is clear, however, that if the OLC can or should only depart from procedure because of the views of the President, and not its own self-volition, then its public issuance of an explanation for its departure does not correspond to greater independence. It is instead serving, primarily, as a public justification of the President’s change in views. Disclosure in this instance would cast the OLC as the expositor of the constitutional preferences of the Executive Branch.<sup>238</sup>

The case for greater transparency may also rest upon a misconception as to the nature of OLC opinions. There is an important distinction between transparency in government reasoning, and transparency in government action or results, and it relates to the kind

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234. Roesch, *supra* note 230, at 421.

235. Morrison, *Stare Decisis*, *supra* note 27, at 1525.

236. *Id.*

237. *Id.*

238. See *supra* Part II-A.

of accountability we want.<sup>239</sup> (Recall the separation between the judicial “result”—the resolution of the case before the judge—and the opinion the judge writes explaining the result). Disclosure of published opinions may be equivalent to transparency over internal deliberations, or it may be fundamentally different. If one views the OLC’s participation in legal determinations as part of the “process” of executive deliberation, the *Morrison* and *Nixon* rationales for candor likely apply, and there are clear perils for effective government decision-making.<sup>240</sup> Voluntarily and regularly disclosing OLC opinions easily viewed as pre-decisional may also undermine the credibility of the need for confidentiality of pre-decisional Executive Branch deliberation generally, with the significant possibility of negative consequences for doctrines of presidential confidentiality. If, alternately, OLC opinions are themselves a kind of end product—a form of executive action in their own right—then the case for transparency may be easier. Yet the former characterization is far more convincing, as the President is not legally bound to follow the OLC’s advice, need not legally claim powers the OLC recognizes, and need not act in such a way as to implicitly claim such powers. Thus, there are important reasons to believe OLC opinions are but a step within a process, and thus areas where candor-enhancing opacity is more important than scrutiny-enhancing transparency.

Arguing for the general desirability of greater transparency on the part of the OLC also requires reckoning with practices of the Office less formal than written opinions. A possible reaction to a shift in the disclosure presumption would be for OLC attorneys to turn more readily to providing informal advice in the form of oral communications or other non-memorialized advice, rather than official opinions. While transparency often rests on the maxim that sunlight is the best disinfectant, the behaviors advocates are concerned about might instead move underground.

There is also a further distorting effect relating to oral advice. If Executive Branch actors asking for the OLC’s opinion are likely to ask for a written opinion if they expect a positive answer—often on

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239. See Jonathan Fox, *The Uncertain Relationship Between Transparency and Accountability*, 17 DEV. IN PRAC. 663, 668 (2007) (noting that when exploring “the relationship between transparency and accountability . . . we are obliged to distinguish between the two concepts because one does not necessarily generate the other.”).

240. See Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1356 (1995) (“[C]ertain criteria that are generally considered to be positively related to a court’s authoritativeness—such as unanimity, continuity, certainty, or the use of distinctly legal language—may often favor the avoidance of candor rather than its use.”).

the basis of initial, informal communication—then the body of legal opinions will become distorted in the direction of executive power.<sup>241</sup> In an altered status quo, where the executive knows that restrictions on its power will not only be formalized but will be *made public*, then the executive may become even *less* likely to seek out the OLC on matters that may constrain presidential power. And if this is indeed an effect of increased transparency, then the OLC exercising its power to constrain will go “off the books,” even as its public credibility for restricting the executive will be diminished.

### CONCLUSION

Envisioning American governance with a far more transparent OLC, we see features and practices that are at cross-purposes with the stated goals of transparency advocates. If we think that *transparency* and monitoring the OLC’s activities are the most important goals, we must worry whether this will imperil the fragile virtues and political capital the Office possesses. And if we take seriously the idea that OLC *independence* is the most paramount virtue for its effective operation, then we must wonder whether transparency is likely to place it under greater constraints and subject it to stronger controlling pressures.

Thus, if one accepts the argument that greater transparency at the OLC will reduce its effectiveness and independence, and that its persuasive role could have downside risks, than disclosure should, at a minimum, be left at the current status quo, if not decreased. Current practices more than adequately provide the means to advance the core goals served by public legal opinions.

Of course, we may still hope to realize *all* of these inter-related values of independence, transparency, and accountability, out of a concern for providing legal constraints upon the Executive Branch. In light of the difficulties in achieving this through a disclosure presumption, however, we might wonder if other, more effective options might exist. Proper attention to institutions directly relates to understanding the constraining power of law on the President.<sup>242</sup> Attention to OLC’s pivotal role in presidential action has helped to ensure “that the role of lawyers in our governance will remain a topic of enormous interest to politicians, the academy, and the public for years to come.”<sup>243</sup> Yet

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241. See Morrison, *Stare Decisis*, *supra* note 27, at 1468–69.

242. Pildes, *supra* note 220, at 1421 (“[T]he provocative question of how much constraining power law should have in presidential decision making can be viewed as directly tied to issues of institutional design.”).

243. See Dailey, *supra* note 44, at 1117.

maybe the OLC is not the proper vehicle for the ambitions held for it.<sup>244</sup>

If a shift toward a general practice of publishing OLC opinions seems unlikely to realize the goals of transparency advocates, then American society and government would best be served, for the time being, by maintaining the status quo. The OLC's immense responsibilities, however, remain no less significant, and its role deserves sustained attention. There should be no rush to dismiss suggestions for how the OLC can improve its capabilities and strengthen its institutional self-awareness. Scholarly attention to the OLC from former members of the office may even help to encourage OLC attorneys to carry out their duties with an eye toward their unique responsibilities and the importance of their decisions.<sup>245</sup>

Even those most optimistic about the OLC's capacities, however, would agree that is at best an incomplete solution to ensuring adherence to the rule of law in the Executive Branch. Recognizing this can inevitably lead observers to challenge, and to ask too much, of an institution occupying a fragile and precarious position. This impulse is understandable, for the consequences when the OLC fails to uphold its responsibilities can be grave. But proposals for reform or other alterations to its historical practices, if adopted, may well weaken its ability to fulfill those responsibilities, and for little gain.

With this in mind, perhaps other avenues may prove more capable of realizing aspirations currently held for the OLC in isolation. Maybe greater attention to institutional design, such as the relationship between the OLC and the Solicitor General, could prove more capable of finding a desirable balance of internal and public-facing legal opinion. Perhaps fears of the President and party allies being able to overwhelm the OLC in public debate would be alleviated by returning some opinion-writing functions to the Attorney General, a figure of greater public stature. And maybe the Supreme Court's reluctance to

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244. See Fontana, *supra* note 5, at 49 ("The lawyers in the headlines matter, but so do the thousands and thousands of lawyers who do not make the headlines as often . . . . Civil service lawyers are crucial to understanding executive legalism. It is their preferences, their incentives, and their behavior that will shape Executive Branch legalism in the future just as much as the several dozen lawyers working in OLC [and the White House Counsel's office]."); see also *supra* note 46 (discussing David Fontana's critique of excessive focus on the OLC and select legal offices in the Executive Branch).

245. NYU Professor Samuel Rascoff suggested in conversation with the author that former OLC attorneys producing scholarship, like Goldsmith and Morrison, act as players within the "constraint" ecosystem Goldsmith describes in *POWER AND CONSTRAINT*, *supra* note 209.

provide advisory opinions is a historical practice ready to be revisited.<sup>246</sup>

Institutional design-based solutions, for their part, carry with them no fewer dangers than the alterations proposed for OLC practice. This only highlights, however, the necessity for caution, and for not taking too quickly to proposals for reform. An adequate and rigorous assessment of possible outcomes is a critical part of the process of improving governance. And this also requires holding out the possibility that there may only be half-best solutions to the challenges of Executive Branch legal interpretation. Accepting that there may only be incomplete ways to realize goals of transparency, independence, and accountability may be less than satisfactory. But to threaten the accommodations that have already been reached may, in the long run, prove far more disheartening.

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246. See Neal Kumar Katyal, *Judges As Advicegivers*, 50 STAN. L. REV. 1709 (1998) (arguing for the importance of the “advicegiving” role of judges, and asserting that there are normative justifications for courts to adopt an advisory role). For background on advisory opinions issuing from Article III courts, see RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 50–53 (6th ed. 2009); Felix Frankfurter, *Advisory Opinions*, 1 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 475, 476 (Edwin R. A. Seligman ed., 1937); see also Robert J. Pushaw, Jr., *Why the Supreme Court Never Gets Any “Dear John” Letters: Advisory Opinions in Historical Perspective*, 7 GEO. L.J. 473, 486 (1998) (book review) (detailing judicial advisory opinions in the early republic, and stating that “the Framers considered the specific practice at issue—written advisory opinions directed by the President—and consciously assigned it not to judges, but to executive department heads.”). There is, predictably, debate about what constitutes a judicial “advisory opinion.” See FALLON, 54–56.