

RATIONAL CHOICE AT THE OFFICE OF LEGAL COUNSEL

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What is the best constitution for the executive department, and what are the powers, with which it should be entrusted, are problems among the most important, and probably the most difficult to be satisfactorily solved, of all which are involved in the theory of free governments. No man, who has ever studied the subject with profound attention, has risen from the labour without an increased and almost overwhelming sense of its intricate relations, and perplexing doubts. No man, who has ever deeply read the human history, and especially the history of republics, but has been struck with the consciousness, how little has been hitherto done to establish a safe depository of power in any hands; and how often in the hands of one, or a few, or many, of an hereditary monarch, or an elective chief, the executive power has brought ruin upon the state, or sunk under the oppressive burden of its own imbecility.¹

INTRODUCTION

Discussions of the Attorney General's advisory function, indeed most discussions of the Attorney General's role in general, are carried out in the intellectual shadows cast by two contrasting images. At

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¹ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 277 § 1404 (1833).

one extreme, we imagine someone like the man Edward Bates conjured when he said that "the office I hold is not properly *political*, but strictly *legal*; and it is my duty, above all other ministers of state, to uphold the law and to resist all encroachment, from whatever quarter, of mere will and power."² At the other extreme, we think of someone like John Mitchell, who went to prison as a result of efforts that began when he was Attorney General to advance the political interests of his President.³ Most Attorneys General are thought to fall between these poles, faithful in some considerable measure to the ideal articulated by Bates, but pulled with greater or less reluctance to shape their view of the law to suit the policy preferences or political demands of the administration in which they served.

This pairing of images, which reflects conventional pieties about the "rule of law,"⁴ comes in handy when one wants to take a stick to an Attorney General whose practices or whose President one does not like. The images are also convenient for an Attorney General who wants a stick with which to defend himself from policy or political pressures that he does not like. The use of such rhetorical devices has in turn provoked responses from defenders of Attorneys General who were aggressive in advancing the programs and interests of the Presidents they served. Unfortunately, the academic literature on the Attorney General's opinion function has remained largely in thrall to this intellectual framework, whose origins and suitability are confined largely to the arena of political debate.⁵ This framework must be re-

² Arthur S. Miller, *The Attorney General as the President's Lawyer*, in *THE ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES* 41, 51 (1968) (unsourced quotation from Edward Bates) (emphasis in original). When political circumstances demanded it, Attorney General Bates proved to have a very broad view of what the law allowed his President to do. See, e.g., *Suspension of the Privilege of the Writ of Habeas Corpus*, 10 Op. Att'y Gen. 74 (1861).

³ See *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); 131 CONG. REC. S1696-1700 (daily ed. Feb. 21, 1985) (remarks of Sen. Harkin) (stating that John Mitchell's loyalty to President Nixon caused him to violate the law).

⁴ Except for "fairness" and its cognates, the phrase "rule of law" may be the most abused term in modern legal writing, for it is too often employed as a low-cost substitute for a reasoned elaboration of the grounds of a controversial opinion. Attaching the prefix "quasi" to adjectives like "judicial" is usually an indication of the same sort of substitution, and much of this Article will be devoted to overcoming the paralysis of thought induced by the use of the term "quasi-judicial" to describe the Attorney General's opinion function. For another, and better known example of the pernicious effects of such "quasi" constructions, see *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935); *Morrison v. Olson*, 487 U.S. 654, 685-93 (1988); *id.* at 724-27 (Scalia, J., dissenting).

⁵ The politically driven nature of much of the debate is confirmed by the frequency with which analysts have changed their positions depending on whose ox stood to be gored. This is most obvious in the case of elected politicians. During debates over the nomination of Edwin Meese III, for example, Republicans who had criticized Griffin Bell's nomination as Attorney General because of his close relationship with President Carter defended the nomination of Meese, who had at least as close a relationship with President Reagan. Similarly, Democrats

considered, and the half-truths that have been attached to it must be integrated within a more comprehensive and precise conceptual structure.

This Article begins with a brief examination of the history and theory of the notion that the Attorney General's opinions should be "quasi-judicial," either in the strict sense suggested by Bates or in a slightly relaxed sense that allows some accommodation of the policies of the popularly elected President. Part II then argues that a defensible normative model of the Attorney General's advisory function can be articulated, without recourse to any notion of a quasi-judicial ideal, by analogy to the lawyer's advisory role in private practice. Weaknesses in this analogy result less from real differences in the lawyer-client relationship itself than from differences in the kind of advice that the Attorney General's unique client typically requests.

The Article's remaining sections, which are primarily positive rather than normative, examine the specialized office to which most of the Attorney General's advisory and opinion-writing function has been delegated in recent years.⁶ This delegate, the Office of Legal

who had defended Bell against such criticism criticized the nomination of Meese on the same grounds that they had thought were inappropriate when the President was of their own party. NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789-1990*, at 176 (1992).

Such switches of position, however, have not characterized the comments of professional politicians alone. A recent example has been provided by critics of the Reagan Justice Department like Lincoln Caplan, who wrote a book-length assault on Reagan's second Solicitor General for compromising the "rule of law" by accommodating the administration's policy goals in his briefs to the Supreme Court. LINCOLN CAPLAN, *THE TENTH JUSTICE* (1987). So far as I am aware, neither Caplan nor others who have expressed views like his made a single public criticism when President Bush interfered with the independence of the Solicitor General in a way that went far beyond anything that is alleged to have happened in the Reagan administration. After meeting with representatives of interests materially affected by a case that was before the Supreme Court, President Bush ordered his Solicitor General to file a brief contradicting the position that the Solicitor General had taken in an earlier brief to the Court in the very same case. See Reply Brief for the United States at *9-10 n.*, *United States v. Fordice*, 112 S. Ct. 2727 (1992) (Nos. 90-1205, 90-6588), *vacating Ayers v. Allain*, 914 F.2d 676 (5th Cir. 1990), available in LEXIS, Genfed Library, Briefs File. Linda Greenhouse, *Bush Reverses U.S. Stance Against Black College Aid*, N.Y. TIMES, Oct. 22, 1991, at B6; Ruth Marcus, *Bush Shifts Stand on Aid to Black Colleges; Administration Now Supports Increased State Funding in Mississippi Case*, WASH. POST, Oct. 23, 1991, at A6. What made this case different from those that so alarmed Mr. Caplan, of course, was the different political direction in which President Bush pushed his Solicitor General. Cf. Roger Clegg, *The Thirty-Fifth Law Clerk*, 1987 DUKE L.J. 964 (discussing evidence of political bias in Caplan's analysis).

⁶ Throughout this Article, I will treat the Attorney General's "opinion function" as including both the preparation of formal legal opinions and the provision of legal advice in other forms. For reasons that will become clear in the course of the Article, I believe that examining the formal opinions of the Attorney General (or his delegate) in isolation can be highly misleading.

I should also note at the outset that the Office of Legal Counsel has largely taken over the

Counsel ("OLC"), consciously and even ostentatiously adopts a quasi-judicial posture in dealing with most other executive agencies. In order to explain that behavior, an effort must be made to move beyond the assumption that OLC is simply trying to live up to the ideal that Attorney General Bates articulated.

Part III tests the pioneering reputational capital model of OLC's behavior that has been offered by Professor John O. McGinnis.⁷ I conclude that Professor McGinnis's theory, which is perhaps the first effort to use rational choice analysis to explain the behavior of those who carry out the Attorney General's opinion function, is not well-supported by the empirical evidence. Thus, Professor McGinnis's approach, although far more sophisticated than earlier efforts to explain OLC's behavior, ultimately proves unsatisfactory. The reason, I argue, is that his theory, like others before it, greatly overestimates the real importance of OLC's fabled culture of elite professionalism and of the reputation associated with that culture.

Part IV, the Article's principal analytic section, proposes a novel theory to explain OLC's behavior, using the tools of economic analysis. By focusing on OLC's position in a competitive market for advisory power, I argue that one can explain why the Office sometimes adopts a quasi-judicial posture, as well as when and how we can expect that posture to be relaxed. Unlike other influential legal offices in the government, OLC does not have anything like a monopoly over its most important work: virtually all of the officials to whom it provides opinions—especially the President, the Attorney General, and the heads of agencies—have readily accessible alternative sources of legal advice. The resulting institutional insecurity, the significance of which has been overlooked by previous commentators, is the most important force shaping OLC's behavior, and it sharply distinguishes the Office from others, such as that of the Solicitor General, with which it shares some superficial similarities. Once this controlling force is appreciated, OLC's role in the administrative apparatus of modern government can be explained solely in terms of the incentives

advisory and opinion-writing functions of the Attorney General. For most purposes, OLC can now be understood as standing in the shoes of the Attorney General. In parts I and II of this Article, where I discuss matters that are not peculiar to the modern era, I will usually refer only to the Attorney General, but what I say should be understood to apply to OLC as the Attorney General's delegate. In parts III and IV, where I focus on the modern era, I will almost always discuss the Attorney General and OLC separately, except where the context indicates that what I say is meant to apply to both.

⁷ John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375 (1993).

that operate on the rational self-interest that generally controls attorney-client relations.

This analysis, which yields testable predictions, provides an alternative to conventional theories that are based more on appearances than realities. The approach taken in this Article avoids two related errors that have characterized previous scholarship on this subject: (1) inappropriately generalizing from the quasi-judicial approach taken by OLC in *some* of its work to the conclusion that such an approach is an essential element of the opinion function; and (2) converting the quasi-judicial posture that is typically assumed on the surface of *all* Attorney General and OLC opinions into a normative standard by which to evaluate those opinions.

I. THE TRADITIONAL VIEW

There is a long and well-recognized tradition that treats the Attorney General's advisory function as a quasi-judicial activity from which political and policy considerations should be excluded. Attorney General Griffin Bell, for example, wrote in his memoirs of the "tension between the attorney general's duty to define the legal limits of executive action in a neutral manner and the President's desire to receive legal advice that helps him do what he wants."⁸ Bell felt free to take this distinction virtually for granted and to describe historical events as well as incidents from his own tenure through the lens that it provides. When one examines the origin of the notion reflected in Bell's thought, however, it begins to look much less self-evident.

The source most commonly cited for the traditional view is in an opinion letter written by Attorney General Caleb Cushing to the President in 1854:

In the discharge of the [duty to give his advice and opinion on questions of law to the President and to the heads of departments], the action of the Attorney General is quasi judicial. His opinions officially define the law, in a multitude of cases, where his decision is in practice final and conclusive,—not only as respects the action of public officers in administrative matters, who are thus relieved from the responsibility which would otherwise attach to their acts,—but also in questions of private right, inasmuch as parties, having concerns with the Government, possess in general no means of bringing a controverted matter before the courts of law, and can obtain a purely legal decision of the controversy, as distinguished from an administrative one, only by reference to the Attorney General.

⁸ GRIFFIN B. BELL & RONALD J. OSTROW, *TAKING CARE OF THE LAW* 185 (1982).

Accordingly, the opinions of successive Attorneys General, possessed of greater or less amount of legal acumen, acquirement, and experience, have come to constitute a body of legal precedents and exposition, having authority the same in kind, if not the same in degree, with decisions of the courts of justice.⁹

Cushing himself appears to have had some doubts about the soundness of this view of his office, for he immediately went on to inform the President:

It frequently happens that questions of great importance, submitted to [the Attorney General] for determination, are elaborately argued by counsel; *and whether it be so or not*, he feels, in the performance of this part of his duty, that he is not a counsel giving advice to the Government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and of legal obligation.¹⁰

Cushing appears to have had two reasons for expressing some doubt about the quasi-judicial approach to the opinion function. First, the quasi-judicial attitude he described was not in his view rooted in the statutory source of his office, or necessarily bound up in the nature of the Attorney General's role as a public legal officer.¹¹ He never suggested that the statute establishing the Attorney Gen-

⁹ 6 Op. Att'y Gen. 326, 333-34 (1854).

¹⁰ *Id.* at 334 (emphasis added).

¹¹ As Cushing pointed out, the statute establishing the Attorney General's office imposed on him only two duties:

To prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law, when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters which may concern their departments.

Id.

Cushing noted in passing that Congress established the office of Attorney General "in organizing the judicial business of the United States," but he did not suggest that the quasi-judicial character of the Attorney General's opinion function was in any way connected with the fact that the office had been created as part of the Judiciary Act of 1789. *Id.*

In describing the various "incidental" duties imposed on the Attorney General since 1789, Cushing indicated that they could be classified either as "purely legal and administrative rather than legal." *Id.* at 336. The ensuing description of those duties does not expressly state to which category each duty belongs, but the descriptions seem to suggest that administrative duties are those that could just as well be performed by a person without legal training (such as conducting the assay of gold and silver for coinage), while "purely legal" duties are those that do require such training (such as supervising the litigation of land claims arising under cessions of territory to the United States). *Id.* at 336-37.

It is perhaps significant that Cushing mentions, without giving the matter any discussion at all, that the Attorney General was once called upon by statute to adjudicate claims under a treaty with Peru. *Id.* at 337. This task sounds as though it is *truly* quasi-judicial, and that it could therefore usefully be compared with the Attorney General's opinion function. In a subsequent opinion the following year, it became clear that this business of adjudicating claims

eral's office dictated the *manner* in which either of its two original and principal functions (providing legal opinions and conducting litigation in the Supreme Court) were to be performed, and he contrasted the quasi-judicial attitude that had attached itself to the opinion function with the advocate's approach that he considered self-evidently appropriate when conducting suits before the Supreme Court.¹²

Second, and perhaps more important, Cushing also believed that the President had the power to direct the Attorney General to perform duties not expressly authorized by statute,¹³ and he adopted a theory under which Congress could not free the Attorney General or

raised a somewhat different set of questions, to which Cushing was not able or willing to provide complete responses:

Of duties imposed on a Head of Department, unofficial, and where his name of office appears only as a *designatio personae*, an example is afforded in the statute which provided "That the Attorney General of the United States shall be, and is hereby, authorized and empowered to adjudicate the claims arising under the Convention concluded between the United States and the Republic of Peru." (ix Stat. at Large, p. 80.) A case, exactly corresponding to this in its legal relations, is the power, conferred by statute on the judge of the District Court of the United States for the Northern District of Florida, to adjudicate certain claims arising under a treaty between the United States and Spain. (*The United States v. Ferreira*, xiii Howard, p. 40.) To the same class of legal relations appertain the duties in regard to pensions, formerly assigned by statute to Circuit Courts of the United States, and which they declined to perform as not being duties of their office. (*Hayburn's case*, ii Dall. p. 409.)

7 Op. Att'y Gen. 453, 470-71 (1855). In its context in the 1855 opinion, this is a somewhat surprising statement, for it is given as an illustration of a class of tasks, akin to purely ministerial or mechanical functions, that heads of departments perform independently of the President and without being subject to his direction. Cushing does not explain why these tasks must or may be performed outside the President's supervision or how such tasks may be distinguished from those that can only be carried out under the President's supervision. Nor does Cushing address the question, raised but left undecided by the *Ferreira* Court, whether such "unofficial" appointments can constitutionally be made by an authority other than the President. He therefore leaves open the questions subsequently drawn into controversy when Congress began undertaking in a more aggressive fashion to establish what is sometimes called the "headless fourth branch of government." For my purposes here, the crucial point is that Cushing drew no analogy whatsoever between the adjudication of claims, a truly quasi-judicial function performed "unofficially" by the Attorney General as well as by other Federal officials, and the Attorney General's "official" opinion function.

¹² See 6 Op. Att'y Gen. 326, 335 (1854).

The other duty prescribed by the act of 1789, that of conducting the suits of the United States in the Supreme Court, is, of course, the function of an advocate, subject to the conditions only of the conscientious and honorable discharge of such a function, and with official relation both to the Government and the Supreme Court.

Id.

¹³ "[T]he President may undoubtedly, in the performance of his constitutional duty, instruct the Attorney General to give his direct personal attention to legal concerns of the United States elsewhere [than in the Supreme Court], when the interests of the Government seem to the President to require this." *Id.* Cushing had previously noted that the statute creating the office of the Attorney General, unlike the statutes creating some of the executive

the Attorney General's subordinates to exercise discretion inconsistent with the will of the President:

[Settled constitutional] theory, as we shall hereafter see, while it supposes, in all matters not purely ministerial, that executive discretion exists, and that judgment is continually to be exercised, yet requires unity of executive action, and, of course, unity of executive decision; which, by the inexorable necessity of the nature of things, cannot be obtained by means of a plurality of persons wholly independent of one another, without corporate conjunction, and released from subjection to one determining will; and the doctrine [under which subordinate officers could claim a right or duty to exercise independent judgment] is contradicted by a series of expositions of the rule of administrative law by successive Attorneys General.¹⁴

Cushing did not draw the conclusion that the Attorney General's legal judgment was subject to the determining will of the President. What stopped him, however, had nothing to do with the supposedly quasi-judicial nature of the opinion function. On the contrary, he noted that the Attorney General's advice, unlike the decision of a court, is not something that must be sought or obeyed.¹⁵ Furthermore, as Cushing would later point out, Attorney General opinions,

departments, did not in terms authorize the President to assign additional tasks not specifically set out in the law. *Id.* at 332.

¹⁴ *Id.* at 342-43. In even stronger words, Cushing asserted in another opinion that was issued the following year:

I hold that no Head of Department can lawfully perform an *official* act against the will of the President; and that will is by the Constitution to govern the performance of all such acts. If it were not thus, Congress might by statute so divide and transfer the executive power as utterly to subvert the Government, and to change it into a parliamentary despotism, like that of Venice or Great Britain, with a nominal executive chief utterly powerless,—whether under the name of Doge, or King, or President, would then be of little account, so far as regards the question of the maintenance of the Constitution.

Without enlarging upon this branch of the inquiry, it will suffice to say that, in my opinion, all the cases in which a Head of Department performs acts, independent of the President, are reducible to two classes, namely: first, acts purely ministerial; and, secondly, acts in which the thing done does not belong to the office, but the title of the office is employed as a mere *designatio personae*.

⁷ Op. Att'y Gen. 453, 469-70 (1855) (emphasis in original).

¹⁵ See 6 Op. Att'y Gen. 326, 334 (1854):

Although the act, requiring this duty of the Attorney General [to render opinions], does not expressly declare what effect shall be given to his opinion, yet the general practice of the Government has been to follow it;—partly for the reason already suggested, that an officer going against it would be subject to the imputation of disregarding the law as officially pronounced, and partly from the great advantage, and almost necessity, of acting according to uniform rules of law in the management of the public business: a result only attainable under the guidance of a single department of assumed special qualifications and official authority.

like all others, are governed by the psychological truth that an opinion is by nature something that can only be one's own.¹⁶ But even if no one can command another to hold an opinion with which he disagrees, a request for advice can certainly be framed in a manner calculated to elicit an opinion that has the nature of advice to a client rather than the nature of a disinterested imitation of the work of a judge. And Cushing could hardly have been ignorant of this obvious fact. It is, therefore, a small step from Cushing's analysis to the conclusion that the Attorney General acts in a quasi-judicial manner, rather than (in Cushing's words) "as a counsel giving advice to the Government as his client," only because and only to the extent that the President directs or allows him to act in such a manner.¹⁷

The tension that Cushing subtly pointed out between the theory of the unitary executive and the Attorney General's habit of behaving in a judge-like fashion has become a staple of discussions of the Attorney General's role in our government. Perhaps in part because of inattention to Cushing's subtlety, however, the quasi-judicial *habits* and *appearances* of Attorneys General have been transformed into a

¹⁶ See 7 Op. Att'y Gen. 453, 463-64, 478 (1855):

[I]n the President is the executive power vested by the Constitution, and also because the Constitution commands that HE shall take care that the laws be faithfully executed: thus making him not only the depository of the executive power, but the responsible executive minister of the United States.

I perceive, in the Constitution or in the general statutes of departmental organization, no departure from this rule except where advice or an opinion is to be given. That advice or opinion must of course embody the individual thought of the officer giving it. Thus, when the President calls on any of the Heads of Department for "advice," either in writing or verbal, such advice must, in the nature of things, be their act, not his. So when the "opinion" of the Attorney General, "upon questions of law," is requested by one of the Secretaries, it is his opinion, not that of the President, and equally so when that opinion is required by the President himself, just as when the President demands executive advice of the Attorney General or of the Secretaries.

... If an administrative act involve legal questions, as to which the President or a Head of Department entertains doubt, or as to which doubts may exist in the public mind, and require to be removed or encountered, then the opinion of the Attorney General is demanded. If that opinion is accepted, as it usually is, as the law of the case, although the responsibility of action still is participated in by all the coactors, yet of course a greater relative weight of responsibility devolves on the Attorney General.

Id.

¹⁷ As I read Cushing's 1854 opinion, he may have been inviting the President to take just this step and then decide for himself whether or to what extent he wanted Cushing to continue behaving in a quasi-judicial fashion. The 1855 opinion, which is more aggressive in its articulation of the doctrine of the unitary executive than the 1854 opinion, could suggest that the President took the invitation and decided to change past practice. Other interpretations, of course, are quite possible, and without more detailed historical research, this is only speculation.

kind of ideal that controls the way in which we think about the opinion function. One recent major historical study of the Attorney General's advisory function, for example, takes as its theme the conflicting loyalties engendered by the Attorney General's supposedly dual roles as advocate for the President and neutral expositor of the law.¹⁸ Similarly, a recent effort to analyze the Justice Department's role in the development of legal policy concludes that the tension between law and politics is both so deeply rooted and so acute that the Attorney General's function may need to be removed in a wholesale manner from the President's control.¹⁹ Indeed, the literature on the Attorney General's role is pervaded by meditations on the difficulties and dilemmas that Attorneys General face in accommodating the pressures on them to adjust their legal analysis in the face of political and policy considerations.²⁰

A conflict so often remarked on is almost certainly not a mere illusion. But does this tension provide any real tools for theoretical

¹⁸ See BAKER *supra* note 5. To her credit, Baker's use of this intellectual framework does not lead her to the simplistic conclusion that "political considerations" should be entirely extirpated from the Attorney General's advisory function.

¹⁹ CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* 50-51 (1992) ("The Attorney General became a paradox within the framework of U.S. government. It was an executive branch office reliant on the Article II power, yet assigned legal functions to be carried out independent of partisan political considerations.").

That the Justice Department has become the primary and most effective weapon in the quest to aggrandize presidential power may be reason enough for us to reexamine the option of an independent Attorney General. In the wake of *Morrison v. Olson*, the question should increasingly be formulated in terms of whether such independence would be politically *desirable* rather than constitutionally *possible*. *Id.* at 236 (emphasis in original).

²⁰ See, e.g., DANIEL J. MEADOR, *THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE* 37 (1980).

Naturally Presidents would prefer to avoid the awkward and politically undesirable position of acting contrary to an Attorney General's legal opinion. For this reason Presidents desire opinions which support their proposed courses of action. Therein lies a source of tension for the Attorney General and the Office of Legal Counsel.

Id.; Griffin B. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 *FORDHAM L. REV.* 1049, 1068 (1978) ("[T]he independence of the Attorney General has only a general and uneven tradition to support it, and a complexity that resists easy resolution."); Miller, *supra* note 2, at 41, 51.

The relationship of the attorney general to the President is made more difficult because the attorney general is a *political* officer charged with *legal* duties. He is called upon to render both political and legal advice to the President, as well as legal advice to the other departments of the government.

Id. (emphasis in original); Note, *The Confrontation of the Legislative and Executive Branches: An Examination of the Constitutional Balance of Powers and the Role of the Attorney General*, 11 *PEPP. L. REV.* 331, 349 (1984) ("The confusion surrounding the role of the Attorney General is due in part to the fact that the office has a built-in schizophrenic nature.").

analysis, or is it just a gussied-up example of the conflict that virtually any government employee can encounter between what he believes should be done and what he believes the President or one of the President's political appointees wants to do? Or, to put the question in terms suggested by Cushing's analysis, should we consider abandoning the assumption that the Attorney General's opinion function ought to be conducted in a quasi-judicial fashion?

II. THE PRIVATE LAWYER MODEL

One way to begin addressing these questions is to ask what is meant by calling the Attorney General's advisory function "quasi-judicial." What Cushing and others seem to mean is that the advice-giver provides legal analysis uncolored by or disregarding of the client's interests. What this amounts to is the removal of a constraint on the analyst (in this case the Attorney General), which is replaced with the duty to say what he thinks the law really is. So long as the analyst is assumed to have no other interests of his own, the removal of that constraint should dramatically increase the correspondence between the conclusions he reaches and those actually dictated by the law, since the only remaining constraint would be the limits of the analyst's legal acumen. As everyone knows, however, things are not so simple. The analyst has his own interests, which have to be suppressed if he is truly to act as an oracle of the law. And that does not happen automatically, if it happens at all. Whether the (largely unenforceable) demand that the analyst suppress his own interests will lead to his arriving at conclusions more in accord with the law than he would if he were conducting his analysis in light of the interests of his client (whether that be understood as the President or "the government") is not clear at all.²¹

What *is* clear is that removing the constraint of serving a client's interests is a benefit to the analyst: it leaves him free either to enjoy the intellectual pleasure of expressing uninhibitedly his own opinion of what the law is or to promote other interests of his own, such as moving the law in the direction he prefers or currying the approval of audiences who can affect his career after he leaves office. Removing the constraint of the lawyer-client relation is likely to lead "quasi-

²¹ Even in the case of Article III judges, where much trouble has been taken to remove incentives that would incline the analyst's legal acumen to be influenced by anything other than the merits of the arguments, there is reason to believe that the institutional interests of the judiciary, as well as the personal beliefs and interests of the judge, have a considerable impact on the conclusions reached. The same is surely true of law professors and other pundits, who take no oath of office and whose careers can be greatly affected by the degree to which their analysis both conforms with current intellectual fashions and has the appearance of originality.

judicial" Attorneys General, whether consciously or not, to pursue their self-interest in ways other than by enjoying the purely intellectual satisfaction of exercising their powers of legal analysis. But there is no obvious reason why the Attorney General's interests should take precedence over those of the President. One must therefore ask whether the ideal of a quasi-judicial Attorney General is useful at all. Instead, might the opinion function be thought of more profitably by analogy with the advisory function of a lawyer in private practice? The remainder of this section probes that analogy.

In private practice, the client sets the objectives and the lawyer's function is to help the client understand the legal constraints and risks that should be weighed by the client in pursuing those objectives. The quality of the advice is measured by the degree to which it enables the client to make fully informed decisions, and, when the advisor is presented with those interesting cases that call for "creative lawyering," by the lawyer's success in devising ways to lower the risk (or the risk/benefit ratio) entailed in pursuing the objectives set by the client.

Within very broad bounds, clients are generally considered free to ask for any sort of legal advice they want.²² In some circumstances, they may want to know whether a proposed course of action is clearly legal, and in others whether a proposal is clearly illegal. Sometimes they may ask for an assessment of the likelihood that a proposed action will be upheld by the courts and at other times they

²² The breadth of the client's freedom to determine what sort of legal advice he wants is suggested by the American Bar Association's Model Rule of Professional Conduct 1.2, which provides in relevant part that:

(a) A lawyer shall abide by a client's decisions concerning the objective of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. . . .

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1989); *cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1989) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.").

may want to know how likely it is that a proposed course of action will trigger an enforcement action by the government or a lawsuit by a private party. It is not unusual for a client to request a menu of options together with an assessment of the legal risks of each item, and it is not unheard of for a client simply to describe what he wants to do, giving the lawyer the task of figuring out the best way to get it done within existing legal constraints.

Like clients in private practice, the President is responsible for his own decisions, and in fact he has the authority either to make his own legal determinations without consulting any particular lawyer or to proceed in the face of contrary advice from any lawyer he does consult.²³ Accordingly, there is no obvious reason for him to have less freedom than private clients to require from his lawyers the kind of legal advice he thinks will be most useful to him. It is true that the President has legal obligations that are different from those of any private citizen, but they are *his* obligations, not those of his lawyers or other subordinates.²⁴

²³ Perhaps the most famous example of the exercise of this authority is the legal opinion that President Franklin D. Roosevelt delivered to his own Attorney General, declaring the legislative veto unconstitutional in the face of the Attorney General's contrary suggestion. See Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353 (1953). An incident that seems in some way even more startling had occurred earlier in the century:

[President] Taft presided over a presidential court to determine the legal meaning of the word "whiskey" raised under the pure food laws, since his attorney general and solicitor general disagreed on the scope of the definition. The president summoned Attorney General Charles Bonaparte and the secretary of Agriculture to sit with him while he heard two days of argument by distinguished counsel. After that, he read the 1,200 pages of testimony taken earlier by the solicitor general. Then Taft wrote his own opinion in the appropriate judicial manner and directed the secretaries of Agriculture, Commerce, Labor, and Treasury to use it in preparing regulations under the pure food law. His definition was broader than that suggested by either of his law officers.

BAKER, *supra* note 5, at 14 (footnote omitted). For a more recent example, see BELL & OSTROW, *supra* note 8, at 24-28 (discussing President Carter's decision to ignore an OLC opinion, which had been endorsed by the Attorney General, recommending on constitutional grounds against a proposal to use public funds to pay the salaries of certain persons working in church schools).

²⁴ Note that I am focusing on the Attorney General's obligations, not the President's. Undertaking to determine what kind of advice the President ought to seek from his legal advisors is an interesting and difficult question. But unless it could be shown that the Attorney General is obliged to substitute his own judgment about the President's obligations for the President's judgment, it does not seem necessary to fully understand the President's obligations before one can understand those of the Attorney General.

The difference between these two issues is suggested, I think, by the difference between the President's unique constitutional oath and the oath requirements that apply to the Attorney General. Unlike the President, who must swear or affirm that he will "to the best of [his] Ability, preserve, protect and defend" the Constitution, U.S. CONST. art. II, the Attorney General, like other state and federal officers, is constitutionally required only to bind himself to "support" the Constitution. U.S. CONST. art. VI. Similarly, like virtually all other federal

Nor does the Attorney General's role as legal advisor to the heads of other departments require abandoning the analogy with a private lawyer. In order to facilitate the achievement of goals articulated by the chief executive officer, large private organizations employ lawyers to provide legal advice and guidance to the organization's other officers and employees. Depending on circumstances and the judgment of the people involved, those goals may be thought to require a cautious or aggressive approach to the law. There is no obvious reason why similar choices should be foreclosed to the President and the Attorney General. The law does not by its terms purport to limit the President's discretion to control what kind of advice the Attorney General or his delegate should provide to the heads of agencies or other executive officials. Nor does it indirectly limit the President's power of control either by requiring the heads of agencies to obtain the Attorney General's advice before acting or by depriving them of access to legal advice from sources other than the Attorney General.

As in the case of private corporations, where the lawyer's client is understood in a technical sense to be the firm itself,²⁵ rather than

employees except the President, the Attorney General is required by statute to take an oath that is phrased in very general terms:

I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

5 U.S.C. § 3331 (1988). Nothing in this oath need be read to require the Attorney General, or other government lawyers or employees, to restrict the sort of requests for advice they will honor, beyond the kind of restrictions that are also imposed in private practice.

When considering the Attorney General's advisory function, one must avoid confusing a government lawyer's legal and professional obligations with his personal scruples. No one is compelled to hold these jobs, and there are a whole variety of reasons why particular individuals may not want to work, or continue working, for a particular President or for any President. One such reason could be that one considers it personally unacceptable to be asked to provide certain sorts of legal advice. Such personal scruples are not binding on other people, and they are not the same as legal obligations.

²⁵ The ABA Model Rules of Professional Conduct provide: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(a) (1992). The rule recognizes that, in order to fulfill his obligations to the organization, a lawyer may sometimes have to refer a matter to the highest authority that can act on behalf of the organization. Where the highest authority insists upon proceeding in a manner "that is clearly a violation of law *and* is likely to result in substantial injury to the organization, the lawyer *may* resign[.]" MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(c) (1992) (emphasis added). The ABA's comment on Rule 1.13 indicates that government lawyers may operate under additional constraints imposed by statute and regulation and that "a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 cmt. (1992). This vague and unexceptionable remark is hardly inconsis-

the particular human being who serves as chief executive officer, there are no doubt any number of ways in which the Attorney General's function must be and is distinguished from the advisory role played by the President's personal attorney. In both the public and private sectors, doubts may arise about the exact location of the dividing line between the chief executive officer's private and official interests, and the legal advisor may be confronted with an occasional dilemma resulting from a discrepancy between his own and his client's perception of that line. In neither case, however, do such line-drawing problems demand any significant alteration of the normal attorney-client relation or transformation of the lawyer's advisory function into that of a judge.

It is also true that the operation of the government is subject to a different and more comprehensive set of legal constraints than the operation of private enterprises, since the executive department exists in a sense only to implement the Constitution and laws of the United States. This obviously creates differences in the nature of the goals pursued by those whom the Attorney General advises (and concomitant presumptions that government lawyers routinely indulge about the kind of advice that is expected of them), as well as differences in the body of law that will be relevant. But these differences between private and public clients do not necessarily imply any fundamental difference in the nature of the attorney-client relation itself.²⁶ If it did, it would be hard to see why *every* lawyer in the government (and maybe every other employee, as well) should not set himself up in a quasi-judicial role.²⁷

Thus, the analogy between the Attorney General's opinion func-

tion with my contention that the Attorney General may properly honor a range of requests for legal advice that is not significantly narrower than its private-sector counterpart.

²⁶ Cf. John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371, 373 (1988).

[T]here is a fundamental error in proceeding from arguments about good ways to run the government to arguments about legal obligation. Let me phrase the question this way: does the President have an obligation to make the government run smoothly? In a sense he does—in the sense that it is his obligation to be a good President. But this obligation is not the same as his duty to follow the law. The underlying distinction I want to stress is between the things the President is legally obliged to do and the things he ought to do in order to get the job done right. The Constitution contains many incentives for the President to do his job well: incentives appealing to patriotism, to love of honor, and to love of power. Those incentives, however, are not legal obligations.

Id.

²⁷ For a penetrating exploration of some common misunderstandings about the attorney-client relationship in the context of government employment, see Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987).

tion and the advisory role of a private lawyer seems to capture adequately the normative implications of the doctrine of the unitary executive as it is reflected in our law.²⁸

The private-lawyer analogy may also help to explain aspects of the modern OLC's quasi-judicial posture that do not seem to fit readily into such a framework. One illustration may be taken from Professor Douglas W. Kmiec's discussion of OLC's advice on the legality of a proposed Executive Order restricting the sale of pornography by the Government.²⁹ In Professor Kmiec's view, this incident is an example of one pernicious effect that can arise from OLC's cautious, quasi-judicial approach to providing legal advice: the client receiving the advice may not understand the difference between a conservative assessment of litigation risks and a determination by OLC that a proposal is "illegal" or "unconstitutional."³⁰

No one would defend a practice that is likely to cause a lawyer to mislead his client, whether in private practice or anywhere else. In this sense, Professor Kmiec's criticism of OLC's quasi-judicial posturing is fully consistent with the private lawyer model that I have sketched out. A closer look at the pornography incident, however, will show that this posturing may actually be defensible under the very same model.

As Professor Kmiec describes the incident, OLC was asked to evaluate whether the President could ban all sexually explicit material from Federal retail outlets, including those on military bases.³¹ This

²⁸ I am speaking here only of the Attorney General's advisory function. A different analysis would be required with respect to some of the other roles that the Attorney General plays in administering the law.

I should also emphasize that when I advert to the doctrine of the unitary executive, I am assuming constitutional and statutory law as it currently exists, without reference to whatever the Framers of the Constitution may have contemplated and without reference to reform proposals that may be advocated by those who are dissatisfied with current law. Cf. Susan L. Bloch, *The Early Role of the Attorney General in our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561; Lawrence Lessig, *Readings by Our Unitary Executive*, 15 CARDOZO L. REV. 175 (1993). From time to time, there have been proposals to alter statutory law in ways that would greatly diminish the Attorney General's ability or right to enjoy a normal attorney-client relationship with the President. See, e.g., *Removing Politics from the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974). The constitutional questions raised by such proposals are beyond the scope of this Article. Similarly, even if one believed that most such proposals would be unconstitutional, one could still ask whether the Constitution should be amended to allow them. Addressing these questions would carry one deeply into the intellectual thickets alluded to by Justice Story, see STORY, *supra* note 1, and such a journey is far beyond the scope of this Article.

²⁹ Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337, 359-62 (1993).

³⁰ *Id.* at 361-62.

³¹ *Id.* at 360.

was apparently not the President's idea, or that of anyone in his administration: "Congress, in the person of Senator Armstrong" was pressing this proposal as an alternative to a narrower Executive Order, which did originate in the administration.³² The proposal that the administration had generated focused only on child pornography, legally obscene materials, and juveniles' access to sexually explicit materials.³³ OLC acknowledged that there was a plausible constitutional argument that Senator Armstrong's proposal would not violate the First Amendment, but cautioned that the courts might well not accept this argument.³⁴

In Professor Kmiec's account, OLC's advice caused the Armstrong proposal to be rejected, and he criticizes that advice because it "seems more calculated to preserve the status quo[] than to fully demarcate the extent of the President's authority."³⁵ But is it so clear that President Reagan would have wanted legal advice that stressed the arguments in favor of his ability to accept the Armstrong proposal? On the contrary, it is easy to imagine that the President would not have enjoyed the prospect of choosing either to offend some of his supporters by seeming unnecessarily tolerant of pornography or to provoke the ridicule and resentment of others by taking an apparently unnecessary slap at the numerous members of the military who purchase popular magazines like *Playboy*. If the Armstrong proposal put the President to the choice between looking too soft on pornography (to some) and (to others) too hard on our soldiers, OLC advice emphasizing the litigation risks entailed in the proposal might have helped the President out of an awkward situation by changing the nature of the decision the President had to make.

To the extent that Professor Kmiec's suspicion that President Reagan was misled by OLC's advice is based on direct personal contact with the President, I must naturally defer to that first-hand knowledge. The evidence that Professor Kmiec presents, however, seems at least equally consistent with the hypothesis that the President may have been deliberately seeking to deflect onto OLC some of

³² See *id.* Professor Kmiec is of course using literary license when he identifies Senator Armstrong with the Congress. If Senator Armstrong had had the votes for his proposal in the legislature, he would not have needed to lobby for an Executive Order.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 361. I leave aside Professor Kmiec's discussion of *Rust v. Sullivan* and his suggestion that OLC erred by overstating the litigation risks of the Armstrong proposal. Without access to the exact terms of the legal analysis on which OLC relied in providing advice about the Armstrong proposal, this suggestion cannot be evaluated. In any event, as Professor Kmiec recognizes, this issue is not crucial to the main point of his discussion of the pornography proposal.

the responsibility for his own decision to reject the Armstrong proposal. In *The Attorney General's Lawyer*,³⁶ Professor Kmiec provides a more detailed account of this incident. There, he relates that his discussion of the issue with President Reagan occurred during a meeting attended by Senator Armstrong (to whom OLC had previously given a detailed explanation of its views), and Professor Kmiec seems clearly to imply that repeated discussions of the issue with the Counsel to the President had given the White House good reason to expect that OLC would firmly recommend against adopting the Armstrong proposal.³⁷ Thus, to believe that President Reagan failed to understand that OLC's assessment of the litigation risks entailed in the Armstrong proposal was not tantamount to a declaration of unconstitutionality by OLC, we must apparently assume a serious lapse not only by OLC but also by the Counsel to the President and by Senator Armstrong himself. It seems quite impossible to suppose that the Counsel to the President would have misunderstood the distinction between a cautious analysis of litigation risks and an independent assessment of the proposal's constitutionality. Nor does it seem likely that the Counsel to the President would have hesitated to ask OLC for an independent assessment of the Armstrong proposal's constitutionality if such an assessment seemed more likely to enable the President to do something he really wanted to do. Not long before this incident, after all, President Reagan had declared an enrolled bill unconstitutional in the face of clear Supreme Court precedent to the contrary,³⁸ and the Department of Justice had achieved some notoriety for maintaining that the Executive could refuse, on constitutional grounds, to implement or defend the Competition in Contracting Act even after several courts had declared the statute constitutional.³⁹

If, however, President Reagan understood the nature of OLC's

³⁶ DOUGLAS W. KMEIC, *THE ATTORNEY GENERAL'S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT*, 89-92 (1992).

³⁷ *Id.* at 91-92.

³⁸ See Veto of the Fairness in Broadcasting Act of 1987, 23 WEEKLY COMP. PRES. DOC. 715 (June 19, 1987). In this statement, President Reagan declared the so-called "fairness doctrine" (under which the FCC had at one time regulated the editorial practices of broadcasters) unconstitutional under the First Amendment, contrary to clear Supreme Court precedent. *Id.* Although the President noted that the Supreme Court had hinted at a willingness to reconsider its decision upholding the fairness doctrine, the judgment rendered in the President's veto message purports to rest on an independent interpretation of the Constitution.

Before the Armstrong incident, moreover, Reagan had demonstrated his seriousness on this issue by threatening to veto an omnibus appropriations bill near the end of a fiscal year, thus potentially forcing the cessation of large elements of the government's ordinary functions, unless a rider codifying the fairness doctrine was removed from the bill. See 45 CONG. Q. 3185 (1987). The rider was removed.

³⁹ See KMEIC, *supra* note 36, at 54-57.

advice perfectly well, but wanted to seem as sympathetic as possible to Armstrong's anti-pornography sentiments without accepting his proposal, it would have made considerable sense for him to affect an air of deference to OLC's legal concerns during the meeting with the Senator. This would have enabled him to deflect some of the responsibility for the decision to his "expert" advisor, thereby escaping the dilemma in which Senator Armstrong had put him.

Whatever the facts may actually have been in this case, Presidents would obviously find it useful to engage in such deflection of responsibility from time to time. What lawyer has not had the experience of being used by his client in this way, in private practice and elsewhere, often at the lawyer's own suggestion? Surely Presidents have more frequent occasions than most clients to find such tactics useful, and there is no discernable reason why they wouldn't choose to use them.

A similar hypothesis can be constructed with respect to another incident in which OLC's performance is criticized by Professor Kmiec.⁴⁰ As Professor Kmiec points out, a startling constitutional theory emerged in late 1987 under which the President was said already to possess a great power that many holders of that office, including Ronald Reagan, had often said they badly wanted: the authority to veto individual portions of bills presented to them, while allowing the remainder to become law.⁴¹

This theory of the "inherent item veto" was rejected in a formal OLC opinion the following summer.⁴² Professor Kmiec offers the 1988 OLC opinion as an example of excessively cautious advice that inappropriately inhibited the President from pursuing legitimate policy goals.⁴³ Asserting that OLC's rejection of the inherent item-veto theory "was a great disappointment to the President,"⁴⁴ Professor Kmiec suggests that President Reagan would have been more likely to test the theory if he had understood that OLC was only "exhibiting its highly cautious approach to the rendering of legal advice."⁴⁵

Assuming for the moment that OLC's item-veto opinion was highly cautious and that a defensible opinion could have been written to support the conclusion that the inherent item-veto authority ex-

⁴⁰ See Kmiec, *supra* note 29, at 353.

⁴¹ *Id.*

⁴² The President's Veto Power, 12 Op. Off. Legal Counsel 159 (1988) (preliminary print).

⁴³ See Kmiec, *supra* note 29, at 353-54.

⁴⁴ *Id.* at 353.

⁴⁵ *Id.* (OLC's handling of the item-veto issue illustrates that the Office's guise of impartiality is possibly misleading to the President.)

ists,⁴⁶ it is still easy to imagine that President Reagan may have been

⁴⁶ I do not believe that such an opinion could have been written. It may be useful to supplement Professor Kmiec's discussion of this issue with a slightly more detailed summary of the arguments that support OLC's conclusion.

The inherent item-veto theory was apparently first articulated by a lawyer named Stephen Glazier in the *Wall Street Journal* in late 1987. Stephen Glazier, *Reagan Already Has Line-Item Veto*, WALL ST. J., Dec. 4, 1987, § 1, at 14. The essence of the argument is that the item veto power is implicit in Article I, Section 7, Clause 3 of the Constitution ("Clause 3"), which requires that every "Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment)" be presented to the President (and thus subject to his qualified veto) before it can take effect, just as in the case of a legislative instrument denominated a "Bill." U.S. CONST. art. I, § 7, cl. 3. The term "bill" is itself undefined in the Constitution. According to Glazier, a President may decide that a "bill" addressing more than one subject actually contains more than one "order, resolution, or vote," which he can sign or veto separately. Glazier concludes that Clause 3 "gives the President the power to veto individual line items of appropriations bills, and any part of any other bills." Stephen Glazier, *The Line-Item Veto: Provided in the Constitution and Traditionally Applied*, in PORK BARRELS AND PRINCIPLES: THE POLITICS OF THE PRESIDENTIAL VETO 12 (National Legal Center for the Public Interest 1988).

In response to the objection that this implicit presidential authority could hardly have been overlooked for 200 years by every President and every other student of the Constitution as well, Glazier argues that there had been no need to find or use it because presidents possessed and used the very same power under the name "impoundment," a term that refers to refusals by the President to spend money appropriated by statute. The need to recur to Clause 3, says Glazier, arose only with the curtailment of the impoundment power in the 1974 Budget and Impoundment Control Act and with the modern increase in the congressional proclivity to bundle numerous, often unrelated, legislative measures into single bills.

This theory suffers from fatal weaknesses, several which are explored in detail in the OLC opinion. I will summarize a few of the arguments here.

First, the broad scope of the Clause 3 power described by Glazier, which includes the power to veto, not only items of appropriation, but also "any part of any [non-appropriations] bill," is inconsistent with his claim that it is simply the power of impoundment under another name. But it is also difficult to see how one could find a limit on the scope of the Clause 3 power, so as to make it congruent with the impoundment power, that would fit with the broad language of Clause 3 itself. Neither Glazier nor Professor Kmiec addresses this difficulty.

Second, the theory is by no means the only, or the most natural, way to give meaning to the constitutional language on which it is based. What the language of Clause 3 obviously and emphatically accomplishes is to prevent Congress from nullifying the President's veto power simply by giving an instrument of legislation some label other than "bill." As the OLC opinion demonstrates, moreover, this was in fact the original and recognized purpose of the Clause 3 language.

Third, the inherent item-veto theory entails the conclusion that the President's veto power is greater than that of either the Senate or the House of Representatives. The Constitution gives each chamber of Congress an absolute veto over legislation proposed by the other. The Constitution gives the President something less: a qualified veto, subject in most instances to override by a supermajority of both houses. U.S. CONST. art. I, § 7, cl. 2. If the inherent item veto exists, however, the President actually has *more* power in the legislative process than either house of Congress, for he alone can amend a bill and cause his preferred version to become law without obtaining approval of the amended version from either of the other two institutional participants in the legislative process. It is virtually inconceivable that the Constitution would use language that on its face gives the President *less* legislative power than either house of Congress to implicitly grant him *more*.

Fourth, there is strong historical evidence that the Framers of the Constitution were acutely aware both of the practice of bundling unrelated measures together in a single legisla-

less disappointed with the opinion than he wished to acknowledge. During the first half of 1988, when the item-veto issue was under consideration, the Reagan administration had been subjected to noisy and widespread charges of lawlessness, and to extremely aggressive congressional investigations, putatively in response to the Iran-Contra Affair. To have exercised a major constitutional authority that had neither been claimed nor even alluded to by any previous President, especially when that authority was one that would significantly diminish congressional power, would plainly have been quite foolhardy. And it would have been foolhardy even if the legal basis for the claim had seemed considerably less dubious than OLC said it was. In such circumstances, President Reagan's desire to exercise the item veto may have been tempered considerably by his recognition of the political dangers of pursuing so legally aggressive an option. Again, OLC's cautionary advice served to relieve the President from choosing between what must have been unpalatable alternatives.

tive package and of the tactical uses to which bundling could be put in order to create obstacles to the veto of legislation. But the Framers declined to forbid or discourage this practice in terms or by any sort of clear implication. It is quite fantastic to suggest that they armed the President, through remote indirection, with a lethal weapon that he could deploy against such tactics, especially a weapon so stealthy that it appeared on nobody's radar for two centuries.

Finally, there is a straightforward but devastating textual argument: If the inherent item veto exists, the President could not exercise it by crossing out the disapproved portions of a bill, or by stating which portions he does not accept. The Constitution is absolutely without ambiguity in describing how the President must exercise his qualified veto over legislation presented to him by Congress: except in the special case of bills presented to him within ten days of a congressional adjournment (which are subject to the "pocket veto"), the only way he can veto a bill is to "return it, with his Objections to that House in which it shall have originated." U.S. CONST. art. I, § 7, cl. 2. Therefore, if the President were to treat a legislative package as a collection of separate bills, the only way he could veto part of the package would be to *cut it out with scissors*, send it back to the originating House, and approve what was left after this physical surgery. It takes no great feat of imagination to realize that Congress, through clever draftsmanship, could make it extraordinarily difficult for the President to physically excise portions of a legislative package that he disliked without affecting the portions that he wished to approve. It takes a tremendous leap of imagination, however, to suppose that the bizarre procedure with the scissors, which was never mentioned by anyone who had anything to do with framing or adopting the Constitution, is somehow implicitly authorized by constitutional language that on its face serves a completely different purpose.

Professor Kmiec suggests that irresponsible congressional practices such as bundling a full year's appropriations into one bill, and then presenting it to the President at the end of a fiscal year, effectively deprive the President of his veto authority. See Kmiec, *supra* note 29, at 353-59. In response, I would note only that President Reagan proved by his actions that this is untrue. He vetoed such a bill in 1981, and got considerable political benefit from doing so. Furthermore, in 1987, he threatened to do it again unless two objectionable riders were removed from such a bill, and Congress did not dare to defy him. See Jacqueline Calmes, *Reagan Wins Concessions in Final Funding Bill*, 45 CONG. Q. 3185 (1987).

For a compendium of arguments against the inherent item veto, and a review of the large and growing literature, see Michael B. Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 735 (1993).

My purpose is not to allege that OLC's legal advice was in fact shaped by the political needs of the President in this case. On the contrary, the power of the arguments in the OLC opinion make such an hypothesis wholly unnecessary.⁴⁷ Rather, I am arguing that a President's decision to defer in public to cautious legal advice that creates an obstacle to his own announced goals does not necessarily imply that he would have wished to receive a different answer.

Examples like this could be multiplied, all leading to the conclusion that the quasi-judicial face that OLC offers to the world in its elaborate and scholarly opinions is not necessarily inconsistent with the normal dynamics of an attorney-client relationship.⁴⁸ Such examples, however, do not necessarily demonstrate that such a relationship in fact exists. As Professor Kmiec's recollections show, and as I am sure everyone who has worked in or with OLC would agree, there are institutional traditions within that Office—of caution, of scholarship, and of independent thinking—that do give the place something of the air of a judge's chambers.⁴⁹

The existence of these institutional traditions, and even a certain amount of behavior that actually amounts to something like quasi-judicial decision making, is completely compatible with the hypothesis that OLC actually functions according to the private lawyer model. Establishing the truth of this counterintuitive proposition, and explaining the hidden relations between OLC's quasi-judicial pos-

⁴⁷ The inherent item-veto theory was reconsidered during the Bush administration. Although the circumstances were quite different, both with respect to the nature of the President's interest in the matter and with respect to external political factors, the decision was ultimately the same. On March 20, 1992, more than three years into his administration, President Bush announced with manifest regret that he would not test the theory because his legal advisors had concluded that he did not have the inherent item veto. 28 WEEKLY COMP. PRES. DOC. 510 (Mar. 20, 1992). In light of President Bush's repeated public expressions of fascination with the inherent item-veto theory, and the political attractions of testing such a theory during a time when the budget deficit was a politically pressing issue, it is probably safe to surmise that an excessively cautious legal opinion from the previous administration would not have been much of an obstacle to the President's doing what he apparently wanted to do. *Cf.* Authority of the Federal Bureau of Investigation to Override Customary or other International Law in the Course of Extraterritorial Law Enforcement Activities, 13 Op. Off. Legal Counsel 195 (1989) (preliminary print) (overruling 1980 OLC opinion).

⁴⁸ The production of elaborate and scholarly opinions is by no means confined to lawyers who think they are performing a quasi-judicial function, or indeed to lawyers in the public sector. Important legal opinions by sophisticated private-sector lawyers often rival or exceed the care and attention to detail that characterize judicial and quasi-judicial opinions. *See generally* SCOTT FITZGIBBON & DONALD W. GLAZER, FITZGIBBON AND GLAZER ON LEGAL OPINIONS (1992).

⁴⁹ Except perhaps for OLC's tradition of scholarship, which may be matched only by the Solicitor General's office and the Office of the Legal Advisor at the State Department, similar differences from the atmosphere usually encountered in private practice can be found, in varying degrees, in many government law offices.

ture and the forces that actually drive its decisions, will require a somewhat extended analysis.

The best way to begin this analysis is by examining an important recent effort to explain OLC's behavior as an outcome of the incentives faced by those who are employed there. This effort, for which we are all indebted to Professor John O. McGinnis, offers an impressive and initially plausible application of the tools of political science to the behavior of OLC. As I will demonstrate in part III, however, Professor McGinnis's model is not supported by the empirical evidence I have examined. In part IV, I offer a substantially different model that I believe accounts for all the evidence offered by Professor McGinnis as well as for the evidence that his theory cannot explain.

III. THE REPUTATIONAL CAPITAL THEORY

Professor McGinnis acknowledges the power of the quasi-judicial tradition by contending that it creates the most important problem facing those who for the most part carry out the Attorney General's opinion function in the modern Department of Justice:

The central dilemma for any Assistant Attorney General of OLC is how to provide his clients, particularly his key patrons, the White House Counsel and the Attorney General, with advice and opinions they find generally congenial while at the same time upholding the reputation of the office as an elite institution whose legal advice is independent of the policy and political pressures associated with a particular question.⁵⁰

By speaking only of the need to preserve the Office's *reputation*, Professor McGinnis seems to imply that those who head the Office do not necessarily believe that they ought to remain insulated from the policy and political pressures to which they are subjected. This impression is reinforced when Professor McGinnis describes the value of OLC's reputation as an independent decision maker to those "patrons" who are the most important sources of the pressures from which OLC strives to seem immune:

[T]he reputation of OLC for legally principled advice has political and policy value for the President and the Attorney General. Precisely because the President (and to a lesser extent the Attorney General) have so many political responsibilities, the legal force of even their purportedly legal decisions or views may be discounted. And yet the President is likely to want his legal views to have force. . . . Hence it is useful for the office to cultivate a reputation of applying the law scrupulously without regard to political or pol-

⁵⁰ McGinnis, *supra* note 7, at 422 (footnote omitted).

icy interest.⁵¹

No one who has given serious attention to the processes of government can be unaware of the gaps that arise between reputation and reality, or of the strong forces that induce participants in those processes to take actions for reasons they are unwilling to acknowledge publicly. Accordingly, there is nothing radical or immediately implausible in Professor McGinnis's effort to explain OLC's behavior as he does.

When we turn to Professor McGinnis's discussion of constitutional theory, however, his analysis of OLC's behavior is thrown into a somewhat different light. Professor McGinnis suggests that the traditional view of the distinction between legal judgments and political or policy judgments should be discarded, or at least significantly modified, as it applies to the Attorney General and OLC. Thus, he argues that legal interpretation by the executive appropriately gives significant weight to practical considerations that may conflict with the abstract principles that are thought to control quasi-judicial or strictly legal judgments, and that the judiciary ought to modify its own doctrines so that they pay greater respect to the validity of the executive's policy-laden legal judgments.⁵²

⁵¹ See *id.* at 424.

⁵² See *id.* at 397-401.

[I]t is not clear that the Constitution contemplates that the President and his subordinates will exercise their constitutional responsibilities with a jurisprudence whose methodology exactly tracks that of the judiciary; and the independent authority model does not necessarily imply that Attorney General opinions not resemble those that would be produced by a shadow court of jurists following the President's jurisprudential principles. The President is not insulated from public passions in the same way that life tenure insulates the Article III judiciary. Indeed, at least some of the Framers believed it important that the people influence constitutional interpretation through their political representatives: only in this way can people correct constitutional usurpations. Given that the President's constitutional responsibilities are, as a matter of constitutional structure, more closely related to the people's will, the independent authority model can be expected to generate opinions that should reflect in part some of that "will" and not partake only of the "judgment" expected of the judiciary. The premises of the independent authority model may thus tend to move the executive branch toward a more political mode of interpretation.

Indeed, if legal reasoning were made up of different elements, and if no one system of jurisprudence were likely to arrive at just results on its own, it would seem reasonable for each branch to contribute the kind of legal reasoning in which it has a comparative advantage. In this way, as a general matter, the analytical product of a system of institutionally distinct interpreters may result in a product superior to that of a single system.

... [S]tare decisis as applied by the judiciary in recent times has looked only to judicial precedent to determine whether a constitutional issue should be treated as settled. However, if constitutional law is understood to be constituted by a

One implication of this argument may be that OLC ought to be liberated, at least in some significant measure, from what Professor McGinnis calls its "central dilemma." Indeed, Professor McGinnis goes so far as to hint that OLC can be viewed as a kind of Warren Court writ small, which can make decisions on the basis of distinctively executive principles that are more properly characterized as unprincipled when they are employed by a court:

Occasionally, [OLC's] political capital is spent in giving the President the benefit of the doubt on a close issue that is of particular importance to him, just as occasionally the [Supreme] Court appears to make an unprincipled decision for the greater social good.⁵³

If one assumes some kind of systematic coincidence between the President's preferences (at least on issues that are especially important to him) and "the greater social good," one can start to imagine the possibility of OLC's developing a kind of hybrid jurisprudence in which the President's policy preferences are openly incorporated into the legal analysis supplied by OLC lawyers. OLC could then be seen as performing, with a greater claim to legitimacy, a role that the Supreme Court has played during some of its more aggressively policy-oriented periods.

This prospect raises a number of intriguing possibilities. One can imagine, for example, that if the courts were willing to recognize such a jurisprudence as a legitimate exercise of the executive power, it might somewhat relieve the pressure that courts feel to incorporate their own views of sound policy into their decisions. It might also cause the President to exercise greater care in choosing the extra-legal considerations that he wants incorporated into OLC's decision making because those considerations would be more openly displayed in the resulting opinions than they traditionally have been. And perhaps not least significantly, such a development might give OLC enhanced status and power within the government.

Professor McGinnis does not expressly draw the implications that I have just suggested, perhaps because of a distinction that he repeatedly makes between separation of powers questions and other

reflective equilibrium brought about by executive (and perhaps legislative and state) interpretation as well as judicial interpretation, then stare decisis should not be confined to an inquiry into past judicial interpretation. Instead, stare decisis should be replaced by a broader doctrine of constitutional closure that regards constitutional law as settled only when concurred to (for some period of time or through some number of instances) by more than one branch of government.

Id.

⁵³ McGinnis, *supra* note 7, at 435.

legal issues. When the institutional interests of the presidency are at stake, he suggests, the President and his legal advisors have a constitutional warrant for systematically resolving doubtful questions in ways that strengthen the power of the presidency. Professor McGinnis believes this warrant is rooted in the expectations of the Framers; he also contends that it has been vindicated by the development within the executive department of a principled separation of powers jurisprudence that serves as a salutary counterweight to the competing principles that drive the legal views of the legislative and even the judicial departments.⁵⁴ Professor McGinnis does not, however, openly contend that the Executive has or should develop a coherent and articulated jurisprudence to compete with those of the other departments on matters of statutory construction generally or on constitutional issues that are not directly related to the authority of the President's office.

Perhaps the reason for treating separation of powers questions differently from other issues is obvious. When the interests of the President's office are at stake, he and his legal advisors can plausibly be thought to be working on behalf of principles that are more durable and more directly rooted in the Constitution than the transitory political and policy considerations that are presumed to drive what Professor McGinnis sees as the "occasional" expenditure of reputational capital by OLC in behalf of the President.

This distinction, intuitively attractive as it is, does not seem to be

⁵⁴ The following passages from Professor McGinnis's Article are illustrative:

[T]he President is, in a very real sense, the party in interest in separation of powers cases that involve his prerogatives. Not surprisingly, the Framers believed that the President would use his power of legal interpretation to safeguard his own office. Indeed, there are systemic reasons as well not to object to an intrusion of the executive branch's institutional interests into its interpretation in separation of powers issues: institutional interests will surely have a particularly strong influence on the other branches' interpretation of constitutional provisions that affect their own institutional prerogatives and the prerogatives of the competing branches. Given the inevitability of strong institutional interests in this area, it would appear that a plausible solution is to permit the constituent parts of the system to pursue their self-interest with the confidence that a system so constituted could work more easily the public interest. Thus, a vigorous advocacy by the Attorney General of the executive branch's institutional interests on separation of powers questions in his opinions could be seen to redound to the benefit of the constitutional system as a whole.

McGinnis, *supra* note 7, at 399-400 (footnotes omitted).

[T]here is little risk to OLC's reputation in advocating a version of the jurisprudence on executive-congressional separation of powers issues that aggressively advances the executive interest with little regard for court precedent because the permanent interests of the executive branch are likely to generate a coherent and articulated jurisprudence that has substantial continuity between administrations.

Id. at 431 (footnote omitted).

required by Professor McGinnis's constitutional theory of executive interpretation of the law. On the contrary, that theory suggests that executive interpretation should be less "abstract" than judicial interpretation and that it should accommodate reasons for decision that give greater weight to the "will" that we associate with political behavior.⁵⁵ Such reasons, however, sound at least as much like the policy and political considerations from which OLC seeks to seem immune as they do like the "principles" that underlie the relatively coherent jurisprudence that has developed to support the institutional interests of the presidency.

For this reason, one might think that Professor McGinnis's constitutional theory would hold great attraction for OLC as an institution. With a bit of elaboration along the lines I have just suggested, it seems to offer the hope of liberation from what he sees as the central dilemma facing the head of OLC. Were this theory adopted, there would seem to be no longer any need for OLC to masquerade as a quasi-court or to conceal its willingness to accommodate the President's political needs and policy agenda in its decision making.

Professor McGinnis seems to offer his constitutional theory as something of an innovation—one that is generally compatible with OLC's institutional interests and that may be worthy of the respect of other institutions, especially the judiciary. But he does not push it as far as its logic seems to point, and he certainly does not claim that OLC itself has adopted the full version that seems implicit in his presentation. Why not? Again, there is an obvious answer suggested by Professor McGinnis's analysis: this would seem so radical a departure from conventional notions of legal interpretation that OLC's reputational capital would be depleted, thus undermining its ability to perform its essential functions and especially its ability to "spend" its reputational capital by giving the President the benefit of the doubt in close cases that particularly interest him.

But is this really true? Professor McGinnis asserts that OLC strives to *appear* as a disinterested, court-like provider of legal analysis and judgments,⁵⁶ and I have no doubt that this is true in significant measure. It also seems clearly true that there is a point beyond which complete indifference by OLC to the need for cultivating such a reputation would be self-destructive. Suppose, for example, that the Office persistently and systematically construed statutes in a manner that flouted legislative intent, perhaps in order to advance a presidential policy agenda that differed significantly from the policies embodied in

⁵⁵ See *id.* at 397.

⁵⁶ *Id.* at 378-80, 421-25.

statutes considered important by a working majority of the legislature and embraced by the bureaucratic cultures of the agencies charged with implementing those statutes. Congress would surely take steps to stop such conduct. Short of engaging in such extreme behavior, however, I suspect that OLC's need to maintain its reputational capital is quite limited, for the simple reason that I doubt such capital actually exists. If I am right about this, Professor McGinnis's reputational capital model does not adequately account for OLC's behavior, and we must look for another explanation.

In order to see why I am skeptical of the reputational capital theory, one must ask what "audiences" or "consumers" the President would be concerned with, and whose behavior might be affected by OLC's reputation. There are three obvious possibilities: the legislative and judicial departments of the government, and the press. For the moment, I leave aside OLC's reputation within the executive department because the *President* need not be concerned with spending reputational capital in this forum, except to the extent that his subordinates are actually controlled by other political actors, such as Congress.⁵⁷ I return to consider OLC's reputation within the executive, and the usefulness of that reputation to the President, in part IV.

A. Congress

One cannot easily use the public record to assess OLC's reputation in Congress, or to determine whether it has any significant effect in shielding the President when OLC resolves a close question in his favor. Statements by individual members reveal little, since the legislature is so large and diverse that virtually any significant interest or point of view can usually find someone to act as its representative. Committee reports, which purport to provide the reasoning on which legislative action is based, are also notoriously unreliable indicators of

⁵⁷ As I will discuss in part IV, OLC may have something of a reputation for quasi-judicial decision making among some executive agencies. As Professor McGinnis points out, this reputation would have some value in reducing the incentives that agencies might otherwise have to appeal adverse decisions from OLC to the Attorney General or the President after OLC has settled an interagency dispute. Except where the Attorney General or the Department of Justice has an interest in the dispute, however, the costs of maintaining this reputation should be quite low, or (as I will suggest in part IV) even negative. Thus, this cannot be the basis for what Professor McGinnis calls the "central dilemma" faced by the head of OLC. At least in theory, moreover, the President himself should have no need for OLC to expend its capital in his behalf in this context since there can ordinarily be no appeal of interagency disputes beyond the President. (One limited exception involves the so-called "independent agencies." See, e.g., *Mail Order Ass'n of America v. United States Postal Serv.*, 986 F.2d 509 (D.C. Cir. 1993). The Executive Order from which OLC derives its authority to resolve interagency disputes does not cover these agencies, see Exec. Order No. 12,146, sec. 1-4 (1979), and OLC may not have much of a reputation for quasi-judicial decision making among these agencies.)

the motives actually at work in the legislative process. Such reports are typically the work of congressional staff, often with considerable assistance from private lobbyists or administration officials and very little guidance from those who bear formal responsibility for their contents. Committee reports, moreover, have obvious uses—such as influencing the interpretation of statutes by courts and administrative agencies—other than to reflect the actual reasons for legislative decisions. It would therefore be hazardous to draw inferences about the real effects of OLC's efforts at building reputational capital solely from Congress's public records.⁵⁸

Based on my own experience in dealing with the Congress on behalf of the executive, I would guess that there is very little aware-

⁵⁸ It would also be hazardous to take at face value the oaths of fealty to the Edward Bates model of the opinion function that have been extracted from some recent nominees at their confirmation hearings. For obvious reasons, some members of the Senate Judiciary Committee have had an interest in promoting the notion that the opinion function ought to be exercised without regard to the President's interests. See, e.g., *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 52 (1990) ("Senator HEFLIN: Do you see your office [Assistant Attorney General for OLC] as legal in nature or policy-oriented in nature? Mr. LUTTIG: Without any question, Mr. Chairman, the office is legal in nature. I personally have never had an interest much in policy. My interest is in law and, by design, that's precisely what the office is supposed to do, and that is only what it's supposed to do."); *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. 87 (1989) ("The CHAIRMAN: . . . [D]o you see your office as legal in nature, policy oriented in nature, or something else altogether? Mr. BARR: Senator, I view the office as purely legal in nature . . . Now, I think the tradition of the office—its great value in the Government has been precisely its capacity to [inform the Attorney General as to where the law stands] and to build up the reputation that it is the one place you could go perhaps in the executive branch for that objective opinion that is not driven by any particular policy concerns."); *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 489 (1988) ("Senator KENNEDY: Mr. Kmiec, will you give the committee your assurance that, if confirmed as Assistant Attorney General, you will fairly interpret the law . . . ? Mr. KMIEC: The Office of Legal Counsel has a long tradition of providing candid and objective advice, notwithstanding the fact that it sometimes disappoints the recipient of that advice. I intend to maintain that tradition.").

Not all nominees have been so willing to embrace the quasi-judicial model of the opinion function. See, e.g., *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 546 (1985) ("The CHAIRMAN: If an occasion should arise when your best legal advice conflicted with a policy which you knew the Attorney General wished to pursue, what actions would you take to attempt to resolve the conflict? Mr. COOPER: Well, Senator, it would be the responsibility of the Assistant Attorney General for the Office of Legal Counsel to research and analyze, in a painstaking and careful way, the legal ramifications of any policy . . . and advise the Attorney General of those legal ramifications. If it appeared that a policy initiative conflicted with the best legal judgment of the Office of Legal Counsel, it would be the responsibility of the Office of Legal Counsel to make the Attorney General aware of that, and to advise him of the legal aspects of any such policy."). The fact that Cooper's statement appears to follow the private-lawyer model more closely than the quasi-judicial model should not lead us to assume that he exercised less independent judgment or was in any sense more "political" than his successors.

ness of the role that OLC plays within the Department of Justice, and even less inclination to give credence to the Office's efforts to cultivate a reputation as a quasi-judicial decision maker. When someone has an interest in doing so, it is not very difficult to remind or inform appropriate members of Congress that Department of Justice legal opinions are generally treated as binding throughout the executive department. This information will obviously be relevant, especially as to matters in which judicial review is impossible or unlikely, if a legislator is considering whether new legislation is necessary or desirable. But recognition of the fact of OLC's power to give interpretations that are binding within the executive department implies nothing about the Office's reputation as a source of quasi-judicial analysis.

Bill comments are the OLC work product that Congress sees the most of, and the most common are those that advance OLC's theory of the proper division of rights and responsibilities between the executive and legislative departments.⁵⁹ I feel pretty safe in saying that the legal argumentation contained in these comments on pending legislative proposals, which is often quite complex and scholarly, has negligible credibility in Congress. If they are read at all, which I suspect is not often or not widely, they are probably regarded for the most part as quite outlandish, and even insulting, by Democrats and Republicans alike. What does impress those at whom these arguments are aimed—and I believe this is the only thing that impresses them—is a credible threat that the President will veto a bill because of a constitutional objection.⁶⁰ It is quite unlikely, however, that the credibility of

⁵⁹ For more detailed discussions of the bill comment function, see McGinnis, *supra* note 7, at 431-34, and Kmiec, *supra* note 29, at 338-45.

⁶⁰ There is also at least one analog to the veto that has sometimes proved effective: the possibility that the President will refuse to implement a statute because he regards it as unconstitutional. When he approved the National and Community Service Act of 1990, Pub. L. No. 101-610, 104 Stat. 3127 (1990), for example, President Bush issued a signing statement discussing what he regarded as constitutional defects in the language establishing a commission created by the statute to administer the most important programs established in the Act. Under the statute, a variety of restrictions were placed on the President's freedom to choose nominees for this commission, which the President regarded as violations of the Appointments Clause. The President said that these restrictions were "without legal force or effect." 26 WEEKLY COMP. PRES. DOC. 1833 (Nov. 16, 1990).

So long as the President refused to nominate candidates for the commission, the congressionally mandated programs would not be administered. See Appointment of Members of the Bd. of Directors of the Comm'n on National and Community Serv., 14 Op. Off. Legal Counsel 173 (1990) (preliminary print). In the course of the signing statement, the President also indicated that he was not particularly enthusiastic about the programs that this commission was to administer, while he strongly favored a separate part of the act. Congress therefore had reason to believe that the President might refuse to make the nominations required by the statute. In a burst of speed that would otherwise be mystifying, Congress passed remedial legislation bringing the statute into conformity with the President's view of the Appointments Clause

such threats is enhanced or diminished by the quality of the legal arguments that OLC advances to explain the threat (whether quality is measured by consistency with the original meaning of the Constitution, with the decisions of Article III courts, or with positions taken in the past by incumbent or previous Presidents, Attorneys General, or heads of OLC).

Those in Congress who are accustomed to receiving from the Department of Justice legal analysis that they regard, when in a charitable mood, as very aggressive advocacy of the interests of OLC's client are not likely inclined to presume that OLC behaves in a less client-oriented way when opining on matters that do not directly involve issues of presidential authority. In any case, even if OLC were regarded in Congress as a highly principled decision maker, there would be few occasions on which such a reputation would be relevant.

In matters of statutory construction, for example, Congress faces two kinds of questions when responding to, or anticipating, authoritative interpretations of its legislative output by implementing agencies, whether they be courts or executive agencies charged with administration or enforcement responsibilities. First, does an interpretation given to previously enacted statutes accord with what Congress now wants the law to do? If not, it is largely irrelevant whether: a) the statute was incorrectly interpreted by those charged with its implementation; b) the statute was poorly drafted by a prior Congress; or c) that Congress for whatever reason now wants the law to be different than it has been in the past. Whatever the cause, the remedy would be the same: amend the statute so that it will accomplish what Congress now wants done. Second, what steps need to be taken to ensure that a statute will be implemented in a way that accomplishes its animating purposes? To answer this question, legislators (or those to whom they delegate the task of drafting bills, committee reports, floor statements, etc.) need a rough sense of the rules of construction that will be used by those responsible for its implementation. To the extent that those rules of construction are clear (and shared among the entities responsible for implementation), the job of draftsmanship will be easier. But even if there is a lack of clarity, created for example by unprincipled decision making or by the use of different principles by different implementers, this would only mean that legislators would need to take such facts into account in their draftsmanship. They might take it into account by carefully using clear and precise language in order to prevent implementers' rules of construction from

early in the next session. *See* National and Community Service Technical Amendments Act of 1991, Pub. L. No. 102-10, 105 Stat. 29 (1991).

affecting the statute's implementation.⁶¹ Or they could deliberately use vague language in order to shift responsibility for policy choices from the legislature to another entity.⁶² In both cases, one could say that the implementing agency's reputation in Congress had affected legislative behavior, but one could not say in either case that these effects had anything to do with the use of reputational "capital" to avoid consequences adverse to the interests of the implementing agency or the President.

When one turns from issues involving statutory construction to questions of constitutional interpretation, a different analysis is required. Leaving aside issues involving the separation of powers, the congressional treatment of which has already been discussed, one needs to ask whether it makes any difference to the President whether OLC's interpretation of the Constitution is likely to be given credence in Congress. One might imagine that it could make a difference in the following way. If OLC were regarded in Congress as a reliable predictor of whether the courts were likely to uphold constitutionally questionable legislative proposals, the Office's reputation might occasionally be used to dissuade the legislature from passing constitutionally dubious proposals. This ability to block proposals might be useful to the President in several ways. It could save him from having to decide whether to veto a bill that contained a constitutionally objectionable provision along with other provisions that he favored on policy grounds. It could also save him, in cases where such a bill became law, from having to decide whether to enforce the constitutionally dubious provision or defend it in court. And it might occasionally enable him, by trickery as it were, to prevent the enactment of constitutionally sound proposals to which he objected for other reasons.

Perhaps Congress does sometimes defer to OLC's legal judgments in this way, but my own impression is that legislators (assuming that they have any real interest in constitutional analysis at all) are unlikely to give credence to OLC's constitutional analysis just because it comes from OLC or the Department of Justice. It is more likely, I suspect, that legislators will impute ulterior political motives

⁶¹ Obviously, there are limits on the power of clear language alone to control the courts or other implementing agencies. *See, e.g.,* *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). Because they are not relevant to my argument, I abstract from the complex of factors that would need to be discussed if one were trying to offer a complete account of the many ways in which courts, agencies, and legislatures can impose constraints on one another.

⁶² This phenomenon is discussed at length in M. HAYES, *LOBBYISTS AND LEGISLATORS* ch. 5 (1981). For a rich and recent collection of examples, see the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

to the administration's opposition to a proposal or will be more swayed by their own interests in passing a bill than by whether the courts would be likely to uphold it.

One illustration of this phenomenon occurred in the aftermath of the Supreme Court's decision in *Texas v. Johnson*⁶³ that flag burning is protected by the First Amendment. The Bush administration quickly joined with congressional critics of the decision to support a constitutional amendment that would have provided: "The Congress and the States shall have power to prohibit the physical desecration of the Flag of the United States."⁶⁴ In the face of a public outcry so loud and widespread that enactment of such an amendment seemed quite possible, congressional opponents proposed as an alternative that Congress adopt a statute prohibiting the desecration of the Flag.⁶⁵

The most obvious problem with this proposed legislation was that it seemed to fly straight in the face of the Court's decision in *Texas v. Johnson*, as the Senate Judiciary Committee was told by the head of OLC during hearings on the bill: "[I]t cannot be seriously maintained that a statute aimed at protecting the Flag would be constitutional."⁶⁶ The Committee's Report dismissed OLC's conclusion and arguments in a series of footnotes that respectfully cited the contrary views of several law professors.⁶⁷ The Committee Report's casual dismissal of OLC's views stands in striking contrast with its apparent deference to the law professors who disagreed with OLC's prediction that the Supreme Court would surely invalidate the proposed flag protection law.⁶⁸ Although certain Republicans on the Committee seemed to give more weight to OLC's views than the majority did,⁶⁹ even some of the Republicans seemed to rely at least as much on witnesses from the private sector as on OLC.⁷⁰

⁶³ 491 U.S. 397 (1989).

⁶⁴ S.J. Res. 180 101st Cong., 1st Sess. (1989); H.J. Res. 350 101st Cong., 1st Sess. (1989). Within days of the Court's decision in *Texas v. Johnson*, President Bush had called a press conference to announce that he supported amending the Constitution, and that his administration would work with congressional supporters of an amendment to draft the language. See 25 WEEKLY COMP. PRES. DOC. 1006 (June 30, 1989); 25 WEEKLY COMP. PRES. DOC. 982 (June 27, 1989).

⁶⁵ See, e.g., Charles Tiefer, *The Flag-Burning Controversy of 1989-1990: Congress' Valid Role in Constitutional Dialogue*, 29 HARV. J. ON LEGIS. 357 n.34 (1992).

⁶⁶ S. REP. NO. 152, 101st Cong., 1st Sess. 24 (1989) (minority views of Sens. Hatch and Grassley) (quoting testimony of William P. Barr, Assistant Attorney General for the Office of Legal Counsel).

⁶⁷ *Id.* at nn.3 & 6-7 (majority views).

⁶⁸ The Report cites with approval the views of Laurence Tribe, Brady Williamson, Walter Dellinger, Geoffrey Stone, Henry Monaghan, and Gordon Baldwin.

⁶⁹ See, e.g., *id.* at 24 (minority views of Sens. Hatch and Grassley).

⁷⁰ See *id.* at 18 (statement of Sen. Thurmond) (citing testimony of Robert Bork and

The flag protection statute was quickly enacted,⁷¹ and then promptly (and rather curtly) struck down by the Supreme Court,⁷² thus confirming OLC's prediction. Why would OLC's confident and accurate forecast have been treated so dismissively by the Judiciary Committee? One possibility is that Senators believed that OLC's legal opinion was influenced by political considerations,⁷³ whereas the law professors on whom the Committee relied had no similar influences distorting their legal judgment. While not inconceivable, this hypothesis leaves important facts without a very good explanation. First, the Committee also ignored or deprecated the testimony of private sector witnesses (including a former dean of the Harvard Law School) who agreed with OLC's conclusion.⁷⁴ Second, the Bush administration had no obvious motive for overstating the vulnerability of the proposed bill to constitutional challenge under *Texas v. Johnson*. The administration did not by any means oppose providing the Flag with statutory protection, arguing only that a constitutional amendment was *also* necessary to ensure that it would survive a constitutional challenge.⁷⁵

Charles J. Cooper, along with that of OLC); *see also id.* at 29 (statement of Sen. Humphrey) (citing Bork and OLC). Although Bork is a former Solicitor General and Circuit Judge, and Cooper is a former head of OLC, they appeared as private citizens, without whatever credibility attaches to the offices they once represented.

⁷¹ Pub. L. No. 101-131, 103 Stat. 777 (1989). President Bush allowed the bill to become law without his signature. In a statement on the issue, he noted that the Department of Justice had concluded that he should expect the statute to be struck down by the courts and reaffirmed his conviction "that a constitutional amendment is the only way to ensure that our flag is protected from desecration." Statement on the Flag Protection Act of 1989, 25 WEEKLY COMP. PRES. DOC. 1619 (Oct. 26, 1989).

⁷² *See United States v. Eichman*, 496 U.S. 310 (1990).

⁷³ In his testimony before the Judiciary Committee, Assistant Attorney General Barr noted that "there have been some snide remarks about the President's motivations in this." *See Hearings on S. 1338, H.R. 2978, and S.J. Res. 180 Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. 120 (1989).

⁷⁴ *See id.* at 249 (testimony of Erwin N. Griswold) (predicting that the Supreme Court would not uphold any statute that punished destruction of the Flag "if there is any sort of political context and the person doing it is doing it for the purpose of expressing an opposition to some governmental action."). Griswold's testimony was not discussed in the ensuing Committee Report.

⁷⁵ This is not meant to say that ulterior political motives could not have been imputed to those who advocated efficacious measures to protect the Flag from desecration. On July 31, 1989, after the President announced his support for such an amendment, but before the Judiciary Committee held its hearings, the Committee's Chairman made the following remarks in response to a suggestion that "cynicism also abound[s] in Congress on the flag-burning issue":

I wouldn't call it cynicism; I'd call it fear. (Laughter.) That would abound. And the fact of the matter is I think there's also—I said cynicism, and the other description I gave of the drug problem was opportunism. I think it'd be more apt to call it opportunism, and I think there is an attempt to decide who is going to be stronger in the defense of the flag. I happen to believe that the flag, as a unifying national symbol in this most heterogeneous of societies, is something in and of

Another explanation for the Judiciary Committee's refusal to credit OLC's legal views might be constructed through a hypothesis that focuses on the political interests of the Senators and law professors who predicted that the proposed flag desecration statute would be upheld. If the Senators who dismissed OLC's prediction were privately opposed to legislation prohibiting the desecration of the Flag, but were unwilling to oppose it openly in the face of strong contrary popular sentiment, then the 1989 legislation may have been intended only as a delaying tactic meant to divert attention away from a constitutional amendment until after popular interest in the matter subsided. There is evidence consistent with this hypothesis in the voting patterns of the Senators involved, several of whom voted against the constitutional amendment that would have authorized the statute they purported to support even after the Supreme Court struck that statute down.⁷⁶ If this is the true account, the Senators involved (and conceivably some of the law professors they used as witnesses) must

itself worth being protected. I think it's very simple, straightforward. You don't have to talk about fighting for it and dying for it. You don't have to talk about who is buried in it or not buried in it. It's very simple. I think it's a unifying symbol in a heterogeneous society where more than 50 percent of the people within the next five years will come from parentage that have no relationship to European lineage. This is a diverse country, folks, and it is one of the unifying symbols that embodies what we stand for. It's worth protecting. But it doesn't need, in my view, a constitutional amendment to do that. That's wherein I think a little bit of the political one-upmanship is being worked right now.

Senator Joseph Biden, Speech at the National Press Club Luncheon (July 31, 1989) (LEXIS, Nexis Library, FedNew File). Even if one doubts that Senator Biden was sincere in claiming that he favored legal protection for the Flag, it would not necessarily follow that he was insincere in suggesting that proponents of a constitutional amendment were engaged in "opportunism."

⁷⁶ Senator Thurmond, who filed a statement indicating that he did take OLC's views seriously, voted in favor of both the Biden bill (which Thurmond regarded as unlikely to survive a constitutional challenge in the courts) and the constitutional amendment. Leaving Thurmond aside, six Democrats and two Republicans voted in favor of the Judiciary Committee's report on the flag protection bill on September 21, 1989. S. REP. NO. 152, 101st Cong., 1st Sess. 15-16 (1989), reprinted in 1989 U.S.C.C.A.N. 610, 624-25. On October 19, 1989, five of those Senators (four Democrats and one Republican) voted against the constitutional amendment supported by the administration. 135 CONG. REC. S13,733 (daily ed. Oct. 19, 1989) (Rollcall Vote No. 251 Leg.). On June 26, 1990, after the *Eichman* decision removed all doubt that protection of the Flag would require a constitutional amendment, the same four Democrats again voted against such an amendment. 136 CONG. REC. S8736 (daily ed. June 26, 1990) (Rollcall Vote No. 128 Leg.). Chairman Biden, who may be presumed to have had principal responsibility for the 1989 Committee Report, was among those who voted against a constitutional amendment both before and after the *Eichman* decision.

This evidence also tends to undermine another hypothesis, viz. that the law professors who testified in favor of the statute misled a group of sincere but legally unsophisticated legislators. That hypothesis would also be difficult to reconcile with the Committee Report's refusal to give credence to any of the scholars who testified that a constitutional amendment was necessary to authorize such a statute.

actually have believed that OLC was correct, but were for that very reason disingenuously pretending to think otherwise.⁷⁷

⁷⁷ The following passages from the Committee Report make interesting reading in light of the Court's subsequent opinion in *Eichman*:

There are substantial differences between S. 1338 and the statute struck down in *Texas v. Johnson*. Dean [Geoffrey] Stone [of the University of Chicago Law School], for example, concluded in forceful terms:

Unlike the Texas law invalidated in *Johnson* [S. 1338] does not turn on the communicative impact of the prohibited conduct, it is not content-based, it is not directly related to the suppression of free expression, and its constitutionality is thus not controlled by the principles that * * * dictated the outcome of *Johnson*.

S. REP. NO. 152, 101st Cong., 1st Sess. 12 (1989), reprinted in 1989 U.S.C.C.A.N. 610, 621 (written statement of Stone at 8).

There is another difference as well between S. 1338 and the law struck down in *Texas v. Johnson*. A court reviewing a challenge to the constitutionality of S. 1338 would not, as the administration [i.e. OLC] argued, apply "strict scrutiny." As Dean Stone stated:

I do not agree with [OLC's] Mr. Barr that the Court "will necessarily apply strict scrutiny" to [S. 1338]. First . . . , the proposed legislation poses a very different question than the Texas statute invalidated in *Johnson*. Unlike the Texas statute, the proposed legislation is content-neutral, does not turn on "communicative impact," is "unrelated to the suppression of free expression," and does not trigger the "bedrock" first amendment principle that government may not prohibit the expression of an idea because it is offensive to others. In short, the invocation of strict scrutiny in *Johnson* was based on factors that simply are not present in [S. 1338]. (Answer of Geoffrey Stone to written question (3)(a) from Chairman Biden.)

The same view was expressed by Professor [Walter] Dellinger [of Duke Law School], who commented that "I think it is not at all necessarily the case that the Court would apply strict scrutiny . . ." (Testimony of Walter Dellinger, Sept. 14, 1989, at 48).

S. REP. NO. 152, 101st Cong., 10 n.6 (1989), reprinted in 1989 U.S.C.C.A.N. 610, 619 n.6.

Mr. Barr cited Spence in support of his argument that S. 1338 is unconstitutional. Several witnesses rejected this interpretation of *Spence*, including Dean Stone, who said; "The law invalidated in *Spence* dealt explicitly with the 'exhibition and display' of the American flag. It was thus 'directly related to the suppression of free expression.' That is not the case with [S. 1338], which is much broader than the flag misuse statute invalidated in *Spence* and is not expressly directed at acts of expression." (Answer of Geoffrey Stone to written question (3)(a) from Chairman Biden.) See also answer of Laurence H. Tribe [of Harvard Law School] to written question (1)(b) from Chairman Biden ("The *Spence* case . . . is not precedent for striking down [S. 1338].")

S. REP. NO. 152, 101st Cong., 1st Sess. 14 n.7, reprinted in 1989 U.S.C.C.A.N. 610, 623 n.7.

In *Eichman*, the Court said:

As we explained in *Johnson* . . . : "[I]f we were to hold that a State may forbid flag burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag—we would be . . . permitting a State to 'prescribe what shall be orthodox' by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the Flag's representation of nationhood and national unity." Although Congress cast the Flag Protection Act of 1989 in somewhat broader terms than the Texas statute at issue in *Johnson*, the Act still suffers from the same fundamental flaw: It suppresses expression out of concern for its likely communicative impact. Despite the Act's wider scope, its

Whichever of these two hypotheses is thought to be more plausible, the flag desecration incident illustrates why OLC's attempt to create a reputation for principled legal analysis is unlikely to be very useful to the President in dealing with the Congress.

B. *The Courts*

OLC opinions are rarely cited in majority opinions of the Supreme Court.⁷⁸ By way of contrast, it is not uncommon for the Court to give considerable attention and perhaps significant weight to the views of the government's advocate, the Solicitor General,⁷⁹ and

restriction on expression cannot be " 'justified without reference to the content of the regulated speech.' " *Boos*, 485 U.S., at 320, (emphasis omitted) (citation omitted); see *Spence v. Washington*, 418 U.S. 405, 414, nn. 8-9 (1974) (State's interest in protecting flag's symbolic value is directly related to suppression of expression and thus O'Brien test is inapplicable even where statute declared "simply . . . that nothing may be affixed to or superimposed on a United States flag") (emphasis omitted). The Act therefore must be subjected to "the most exacting scrutiny," *Boos*, *supra*, at 321, and for the reasons stated in *Johnson*, *supra*, at 413-15, the Government's interest cannot justify its infringement on First Amendment rights.

United States v. Eichman, 496 U.S. 310, 317-18 (1990) (emphasis omitted). Even the dissenters in *Eichman* acknowledged "the fact that the Court today is really doing nothing more than reconfirming what it has already decided, [and that] it might [therefore] be appropriate to defer to the judgment of the majority and merely apply the doctrine of stare decisis to the case at hand." *Id.* at 323-24 (Stevens, J., dissenting) (emphasis omitted).

The boldness with which prominent law professors attacked OLC's reading of *Texas v. Johnson*, as well as the alacrity with which their conclusions were accepted by members of the Judiciary Committee, does not require one to indulge the rather far-fetched hypothesis of professional incompetence. Instead, one need only postulate a political strategy aimed at derailing a constitutional amendment that would have authorized statutory protection of the Flag. There may be other possible explanations, but they do not leap out from the public record.

⁷⁸ In *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2553 n.9 (1993), the Court mentioned the existence of an OLC opinion in the course of describing the factual background of the case. The OLC opinion was inconsistent with the government's subsequent position, a fact to which the Court appeared to attach no weight.

⁷⁹ The office of the Solicitor General is widely believed to be an extremely effective advocate that possesses a substantial reservoir of credibility in the Supreme Court. The extent to which the Supreme Court actually defers to the legal views of the Solicitor General, however, is difficult to document. The Solicitor General certainly has a higher success rate in the Supreme Court than other litigants, but this could easily be the result in large measure of the Solicitor General's power to affect which cases to which the United States is a party reach the Court. More tellingly, perhaps, the Court in recent years has with increasing frequency extended invitations to the Solicitor General to submit amicus briefs in cases to which the United States is not a party. REBECCA M. SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 144-45 (1992). No other entity receives such invitations, and it may well reflect in part a belief that the Solicitor General can be relied on to offer relatively dispassionate and responsible legal reasoning. See Albert Lauber, Jr., *An Exchange of Views: Has the Solicitor's Office Become Politicized?*, *LEGAL TIMES*, Nov. 2, 1987, at 22.

If the Court had indeed reached the conclusion that the solicitor general's briefs are untrustworthy, it is odd that the Court invites the solicitor general so often to file briefs expressing his views in other people's cases. The Court did so on 55 occasions during the 1985 and 1986 terms. Having requested the solicitor gen-

to agencies charged with the administration of particular statutes.⁸⁰ And after Justice Jackson's famous rejection of precedents he had himself created when serving as the President's lawyer,⁸¹ it might not be surprising if the courts were disinclined to view OLC opinions as dispassionate statements of the law. Nevertheless, it may be worth examining more recent cases to see whether the courts have come to perceive the existence of a new tradition of scholarship and principle in OLC or the Department of Justice.

OLC opinions are sometimes cited by Justices in concurring and dissenting opinions, but those citations do not seem to reflect any recognition that OLC deserves a reputation as a quasi-judicial or disinterested producer of legal analysis. On the contrary, OLC opinions are cited either as part of a demonstration that a statute has consistently been given a certain construction and that this is part of the

eral's views, moreover, the Court generally found them persuasive. The Court, for example, has disposed of 21 of the cases in which it invited the solicitor general during the 1986 term to express his views. In 19 of those cases, or 90 percent, the Court's disposition matched the solicitor general's suggested disposition almost exactly.

Id. at 25 n.46.

It is also true, however, that the United States has *interests* that are uniquely significant and exceptionally likely to be affected by cases in which the government is not a party. The Court's requests for amicus participation by the Solicitor General could therefore be little more than a handy way to find out what those interests are.

⁸⁰ *E.g.*, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). For a thorough review of cases applying the *Chevron* doctrine, see Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 *YALE L.J.* 969 (1992).

⁸¹ Commenting on an analogy that had been drawn between President Roosevelt's seizure of a defense plant when Jackson was Attorney General and the seizure at issue in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Jackson said: "I do not regard it as a precedent for this, but, even if I did, I should not bind present judicial judgment by earlier partisan advocacy." 343 U.S. at 649 n.17. Justice Jackson also stated:

The vagueness and generality of the clauses that set forth presidential powers afford a plausible basis for pressures within and without an administration for presidential action beyond that supported by those whose responsibility it is to defend his actions in court. The claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy. While it is not surprising that counsel should grasp support from such unadjudicated claims of power, a judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself.

Id. at 647. In his concurring opinion in *McGrath v. Kristensen*, 340 U.S. 162, 176 (1950), Justice Jackson explained why he was joining an opinion contrary to an opinion that he had rendered as Attorney General. Jackson treated the Attorney General opinion as an embarrassing lapse, inconsistent not only with the result he considered appropriate in *Kristensen*, but also with arguments he had urged upon the Court in *Perkins v. Elg*, 307 U.S. 325 (1939). In his *Kristensen* discussion of other instances of inconsistencies between positions taken by sitting judges and their "prior opinion[s]," Jackson drew no distinction between positions urged as an advocate and positions taken as a judicial or quasi-judicial legal officer.

background against which Congress legislated in particular circumstances,⁸² or to undermine the interpretation offered by the Department of Justice in litigation by showing that the executive has not been consistent over time.⁸³ It is conceivable that individual Justices, or the Court itself, might also use OLC opinions as evidence of the executive's consistency in interpreting a given law, but this does not seem to have happened yet.

Additional evidence for doubting that OLC's reputation carries much weight in the Supreme Court can be found in what seems to be the most extended discussion of OLC's jurisprudence in any opinion

⁸² One example is Chief Justice Burger's dissenting opinion in *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 459 (1983), where a 1961 OLC opinion is cited in the context of a discussion of the Justice Department's longstanding practice of granting routine access to grand jury materials for the purpose of pursuing civil matters. The dissent emphasized that this longstanding practice formed the backdrop against which Congress was operating when it amended the relevant statute in 1977. Chief Justice Burger's discussion of the OLC opinion suggests that the opinion was only stating the obvious: "Not surprisingly, that Office's conclusions echoed those the *Procter & Gamble* Court had reached three years earlier." *Id.* The quotations offered from the OLC opinion, moreover, seem to reflect nothing but a straightforward summary by OLC of existing case law. It should also be noted that this reference to an OLC opinion occurs in the context of the dissent's strong criticism of the majority's departure from the conclusions reached in the Court's opinion in *Procter & Gamble*, which Chief Justice Burger characterized as the "leading case" on the point at issue. *Id.* at 457.

⁸³ *E.g.*, *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2568-69 n.3 (1993) (Blackmun, J., dissenting); *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2205 n.34 (1992) (Stevens, J., dissenting); *INS v. Chadha*, 462 U.S. 919, 969 n.5 (1983) (White, J., dissenting) (citing testimony by the head of OLC, along with numerous other documents, including a memorandum by the General Counsel of the Department of Agriculture, to support the proposition that some administrations accepted the constitutionality of one-House and two-House legislative vetoes prior to President Nixon's veto of the War Powers Resolution).

Although I have not found such citations in majority opinions of the Court, OLC opinions are sometimes used by the courts of appeals to attack the Government's position. *See infra* note 110. This phenomenon shows that OLC's court-like practice of publishing its opinions can actually interfere with the ability of the President's litigators to defend his positions in court.

An enormous mass of OLC opinions, selected from a full decade of the Office's work, was published during the closing moments of the Bush administration; this mass release may hinder the Clinton administration's ability to defend positions that differ from those taken by OLC in these now-public documents. These recently issued volumes include opinions that OLC had tenaciously resisted providing to Congress only a short time earlier. *Compare Authority of the Federal Bureau of Investigation to Override Customary or other International Law in the Course of Extraterritorial Law Enforcement Activities*, 13 Op. Off. Legal Counsel 195 (1989) (preliminary print released Jan. 15, 1992) and *Extraterritorial Effect of the Posse Comitatus Act*, 13 Op. Off. Legal Counsel 387 (1989) (preliminary print released Jan. 15, 1992) with *Kidnapping Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm.*, 102d Cong., 2d Sess. (1992) (remarks of Chairman Edwards), available in LEXIS, Nexis Library, FedNew File. The timing of the publication of these opinions also illustrates a significant way in which OLC behaves differently than the courts. Whereas courts routinely make their opinions public at the time of decision, OLC treats its own opinions as privileged material, which is released only when it suits the interests of OLC and its clients.

from the Justices. In *Crandon v. United States*,⁸⁴ the Court held that a criminal statute, 18 U.S.C. § 209(a),⁸⁵ which forbids private parties from providing supplemental compensation to Federal employees for their government service, does not apply to a severance payment made by a private firm to its employee before he begins government employment in order to encourage public service. The Court's opinion made no mention of OLC or its extensive jurisprudence construing section 209(a).⁸⁶

In a lengthy and complex opinion concurring in the judgment, however, Justice Scalia⁸⁷ emphasized his view that legal opinions interpreting section 209(a)—whether issued by the Attorney General, OLC, or other lawyers in the executive and legislative departments—are not entitled to *Chevron* deference because the administration of criminal statutes is the business of the courts alone.⁸⁸ Justice Scalia also implicitly analogized such opinions to those of private lawyers: “Any responsible lawyer advising on whether particular conduct violates a criminal statute will obviously err in the direction of inclusion rather than exclusion—assuming, to be on the safe side, that the statute may cover more than is entirely apparent.”⁸⁹ The Justice Department, moreover, according to Justice Scalia, has additional incentives to construe criminal statutes broadly because it “knows” that overly broad constructions will be corrected by the courts.⁹⁰

In addition to these general reasons for regarding OLC opinions as sharply different from judicial opinions, Justice Scalia went on to criticize OLC's interpretation of section 209(a) in great detail and with considerable sarcasm. The flavor of his analysis is perhaps captured best in this remark: “The administrative history of § 209(a) is a record of poignant attempts by the Attorney General and the OLC to derive reasonable results from the rigid and indiscriminating criminal statute they have invented. To follow their logic is to glimpse behind the looking glass.”⁹¹

Some of Justice Scalia's reasons for refusing to defer to OLC opinions would not be applicable outside the context of a criminal statute, but nothing in the tone or content of his *Crandon* concurrence

⁸⁴ 494 U.S. 152 (1990).

⁸⁵ 18 U.S.C. § 209(2) (1988).

⁸⁶ Nor did the court of appeals or the district court opinions discuss OLC's jurisprudence. See *United States v. Boeing Co.*, 845 F.2d 476 (4th Cir. 1988); *United States v. Boeing Co.*, 653 F. Supp. 1381 (E.D. Va. 1987).

⁸⁷ Justices O'Connor and Kennedy joined his concurrence.

⁸⁸ *Crandon*, 494 U.S. at 177 (Scalia, J., concurring).

⁸⁹ 494 U.S. at 177-78 (emphasis added).

⁹⁰ *Id.* at 178.

⁹¹ *Id.*

suggests that he would ever approach OLC opinions with any deference at all.

There might be reasons to discount the attitude toward OLC manifested in the *Crandon* concurrence. First, Justice Scalia is considered notoriously less inclined than most Justices to rely on precedent, including that of the Supreme Court itself.⁹² One would therefore not expect him necessarily to be typical in the degree of his willingness to defer to quasi- (or pseudo-) judicial precedent of the kind represented by OLC opinions. Second, Justice Scalia is himself a

⁹² See, e.g., David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1699 (1991):

We knew from the start that Justice Scalia was not a great fan of stare decisis. During his first Term on the Supreme Court, there was a period of a little over a month in which he called for overruling five major precedents. The trend has not abated: last Term he again urged that at least five major cases be overruled, and he explicitly confined a sixth to its facts.

Robert A. Burt, *Precedent and Authority in Antonin Scalia's Jurisprudence*, 12 CARDOZO L. REV. 1685, 1685-86 (1991) ("More openly than any other Justice sitting today, Antonin Scalia is ready to reverse prior Supreme Court precedent. . . . Prior rulings command Scalia's respect primarily when he sees independent reasons that would lead him to decide the case the same way if it first appeared before him today.") (footnotes omitted). See also Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 130 n.305 (1991) ("[W]hen Justices have tried to state a complete theory of stare decisis, they sometimes have found themselves on the margin of the Court, as demonstrated by Justices Scalia and Douglas's routine disregard of precedent in order to do what each thought was right . . .").

Justice Scalia's reluctance to compare executive agencies to courts, even in cases where an "independent" agency is performing adjudicatory functions, is manifest in *NLRB v. Int'l Bhd. of Elec. Workers*, 481 U.S. 573 (1987) (Scalia, J., concurring):

If the question before us were whether, given the deference we owe to agency determinations, the [National Labor Relations] Board's construction of this Court's opinion in [*American Broadcasting Cos. v. Writers Guild of America W., Inc.*, 437 U.S. 411 (1978)] is a reasonable one, I would agree with the Government that it is. We defer to agencies, however (and thus apply a mere "reasonableness" standard of review) in their construction of their statutes, not of our opinion. . . . The Board's approach is the product of a familiar phenomenon. Once having succeeded, by benefit of excessive judicial deference, in expanding the scope of a statute beyond a reasonable interpretation of its language, the emboldened agency presses the rationale of that expansion to the limits of its logic. And the Court, having already sanctioned a point of departure that is genuinely not to be found within the language of the statute, finds itself cut off from that authoritative source of the law, and ends up construing not the statute but its own construction. Applied to an erroneous point of departure, the logical reasoning that is ordinarily the mechanism of judicial adherence to the rule of law perversely carries the Court further and further from the meaning of the statute. Some distance down that path, however, there comes a point at which a later incremental step, again rational in itself, leads to a result so far removed from the statute that obedience to text must overcome fidelity to logic.

Id. at 597-98. A Justice who is this scrupulous to avoid deferring to the *combination* of administrative and judicial precedent is probably not very likely to defer to *any* institution on the basis of its reputation.

former head of OLC, and he may therefore be especially cognizant of the extent to which OLC's attempt to cultivate a reputation for principled decision making is distinguishable from actually behaving in a principled and disinterested manner. This second reason, however, may actually strengthen the grounds for doubting that OLC's efforts to create a reputation as a quasi-court are likely to have gotten very far with the Supreme Court. If a colleague who formerly headed OLC does not seem to think such a reputation is warranted, why should anyone else?⁹³

Attorney General opinions, which are more numerous than OLC opinions, are more frequently cited by the Justices.⁹⁴ A cursory review of Supreme Court opinions from the last few years, however, provides little reason to think that the Court takes into account any reputation that Attorneys General as a group might have for rendering opinions in a principled or court-like fashion.

Because Attorney General opinions are generally treated as binding within the executive department, they sometimes constitute significant elements of the legal background against which Congress legislates. Not surprisingly, therefore, the Court sometimes cites or discusses them in order to explain the history of a statute,⁹⁵ or to support an argument that Congress later approved the interpretation in the Attorney General opinion,⁹⁶ or to reject an argument that Congress intended when amending a statute to effect a result inconsistent with an interpretation previously adopted in an Attorney General opinion.⁹⁷

Attorney General opinions are also cited as part of an effort to show that the executive has interpreted the statute or constitutional provision in question consistently⁹⁸ or inconsistently,⁹⁹ or to reject

⁹³ Chief Justice Rehnquist, also a former head of OLC, joined Justice Stevens's majority opinion in *Crandon*, which ignored OLC altogether.

⁹⁴ Although OLC has almost entirely taken over the Attorney General's opinion-writing function in recent times, so that OLC opinions are now the legal equivalent of Attorney General opinions, there is a large stock of Attorney General opinions (collected in 43 published volumes) that were generated before that transition occurred.

⁹⁵ *E.g.*, *Perpich v. Dep't of Defense*, 496 U.S. 334, 343 & n.13 (1990) (the opinion also rejected, more or less in passing, the constitutional analysis of the cited Attorney General opinion); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 180-81 & n.12, 200-01 (1989); *School Bd. v. Arline*, 480 U.S. 273, 285 n.14 (1987); *United States v. Mitchell*, 463 U.S. 206, 219-20 & n.20 (1983).

⁹⁶ *E.g.*, *Regents of the Univ. of Cal. v. Public Employment Relations Bd.*, 485 U.S. 589, 595-96 (1988).

⁹⁷ *E.g.*, *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 407 (1987).

⁹⁸ *E.g.*, *Library of Congress v. Shaw*, 478 U.S. 310, 316 & nn.3-4 (1986); *INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983).

⁹⁹ *E.g.*, *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 465-66 &

such arguments.¹⁰⁰ However, there is seldom if ever a suggestion that the conclusions in an Attorney General opinion should be given any special weight because of their provenance.¹⁰¹

The courts of appeals refer to OLC opinions with some frequency, but these courts seem no more inclined than the Supreme Court to assume that the Office's opinions are the product of disinterested legal analysis.

In what appears to be the most elaborate discussion on record, the D.C. Circuit took an approach strikingly similar to that suggested by Justice Scalia's concurring opinion in *Crandon*. In *Public Citizen v. Burke*,¹⁰² the court rejected an interpretation placed by OLC on regulations promulgated by the Archivist of the United States under the Presidential Recordings and Materials Preservation Act of 1974. That interpretation, according to which the Archivist was required to honor claims of executive privilege asserted by former President Nixon, had been accepted by the Archivist and defended by the Department of Justice in the *Public Citizen* litigation.¹⁰³

The court began by noting that if an agency accepts an interpretation of a statute pressed upon it by OLC *on behalf of the President*, it may well be entitled to *Chevron* deference. The reason such deference might be appropriate, however, has nothing to do with OLC's reputation as a court-like entity. On the contrary, according to the court, the reason lies in the fact that the President embodies "the ultimate *political* legitimacy" as head of an "Executive Branch, populated by *political appointees*, [which] is thought to have greater legitimacy

n.38 (1986) (plurality opinion) (citing Attorney General opinion in the course of contrasting "contemporaneous" interpretations of statute by enforcing agencies with the position advanced by those agencies in the case at hand); *INS v. Chadha*, 462 U.S. at 976 & n.14, 995 & n.22 (1983) (White, J., dissenting).

¹⁰⁰ *E.g.*, *Regents of the Univ. of Cal.*, 485 U.S. at 613 n.7 (1988) (Stevens, J., dissenting).

¹⁰¹ In *United States v. Alaska*, 112 S. Ct. 1606 (1992), the Court rejected the interpretation given to a statute in a 1909 Attorney General opinion. In explaining why, the Court emphasized that the contrary interpretation was consistent "with the statute's language, our cases interpreting it, and the agency's practice since the late 1960's." *Id.* at 1614 (emphasis added). *Cf.* *United States v. Louisiana (Ala. Miss. Boundary Case)*, 470 U.S. 93, 103 n.4 (1985) (rejecting the position advocated by the Solicitor General and drawing an analogy from an early Attorney General opinion). *Cf. also* *Traynor v. Turnage*, 485 U.S. 535, 555 (1988) (Blackmun, J., concurring in part and dissenting in part) (citing HEW regulations "reflecting" the views of the Attorney General for a proposition not disputed in the majority opinion); *Regents of the Univ. of Cal.*, 485 U.S. at 607 n.1 (Stevens, J., dissenting) (citing Attorney General opinion to support a proposition not disputed in the majority opinion); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853-55 (1985) (rejecting the position advocated by the Solicitor General and distinguishing one of the Court's own prior decisions in which it had adopted the reasoning of early Attorney General opinions).

¹⁰² 843 F.2d 1473 (D.C. Cir. 1988).

¹⁰³ *Id.* at 1474.

than the non-political Judiciary in resolving statutory ambiguities, *in light of policy concerns*, when congressional intent is unclear."¹⁰⁴

The court concluded that it need not decide whether *Chevron* deference would be extended to an interpretation forced upon the Archivist by the President, however, because the gloss put on the Archivist's regulations by OLC was not in any meaningful sense based on an interpretation of the authorizing statute at all. On the contrary, said the court, OLC's view was based on its contention that the statute would be unconstitutional unless it permitted former President Nixon to compel the Archivist to honor his claims of executive privilege. The court rejected this constitutional argument in the most forceful terms, asserting that "[t]he federal Judiciary does not . . . owe deference to the Executive Branch's interpretation of the Constitution";¹⁰⁵ that OLC's constitutional argument was illogical and incorrect;¹⁰⁶ and that OLC's "discomfort with the role that the Archivist would play under the regulations as written suggests more notions of *lèse majesté* than unconstitutionality."¹⁰⁷

What *Public Citizen* suggests, therefore, is that OLC's construction of statutes may be entitled to deference in some circumstances precisely because OLC is presumed *not* to behave like a court, but rather as a servant of the policy concerns of the politically accountable President.¹⁰⁸ In addition, the court's disparaging remarks about OLC's use of the familiar judicial technique of construing statutes so as to avoid constitutional issues seem to imply a strong suspicion that OLC's entire jurisprudence may be driven by principles that are alien to those of Article III courts. Coming as it does in the course of a discussion of presidential authority, one might even speculate that the *Public Citizen* court suspected that it was being invited to adopt something like Professor McGinnis's theory of constitutional law, and wanted no part of it.¹⁰⁹

More generally, the courts of appeals appear to cite OLC opinions in a pattern similar to the pattern observed in recent Supreme Court citations of Attorney General opinions. OLC opinions, for ex-

¹⁰⁴ *Id.* at 1477 (emphasis added) (citation to *Chevron* omitted).

¹⁰⁵ *Id.* at 1478 (citation omitted).

¹⁰⁶ *Id.* at 1478-79.

¹⁰⁷ *Id.* at 1479.

¹⁰⁸ *Cf.* McGinnis, *supra* note 7, at 422 (discussing the value of OLC's reputation "as an elite institution whose legal advice is independent of the policy and political pressures associated with a particular question").

¹⁰⁹ The author of the *Public Citizen* opinion is by no means a habitual or unthinking critic of debatable constitutional theories advanced in defense of a strong view of the unitary and autonomous Executive. See, e.g., *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988) (Silberman, J.), *rev'd sub nom.*, *Morrison v. Olson*, 487 U.S. 654 (1988).

ample, are cited by courts to impugn positions taken by the Government in litigation,¹¹⁰ to pile up authority for conclusions apparently reached on other grounds,¹¹¹ and to explain the legislative or administrative background of a case.¹¹²

¹¹⁰ *E.g.*, *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350, 1364 (2d Cir. 1992) (rejecting an interpretation of a treaty adopted by OLC and the Department of State, and reflected in an Executive Order issued by the President, partly because of inconsistency between that interpretation and an interpretation offered by OLC ten years earlier), *rev'd sub nom.*, *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993); *M.A. A26851062 v. INS*, 899 F.2d 304, 321 n.6 (4th Cir. 1990) (en banc) (Winter, J., dissenting) (quoting from an OLC opinion that had been introduced during congressional hearings to support the proposition that Congress expected a specified United Nations document to be relied upon in construing a statute), (*but cf. id.* at 312 n.5 (majority opinion) (citing Supreme Court precedent to support a similar point)); *Olsen v. DEA*, 878 F.2d 1458, 1469 n.* (D.C. Cir. 1989) (Buckley, J., dissenting) (citing OLC opinion solicited by agency to raise doubts about agency's explanation during litigation of the reasons for agency's decision), *cert. denied*, 495 U.S. 906 (1990); *United States v. Myers*, 692 F.2d 823, 857 & n.31 (2d Cir. 1982) (rejecting Government's legislative history argument, which relied in part on OLC opinion that had been submitted to Congress, and citing Department of Justice statements submitted to Congress that conflicted with OLC opinion), *cert. denied*, 461 U.S. 961 (1983); *Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 243 & n.7 (D.C. Cir. 1981) (rejecting position taken by the Government in litigation and contrasting it with the position taken in OLC opinion, which although "to some degree self-serving" was adopted "in a nonlitigation context"); *Nat'l Org. for the Reform of Marijuana Laws v. DEA*, 559 F.2d 735 (D.C. Cir. 1977) (rejecting Justice Department interpretation of statute and noting that Justice Department's litigating position on issue involving allocation of jurisdiction between Attorney General and Secretary of HEW conflicted with interpretation previously adopted by OLC).

¹¹¹ *E.g.*, *Burlington N. R.R. v. Office of Inspector Gen.*, 983 F.2d 631 (5th Cir. 1993) (citing an OLC opinion in support of a conclusion that the court also found to be supported by the language, purpose, and legislative history of the statute in question, while also noting congressional and academic criticism of the OLC opinion); *Harris v. Thigpen*, 941 F.2d 1495, 1524 n.46 (11th Cir. 1991) (citing OLC opinion at end of string cite to judicial opinions, and indicating that OLC opinion was of less importance); *Canas-Segovia v. INS*, 902 F.2d 717, 724 n.13 (9th Cir. 1990) (citing OLC opinion to reinforce conclusion reached by sister circuit), *vacated*, 112 S. Ct. 1152 (1992); *Rose v. United States Postal Serv.*, 774 F.2d 1355, 1361 n.16 (9th Cir. 1984) (noting that position taken by Postal Service conflicts with opinions of "the General Counsel of the Architectural and Transportation Barriers Compliance Board, the Attorney General, Office of Legal Counsel, and the Congressional Research Service").

¹¹² *E.g.*, *United Ass'n of Journeymen & Apprentices v. Barr*, 981 F.2d 1269, 1273 (D.C. Cir. 1992) (discussing OLC opinion but concluding that the issue addressed in that opinion was not properly before the court); *In re Olson*, 884 F.2d 1415 (D.C. Cir. 1989) (Special Division) (citing OLC opinion to support the proposition that Department of Justice has, since the enactment of Independent Counsel Act, consistently interpreted statute's purpose to be the separation of Independent Counsel from control by Department of Justice); *Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245, 1256 (1988) (citing OLC opinion, along with newspaper story, as evidence of historical fact that Department of Justice advised Sentencing Commission that it had authority to establish procedures for imposing death penalty), *stay denied*, 857 F.2d 1285 (9th Cir. 1988), *vacated*, 488 U.S. 1036 (1989); *Appeal of Bolden*, 848 F.2d 201, 204 (D.C. Cir. 1988) (describing OLC opinion in response to which Office of Personnel Management sought and obtained legislation to permit action not previously authorized by statute); *United States v. One Lear Jet Aircraft*, 808 F.2d 765, 773 & n.6 (11th Cir. 1987) (summarizing appellant's argument (rejected by the court on other grounds), which relied on congressional committee report discussing need to revise statute to provide Government with law enforcement powers

The research summarized in this section, which is based on a review of cases from the past ten years, indicates that the courts do not regard OLC as a producer of quasi-judicial opinions. This does not imply that OLC is held in low regard by the judiciary, but it does strongly suggest that OLC is not a repository of "reputational capital" that can be drawn on by the President to persuade the courts to rule in his favor in close cases.

The infrequency with which OLC opinions are cited by the courts should not be particularly surprising when one considers that relatively few of these opinions deal with issues that generate litigation. The apparently complete absence of *any* case in which OLC's supposed reputation as a quasi-court has assisted the President's litigators in sustaining his position, however, constitutes particularly telling evidence against Professor McGinnis's theory of reputational capital. Unlike the Congress and the press, many appellate judges (including several Supreme Court Justices who sat during the period studied here) are intimately familiar with OLC as a result of previous service in the federal government. There are important occasions, moreover, even if they are not an everyday occurrence, on which the courts could easily treat OLC opinions as products of a quasi-judicial approach to the law if the judges thought this was appropriate. As the *Chevron* doctrine demonstrates, appellate judges are not generally averse to deferring to executive interpretations of the law, and the absence of any sign of such deference to OLC is therefore quite striking.

C. *The Press*

Like Congress, the press is so multifarious that one could likely find an exception to almost any generalization one tried to make about the attitudes it displays. Nevertheless, after several years of

that OLC had concluded were not provided by original version of statute), *cert. denied*, 487 U.S. 1204 (1988); *Towers v. Horner*, 791 F.2d 1244, 1246 n.9 (5th Cir. 1986) (citing OLC memorandum submitted during congressional hearings for the proposition that the Office of Special Counsel, created by the Civil Service Reform Act of 1978, is modeled after the General Counsel of the National Labor Relations Board); *Frazier v. Merit Sys. Protection Bd.*, 672 F.2d 150, 162-63 & n.43 (D.C. Cir. 1982) (same); *In re Longstaff*, 716 F.2d 1439, 1444 n.22 (5th Cir. 1983) (noting that Surgeon General appears to have rejected OLC legal advice), *cert. denied*, 467 U.S. 1219 (1984); *id.* at 1446 n.40 (refusing to take judicial notice of facts recited in OLC opinion on which Government relied in litigation); *id.* at 1447, 1449-50 (describing OLC's role in administrative history of regulation at issue); *id.* at 1450 (granting deference to INS interpretation of statute on issue on which OLC had opined); *id.* at 1450-51 (relying on Supreme Court precedent to reject relevance of Surgeon General position that was at odds with that of OLC); *Devine v. White*, 697 F.2d 421, 435 n.63 (D.C. Cir. 1983) (noting OLC policy suggestion that was rejected by Congress).

fairly close, though unsystematic attention to stories about OLC in the major news outlets, I have not been left with the impression that the Office enjoys a reputation for disinterested or principled decision making. When the news media pay any heed at all to an OLC opinion, which is not often,¹¹³ they tend to focus on the effects the opinion is likely to have, rather than on whether it is a correct or disinterested interpretation of the law.¹¹⁴

The rare cases in which OLC opinions draw press attention, however, are also likely to be the ones in which OLC's reputational capital, if any such thing exists, could be very useful to the President. The opinions at issue in these cases will typically have attracted the interest of the press because they were leaked by someone strongly opposed to them or were released officially in response to pressure arising from the politically controversial nature of the issues with which they dealt.

During the Bush administration, for example, the opinions that attracted the most attention were those that provided expansive interpretations of the federal government's powers to conduct law enforcement operations abroad.¹¹⁵ News reports about these opinions often

¹¹³ Since the actual texts of OLC opinions rarely become public until long after they would have been newsworthy, the press would seldom be able to comment on them in much detail even if it were inclined to do so. On the other hand, the infrequency with which OLC opinions are leaked may reflect an absence of press interest in them.

¹¹⁴ One will sometimes encounter references to OLC in the popular press that are not tied to a particular OLC opinion. This seems to happen most commonly when reporters are supplying background information after somebody who previously worked in OLC becomes a candidate for a more prestigious job, such as Attorney General. This occurred in connection with the nominations of William P. Barr in the Bush administration and of Zoe Baird in the Clinton administration. See, e.g., Neil A. Lewis, *Getting Things Done—Zoe Baird*, N.Y. TIMES, Dec. 25, 1992, at A1; Sandra Torrey, *Bush's Choice for Attorney General Is a Quiet, Influential Insider*, WASH. POST, Oct. 28, 1991, at F5.

Another example appeared after *Morrison v. Olson* was argued, but before the decision was announced. In a kind of "soft news" story about the involvement of several former OLC officials in the case, Stuart Taylor described the office as having two "central missions . . . that sometimes chafe against one another: preserving and enhancing the power of the Presidency, and providing expert, supposedly apolitical advice to the Attorney General and the White House on the most difficult legal questions the Government faces." Stuart Taylor, Jr., *Agency Plays Pervasive Role in High Court Case*, N.Y. TIMES, May 2, 1988, at B6 (emphasis added). Similarly, a 1987 story about the head of OLC (Charles J. Cooper) focused on the fact that several of the positions he had taken had been repudiated by the courts. Except perhaps for Cooper himself, who was quoted as saying (ambiguously) that he had "not signed anything that I did not agree with," none of the sources for the story even hinted that OLC could be viewed as a quasi-judicial decision maker. Howard Kurtz, *Reagan's Conservative Law Adviser Finds Courts Going Against Him: U.S. Office of Legal Counsel Continues to Wield Vast Influence*, WASH. POST, Mar. 21, 1987, at A3.

¹¹⁵ Authority of the Federal Bureau of Investigation to Override Customary or other International Law in the Course of Extraterritorial Law Enforcement Activities, 13 Op. Off. Legal Counsel (1989) (preliminary print) (federal government has legal authority to arrest and ab-

treated them as “controversial,” and gave considerable attention to the ill effects to which they might lead.¹¹⁶ Even when the press was not insinuating that the OLC opinions reflected an ill-advised shift in policy, I doubt that there was ever a suggestion that they were the product of disinterested legal analysis. The editorial column of *The New York Times*, for example, which may be the most reliable voice of the most conventional views among the press, made the following statement after the signatory of these two opinions was nominated to be Attorney General:

Mr. Barr is perhaps best known for his 1989 advisory opinion supporting the legality of snatching suspects abroad, with or without permission of the foreign nation where the suspects are found, and taking them back to the United States for trial.

That breathtaking notion, which saw fruition in the arrest of Manuel Noriega, was less extreme than it may have sounded because it was limited to a discussion of legal power, not the wisdom of global kidnapping. The opinion was also consistent with the traditions of the department’s Office of Legal Counsel, which Mr. Barr headed. The Office often tells Presidents—Republican or Democratic—that what they might want to do is within the law.¹¹⁷

Another opinion that attracted some attention held that the Inspector General Act of 1978 provided authority for investigations of the operations, employees, and grantees of the agency to which an Inspector General was attached, but not for investigating persons who were merely subject to the agency’s regulatory jurisdiction.¹¹⁸ As it happens, this is a case in which OLC’s reputation for quasi-judicial decision making might have had some value, for there were suggestions that the Department of Justice had institutional interests of its own at stake in the matter:

[Senator John] Glenn called it a “strange coincidence” that the

duct fugitives residing abroad even if such actions violate international law); Extraterritorial Effect of the Posse Comitatus Act, 13 Op. Off. Legal Counsel 387 (1989) (preliminary print) (Posse Comitatus Act, 18 U.S.C. 1385, does not apply outside the territory of the United States).

¹¹⁶ See, e.g., Saul Friedman, *Military’s Drug-War Role Questioned*, NEWSDAY, Jan. 7, 1990, at 16; Michael Isikoff, *U.S. ‘Power’ on Abductions Detailed: Controversial Justice Dept. Memo Asserts Authority to Act Overseas*, WASH. POST, Aug. 14, 1991, at A14; Michael Isikoff & Patrick Tyler, *U.S. Military Given Foreign Arrest Powers*, WASH. POST, Dec. 16, 1989, at A1 (“The new authority [to use the military in law enforcement operations abroad] also could complicate U.S. anti-drug efforts in Latin America and stir up a wave of anti-American nationalism.”); Ruth Marcus, *FBI Told It Can Seize Fugitives Abroad; Critic Says Justice Opinion Makes U.S. an ‘International Ruffian’*, WASH. POST, Oct. 14, 1989, at A15.

¹¹⁷ *A New Attorney General Steps Up*, N.Y. TIMES, Oct. 20, 1991, § 4, at 14.

¹¹⁸ Authority of the Inspector General to Conduct Regulatory Investigations, 13 Op. Off. Legal Counsel 63 (1989) (preliminary print).

Justice Department moved to restrict the powers of the inspectors general immediately after Congress imposed an inspector general on the Justice Department itself.

[Assistant Attorney General William P.] Barr strongly defended the department's actions. "Any suggestion that the Office of Legal Counsel is doing this in a vindictive way because of the creation of an inspector general in Justice is way off the mark," he said.¹¹⁹

News reports on the issue do not appear to have treated the OLC opinion as the result of principled legal analysis. In the story quoted above, for example, Barr is said to have denied that "turf" was at stake in his ruling. The reporter's lead sentence, however, was: "A Titanic turf battle between the Justice Department and agency inspectors general is causing the government to 'fumble' thousands of waste and fraud investigations, Sen. John Glenn (D-Ohio) charged yesterday."¹²⁰ Other stories about the dispute described the OLC legal opinion as an expression of a changed "policy," which suggests that the basis for the ruling was not rooted in the dictates of the law.¹²¹ Even stories that made some effort to present a balanced array of viewpoints focused on the practical consequences of the OLC opinion rather than on whether it was a correct or honest interpretation of the law.¹²²

It should be no surprise that OLC's reputation for quasi-judicial decisions, to whatever extent it exists at all, does not seem to be taken seriously or considered relevant by the popular press. Stories about other legal decision makers, even Article III courts themselves, tend to focus much more on the effects of the decision than on whether the opinions reflect correct or disinterested interpretations of the law.¹²³ Whatever the reason may be for the lack of interest in such questions, it appears to prevent the President (or anyone else in the government) from relying on OLC's reputational capital in this forum.

¹¹⁹ Judith Haverman, *Dogfight Over Government Watchdogs: Inspector General Says Justice Dept. Opinion Is Limiting Probes*, WASH. POST, Apr. 26, 1990, at A21.

¹²⁰ *Id.*

¹²¹ *E.g.*, J. Jennings Moss, *Justice Actions Irk Inspectors General*, WASH. TIMES, Apr. 26, 1990, at A4 ("The change in Justice's policy dates back to March 1989.").

¹²² *See, e.g.*, Ruth Marcus, *Agency Inspectors General Feeling Justice Department's Leash*, WASH. POST, Sept. 18, 1989, at A17.

¹²³ Compare, for example, Robert Bork's recollection of the press's treatment of his work as Solicitor General: "They paid attention. But they usually reported it in political terms. I mean, if you took a position, they would report it not as a legal position but as a political position, which annoyed me considerably." SALOKAR, *supra* note 79, at 101 (quoting from interview with Robert Bork).

D. Conclusion

The evidence examined here suggests that when OLC is given any attention at all by the Congress, the courts, and the press, it tends to be regarded as an entity that gives legal advice that is highly colored by the interests of its client. In other words, OLC is assumed or perceived to behave much like a private lawyer rather than like a quasi-court. Thus, the need for OLC to maintain its reputational capital so that it may be "spent" on the President's behalf in connection with unusually important issues does not seem to justify whatever reluctance the Office may exhibit in responding to its clients' political and policy concerns.

This leaves open the question why OLC seems to almost all close observers to strive for a quasi-judicial status or reputation. One possibility is that most presidents most of the time want their designated experts in legal analysis to apply that expertise to the questions presented to them, just as most presidents will generally defer to the expertise of their experts in military affairs, medical science, and a variety of other specialized fields of knowledge. There is probably considerable truth in such an explanation, which is inconsistent with the reputational capital theory. But it does not account for the persistent theme in the literature on the opinion function—a theme that seems not to arise from a well-grounded normative theory—that contrasts OLC's (and the Attorney General's) aspirations to an independent, quasi-judicial role with the realities of an operational system of government in which such independence is not well-secured. An adequate account of OLC's behavior must explain both the routine and the exceptional examples of the Office's behavior.

In the next section, I will analyze OLC's behavior by examining the incentive structure that the Office faces within the Department of Justice and within the executive department more generally. The most important force driving the Office to cultivate a quasi-judicial aura, I will argue, is not a desire to remain, or to appear to remain, independent from the President's policy agenda, or even his political interests. The real key to understanding this phenomenon, I contend, is something very different: competition from other legal advisors within the executive.

IV. OLC AND THE COMPETITION FOR ADVISORY POWER

The theme of conflicting loyalties—to "the law" and to the administration's policy and political needs—is not the only theme that runs through the literature on the Attorney General and the Department of Justice. Although it seems to get considerably less attention,

the history of the office of the Attorney General reflects a slow and by no means smooth or effortless accumulation of institutional power. This accumulation of power, moreover, has not followed the intuitively obvious pattern in which the significance of a bureaucracy at any given time tends to reflect the relative importance within the government of the functions with which it is charged.

The original functions of the Attorney General—representing the United States in the Supreme Court and providing legal advice on request to the President and heads of departments—are quite limited and self-contained. For many years after the creation of the office, the Attorney General had almost no staff, was paid far less than the heads of real departments of government, and did not treat the job as a full-time position. Indeed, there was no Department of Justice until 1870, long after one might think (as many Attorneys General did think) that the conduct of the government's legal business would have required the creation of a unified organization specially adapted to that purpose.

Even today, after a tremendous expansion in the size of the government and the complexity of its business, after an explosion in the amount and complexity of the law that the executive implements and by which it is governed, and after a significant accretion of new responsibilities to the Justice Department, the Attorney General continues to perform the original and core functions of the office with the assistance of a minuscule staff. The Solicitor General's office, which is responsible for Supreme Court litigation, employs two dozen-odd lawyers, and OLC's staff is normally about the same size.

Much of the growth in the Attorney General's power and responsibility has come from a mostly successful effort to centralize the government's litigating functions within the Department of Justice. The power, if not the size, of the Solicitor General's office has increased correspondingly because the approval of that office is required before appeal may be taken from an adverse decision in a trial court.¹²⁴ Thus, to a considerable extent, the Solicitor General coordi-

¹²⁴ The mystique of the Solicitor General's office is largely bound up with its Supreme Court work, and that work obviously gives it significant influence in a variety of ways. The appeals-authorization function, however, gives the Solicitor General an extremely important tool for controlling the U.S. Attorneys and the litigating divisions of the department, as well as the agencies that conduct litigation without direct or substantial supervision by the Justice Department. This control provides much of the real administrative foundation for the Solicitor General's ability to maintain something of the same quasi-judicial aura to which OLC seems to aspire. One perceptive lawyer with long experience in the Solicitor General's office hinted at this possibility when she made the following comment:

In some sense, authorizing appeals in the lower federal courts may be the most important thing we do. Once a case gets to the Supreme Court, we have an infor-

nates the exercise of the Attorney General's near monopoly over significant government litigation (i.e., litigation that is likely to lead to the creation of important legal precedents).¹²⁵

The Justice Department, however, has never succeeded in gaining anything close to a monopoly over the provision of legal advice within the government.¹²⁶ The heads of virtually all agencies are provided with their own legal advisors, some of whom employ very large staffs, and these advisors have no formal obligation to submit even the most difficult legal questions to the Department of Justice. Some entities within the Executive Office of the President, such as the Office of Management and Budget and the National Security Council, also have their own legal staffs. And, in recent decades, the President has created for himself a source of independent legal advice within the White House that he can and does deal with directly.¹²⁷

mation-gathering function, because the government as a whole is a repository of specialized information about all kinds of law: the Social Security Act, the Freedom of Information Act, and so on. One role we play is to translate this information for the Supreme Court, to tell the Justices about the impact of a possible decision on the workings of the government. On the other hand, the Justices sure as heck can read cases. They've got a terrific staff of law clerks who can help them with the reading, and in many cases they can get along without us. But when we're deciding about an appeal in the lower courts, we've got to decide whether the government should swallow a defeat or, if not, why we should take a crack at a case in an appeal. We serve a kind of judicial function, and it's ours alone.

CAPLAN, *supra* note 5, at 212 (quoting Harriet Shapiro). If authority to authorize appeals were lodged somewhere other than with the Solicitor General, for example with those who conduct litigation at the trial level, this could be expected to markedly diminish the Solicitor General's ability to influence the Supreme Court. By exercising some control over the flow of cases into the courts of appeals, the Solicitor General is able to minimize the creation of adverse circuit court decisions that the Solicitor General would, for a variety of reasons, not want to submit to the Supreme Court but which he might well feel compelled to take there. Although this device is useful in assisting the Solicitor General in performing the core function of conducting Supreme Court litigation, it also brings with it considerable power to control the legal and administrative business of government in ways that are not necessary for performance of that function.

¹²⁵ See generally SALOKAR, *supra* note 79, at 69-105. A number of statutes provide agencies other than the Justice Department with independent litigating authority, and the Justice Department's general authority over litigation has never been nearly as complete as Attorneys General would have liked it to be. The Department's control over truly significant litigation, however, is very substantially complete, though not perfect.

¹²⁶ There seems at times to have been some movement in the direction of centralizing the legal advisory function under the Attorney General, but it has never gotten far. See Bell, *supra* note 20, at 1050 ("Although I am the chief legal officer in the executive branch, I have learned that I have virtually no control or direction over the lawyers outside the Department of Justice, except indirectly in connection with pending litigation."); James M. Strine, *The Office of Legal Counsel: Legal Professionals in a Political System* 63-67 (1992) (unpublished Ph.D. dissertation, Johns Hopkins University).

¹²⁷ The office now known as that of the Counsel to the President apparently traces its origins to the administration of Franklin D. Roosevelt, who was also President when the predecessor of OLC was first created. See BAKER, *supra* note 5, at 13. The nature of the advisory

Nor has OLC acquired anything like the administrative power that the Office of the Solicitor General exercises through its role in authorizing appeals and deciding when to ask the Supreme Court to exercise its discretionary jurisdiction. It is true that opinions of the Attorney General (and now OLC) are generally treated as binding throughout the executive department.¹²⁸ Except in narrowly defined circumstances, however, no one outside Justice is ever required to seek OLC's advice, and so far as I am aware there is no institutionalized mechanism for monitoring other agencies to ensure that they comply with OLC's decisions.

The one narrow exception to the absence of a requirement that

role played by the Counsel to the President has apparently varied over time, as one would expect of positions on the President's immediate staff. See, e.g., *id.* at 13-14. For a competent summary of the functions generally performed by the Office of Counsel to the President in recent years, see BRADLEY H. PATTERSON, JR., *THE RING OF POWER* 141-50 (1988).

The very existence of the Counsel's office prevents OLC and the Attorney General from being able to take for granted their role as principal legal advisors to the President. Cf. BELL & OSTROW, *supra* note 8, at 37:

[T]he White House Counsel's Office, yet another power center, wields significant power, even when under the stewardship of a relatively unassertive, retiring lawyer At times, the counsel has been more of a general presidential assistant than a lawyer, but in recent years the job has taken on increasing amounts of legal work. The counsel sometimes serves as a conduit through whom all communications from the attorney general to the President flow.

It is probably no accident that the Office of Legal Counsel and the office of the Counsel to the President both originated in the administration of Franklin D. Roosevelt, who was more adept than any President in modern times at wielding power over large bureaucracies through the use of divide-and-control tactics.

¹²⁸ Caleb Cushing observed that the "general practice" in the government has almost always been to treat Attorney General opinions as binding, 6 Op. Att'y Gen. 326, 334 (1854), and this is still no doubt true. The extent to which these opinions are *legally* binding, however, is unclear. Attorneys General have from time to time expressed a variety of views on the question, and the issue seems never to have conclusively settled. See HOMER CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE* 517-19 (1937); Rita W. Nealon, *The Opinion Function of the Federal Attorney General*, 25 N.Y.U. L. REV. 825, 839-40 (1950). More recently, Executive Order No. 12,146 requires some executive agencies to "submit" certain legal disputes to the Attorney General "prior to proceeding in any court," which seems to imply that such agencies are forbidden to take positions in court that contradict the Attorney General's resolution of the dispute. Exec. Order No. 12,146, 3 C.F.R. 409 (1979), *reprinted as amended in* 28 U.S.C. § 509 (1988). Beyond this point, however, the legal authoritative nature of the Attorney General's opinions becomes murky. Executive Order No. 2,877, which Professor Kmiec cites as though it is still binding, Kmiec, *supra* note 29, at 368-69, provided that "any opinion or ruling by the Attorney General upon any question of law arising in any department, executive bureau, agency or office shall be treated as binding upon all departments, bureaus or offices therewith connected." Exec. Order No. 2,877 (1918). Attorney General Bell, however, publicly stated during his tenure that "this Executive order was promulgated under an act giving the President temporarily expanded powers for the World War I effort, and it expired along with the act six months after the armistice." Bell, *supra* note 20, at 1056. More recently, Executive Order 2,877 was cited in a footnote in an OLC opinion, but the citation appears to be gratuitous. See *Applicability of the Davis-Bacon Act to the Veteran Administration's Lease of Medical Facilities*, 12 Op. Off. Legal Counsel 109, 114 n.9 (1988) (preliminary print).

OLC's advice be sought, moreover, reveals the weakness of the Office's administrative power. When two or more executive agencies are unable to resolve a legal dispute among themselves, they are ordinarily required to submit it for decision to the Attorney General "prior to proceeding in any court."¹²⁹ Because the Attorney General controls the conduct of most important litigation in which agencies are involved,¹³⁰ it is the power vested in the Justice Department's litigating divisions and the Solicitor General's office that provides the one real bureaucratic lever that OLC can use to compel executive agencies to come to it as they would come to a court.¹³¹ Were OLC's sole or even principal role simply to alert agencies to the legal positions that the Department of Justice would insist on taking in the course of litigation, that function might just as well be performed by the Office of the Solicitor General, which in fact performed it for many years prior to OLC's creation. Conversely, if the litigating divisions were forbidden to defend the actions of their client agencies by taking positions in court that were at odds with OLC's view of the law, the development of a quasi-judicial OLC jurisprudence would radically alter the conduct of litigation, leading to a displacement by OLC of much of the Solicitor General's function, and dramatically transforming the operation of the government. Thus, if OLC's only source of power within the government were that derived from the Attorney General's litigating authority, we would expect the Office to be dominated by the Solicitor General's Office in much the same way that the litigating divisions are.¹³²

In fact, however, OLC does not serve as the mouthpiece for the

¹²⁹ Exec. Order 12,146, § 1-401, 3 C.F.R. 409 (1979), *reprinted as amended in* 28 U.S.C. § 509 (1988).

¹³⁰ *See* 5 U.S.C. § 3106 (1988); 28 U.S.C. § 516 (1988).

¹³¹ Just as one would expect, OLC has opined that an agency with special statutory authority to litigate outside the direct supervision of the Attorney General is not thereby authorized to oust the Attorney General from deciding questions of law, posed by *other* agencies, involving the interpretation of statutes over which the first agency has litigating authority. *See* Applicability of the Davis-Bacon Act to the Veteran Administration's Lease of Medical Facilities, 12 Op. Off. Legal Counsel 109, 114 (1988) (preliminary print); Application of the Davis-Bacon Act to Urban Development Projects that Receive Partial Federal Funding, 11 Op. Off. Legal Counsel 119 (1987) (preliminary print). It might seem to follow that agencies with independent litigating authority are obliged to adopt OLC's interpretation of "their" statutes when conducting litigation. As a practical matter, however, such a rule would be extremely difficult to enforce apart from the control that the Solicitor General and the Justice Department's litigating divisions exercise over appeals and petitions for certiorari.

¹³² This is not meant to suggest that the office of the Solicitor General does or could get in the habit of taking lightly the views of other components of the Justice Department or those of the client agencies. Reckless arrogance of that kind would obviously have adverse consequences for the operation of the government and would have to be corrected by the Attorney General. The fact remains, however, that the Solicitor General almost always gets to decide

Solicitor General or the litigating divisions, nor they for OLC. The litigating divisions will often defend an agency action even if OLC would have advised against the action. Conversely, OLC does not give legal advice based on the notion that the law allows agencies to do anything that the Justice Department's litigators would be willing to defend in court.¹³³ This discrepancy shows that OLC has aspirations to preeminence in settling interagency legal disputes, aspirations that are not grounded in the formal basis for its jurisdiction.

One might think that OLC could acquire some degree of administrative power by virtue of its ability to issue opinions in response to the request of one agency that will bind other agencies. For several reasons, however, this power alone would not likely add significantly to the small amount of administrative power that OLC derives from the Attorney General's control of litigation. First, in some cases in which a statute affects more than one department, a decision by an agency to seek advice from OLC may reflect an incipient dispute that would eventually have triggered OLC jurisdiction in any event. Second, unless an issue decided by OLC later becomes the subject of litigation, the Justice Department has very limited means of monitoring compliance with OLC's advice, even with respect to the agency re-

what the government's position will be in the Supreme Court and in important cases in the inferior courts. See generally SALOKAR, *supra* note 79, at 77-86.

The Solicitor General's preeminence within the Justice Department has not always gone unchallenged. There is considerable potential for conflict, for example, between the interpretation of the law favored by OLC and the interpretation favored by the Solicitor General. Judging from recent published accounts, however, OLC has had little success in imposing its views when they conflicted with those of the Solicitor General. See, e.g., CHARLES FRIED, ORDER AND LAW 168 (1991) (discussing unsuccessful effort by Assistant Attorneys General for OLC and Civil Division to persuade the Attorney General to require the Solicitor General to file a brief more aggressively defending presidential authority than the Solicitor General deemed appropriate); KMIEC, *supra* note 36, at 119-23 (reporting Attorney General's refusal to overrule Solicitor General's decision to file a brief that was at odds with the views of OLC, of the Lands and Natural Resources Division of the Justice Department, and of the Secretary of the Interior).

¹³³ One would expect, as a general rule, that OLC would not knowingly issue an opinion contrary to that taken by the Solicitor General in a brief, or even that taken with the approval of a head of a litigating division. If this happened with any frequency, the Attorney General would appear not to be in control of his own house, the credibility of the department's litigators would suffer in the courts, and OLC's credibility with other agencies would be undermined.

Consistent with that hypothesis, the Attorney General long ago instituted a jurisdictional rule that generally prevents the Attorney General or OLC from issuing opinions on issues that are, or are about to be, in litigation. See CUMMINGS & MCFARLAND, *supra* note 128, at 84. That the purpose of this rule is to protect the Justice Department's institutional interests is confirmed by the fact that OLC is quite willing to waive the rule when that would serve to protect its own power over other agencies. See, e.g., Applicability of the Davis-Bacon Act to the Veteran Administration's Lease of Medical Facilities, 12 Op. Off. Legal Counsel 109, 114 n.9 (1988) (preliminary print).

questing the advice, let alone with respect to other agencies that are supposedly bound by the opinion. Absent the prospect of litigation, there is no reason to assume that agencies will always take care to assure adequate dissemination of OLC's views to the appropriate operational personnel, and there is certainly no reason to assume that agency lawyers will be incapable of reading OLC opinions narrowly if that suits their clients' interests. Third, in order for OLC effectively to exercise its power over one agency by issuing an opinion in response to a request from another agency, the requesting agency would have to have an incentive to request OLC's advice, which cannot necessarily be assumed to exist absent an incipient dispute between the two agencies.

This third point raises a serious question, the answer to which will prove to have some very startling implications. Why would heads of agencies *ever* request OLC's views on issues other than those over which they were, or expected to be, involved in a dispute with another agency or in which they were contemplating an action that they believed the Justice Department might subsequently refuse to defend in court? Several possible explanations may be advanced.

It is conceivable that the head of an agency might not trust the legal judgment of the agency's own general counsel, and might believe that he can get more reliable advice from OLC. This may happen occasionally, but it seems far-fetched to imagine that it would happen frequently. Heads of agencies generally have considerable discretion in choosing their own general counsel, and the agencies' legal staffs usually have far more experience with the relevant law than anyone at OLC. A related, but more plausible, hypothesis is that agency general counsel may sometimes want to submit questions to OLC in order to save themselves the trouble of doing the legal analysis required to resolve the question. This would presumably happen principally in cases in which the agency head is largely indifferent to the outcome, and the phenomenon is therefore of little theoretical interest.¹³⁴

Alternatively, the agency head might solicit an OLC opinion about a proposal to which he was privately opposed, but which was being promoted by a powerful constituency inside or outside the government, in hopes of receiving a negative response from OLC. This probably does explain some requests for advice. High-ranking government officials have strong incentives to shift the responsibility for

¹³⁴ If OLC believes it is simply being asked to make up for someone else's shirking, it may drag its feet in responding to the request or press agency counsel to do the work themselves. In many cases, however, it may be easier for OLC to do the legal work, albeit in a leisurely fashion, than to try to shift the burden back to the requesting agency.

inaction away from themselves in such circumstances. Such blame-shifting tactics, however, tend to threaten rather than enhance OLC's institutional interests, especially if the constituency favoring the proposal is one to which the head of OLC or the Attorney General is also vulnerable. One would expect that these are the kinds of requests that OLC would have the most trouble finding time to respond to, although dodging them may be impossible in some cases.¹³⁵ Furthermore, as Professor McGinnis reports, OLC has adopted a rule requiring the agencies to submit their own views before OLC will decide the question, which creates an obstacle to this kind of blame-shifting by requiring the agency head or the agency's general counsel to state his own opinion of the matter in writing.¹³⁶

Finally, in what proves to be the most interesting case, the head of an agency might want to proceed with an initiative that is subject to some legal doubt, and must decide whether to solicit an OLC opinion on the issue. The purpose of doing this would be to insulate the agency head from criticism for a legally questionable undertaking by first securing from OLC an opinion ratifying the undertaking. Here again, the unquenchable desire to deflect criticism, which is characteristic of most officials who have survived public life long enough to become heads of agencies, undoubtedly accounts for some of the opinion requests that OLC receives. And, in these circumstances, the availability of Justice Department advice should have a moderating effect on agencies' behavior.

Because the agency head would ordinarily expect to capture much of the political benefit of approving a legally questionable initiative, he could be expected to weigh those expected gains against the expected costs arising from the legal doubts, and (assuming that OLC advice was not available) to approve the initiative if the expected gains exceeded the expected costs. The agency's general counsel, in turn, whose own interests will ordinarily be fairly closely aligned with those

¹³⁵ Obvious examples might include issues submitted by an agency head who has a particularly close relationship with the President, and those rare issues that are the subject of intense public attention. One opinion that may have fallen into both these categories is Legal Authority of the Department of the Treasury to Issue Regulations Indexing Capital Gains for Inflation, 16 Op. Off. Legal Counsel 145 (1992) (preliminary print).

There may also be cases in which OLC can expect to please a constituency that it values by discouraging another agency from acting in a way advocated by a constituency to which that agency's head is vulnerable. In such cases, one would expect OLC to respond with alacrity to the request for advice.

¹³⁶ The obstacle may not be too great, however, since OLC is prohibited by rules of confidentiality from disclosing the views of the agency. The agency, moreover, is not necessarily required to provide elaborate or candid explanations for its stated view. See McGinnis, *supra* note 7, at 426-30.

of the head of the agency, can be expected to provide legal advice that reflects a calculation close to the one that his superior would make if he had the time and expertise to perform the legal analysis.

The Assistant Attorney General for OLC faces a very different incentive structure. In the typical case, if he approves the initiative, the benefits will still be captured almost entirely by the client agency, while the costs of taking a legally aggressive position will largely be borne by OLC. If OLC disapproves the initiative, however, the expected costs of forgoing the initiative will be borne mostly by the client agency, without any corresponding loss of benefits to OLC. OLC can therefore be expected in general to offer more cautious legal advice than agencies' general counsel, and to develop a reputation within the government for doing so.¹³⁷ This institutional caution is the principal source of OLC's reputation and self-image as a disinterested or quasi-judicial decision maker. That reputation, while it has some basis in fact, is not something that needs to be promoted or protected, let alone burnished like a sacred icon. It is nothing more than the natural result of a self-protective bureaucratic imperative. And it need extend no further than that imperative dictates.

Having the option of seeking OLC advice complicates the calculus for heads of agencies. The costs of ignoring specific OLC advice are so high that they will ordinarily preclude the initiative from going forward. The costs of failing to consult OLC are much lower, but not zero.¹³⁸ The agency head must therefore calculate the probability of OLC concurrence and factor this into the cost/benefit analysis. Over a large run of cases, the result should be a reduction (though not to zero) in the pursuit of legally questionable initiatives that would have been pursued were OLC advice not available to agency heads.

This conclusion, however, also suggests that agency heads will have an incentive to find ways to close the gap between what they would do if OLC advice were unavailable and what they find themselves constrained to do by the fact that this advice is available. Or, to put it another way, agency heads have an incentive to attempt to align

¹³⁷ There may be some cases in which OLC has a legally aggressive agenda of its own, in the cause of which it must recruit reluctant agency collaborators who will perceive that some of the costs of OLC's initiative are being shifted onto them. One example is suggested by the EPA executive privilege affair during the first term of the Reagan administration. See Strine, *supra* note 126, ch. 5 (especially pp. 231-50). Whatever costs EPA officials bore in this incident, no one could imagine that the head of OLC paid less than his full share of the total costs. See, e.g., *In re Olson*, 884 F.2d 1415 (D.C. Cir. 1989) (Special Division).

¹³⁸ The benefits of securing OLC concurrence lie in shifting responsibility for the legal aspect of the decision to OLC.

OLC's interests with their own. One way to do this, in cases where the agency has decided not to proceed without an OLC opinion, is to turn the opinion-writing process into a process of negotiation. The agency could, for example, ask for oral advice, in the light of which it would decide whether to ask for a written opinion. It could also ask to see preliminary drafts of any written opinion, on which it would want to offer comments and suggestions, leading perhaps to much back-and-forth, so that the final opinion came closer than it otherwise would to the opinion that would be written by the agency's general counsel. The agency could also in many cases supply "assistance" to OLC in the form of lobbying by lawyers representing private interests that would benefit from the proposed initiative. Such intercourse, however, would generally appear to OLC as a lot of undesirable hassles. And, since agencies will normally have little or nothing to offer in exchange for OLC willingness to endure such unpleasantness, we would expect to see, and in fact do observe, that OLC has adopted a set of rules that tend to limit such interaction with outsiders.¹³⁹

These rules are the core of the self-consciously "judicial" opinion-writing processes that OLC has adopted. In order to explain the rules' existence, I doubt that one need look farther than to the absence of an incentive for putting up with the hassles they prevent.¹⁴⁰ If the factors analyzed so far were all that were at work in affecting OLC's behavior, however, OLC's opinion-writing function might begin to have more profoundly conservative effects than the orderly functioning of government requires or even allows. Or, to put it another way, the general interests of the government would not necessarily be well-served unless OLC were required to factor agency interests into its legal decision making to a greater extent than it would if OLC were always permitted to operate in the court-like fashion dictated by its self-interest.¹⁴¹

OLC's self-serving tendencies toward quasi-judicial decision making are moderated in practice by the influence of the Attorney General and especially the White House (which the Attorney General will in many cases represent if he is involved at all). Perhaps more than any other agency in the government, and certainly more than any other legal office, the behavior of OLC is determined primarily by its relationship with the White House. In order to see why, a compar-

¹³⁹ McGinnis, *supra* note 7, at 426.

¹⁴⁰ The analysis presented here was influenced in some respects by Richard A. Posner, "What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)," *Law & Economics Working Paper Series*, No. 93-003, Geo. Mason U. School of Law (1993).

¹⁴¹ On the other hand, if OLC were no more conservative in its legal advice than agency general counsel, it would hardly perform any function at all.

ison between the Solicitor General and the head of OLC may be instructive.

President Reagan's second Solicitor General, Charles Fried, reports in his memoirs that he had a serious disagreement "over the principle of federalism . . . with the Attorney General [Edwin Meese] and many colleagues in the Department—especially Chuck Cooper [Assistant Attorney General for the Office of Legal Counsel] and Brad Reynolds [Assistant Attorney General for the Office of Civil Rights and Counsellor to the Attorney General]."¹⁴² Fried reports that although Meese, Cooper, and Reynolds "had a convinced and important ally in President Reagan,"¹⁴³ Fried strongly resisted a federalism initiative that the others were promoting. Even after their "important ally" issued a formal executive order largely reflecting the views of Fried's opponents, the Solicitor General believed that he need only avoid an "unduly" grudging response. This apparently did not require much sacrifice, for Fried reports, apparently without embarrassment, that he "was probably guilty of some considerable backsliding" in one major brief that he filed in the Supreme Court.¹⁴⁴

However unpopular and mistrusted Fried may have made himself through his resistance to the views of the Attorney General and the Attorney General's "important ally" (Fried's revealing description of the President), there is no reason to expect that Fried's power would have been significantly reduced unless he went so far as to provoke his legal superiors into forcing his resignation. So long as he remained in his job, he could expect to continue exercising almost complete control over very significant portions of the government's business, for the simple reason that responsibility for that business attaches automatically to the office of the Solicitor General. Briefs and petitions for certiorari have to be written and filed, oral arguments have to be conducted, appeals-authorization decisions must be made, and there is no mechanism readily available for getting this work done by some entity other than the Solicitor General's office.

The Assistant Attorney General for OLC is in an entirely different position. His role is wholly advisory, and there is almost nothing that both must be done and must be done by OLC. Indeed, this Office could stop functioning completely without any significant effect on the operation of the government. If the Attorney General loses confidence in the legal advice that OLC provides, there are countless other sources within the Department of Justice to which he can turn virtu-

¹⁴² FRIED, *supra* note 132, at 186.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 188.

ally on an instant's notice without disrupting any established and significant bureaucratic routine. Similarly, other agencies would rarely, if ever, find themselves frustrated in carrying out their functions because of an inability to obtain a legal opinion from OLC or the Attorney General. And, perhaps most important, if the President does not get the kind of legal advice he wants from OLC or the Attorney General, he can simply stop soliciting it, and turn instead to the many other eager sources of legal advice that are readily available to him.

It is worth emphasizing, before proceeding with the analysis, that my discussion deliberately focuses entirely on the incentives facing the Assistant Attorney General for OLC. The incentives facing the other lawyers who work in the Office, which are quite different, undoubtedly account for elements of the Office's quasi-judicial atmosphere and traditions, but I do not believe they are significant in explaining OLC's important role in the operation of the government.¹⁴⁵ This will seem highly counter-intuitive to those who are accustomed, because of the academic literature on organizational behavior or because of their own experiences in the government, to assuming that the heads of administrative units are highly constrained by the cultures of the bureaucracies they are assigned to manage. Such an assumption is misplaced in this context. Unlike agencies that have important tasks assigned to them as a matter of routine, OLC is almost exactly and exclusively what the head of the Office chooses to make of it. Unfortunately, this fact about OLC, and certainly its significance, has been entirely overlooked by previous analysts.¹⁴⁶

¹⁴⁵ A good summary of the incentives that operate on OLC staff lawyers is presented in McGinnis, *supra* note 7, at 421-23.

¹⁴⁶ This is not to deny that the head of OLC needs to employ sound managerial techniques to control the staff. The challenges facing this official as a manager, however, are not very great. The nature of OLC's work is such that the head of the Office can monitor the work of subordinates quite closely and need not delegate real decision-making authority on important issues to any appreciable extent. In this respect, the staff lawyers function much like judicial clerks, except that it is even easier for the head of OLC than for a judge to avoid being controlled by his subordinates. A much smaller proportion of the Office's work has the kind of consequences that would make it dangerous to rely on the judgment of subordinates, and the head of OLC has much greater control over the mix of work that the Office performs than a judge does.

Like judicial clerks, OLC staff lawyers are few in number, turnover is high, and the head of the Office has very considerable discretion in choosing who will fill the vacancies that occur. What is most significant, though, is the fact that the important work of the Office (that in which the White House or the Attorney General may be interested) can be carried out with the assistance of a tiny number of trusted and enthusiastic lawyers. If some lawyers working in the Office are not trusted, which will usually be the case, they can be assigned to unimportant projects such as minor interagency disputes (which are never in short supply) and their work can be scrutinized with special care. A phenomenon that one encounters frequently in other government agencies—the manager's need to support the judgment of his subordinates in or-

Because of its institutional insecurity, OLC does not impose its quasi-judicial rules and processes on the White House. The significance of the difference between the way that the White House and most other agencies are treated can hardly be overstated. The relationship between OLC and the White House Counsel's office (which usually serves as the principal point of contact) can be quite informal and collaborative, much like the relationship between in-house counsel and outside counsel in private practice.¹⁴⁷ The nature of such a relationship obviously promotes OLC's ability to provide that degree of legal aggressiveness or legal caution that reflects the President's interests, which may vary quite considerably from issue to issue and from time to time. Any number of factors can affect this variation, including the President's settled policy priorities, his own view of his constitutional responsibilities, and the sometimes volatile political constraints or opportunities that any administration encounters from day to day.

An informal lawyer-client relationship between the White House and OLC, however, does not merely help to ensure that the President receives the kind of advice he wants on questions that involve action directly by him. In fact, this may be one of the less important effects of White House-OLC cooperation. Even more important may be the coordinating function that this relationship allows the White House to play in ensuring that *other agencies* receive the kind of legal advice

der to maintain staff morale and effectiveness—simply need not affect any important decision at OLC.

One can go seriously astray by failing to grasp the sharp distinction between the incentives facing the head of OLC and those facing OLC staff, and the relative absence of constraints imposed on the head of the Office by his managerial responsibilities. *See, e.g.,* Strine, *supra* note 126 (concluding that OLC's behavior is driven largely by a "culture of professionalism"). Some heads of OLC may allow themselves to become staff driven, but this should be comparatively rare, for reasons that will appear in the following analysis.

¹⁴⁷ For simplicity of exposition, I will assume throughout most of the following discussion that OLC deals with the President primarily through the Counsel to the President. This is not necessarily or always the case. The Attorney General and others provide alternate channels of communication, and these can sometimes be more important than the Counsel to the President. An obvious example could be found in an administration in which the President and the Attorney General enjoy a close working relationship and the White House Counsel's principal ties are with the White House Chief of Staff. In such circumstances, relations with the White House Counsel's office are still likely to be informal, but they are more likely to be testy and competitive than collaborative. Such variations on the simple model I assume in the text can present a complex set of problems and opportunities to the head of OLC when he attempts to read the President's interests and desires, but they do not affect my underlying analysis.

I also abstract from the personality clashes, petty jealousies, and miscalculations that may cause deviations from the model I am offering here. Such factors undoubtedly affect the outcomes of particular events, as they do everywhere else that people cooperate and compete with each other, but they should not be much more significant over a long run of cases in this context than in any other.

that promotes the President's interests. The White House is perfectly free to consult with OLC before OLC provides advice to other agencies, and that fact is well known within the government. Thus, if we assume that OLC will, when left to itself, generally give very cautious legal advice to agencies, we can also assume that agencies with an interest in obtaining OLC concurrence in their proposals will try to obtain advice more congenial to the client agencies' interests by soliciting the White House to signal its interest in the matter to OLC. In order to overcome White House inertia, however, the agency will have to show that it is in the interest of the President (in contradistinction to that of the agency head) to proceed with the initiative despite whatever legal doubts are associated with it.¹⁴⁸ Thus, the legally conservative baseline that OLC would naturally tend to set apart from White House influence gives the White House a powerful tool for controlling the agencies.¹⁴⁹

There are two interrelated reasons for OLC's willingness to be more responsive to White House interests than to those of other agencies. First is the simple but significant point that the head of OLC legally reports to the President (through the Attorney General). If anyone has the right to determine whether OLC should be giving cautious or aggressive advice in any particular case, it is the President. None of the agencies can make any similar claim of right. Second, and perhaps of greater operational significance than legal theory would predict, the President, the Attorney General, and even the White House staff hold the keys to some of the most desirable appointments to which lawyers aspire. In recent decades, for example, those who have headed OLC have been rewarded with seats on the Supreme Court at a higher rate than people serving in any other posi-

¹⁴⁸ The distinction between the interests of agency heads and the interests of the President is also important when agencies are recommending that the President himself take action. *See, e.g.,* Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 15 (1982) ("[T]he White House staff is likely to suspect that [agencies'] general counsels' work product reflects the orientation of their clients. Accordingly, they turn to lawyers whose client is the President—the Counsel to the President, and, for 'outside counsel,' the Office of Legal Counsel in the Department of Justice.").

I should note that I am assuming for simplicity of exposition in this discussion that the interests of the White House staff and the President are identical. This is not quite true—there are agency costs within the White House just as there are everywhere else—but those interests will ordinarily be much more closely aligned than the interests of the President and his subordinates in the agencies. There are many reasons for this dramatic difference in the alignment of interests, but the most important probably arise from the powerful effects of physical proximity and from the fact that White House staff are not subject to Senate confirmation.

¹⁴⁹ Because of the indirect and usually invisible nature of the process, moreover, the President is hardly exposed to the risks associated with deciding whether or not to kill an initiative on legal grounds.

tion in government, including even the more prestigious and powerful positions of Attorney General and Solicitor General.¹⁵⁰ This is less surprising than it might otherwise be when one recognizes that there is very little that actually must be done by OLC, and that the head of OLC therefore has very little to do *except* find ways to make himself useful to the President and those who can influence the President's promotion decisions.¹⁵¹ It may also be significant that much of OLC's assistance to the President takes place outside public view, where there is relatively little risk of attracting the kind of dislike and mistrust that can create obstacles to nomination or to confirmation by the Senate.

None of this is meant to imply that the head of OLC need act or even can routinely act as a tool of the White House in any simple or straightforward way. The White House itself, for example, is a complex and volatile environment, and perceiving the President's real desires and interests as they get filtered through the White House staff can be a treacherous undertaking. Other complicating factors include the needs and demands of the Attorney General and other components of the Justice Department, which may conflict with those of the White House, but which must be addressed and must ordinarily be satisfied at least to some extent.¹⁵² The existence of a separate chan-

¹⁵⁰ Although far more Supreme Court Justices in the modern era have served on a United States Court of Appeals than in OLC, this pool of candidates is also far larger than the pool of people who have served in any particular position in the Justice Department. The rate of promotion is therefore higher for OLC.

Chief Justice Rehnquist was appointed Associate Justice directly from his position at OLC, while Justice Scalia was appointed several years after his service in OLC by a different President. Justice White was appointed directly from his position as Deputy Attorney General; Justice Marshall was appointed to the Court by the same President he had served as Solicitor General; Chief Justice Burger had served as Assistant Attorney General for the Civil Division.

More recently, William P. Barr was promoted from OLC to Deputy Attorney General and then to Attorney General. Barr's successor, J. Michael Luttig, was one of only three officials in the Bush Justice Department to be appointed to a United States Court of Appeals.

I do not claim that any of this is statistically significant, but I do believe it is striking enough to catch the attention of those who serve as heads of OLC.

¹⁵¹ An interesting example of this phenomenon, which is not mentioned by either Professor McGinnis or Professor Kmiec, is OLC's substantial involvement in judicial selection and in assisting judicial nominees during the confirmation process. These activities have little to do with OLC's official role of providing *legal* advice to the President and the heads of agencies, but a great deal to do with OLC's "unofficial" mission of making itself useful in whatever way it can to the President and the Attorney General.

¹⁵² An almost comical example of OLC's need to be at least as sensitive to the Attorney General's needs as to the wishes of the White House staff is provided in *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. Off. Legal Counsel 249 (1989) (preliminary print). This opinion, which is addressed to the Attorney General, deals with a statute that authorizes private citizens to prosecute civil fraud claims on behalf of the United States even when the Attorney General has determined that the particular claim at issue should not

nel of responsibility and information running through the Attorney General to the President may create its own set of opportunities, but also its own set of pitfalls. And the President may well have relationships with the heads of some agencies that give them an importance well beyond what inheres in their offices. In addition, there will be many cases in which the President, the Attorney General, and the White House staff have no very precise idea of what they want done, leaving the head of OLC to substitute his own best judgment for theirs.

It would also be a mistake to infer from my analysis that OLC *cannot* operate as a quasi-judicial legal analyst, by giving legal opinions that simply reflect the private views of the author, uncolored by the interests of the President. Indeed, given the difficulties and risks that are often involved in assessing what kind of advice would be most useful or pleasing to the President, there are undoubtedly frequent occasions on which the head of OLC falls back on his personal views and decides issues as though he were a judge, especially with respect to issues in which the White House or the Attorney General has not appeared to take any strong interest. Rarely would there be any strong or immediate sanction for such behavior even with respect to issues in which the White House *is* interested. It is well known that one way for OLC to make itself useful to the President is to resist specious proposals whose remote negative consequences may outweigh the immediate benefits that tend to be most apparent in the politically hyper-sensitive atmosphere of the White House. So long as the head of OLC appears to be providing competent and "client-oriented" advice, the occasional disappointing answer need not undermine the Office's credibility. Only a pattern of disregard for the President's interests, or some particularly egregious incident, is likely to trigger a strong response. And some of the strongest responses are also the easiest to implement: finding a substitute for OLC when important matters are at stake and overlooking the head of OLC when promotions become available.¹⁵³

be pursued. The second sentence of the opinion says of this threat to the Justice Department's litigating turf: "This may well be the most important separation of powers question you will have to address as Attorney General." *Id.*; *cf.* United States *ex rel.* Kelly v. Boeing Co., No. 92-36660, at *1 (9th Cir. Sept. 7, 1993) (preliminary opinion) (concluding, contrary to the OLC opinion cited above and without mentioning that opinion, the *qui tam* provisions of the False Claims Act are constitutional).

¹⁵³ With characteristic insight and deftness of expression, Antonin Scalia wrote in 1979:

The White House will accept distasteful legal advice from a lawyer who is unquestionably "on the team;" it will reject it, and indeed not even seek it, from an outsider—when more permissive and congenial advice can be obtained closer to home. And it almost always can be, if not from the White House Counsel then

I also do not mean to suggest that the head of OLC is constantly, or even frequently, required to compromise his own views of what the law is in order to maintain his influence. The people chosen for this job are likely either to have reputations for holding views of the law that are welcome in the administration in which they serve, or reputations for subordinating their personal views to the interests of their clients, or (most likely) both. Advice, and even formal opinions, moreover, can often be framed in a way that serves the client's interest without requiring the advice giver to compromise his principles or to make statements that would threaten to injure his reputation as a competent lawyer.

What my analysis does imply, and I believe this is significant, is that the incentive structure facing the head of OLC is largely dominated by the fact that OLC's influence and status within the government will be strongly and inversely correlated with the extent to which it ignores White House interests in order to behave in accord with the image of the quasi-judicial or independent decision maker that it publicly cultivates. We should therefore expect to see the quasi-judicial posture assumed primarily in two situations (as well as in resolving relatively insignificant interagency disputes, where the quasi-judicial pose would tend to be indistinguishable from the reality of quasi-judicial decision making). First, OLC can be expected to behave in a quasi-judicial style when dealing with entities other than those that are regarded as the Office's true clients, namely the Attorney General, the President, and those who are believed actually to speak for them.¹⁵⁴ Second, one would expect to see OLC strike the pose of quasi-judicial advisor even when dealing with clients such as the White House Counsel in circumstances in which a record is being or may be created. This would most obviously be the case in formal

from one of the Cabinet members who is a lawyer, or from one of the Washington attorneys who soon become advisors of any administration.

MEADOR, *supra* note 20, at 40.

There may well be periods during which OLC actually seeks to become an independent judge-like decision maker, and develops something of an adversarial or indifferent attitude toward the White House. This seems to have happened during the Carter administration, when the Attorney General himself encouraged such an attitude throughout the Department of Justice. See Strine, *supra* note 126. Whatever the lasting effects of such experiments may be in other components of the Justice Department, we should expect the incentive structure faced by the head of OLC to prevent them from persisting in an institutionalized fashion in that Office.

¹⁵⁴ For my purposes here, it does not matter whether one thinks of the attorney-client relationship as arising from a legal source (the Attorney General and the President are the legal superiors of the Assistant Attorney General for OLC) or from a more practical source (the President and Attorney General and those who can influence them have the power to reward the head of OLC with desirable goods such as fame and promotions).

opinions, but the pose can be maintained to a substantial degree in meetings at which outsiders (such as agency counsel) are present, and even in private conversations (where clear messages can be conveyed among intelligent people without resorting to crude references to the President's policy agenda or his political needs).

If the foregoing analysis is valid, it should be possible to make some predictions in addition to those already included in the previous discussion. For example:

1. Contrary to Professor McGinnis's suggestion, we should expect that people with substantial personal reputations, especially academic reputations, will seldom be chosen to head OLC. Other things being equal, such people are more likely than relatively obscure individuals to believe that their self-interest requires them to behave in accordance with the myth of the quasi-judicial OLC. When people do come into the Office with such reputations, they may tend to generate more conflict with the Attorney General and the White House and accordingly have less influence than people who come into the Office from relative obscurity.¹⁵⁵ Solicitors General, by way of contrast, should be more likely to come into office with substantial personal reputations, and should be less likely to be promoted once they are in office.
2. When a new Attorney General or President inherits an Assistant Attorney General for OLC from his predecessor, reliance on that individual for legal advice should decrease markedly until the individual demonstrates that he has the will and the ability to avoid lapsing into quasi-judicial behavior patterns at inopportune moments.
3. *Stare decisis* should be a very weak force in OLC's jurisprudence. After a change of administration, for example, especially if it involves a change of party, there should be little reluctance to overrule previous opinions that do not serve the policy or political interests of the new Attorney General or President.

There are without doubt obstacles to testing these and similar predictions that might be made on the basis of the foregoing analysis. Only a tiny fraction of OLC's written work is published, and there is no reason to think that this sample is random. On the contrary, it is safer to assume that the sample is a selection of opinions whose release was thought to serve the interests of those who made the publi-

¹⁵⁵ This effect might well not occur in the case of a prominent academic or practitioner who regarded himself as a plausible candidate for the Supreme Court. The prospect of such a promotion could easily swamp any concern with preserving an academic reputation, let alone whatever reputation for disinterestedness is significant in private practice.

cation decision.¹⁵⁶ In addition, much of the most significant advice that OLC provides may never be committed to writing, and those who give and receive it orally may have strong reasons to conceal or obscure the nature of the advice or even the fact that the advice was given. And even if complete and candid memoirs from relevant officials were available, the human soul has so much capacity for self-deception that even such a record could not be deemed wholly reliable.

Despite these difficulties, future research into the legal advisory function of OLC and the Attorney General should give much greater attention than past research has to the peculiar incentives that operate on those who exercise it.

CONCLUSION

The most salient characteristic of the Attorney General's opinion function is that the Attorney General has virtually no institutionalized power to monopolize the provision of legal advice. As a result, the Attorney General (or his modern delegate, the Office of Legal Counsel) must compete for influence as an advisor with agency counsel and other legal officers within the government, especially the Counsel to the President.

The Attorney General's near monopoly over the government's most important litigating functions provides an important bureaucratic lever for exerting control over agency counsel, but that lever does not maximize the influence of the Attorney General or his delegate in OLC, especially in relation to the Counsel to the President. For reasons of self-interest, the Attorney General and especially the head of OLC have incentives to maximize their influence by shaping their legal advice according to the interests and desires of the President in much the same way that private lawyers shape their advice in light of their clients' demands. The quasi-judicial persona that OLC adopts in its formal opinions and in most of its contacts with other agencies is best understood as a device for preventing those agencies from shifting the costs entailed in legal risk-taking onto OLC and as a device for assisting the White House in the control of agencies other than the Department of Justice. OLC's role in resolving routine inter-agency legal disputes—a role in which it can and does behave in a quasi-judicial manner—is relatively unimportant except to the extent that it helps create a legally conservative baseline for government op-

¹⁵⁶ See, e.g., *supra* note 83 (discussing the Bush administration's eleventh-hour mass release of OLC opinions).

erations. This function, in turn, is important largely because it tends to force the policy decisions associated with many important legal issues out of the agencies and into the White House.

This analysis ineluctably leads to the conclusion that OLC more truly deserves a reputation as the President's lawyer than as any sort of quasi-judicial advisor. That conclusion, moreover, does not appear to require any criticism of OLC's behavior. As the discussion in part II of this Article indicated, OLC's role in assisting the President to control the federal bureaucracy and to advance the President's political and policy interests, is unexceptionable under existing law. Such a role is also consistent with the general principles that shaped the design of the federal government, principles that are nowhere more succinctly summarized than in Publius's dictum that ambition must be made to counteract ambition.¹⁵⁷ OLC's function in the federal establishment illustrates that dictum in an unusually subtle and complex way, but that may be more a tribute to the power of the principle than a reason to be disturbed about the phenomenon it explains.

In the end, however, this conclusion does not foreclose the possibility that OLC or the Attorney General should be converted—probably by Congress—into the kind of truly quasi-judicial legal advisor for which it is so often mistaken. To consider that possibility adequately would require attention to all the intricate relations and perplexing doubts referred to by Justice Story in the quotation taken for the epigraph of this Article. Such an undertaking, if it is to be carried out in a responsible fashion, must begin with an accurate analysis of the contribution to limited government that OLC already provides within the framework of existing law. This Article presents that analysis.

¹⁵⁷ THE FEDERALIST NO. 51 at 322 (James Madison) (Clinton Rossiter ed., 1961).

