

# THE OFFICE OF LEGAL COUNSEL: A STUDY OF THE PRESIDENT'S LAW FIRM

*Billy Monroe\**

## TABLE OF CONTENTS

I.	INTRODUCTION .....	48
II.	ROLE OF THE OLC .....	48
III.	CONTRADICTIONS IN THE OLC ROLE.....	50
IV.	HOW THE OLC GOT TO WHERE IT IS TODAY .....	50
V.	THE STRUGGLE TO REMAIN INDEPENDENT .....	52
VI.	ADDRESSING THE PROCESS .....	53
VII.	ISSUES WITH PUBLISHING DECISIONS .....	54
	A. <i>OLC and Qualified Immunity</i> .....	55
	B. <i>Evolution of the Office of Legal Counsel</i> .....	56
VIII.	ESTABLISHING THE FUNCTIONS OF THE OLC.....	64
IX.	ORIGINS OF THE OLC AND EVOLUTION OF THE JUSTICE DEPARTMENT.....	65
	A. <i>Operating in Obscurity</i> .....	66
	B. <i>Increasing Numbers of Opinions</i> .....	66
	C. <i>Legal Actions Against the OLC</i> .....	67
	D. <i>Violations of Ethical Standards</i> .....	68
X.	MODERN ROLE OF THE OLC .....	69
	A. <i>Advisory Functions in Support of the Constitution</i> .....	69
	B. <i>Elimination of the Assistant Solicitor General</i> .....	70
XI.	OPERATIONAL CONCERNS RELATING TO OLC .....	70
XII.	LOOKING TO THE FUTURE.....	72
XIII.	CAUTIONS .....	73
XIV.	CONCLUSION.....	75

---

\* Billy Monroe is Professor of Political Science at Prairie View A&M University. He received his Ph.D. in political science at the University of Texas at Dallas in 2008.

## I. INTRODUCTION

The Office of Legal Counsel (OLC) has been referred to as “the most important government office you’ve never heard of.”<sup>1</sup> “By delegation from the Attorney General [AG], the Assistant Attorney General [AAG] in charge of the Office of Legal Counsel [OLC]” is the individual who “provides legal advice to the President and all executive branch agencies.”<sup>2</sup> Within the executive branch, the OLC acts as a “mini-Supreme Court,” and in actual practice, several leaders of the OLC have gone on to the real Supreme Court.<sup>3</sup> William Rehnquist and Antonin Scalia both served in the OLC prior to becoming Supreme Court Justices.<sup>4</sup> The experience helps develop the skills needed for the highest court. Until then, the carefully worded opinions of the OLC provide binding precedent and serve to help guide the most important of the national agencies, including the Pentagon and the Central Intelligence Agency.<sup>5</sup>

## II. ROLE OF THE OLC

The OLC has the “final say on what the President and all his agencies can and cannot legally do.”<sup>6</sup> “The Office drafts [the] legal opinions of the Attorney General” and their office.<sup>7</sup> It also provides written opinions and oral advice “in response to requests from the Counsel to the President, the various agencies of the [e]xecutive [b]ranch,” and offices within the Department of Justice.<sup>8</sup> “Such requests typically deal with legal issues of particular complexity and importance” where “two or more agencies are in disagreement.”<sup>9</sup> The Office is also responsible for advising on issues of constitutionality, reviewing pending legislation, and for

---

<sup>1</sup> Daniel Klaidman, *Palace Revolt*, NEWSWEEK (Feb. 5, 2006, 7:00 PM), <https://www.newsweek.com/palace-revolt-113407> [https://perma.cc/WF9Y-CQU3].

<sup>2</sup> *Office of Legal Counsel: About the Office*, U.S. DEP’T OF JUST. OFF. OF LEGAL COUNS., <https://www.justice.gov/olc#> [https://perma.cc/Z8Y4-CZ9Y] (last visited Apr. 8, 2023).

<sup>3</sup> Klaidman, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> *See id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Office of Legal Counsel: About the Office*, *supra* note 2.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

providing the executive branch with legal advice.<sup>10</sup>

When the President proposes to issue an executive order or proclamation, he cannot do so unilaterally despite the way that it may be presented in the popular media.<sup>11</sup> When a presidential candidate announces, for example, that their first act if elected will be to issue an executive order on a particular matter, the newly elected President cannot do so without the approval of the OLC. It is the OLC's responsibility to ensure that "executive orders and . . . proclamations proposed to be issued by the President are reviewed by the Office of Legal Counsel for form and legality, as are various other matters that require the President's formal approval."<sup>12</sup> The OLC has generally performed its functions well and in a relatively politically un-involved manner throughout the years.

The nature of the OLC, however, is in itself contradictory. The OLC is charged with providing Presidents with advice and with opinions that they can accept. At the same time, they are expected to be independent of political pressures.<sup>13</sup> Given that their advice is considered binding for the executive branch, this is a very difficult balancing act. In addition, the OLC serves as the attorney for the President and the Attorney General.<sup>14</sup> Saltzman argues that if the OLC uses a great deal of transparency, it will find the potential pressure from the White House and the Attorney General to be easier to stand up to because there would be more support.<sup>15</sup> Yet, despite efforts at transparency, it can be very difficult to determine exactly what the OLC is doing and which products it is producing. It is one thing to have the OLC state that they produced a certain number of decisions during the year and quite another matter to find these decisions, even with the opinions published on the OLC website. As an example, it took a Freedom of Information Act request to find memoranda associated with travel bans, which are discussed in a later section.<sup>16</sup> This is despite

---

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*; see also Rafael Bernal, *Trump Pledges to End Birthright Citizenship on First Day in Office*, THE HILL (May 30, 2023, 1:14 PM), <https://thehill.com/homenews/campaign/4026334-trump-pledges-to-end-birthright-citizenship-on-first-day-in-office/> [<https://perma.cc/WKH4-H6NL>].

<sup>12</sup> *Office of Legal Counsel: About the Office*, *supra* note 2.

<sup>13</sup> Rachel Saltzman, *Executive Power and the Office of Legal Counsel*, 28 YALE L. & POL'Y REV. 439, 442 (2010).

<sup>14</sup> See *id.* at 441–42.

<sup>15</sup> See *id.* at 458–59.

<sup>16</sup> Isaac Arnsdorf, *Justice Department Releases Letter Approving Travel Ban*, POLITICO (Feb. 2, 2017, 5:32 PM), <https://www.politico.com/story/2017/02/justice-department-trump-travel-ban-234561> [<https://perma.cc/ZZY3-X6WT>].

the availability of the OLC's "reading room" and lists of decisions (which, as this researcher experienced, are far from complete).

### III. CONTRADICTIONS IN THE OLC ROLE

Arthur Garrison argues that the OLC is failing to fulfill its original mandate and in fact, after 9/11, switched from a "Neutral Expositor of the best view of the law model and advanced a Private Lawyer model to advising the President."<sup>17</sup> Sonia Mittal would agree with Garrison and argues that the position of the OLC has become diluted, most notably after the "war on terror" began in the Bush administration.<sup>18</sup> In particular, Mittal argues that when the OLC opinions relating to torture were leaked, and then withdrawn, the OLC showed that it was unlikely to be able to stand up to political pressure, especially from the President's office.<sup>19</sup> The next concern is how the OLC got to this point.

### IV. HOW THE OLC GOT TO WHERE IT IS TODAY

In private life, an individual who receives terrible or incompetent advice from their personal lawyer can sometimes mount a significant appeal based on the attorney's gross incompetence.<sup>20</sup> The individual will not make much progress if they assert that they conducted some act because their attorney told them it would be okay to do so.<sup>21</sup> Instead, the process of justice occurs and on appeal they can assert that they received terrible advice. In an average person's life, criminals would have an argument that would nearly grant them immunity if the "bad lawyer" defense was used to excuse criminal behaviors at the beginning of the process. As the *Harvard Law Review* points out, when one is dealing with an issue that can affect the entire nation and the lawyer works for the government, the stakes are even higher; it is not just one life at stake.<sup>22</sup> The government's attorneys

---

<sup>17</sup> Arthur H. Garrison, *The Role of the OLC in Providing Legal Advice to the Commander-in-Chief After September 11th: The Choices Made by the Bush Administration Office of Legal Counsel*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 649, 649 (2012).

<sup>18</sup> See Sonia Mittal, *OLC's Day in Court: Judicial Deference to the Office of Legal Counsel*, 9 HARV. L. & POL'Y REV. 211 (2015).

<sup>19</sup> *Id.* at 237.

<sup>20</sup> See *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>21</sup> *Id.*

<sup>22</sup> Note, *The Immunity-Conferring Power of the Office of Legal Counsel*, 121 HARV. L. REV. 2086, 2088 (2008).

simply have an obligation to get things right.<sup>23</sup>

This puts a great deal of pressure on the OLC, which is asked to make decisions that clarify law that even the leaders of the nation and the attorneys from other agencies are not able to understand. Further, the work the OLC does and the decisions they make originate, if not in the highest office of the land, in *some* of the highest offices.<sup>24</sup> The pressure to “get things right” is immense, but part of the problem is that there is no real guidance in many cases for what is right.<sup>25</sup> These are decisions that are, by definition, advice on new situations or situations in which the law is either conflicting or unclear.

There are several very real concerns with this situation. While the idea exists that the decision could be a bad one and bring a great deal of pressure to the office (as in the case of Bush and Guantanamo), there is also an opportunity for the OLC attorneys to overreach and manipulate any particular situation.<sup>26</sup> From a practical standpoint, it would stand to reason that the more high-profile the decision is, the more political the decision is and the more likely that opportunity to pressure the OLC exists. It is thus all the more likely that a decision could be bought or manipulated.

The OLC has a number of checks and balances in place to ensure that decisions do not go too far afield, however. OLC attorneys consider the OLC’s culture and the pressures they are under. They need to minimize the number of times that errors are made, self-serving decisions are presented, and controversial stances are offered. Richard Bilder and Detlev Vagts assert that the real problem may be determining what “normal” actually is.<sup>27</sup> It is difficult to determine any absolute tests for a boundary for what is a “reasonable” legal argument; it is also difficult to determine what kind of test, if any, could be applied that would satisfy all constituents or stakeholders as to what would define a decision that would be considered completely out of the park.<sup>28</sup>

Part of the difficulty relates to the nature of the work and the importance of offering this legal advice at the highest levels of government. Other difficulties, however, arise purely from

---

<sup>23</sup> See *id.*

<sup>24</sup> See *Office of Legal Counsel: About the Office*, *supra* note 2.

<sup>25</sup> See Garrison, *supra* note 17.

<sup>26</sup> See *id.*

<sup>27</sup> Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT’L L. 689, 693–94 (2004).

<sup>28</sup> See *id.*

American culture and from America's early definition as a 'melting pot.'<sup>29</sup> From the time the nation was established, a wide variety of cultures has been maintained from the original groups of citizens who originated from multiple nations and creeds.<sup>30</sup> It is difficult to foresee any single political or legal decision that would be accepted as being normal and moral by everyone. In fact, the opposite is true; it seems far more likely that no decision would meet these criteria. The question that arises would be to ask how far afield, how far "out there" a decision or position would have to be to be considered abnormal or immoral.

It was John Yoo's 2002 terror memo, and later his books, which may have brought this question to a head.<sup>31</sup> It was, perhaps, a foreshadowing of what would later happen in the Bush White House. It would be difficult to argue that Bush acted incorrectly in consulting the OLC. The question arises, however, as to what types of pressure may have been put upon the OLC to provide answers that the sitting President would find acceptable. When Jack Goldsmith served as Assistant Attorney General in charge of the OLC in 2003, he reported being so concerned over the way law had been interpreted that he wrote three different resignation letters, fearing his unpopular opinions about the OLC might get him removed or even get his position terminated.<sup>32</sup>

## V. THE STRUGGLE TO REMAIN INDEPENDENT

One of the ways the OLC endeavors to remain in control of its own fate, and outside of the pressures that can exist in a highly charged political arena, is to require the individual agencies to seek help from their own General Counsels.<sup>33</sup> The White House is the only department or agency that cannot be ignored or deterred.<sup>34</sup>

---

<sup>29</sup> *Why is America Called the Melting Pot?*, GOLDEN BEACON USA (Oct. 30, 2020), <https://goldenbeaconusa.com/why-is-america-called-the-melting-pot/> [<https://perma.cc/99FQ-XQG8>].

<sup>30</sup> *Id.*

<sup>31</sup> See Letter from John Yoo, Deputy Assistant Att'y Gen., U.S. Dep't of Just., to Alberto R. Gonzales, Couns. to the President (Aug. 1, 2002), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug1.pdf> [<https://perma.cc/VTJ7-WTN7>]; see also JOHN YOO, WAR BY OTHER MEANS 39 (2006).

<sup>32</sup> JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 161 (2007).

<sup>33</sup> See *Office of Legal Counsel: About the Office*, supra note 2.

<sup>34</sup> See, e.g., *id.* ("All executive orders and substantive proclamations proposed to be issued by the President are reviewed by the Office of Legal Counsel for form and legality, as are various other matters that require the President's formal

There are a variety of reasons for requiring agencies to use their own counsels; one of the strongest is simply to keep agency employees from deliberately overworking the OLC with questions that may be frivolous. If the agencies or their agents were allowed to do this, it could slow the legal process in general, clog the OLC's office, and manipulate a situation in which agencies most in need might find real difficulty in getting their questions heard.

Another reason for requiring agencies to use their own General Counsels whenever possible is that it keeps the agencies from deliberately asking for decisions on serious but contentious matters so that the OLC would be under pressure to produce a decision rather than the agency itself. As the political arena in the United States becomes increasingly contentious, it is understandable that individual agencies or departments, and even their General Counsels, would seek to be kept at arms' length from controversial questions and what might be painful decisions. The OLC does reserve the right to accept issues from agencies if there is a justifiable reason that the decision on the issue should be made by the OLC's office and not at a departmental level.<sup>35</sup>

#### VI. ADDRESSING THE PROCESS

At the present time, the OLC declines to write decisions on matters that are already being litigated.<sup>36</sup> It would be extremely divisive to consent to provide a decision on a matter that is already being litigated or is pending hearing before the Supreme Court. It could also set up a situation where the OLC would be providing decisions that could be in direct contrast with the Department of Justice's active cases. The stress that this could put on the justice system as a whole has the potential to be tremendously expensive and even destabilizing for citizens who are awaiting decisions. It would be extremely difficult to explain to the average citizen that the Justice Department believed that the position on an issue should be one thing (and had law to support it) while a division of Justice, the OLC, argued the exact opposite (and also had law to support it).

One of the reasons that the OLC has formalized the process is so that all of the decisions are carefully researched and reckoned; the idea of off-the-cuff legal advice on a matter of national

---

approval.”).

<sup>35</sup> *See id.*

<sup>36</sup> *Id.*

importance is simply staggering.<sup>37</sup> Providing various organizations and the President's office with, for example, an oral response to their questions rather than providing a well-reasoned and legally supported document, tracked and signed, would be extremely impractical and allow for accusations of "he said, she said" which would inevitably result from a more informal process. The *Harvard Law Review* makes another point: "The formality also helps prevent recipients from exaggerating or selectively comprehending nuanced analyses," which would only serve to obfuscate rather than clarify the issues.<sup>38</sup>

## VII. ISSUES WITH PUBLISHING DECISIONS

Some of the OLC's decisions are classified; other decisions are not published because of their content even though they are not technically classified. In addition, many of the opinions are not made available to the public until some years after the decisions have been rendered and presented to the President or the agency that requested them. According to the *Harvard Law Review*, the reason for delaying publishing decisions or to decline to make them public is that the decision has to be able to hold up under public scrutiny.<sup>39</sup> If there is classified information in the decision, or information that it would be safer or better for the public to not know, then it is reasonable that the publishing of the decision be withheld or postponed.<sup>40</sup>

Elizabeth Goitein disagrees, however, and argues that the government is relying on "secret law" when it is not open and transparent.<sup>41</sup> As Goitein points out, "[w]hat qualifies as 'law' — and, for that matter, how 'secret' the law must be in order to raise concerns — are threshold questions that have received little attention."<sup>42</sup> The core of Goitein's argument appears to be that if the people are not allowed a great deal of transparency, they will not be informed, and without being informed, they will not be able to understand what the legislature intended and why it is necessary. More importantly, when they do not know what the law is, they cannot discuss it with their representatives and urge them

---

<sup>37</sup> *See id.*

<sup>38</sup> *The Immunity-Conferring Power of the Office of Legal Counsel*, *supra* note 22, at 2090.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *See* ELIZABETH GOITEIN, *THE NEW ERA OF SECRET LAW* (2016).

<sup>42</sup> *Id.* at 2.

to a particular course of action.<sup>43</sup>

A. *OLC and Qualified Immunity*

One of the keenest issues relating to the use of OLC decisions as a basis for deciding justice or guiding one's behavior is the consideration of qualified immunity. While qualified immunity as a concept was probably developed to ensure that a public servant, in the commission of their work, could not be sued if they deviated from the norm somewhat and made a relatively insignificant error, qualified immunity actually ensures that there is an allowed margin of error before an official or government employee can be sued.<sup>44</sup>

In a civil case there is a wide swath which would have to be violated before qualified immunity would not protect the practitioner. Officials would not be held responsible if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>45</sup> In essence, qualified immunity protects anyone who is not blatantly incompetent. The concept of the "reasonable person," so prevalent in law corners, is utilized in the determination of whether or not an official should receive qualified immunity.<sup>46</sup> Absent deliberate and malicious intent, it is likely that the individual would be protected by the law regardless of the right- or wrong-ness of the OLC's advice.<sup>47</sup>

The case of *Harlow v. Fitzgerald* came to prominence after an individual filed suit because he believed he was fired by the Department of the Air Force, along with White House aides to former President Nixon, in retaliation for their actions in working for Nixon.<sup>48</sup> The primary holding differed with OLC opinions of the time and stated that qualified immunity does apply to presidential aides "performing discretionary functions" of their positions as long as they "do[] not violate clearly established statutory or constitutional rights."<sup>49</sup>

---

<sup>43</sup> *Id.* at 4.

<sup>44</sup> *The Immunity-Conferring Power of the Office of Legal Counsel*, *supra* note 22, at 2091.

<sup>45</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 815.

<sup>48</sup> *Id.* at 802–03.

<sup>49</sup> *Id.* at 813–18.

*B. Evolution of the Office of Legal Counsel*

Arthur Garrison suggests that it is very imperative to understand how the Office of the Attorney General, and by extension the OLC, operates because it is the only organization that could give legal opinions within the executive branch.<sup>50</sup> One of the biggest problems in understanding the functions of the Office of the Attorney General and why it operates in the manner it does, he suggests, is that there has not been a development of adequate research about the evolution of the position. The Attorney General's office was originally a part-time position with no "perks," not even a staff or office supplies. The nature of the responses to requests for clarification of law has evolved with each passing administration. As the nation evolved, the clash between the law and the federal government became more evident.

Professor Garrison, whose works are cited throughout this article, was kind enough to allow an interview on May 27, 2020.<sup>51</sup> He emphasized that the Office of Legal Counsel is given the job of protecting the Office of the President as an *institution*.<sup>52</sup> The OLC must also follow the rule of law and is intended to be as impartial as possible.<sup>53</sup> The opinions of the OLC are considered to be definitive by everyone in the executive branch except for the Office of the Solicitor General.<sup>54</sup> The problem is the opposite view, that the OLC must be loyal to the President's policy objectives. In several recent presidencies this dichotomy has caused a huge dilemma and has resulted in a great deal of outcry.<sup>55</sup> One of the most critical points is that as long as the OLC has the ability to influence politics, it is crucial that it avoid even the appearance of impropriety.

Garrison argues that the OLC is failing to fulfill its mandate and in fact, after 9/11, switched from a "Neutral Expositor of the best view of the law model and advanced a Private Lawyer model to advising the President."<sup>56</sup> Mittal would agree with Garrison and argues that the position of the OLC has become diluted, most

---

<sup>50</sup> Arthur H. Garrison, *The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They Are Significant*, 76 ALB. L. REV. 217 (2013).

<sup>51</sup> Telephone Interview with Professor Arthur H. Garrison, Professor at Kutztown University (May 27, 2020).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Garrison, *supra* note 17, at 649.

notably after the “war on terror” began in the Bush administration.<sup>57</sup> In particular, she argues that when the OLC opinions relating to torture were leaked, and then withdrawn, the OLC showed that it was unlikely to be able to stand up to political pressure, in particular from the President’s office.<sup>58</sup> Mittal argues that the OLC is in danger of becoming nothing but a “rubber stamp” of Presidents’ opinions.<sup>59</sup> There are strong advocates for both sides of this argument, and some analysts argue strongly that the OLC is fulfilling the mandate it was given to provide “best legal advice” relating to a President’s questions and potential actions.<sup>60</sup> It is undisputed that the OLC has the force of binding law within the executive branch. However, a more pertinent question may be what the role of the OLC is in other parts of the government and in the court systems. Mittal questions how judges utilize OLC opinions, and whether they are required to respect and support them.<sup>61</sup> If, for example, the OLC opinions are “entitled to judicial deference,” what kind of deference would be given, and under what conditions?<sup>62</sup>

Some of the analysts believe that the OLC does indeed constrain presidential power when constraint is needed. Others, however, insist that the OLC has departed from its mission. The OLC was developed to provide the executive branch with advice on what behaviors and decisions on a given topic would and would not be acceptable and within the bounds of law.<sup>63</sup> However, in recent years, the OLC has issued decisions that are sometimes interpreted as having the bounds of law, when this is not the case.<sup>64</sup> Instead, the Supreme Court has referred to various OLC decisions in a fashion that would suggest that the decisions are merely representations of historical perspectives or practices.<sup>65</sup> This allows the Court to acknowledge what practices existed, and the law or decisions that supported the practices, without actually regarding the decisions as law. Mittal suggests that when an

---

<sup>57</sup> See Mittal, *supra* note 18, at 223.

<sup>58</sup> See *id.* at 211–12.

<sup>59</sup> See *id.*

<sup>60</sup> See *id.* at 212.

<sup>61</sup> *Id.* at 211–12.

<sup>62</sup> *Id.* at 212, 214; see also *id.* at 217 (discussing the application of different kinds of deference).

<sup>63</sup> See *id.* at 211 n.1; see also Off. of the Assistant Att’y Gen., *Memorandum for Attorneys of The Office*, U.S. DEP’T OF JUST. (July 16, 2010).

<sup>64</sup> Mittal, *supra* note 18, at 225–27.

<sup>65</sup> See *id.* at 217.

agency consults the OLC, it can actually weaken their position if they end up going to court over the issue at some point, since agencies regarded as “expert agencies” will receive more deference from the courts than the OLC does.<sup>66</sup> Thus, Mittal believes, agencies need to consider carefully whether or not they ask for a decision from the OLC.<sup>67</sup> Once they receive a decision, it binds them; thus, it may be more efficacious to avoid asking for OLC advice.<sup>68</sup>

Avidan Cover argues that the production of OLC memos is a collective action.<sup>69</sup> He suggests that the current system fails to hold supervisory attorneys accountable for the contents of the opinions, and thus weakens the opportunity for an attorney to dissent from the presidential viewpoint.<sup>70</sup> By holding the supervisory attorneys responsible for the legal opinions reflected in the OLC memos, there would be more accountability and thus more forethought before the memos are issued. The opinions would more nearly reflect a balanced perspective of the legal points, rather than merely reflecting the presidential view. Cover argues that the time has come to mandate a revision of the professional rules of conduct for those who oversee the OLC in order to ensure that the advice given to the President reflects the law and not the President’s preferences.<sup>71</sup>

From the beginning of the Carter administration through the first year of Obama’s administration, the OLC produced 245 opinions that were available to the public. Of these 245 opinions, 193, or seventy-nine percent, fully supported the President’s position.<sup>72</sup> An additional twenty opinions, or eight percent, supported some portion of the President’s position.<sup>73</sup> Thirty-two opinions, or thirteen percent, were in opposition to the President’s stated viewpoint.<sup>74</sup> However, as Morrison points out, and other analysts have argued, it is very difficult to discover the true number of OLC memoranda for any time period because the

---

<sup>66</sup> *Id.* at 213.

<sup>67</sup> *See id.*

<sup>68</sup> *Id.* at 225.

<sup>69</sup> Avidan Y. Cover, *Supervisory Responsibility for the Office of Legal Counsel*, 25 GEO. J. LEGAL ETHICS 269 (2012).

<sup>70</sup> *See id.*

<sup>71</sup> *See id.*

<sup>72</sup> *Id.* at 276.

<sup>73</sup> *Id.*

<sup>74</sup> Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1463 (2010) (note: Morrison is a former OLC attorney); Cover, *supra* note 69, at 276.

memoranda can be either classified or withheld from the public. Thus, the number of memos in support of the President's opinion may be higher, or lower.<sup>75</sup>

Cover also argues that the number of memoranda in opposition to the President is probably undercounted, simply because they have been withheld from the public and are thus unlikely to reflect the President's opinion.<sup>76</sup> Regardless of what the eventual outcome is, it is clear immediately that there must be some procedure implemented for numbering *and accounting for* executive orders, OLC memos, and their content. Even if the order is classified, the subject of the order should not be, and—to remain transparent—the subject of the order(s) should not be withheld from the public.

It is important to understand that in addition to serving as, in effect, outside counsel for the other agencies of the executive branch, the Office of Legal Counsel also plays a special role within the Justice Department itself. The OLC reviews orders that have been proposed by the Attorney General as well as all regulations that need the AG's approval before being released.<sup>77</sup> It also performs any special assignments that might be referred by the Attorney General or the Deputy Attorney General.<sup>78</sup> Although executive orders existed prior to 1937, they were not consistently numbered until Franklin D. Roosevelt's stay in office.<sup>79</sup> It would be difficult to determine how many orders actually existed, with any assuredness, until the orders began to be routinely numbered. Table 1 reflects the issuance of orders from Franklin D. Roosevelt's presidency to the end of the first Trump presidency. It should be noted that the "years in office" is based on information taken directly from the National Archives and may not reflect complete years. Thus, the "Terms" column provides more detail.

---

<sup>75</sup> Morrison, *supra* note 74, at 1476–79.

<sup>76</sup> Cover, *supra* note 69, at 276 n.36; *see also id.*

<sup>77</sup> *Office of Legal Counsel: About the Office*, *supra* note 2.

<sup>78</sup> *Id.*; *see also Opinions*, U.S. DEPT OF JUST. OFF. OF LEGAL COUNS., <https://www.justice.gov/ole/opinions-main> [<https://perma.cc/YC8S-CCER>] (Dec. 23, 2020).

<sup>79</sup> *See Statistics: Executive Orders*, THE AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/statistics/data/executive-orders> [<https://perma.cc/K696-R8XS>] (June 12, 2025) (explaining that "it was not until the Federal Register Act in 1936 that a more thorough contemporaneous documentation of Executive Orders began").

**Table 1**  
**Executive Orders, 1937 – 2021**

#	President (Political Party)	Total Orders Signed	Approx. Years in Office	Presidential Service Dates	Terms
32	Franklin D. Roosevelt (D)	2023 <sup>[1]</sup>	12	1933–1945	3 full terms plus 2 months and 23 days
33	Harry S. Truman (D)	906	8	1945–1953	3 years, 9 months, and 8 days followed by a full term
34	Dwight D. Eisenhower (R)	484	8	1953–1961	2 full terms
35	John F. Kennedy (D)	214	2	1961–1963	2 years, 2 months, and 2 days
36	Lyndon B. Johnson (D)	325	5	1963–1969	1 year, 1 month, and 29 days followed by a full term
37	Richard Nixon (R)	346	5	1969–1974	1 full term followed by 1 year, 6 months, and 20 days
38	Gerald R. Ford (R)	169	2	1974–1977	2 years, 5 months, and 11 days
39	Jimmy Carter (D)	320	4	1977–1981	1 full term
40	Ronald Reagan (R)	381	8	1981–1989	2 full terms
41	George H. W. Bush (R)	166	4	1989–1993	1 full term
42	William J. Clinton (D)	364	8	1993–2001	2 full terms
43	George W. Bush (R)	291	8	2001–2009	2 full terms
44	Barack Obama (D)	277	8	2009–2017	2 full terms
45	Donald Trump (R)	220	4	2017–2021	1 full term

[1] Only includes executive orders signed by Franklin D. Roosevelt between 1937 and 1945.

The information in Table 1 was gathered from the Executive Order Disposition Tables from the Federal Register of the National Archives.<sup>80</sup> Although the current orders are numbered, there is no single available master list accounting for the numbers or topics. Thus, it is impossible at the present time to determine with any level of accuracy what the orders really were, how many there were, or even what they were about. It is possible that the OLC keeps a list that it does not allow the public, or even other agencies, to access. This supports the contention that the level of transparency in the OLC is not as complete as the organization asserts.

As significant as the description of the OLC implies it is—especially in the current political climate where recent Presidents see executive orders as their most effective governing tool—the reality is that the OLC is one of the most understudied agencies in the national government in terms of books or scholarly journal articles in peer-reviewed journals in political science or related disciplines. Even judicial process textbooks spend much more time explaining the role of the Attorney General, Solicitor General, or U.S. Attorneys than they do for the OLC.

Still, there *are* books that contain information about the OLC. Generally, however, the OLC is not discussed as a central topic in books or journal articles. The books or articles that do discuss the OLC cover the Office as a secondary topic by focusing on opinions produced by the OLC that are worthy of scrutiny.<sup>81</sup> The most famous example are the so-called “terror memos” written by John Yoo and signed by Assistant Attorney General Jay Bybee in 2002 to defend the Bush administration’s position or decisions made regarding torture, waterboarding, and other interrogation techniques used to gain intelligence in fighting the “war on terror.”<sup>82</sup>

Yoo’s books endeavor to explain his position.<sup>83</sup> The books, and his perspective, come from a position of experience: he was a Deputy Assistant Attorney General in the OLC from 2001 to 2003 and had been general counsel of the U.S. Senate Judiciary

---

<sup>80</sup> *Executive Orders*, FED. REG., <https://www.federalregister.gov/presidential-documents/executive-orders> [<https://perma.cc/Q5NW-B68B>] (last visited Apr. 13, 2025).

<sup>81</sup> See Mittal, *supra* note 18.

<sup>82</sup> Saltzman, *supra* note 13, at 440.

<sup>83</sup> JOHN YOO, WAR BY OTHER MEANS 39 (2006); JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005).

Committee from 1995–1996.<sup>84</sup> He also served as clerk for Justice Clarence Thomas of the U.S. Supreme Court.<sup>85</sup> In 2008, the Office of Professional Responsibility (OPR) of the Department of Justice began investigating whether these memoranda, and others on the general topic, actually violated professional standards that the Justice Department expected its attorneys to adhere to.<sup>86</sup> One of the issues was that it would have been impossible for Bush to have the power he did relating to the war on terrorism without the acquiescence of the OLC.<sup>87</sup>

The investigation by the OPR determined that the memoranda in question violated ethical standards as well as the professional standards expected of OLC attorneys. The memoranda were essentially “torture memos.”<sup>88</sup> The OPR recommended that the attorneys who wrote the memos be disciplined. However, Associate Deputy Attorney General David Margolis provided a memo for the Attorney General which dismissed the recommendation that the attorneys be referred to their state bar associations for discipline associated with ethical violations related to the memoranda.<sup>89</sup> At issue, Margolis insisted, was that the OPR standard was higher than the one typically expected of attorneys.<sup>90</sup> He argued that since the OLC attorneys had never been notified of the stricter standards, they could not be held accountable for upholding them.<sup>91</sup> The other side of the argument, of course, is that neither Yoo nor Bybee upheld the standard generally expected of *any* government attorneys.<sup>92</sup>

Jack Goldsmith, who became head of the OLC immediately following John Yoo, was more conservative in nature and action.<sup>93</sup> His books provide a counterpoint to Yoo’s opinion; they both deserve a place of importance in the scholarly literature studying the OLC. Goldsmith’s book entitled *The Terror Presidency: Law and Judgement Inside the Bush Administration*<sup>94</sup> is an excellent

---

<sup>84</sup> See JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005).

<sup>85</sup> Prof. John C. Yoo, FED. SOC., <https://fedsoc.org/contributors/john-yoo> [<https://perma.cc/35Z7-VQQW>] (last visited Mar. 7, 2024).

<sup>86</sup> Saltzman, *supra* note 13, at 440.

<sup>87</sup> *Id.*

<sup>88</sup> *See id.*

<sup>89</sup> *See id.* at 440–45.

<sup>90</sup> *See id.*

<sup>91</sup> *See id.*

<sup>92</sup> *See id.* at 440.

<sup>93</sup> See GOLDSMITH, *supra* note 32.

<sup>94</sup> *See id.*

example of a more conservative interpretation of the law, leading to Goldsmith's opinion that previous OLC staff (including Yoo) had gone astray. Joseph Lavitt supports that contention; he suggests that Yoo conducted criminal actions in his position in the OLC during the Bush administration.<sup>95</sup> Goldsmith's 2012 book entitled *Power and Constraint: The Accountable Presidency after 9/11*<sup>96</sup> moderates some of his previous opinions, however, and suggests that as the president's powers have expanded, so have the constraints, and thus accountability, placed upon him.

In recent times, the OLC received attention when the question was raised whether the agency approved certain executive orders written by President Trump, for example, those regarding the travel ban into specified Muslim nations. Trump's first presidency was very controversial, and the travel ban question was litigated vigorously.<sup>97</sup> It is thus a reasonable assumption that analysts in the future will produce additional books or articles that investigate the activities of the OLC during the Trump administrations. This article is being written in the years closely following the Supreme Court's ruling that President Trump could dramatically limit asylum seekers while the larger issue of travel bans was being litigated.<sup>98</sup> The ruling meant that the United States would not accept asylum applications from individuals (including unaccompanied children) unless they had first applied to their country of transit and were rejected.<sup>99</sup> President Biden overruled the Trump travel bans through executive action, but the legal implications of OLC opinions are subject to litigation regularly.<sup>100</sup>

There are also law review articles related to the OLC; several of them are essentially seminal. Dawn Johnsen, a former Acting Assistant Attorney General, published guidelines in the *Indiana Law Journal* describing how lawyers in the OLC should perform

---

<sup>95</sup> Joseph Lavitt, *The Crime of Conviction of John Choon Yoo: The Actual Criminality in the OLC During the Bush Administration*, 62 ME. L. REV. 155 (2010).

<sup>96</sup> JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012).

<sup>97</sup> See *Trump v. Hawaii*, 585 U.S. 667 (2018).

<sup>98</sup> See *id.*

<sup>99</sup> Adam Liptak, *Supreme Court Says Trump Can Bar Asylum Seekers While Legal Fight Continues*, N.Y. TIMES (Sept. 11, 2019), <https://www.nytimes.com/2019/09/11/us/politics/supreme-court-trump-asylum.html> [<https://perma.cc/5TFK-MRTR>].

<sup>100</sup> Nicole Narea, *Biden is Ending Trump's Travel Ban*, VOX (Jan. 20, 2021, 5:50 PM EST) <https://www.vox.com/policy-and-politics/2021/1/20/22235986/biden-trump-travel-muslim-ban> [<https://perma.cc/GNB7-AZGD>].

their duties.<sup>101</sup> *Stare Decisis in the Office of Legal Counsel* studies the importance of precedents for the OLC and was published in the *Columbia Law Review*.<sup>102</sup> Trevor Morrison, the author of that article, also served as an attorney with the OLC.<sup>103</sup> Arthur Garrison published an article in the *Albany Law Review* that studies the reasons why opinions by the Attorney General and the Office of Legal Counsel are significant.<sup>104</sup> These articles, and other similar ones, provided a valuable source of information for this project. The Garrison article explicitly summarizes the existing research on the OLC.<sup>105</sup> The studies cited are relatively recent, are centered around very few topics (mainly the “war on terror” memos), and are mostly written by former employees of the OLC.<sup>106</sup>

Although a handful of books and articles have been mentioned that provide insight into the OLC, the importance of the organization is completely disproportionate to the existing research. This relative lack of attention is probably the most important reason why more research about the OLC, and particularly the OLC’s input into presidential decision-making vis-à-vis proclamations and executive orders, is necessary.

#### VIII. ESTABLISHING THE FUNCTIONS OF THE OLC

The Office of Legal Counsel was developed to focus on constitutional questions/issues, executive orders, and defending the presidential administration in court.<sup>107</sup> These functions of the AG’s office are established under 28 U.S.C. sections 511 through 513.<sup>108</sup> These sections allow the AG to provide opinions or advice on questions related to law when the President requires him or her to do so, or when the heads of executive departments or military departments so request.<sup>109</sup> Any component of the DOJ that wishes legal advice or assistance is entitled to have it; all they need to do

---

<sup>101</sup> See Dawn E. Johnsen, *Guidelines for the President’s Legal Advisors (Including “Principles to Guide the Office of Legal Counsel”)*, 81 IND. L.J. 1345 (2006).

<sup>102</sup> See Morrison, *supra* note 74.

<sup>103</sup> *Id.*

<sup>104</sup> See Garrison, *supra* note 50.

<sup>105</sup> *See id.*

<sup>106</sup> *See id.*

<sup>107</sup> *Office of Legal Counsel: About the Office*, *supra* note 2.

<sup>108</sup> *Organization, Mission and Functions Manual: Office of Legal Counsel*, U.S. DEPT OF JUST., <https://www.justice.gov/doj/office-legal-counsel> [<https://perma.cc/CPF2-LHAJ>] (last visited Mar. 7, 2024).

<sup>109</sup> *Id.*

is ask the OLC for that assistance.<sup>110</sup>

The OLC is responsible for drafting formal opinions to be issued by the AG.<sup>111</sup> It is also able to give its own opinions to the executive heads of departments and agencies, and to issue opinions to the White House.<sup>112</sup> The OLC reviews all of the executive orders that the President intends to release for form and legality.<sup>113</sup> The OLC also reviews intended presidential proclamations, as well as regulations that need to be approved either by the President or by the AG.<sup>114</sup> In addition, when law questions arise as a result of operations within the DOJ or the administration of the DOJ, the OLC is empowered to issue opinions to both the AG and the heads of departments.<sup>115</sup> The OLC is also the department that advises the AG on issues relating to the Board of Immigration Appeals.<sup>116</sup> Finally, the OLC studies proposed legislation that has been sent to the DOJ for comments.<sup>117</sup> The OLC also reports to the Office of Management and Budget regarding bills that are under consideration.<sup>118</sup>

#### IX. ORIGINS OF THE OLC AND EVOLUTION OF THE JUSTICE DEPARTMENT

As Presidents are being sworn in, they take a pledge to “preserve, protect, and defend the Constitution.”<sup>119</sup> If the President is to effectively execute the laws of the land, they must first know what the laws are. As Johnsen points out, in order to obey the constitutional directives regarding their obligations to the law, the Presidents also need good legal advice.<sup>120</sup> Presidents need to have their legal questions answered.<sup>121</sup> The federal courts have made it clear over time that they will not provide advisory opinions, so Presidents must look to others for legal advice. This marked the beginning of the dependence on the Attorney General,

---

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> U.S. CONST. art. II, § 1, cl. 8.

<sup>120</sup> Johnsen, *supra* note 101, at 1345.

<sup>121</sup> *Id.*

which continued until the OLC was instituted.<sup>122</sup> Today, the OLC has the final say on the interpretation of most legal issues, although the AG or the President can override the OLC under some circumstances, which Johnsen provides a discussion of.<sup>123</sup>

#### A. *Operating in Obscurity*

The OLC typically worked in relative obscurity up until the time of the Bush administration, when word of Abu Ghraib was leaked to the world.<sup>124</sup> When the memo entitled *Standards of Conduct for Interrogation* was released, it appeared to many readers to be a primer for how to conduct torture on our enemies.<sup>125</sup> The torture issue was ultimately resolved through the legislative and legal processes.<sup>126</sup> The activities of the OLC were placed under a microscope and led to the publication of *Guidelines for the President's Legal Advisors (including "Principles to Guide the Office of Legal Counsel")* by former Acting Assistant Attorney General Dawn Johnsen in 2006.<sup>127</sup> The Office of Legal Counsel would incorporate many of Johnsen's recommendations when they formulated the *Best Practices for OLC Legal Advice and Written Opinions* in 2010.<sup>128</sup>

#### B. *Increasing Numbers of Opinions*

The number of opinions released per year or per administration may be considered more numerous in recent years (especially since the Carter administration), as well as the number of opinions overruled (by the President or Attorney General) or challenged in court, relative to the average length of service for either OLC attorneys or the Assistant Attorney General in charge of the OLC.<sup>129</sup> The OLC has published thirty-three volumes of selected opinions that were written between 1977 and 2008.<sup>130</sup> Another

---

<sup>122</sup> See Saltzman, *supra* note 13.

<sup>123</sup> See Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 L. & CONTEMP. PROBS. 105, 109 (2004).

<sup>124</sup> See Bilder & Vagts, *supra* note 27.

<sup>125</sup> See *id.*

<sup>126</sup> See *id.*

<sup>127</sup> See Johnsen, *supra* note 101.

<sup>128</sup> U.S. DEP'T OF JUST., *BEST PRACTICES FOR OLC LEGAL ADVICE AND WRITTEN OPINIONS* (2010).

<sup>129</sup> See *id.*

<sup>130</sup> See *Opinions by Volume*, U.S. DEP'T OF JUST. OFF. OF LEGAL COUNS.,

volume of supplemental opinions covering selected opinions written between 1933 and 1977 was also published in 2013.<sup>131</sup> It is unclear what percentage of the total number of opinions is included in each volume, but Volume 1 does state that approximately twenty-five percent of the opinions for that year are included.<sup>132</sup> According to a Brennan Center for Justice report, 1,191 opinions were published between 1977 and 2009.<sup>133</sup> The Sunlight Foundation found that thirty-nine percent (201 out of 509) of opinions written during the 1998–2012 time period were not published.<sup>134</sup> There are 1,418 OLC opinions on their official website as of April 13, 2025,<sup>135</sup> but there is truly no way to know how many OLC opinions exist because they are classified or not seen as worthy of public interest since they deal with routine governmental operations.

### C. *Legal Actions Against the OLC*

There have been several lawsuits in recent years trying to force the OLC to release more opinions, using the Freedom of Information Act, by special interest groups. A notable example is the Brennan Center for Justice.<sup>136</sup> In a response to these legal actions, the OLC created a FOIA electronic reading room on its website where roughly 175 memos, letters, and advice letters that were not previously selected for publication can be found.<sup>137</sup> There are also two administrative and miscellaneous documents that discuss Best Practices for OLC opinions and a compilation of lists

---

<https://www.justice.gov/olc/opinions-volume> [<https://perma.cc/MR8W-74L7>] (last visited June 15, 2025).

<sup>131</sup> OFF. OF LEGAL COUNS., 1 SUPPLEMENTAL OPINIONS OF THE OFFICE OF LEGAL COUNSEL OF THE UNITED STATES DEPARTMENT OF JUSTICE, at viii (Nathan A. Forrester ed., 2013).

<sup>132</sup> OFF. OF LEGAL COUNS., 1 OPINIONS OF THE OFFICE OF LEGAL COUNSEL OF THE UNITED STATES DEPARTMENT OF JUSTICE, at v (Leon Ulman ed., 1980).

<sup>133</sup> Morrison, *supra* note 74.

<sup>134</sup> Daniel Schuman & Adeeb Sahar, *39% of Office of Legal Counsel Opinions Kept from the Public*, MEDIUM (June 17, 2018), <https://medium.com/@danielschuman/39-of-office-of-legal-counsel-opinions-kept-from-the-public-f9c32055e6ab> [<https://perma.cc/F7PU-K9ZK>].

<sup>135</sup> OLC Opinions by Date and Title, U.S. DEP'T OF JUST. OFF. OF LEGAL COUNS., <https://www.justice.gov/olc/opinions> [<https://perma.cc/7377-P5D5>] (last visited Apr. 13, 2025) (showing “1,418 Results” before application of any keyword searches or search filters).

<sup>136</sup> GOITEIN, *supra* note 41.

<sup>137</sup> OLC FOIA Electronic Reading Room, U.S. DEP'T OF JUST. OFF. OF LEGAL COUNS., <https://www.justice.gov/olc/olc-foia-electronic-reading-room> [<https://perma.cc/WB65-2RP9>] (last visited June 15, 2025).

of OLC opinions for the years 1998 through 2019.<sup>138</sup> It should be noted, however, that this data relates to known documents, and to decisions that are known to be unpublished, up until the date this article was written. There is no way at this point to be certain that there were, or were not, additional opinions or what they were about. The lawsuits mentioned may or may not bear fruit, and additional opinions may or may not be released or discovered.

#### *D. Violations of Ethical Standards*

In particular, it was the administration of George W. Bush that highlighted potential clashes of interest relating to the role of the OLC. In 2004, John Yoo of the OLC authored a memorandum that discussed the standards for conducting interrogations, commonly referred to in the media as the Bybee Memo.<sup>139</sup> This memo, written by Yoo but signed by Jay Bybee, the Assistant Attorney General, discussed what type of interrogation techniques (including waterboarding and other tortures) could legally be applied to terrorism suspects.<sup>140</sup>

Four years later, the Office of Professional Responsibility (OPR) of the Department of Justice began investigating whether this memorandum, and others on the general topic, actually violated professional standards that the Justice Department expected its attorneys to adhere to.<sup>141</sup> As discussed above, the investigation by the OPR determined that the memorandum in question violated ethical standards as well as the professional standards expected of OLC attorneys.<sup>142</sup> The OPR recommended that the attorneys who wrote the memos be disciplined,<sup>143</sup> and Associate Deputy Attorney General David Margolis provided a memo for the Attorney General dismissing the recommendation that the attorneys be referred to their state bar associations for discipline.<sup>144</sup> Margolis argued that since the OLC attorneys had never been notified of the stricter standards to which they were being held, they could not be held accountable for upholding them.<sup>145</sup> The other side of the argument, of course, is that neither Yoo nor Bybee upheld the standard

---

<sup>138</sup> *Id.*

<sup>139</sup> Saltzman, *supra* note 13, at 440.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*; *see also* discussion *supra* Section VII.B.

<sup>143</sup> Saltzman, *supra* note 13, at 440–42.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

generally expected of *any* government attorneys.<sup>146</sup>

## X. MODERN ROLE OF THE OLC

Although the concentration of agencies must be to win in court, there is a corollary to this position. That corollary is that, to a great extent, consulting with the Office of Legal Counsel has a certain level of immunity-conferring power.<sup>147</sup> Attorney General Michael Mukasey testified in congressional hearing that “the Justice Department . . . could not investigate or prosecute somebody for acting in reliance on a Justice Department opinion,” regardless of whether or not that opinion proved to be incorrect.<sup>148</sup>

A Note by the *Harvard Law Review* supports the contention that the most obvious case of differences of opinion of the legal and moral “rightness” of a decision or series of OLC decisions might be related to torture and the war on terrorism, but the issues truly are not limited to this war. Instead, “[i]t is potentially at stake every time the office interprets a criminal law that applies to the government.”<sup>149</sup>

### A. *Advisory Functions in Support of the Constitution*

The advisory functions of the OLC were originally developed in support of Article II of the Constitution which holds that it is the President’s responsibility to ensure that the laws of the United States are “faithfully executed.”<sup>150</sup> The President must understand enough law and its interpretation to know whether or not a law is legal before he can enforce it. Unless the President is an attorney before running for office, this can be exceptionally difficult to do if the President is functioning alone. It was for this reason that Congress gave the office of the Attorney General the obligation to assist and advise the President whenever he requested, or when any of the heads of departments had questions.<sup>151</sup>

---

<sup>146</sup> *Id.* at 440–41.

<sup>147</sup> See *The Immunity-Conferring Power of the Office of Legal Counsel*, *supra* note 22.

<sup>148</sup> *Id.* at 2086.

<sup>149</sup> *Id.*

<sup>150</sup> U.S. CONST. art. II, § 3.

<sup>151</sup> See *The Immunity-Conferring Power of the Office of Legal Counsel*, *supra* note 22, at 2087.

*B. Elimination of the Assistant Solicitor General*

When this process was instituted, the Assistant Solicitor General or Solicitor General provided the opinions in the Attorney General's name until the middle of the twentieth century. The Assistant Solicitor General's position was eliminated in 1950, and at this point the OLC took on the responsibility of writing the decisions.<sup>152</sup> The Department of Justice regulations state that the OLC must give informal opinions to government agencies, as well as give legal advice to and assist the Attorney General in their position as the President's legal advisor.<sup>153</sup>

XI. OPERATIONAL CONCERNS RELATING TO OLC

Bruce Ackerman is so concerned that the OLC is becoming politicized that he proposes setting up a nine-judge panel to represent the executive branch, but not necessarily the President.<sup>154</sup> These judges would have twelve-year terms, and the terms would be staggered.<sup>155</sup> Thus, each sitting President would be able to nominate three judges during each term.<sup>156</sup> The Senate would have to confirm the judges in order to put pressure on the President to nominate strong and reputable jurists who are not prone to acting like political party members.<sup>157</sup> In this way, Ackerman asserts that the judges would look like a court and act like a court, rather than being there in support of the power of the President.<sup>158</sup> Such a tribunal would be able to stop unilateral assertions of authority which Ackerman clearly believes the OLC has surrendered to.<sup>159</sup> Ironically, Ackerman believes that the final decision on whether or not a situation is legal or constitutional would then be made by the President, and the President could ignore advisory opinions produced by the OLC judicial panel. He concedes his idea is not perfect, but it would support the Founding Fathers' intent to have separation of powers.<sup>160</sup> Unfortunately, if Ackerman's plan were to come to fruition, it would likely be seen

---

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* (quoting 28 C.F.R. § 0.25(a) (2007)).

<sup>154</sup> BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 143 (2010).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 143–44.

<sup>159</sup> *See id.* at 144.

<sup>160</sup> *See id.* at 145–47, 149–50.

by the courts as contradictory to the very separation of powers that the plan aims to protect.

Ackerman may be somewhat of an alarmist; he asserts that something is seriously wrong with the American system of government and swears that the presidency has evolved into “an especially dangerous office” which actually threatens the Constitution.<sup>161</sup> He urges Americans to “act before it is too late.”<sup>162</sup> However, as Trevor Morrison points out, this type of concern is not new; Ackerman simply writes in the tradition of more urgent convictions.<sup>163</sup>

Ackerman and Morrison agree on a few things and disagree on many. They both agree, for example, that the OLC is vulnerable to political pressures that will ultimately lead to problematic legal opinions or negative results.<sup>164</sup> Morrison, however, believes that Bush’s actions regarding enhanced interrogation techniques, for example, and those of the OLC represented what was essentially an accident resulting from a “combination of political, ideological, and psychological factors to which no structure could ever be entirely immune.”<sup>165</sup>

Throughout this article, suggestions by various analysts have been presented. It is Avidan Cover who suggests that one of the main problems is the need for ethical reform in the OLC.<sup>166</sup> By having a broad base of qualified immunity, there is little ability to hold supervisors responsible for the actions or decisions of those attorneys writing the memos.<sup>167</sup> Indeed, one might ask why anyone would bother if there can be no action against the OLC as a whole. However, Cover argues that if there is no way to hold lawyers accountable for their ethical failures or the failures of their

---

<sup>161</sup> See *id.* at 4 (discussing how the office of the President threatens to become the “principal agent of destruction” of the tradition of popular sovereignty and that “a series of developments in politics and communications, bureaucratic and military organization . . . have transformed the executive branch into a serious threat to our constitutional tradition”).

<sup>162</sup> *Id.* at 10–11.

<sup>163</sup> Trevor W. Morrison, *Libya, “Hostilities,” the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 64 (2011) (referencing BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010)).

<sup>164</sup> Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1693 (2011) (reviewing BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010)).

<sup>165</sup> See *id.* at 1743.

<sup>166</sup> See Cover, *supra* note 69, at 269.

<sup>167</sup> See *The Immunity-Conferring Power of the Office of Legal Counsel*, *supra* note 22.

subordinates, there is no point in exploring proposals that have the goal to protect the OLC; there is simply no reason.<sup>168</sup> Even if qualified immunity were stripped from the OLC, or limited to a great extent, other steps would need to be taken. Earlier, it was suggested that Ackerman has proposed increasing the number of attorneys and utilizing a panel of jurists to produce the decisions.<sup>169</sup> Cover also suggests using a larger number of senior lawyers, who would review proposed OLC decisions and then either sign off on them or require that deficiencies be corrected before being signed.<sup>170</sup> This simple procedure change, it is suggested, would increase OLC oversight, improve accountability, and result in legal advice that is both better and more independent.<sup>171</sup>

## XII. LOOKING TO THE FUTURE

As long as the OLC has the ability to influence politics, it is critical that it avoids even the appearance of impropriety. The chief “takeaway” from the research thus far is that the set of activities assigned to the OLC may need to be split into two organizations, with legal advisors to the government and legal advisors to the President and Attorney General being separated.

It appears George Washington had great difficulty finding an attorney who would serve as Attorney General since the conditions of the office were so bad at its inception; in fact, Washington lured Edmund Randolph, the candidate, by telling him it would be easier to attract clients if he took the position.<sup>172</sup> Garrison reports that former Attorney General William Barr, when he discovered what Washington offered Randolph, said “[s]o much for government ethics in those days.”<sup>173</sup>

Levity aside, both Garrison and Barr have a point: government ethics have generally been a bit lacking. Indeed, this suggests one of the reasons why the Office of Legal Counsel has been so important. It is the only office regularly available to the White House to gather what is expected to be a dispassionate and disconnected analysis of the law, without regard for what the White House may, or may not, like. Yet in conducting the research

---

<sup>168</sup> See Cover, *supra* note 69.

<sup>169</sup> See ACKERMAN, *supra* note 154.

<sup>170</sup> Cover, *supra* note 69, at 306.

<sup>171</sup> *Id.*

<sup>172</sup> Garrison, *supra* note 50, at 222.

<sup>173</sup> *Id.* at 222 n.15.

for this paper, it became clear that it would be impossible for the OLC to fail to determine what the President's wishes were.

The very nature of the questions that the Presidents over the years have asked the OLC to rule on would serve to alert the OLC to the answers the President wanted. Thus, the OLC had two possible responses: produce an answer that would support the President's actions, and thus provide them with perceived legitimacy, or provide an answer that would frustrate, and perhaps anger, the President and potentially place the OLC at risk. The research showed that, when possible, the OLC provided responses that would placate or support the President. When they could not, the responses were not published, were redacted, or were made into classified documents. While this did not happen all the time, it happened enough that Garrison, Ackerman, Morrison, and other analysts have concluded that it is past time for revisions to the operation of the office.

### XIII. CAUTIONS

One thread that evolved throughout the course of the research was OLC advice relating to impeachment, beginning with President Richard M. Nixon and reaching through the impeachment actions of President William Clinton and a proposed (and defeated) impeachment of President Trump. During the Trump impeachment, the OLC kept busy providing legal opinions into the investigation of Trump's actions, actions of the FBI, and legal issues relating to potential impeachment actions given the highly contested nature of the 2020 election. It is likely that the OLC will end up working extra hours to accommodate questions relating to election security.

The research for this article suggested it is certainly possible to defend the notion of splitting the functions of the OLC into two separate divisions so that the President receives advice on constitutional issues from one division and the rest of the executive branch receives advice from another division. It would certainly bring the appearance of independence and impartiality to the division not tied directly to the President. The problem is the practical reality would seem to make the arrangement either unworkable or not have the desired effects. The President already has a set of personal advisors in the Executive Office of the President and the internal tension between the President and the Justice Department or OLC continues to exist. The President

would also be able to apply indirect political pressure on the second division through leadership appointments or other processes. More accountability in government is always welcome but the argument can be made that the people who would be held responsible for mistakes either become known (Yoo and Bybee for example) or hold positions that would lead to dismissals or resignations (Attorney General, Assistant Attorney General, etc.).

During the course of research and writing this article, it was even challenging to find out the names of the rank-and-file attorneys of the OLC, so requiring more signatures on opinions from staff would be wonderful for the purpose of transparency or simply providing the benefit of having more information available. Of course, the Department of Justice memorandum on best practices for OLC written opinions indicates that the existing process strives for the highest level of quality and professionalism. If the process is followed as written, the only question would be if any mistake made is intentional (and likely worthy of sanctions) or unavoidable.

As noted earlier, OLC opinions tend to overwhelmingly support the legal position taken by the President. Cover notes that seventy-nine percent of OLC opinions fully supported the President and an additional eight percent of opinions partially supported the President in the timeframe covering the Carter administration to the first year of the Obama administration.<sup>174</sup> From a personal point of view, it is hard to say whether that reality is problematic or not. It is almost certain that the President makes their position clear to the OLC when asking for an opinion by how they frame their question or through direct communication. Lawyers are also ethically bound to zealously defend their client and, as much as the client is expected to be the American people, it is more candid to believe that the OLC represents the only one nationally elected by the public as their chosen leader—the President. After reading many OLC opinions, it is also clear that OLC attorneys objectively advise the President by looking at historical precedents and trying to look at both sides of an issue.

---

<sup>174</sup> Cover, *supra* note 69, at 276 (citing Morrison, *supra* note 74, at 1476–79).

## XIV. CONCLUSION

This author would argue that the best reform is simply more transparency by requiring many more OLC opinions to be released to the public after an appropriate number of years have passed to alleviate any national security or other concerns. The only disappointments of writing this article were the inability to find any former OLC attorney willing to discuss their years of service on record and only having access to roughly twenty-five percent of existing OLC opinions. To be clear, it is completely understandable why these attorneys did not want to speak on record, and their commitment to professional ethics should be applauded. Qualified immunity is also very worthwhile to keep in place for these highly trained lawyers.