

FAITHFULLY EXECUTING THE LAWS: INTERNAL LEGAL CONSTRAINTS ON EXECUTIVE POWER

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Since September 11, 2001, the Bush Administration has engaged in a host of controversial counterterrorism actions that threaten civil liberties and even the physical safety of those targeted: enemy combatant designations, extreme interrogation techniques, extraordinary renditions, secret overseas prisons, and warrantless domestic surveillance. To justify otherwise unlawful policies, President Bush and his lawyers have espoused an extreme view of expansive presidential power during times of war and national emergency. Debate has raged about the details of desirable external checks on presidential excesses, with emphasis appropriately on the U.S. Congress and the courts. Yet an essential internal source of constraint is often underestimated: legal advisors within the executive branch. On a daily basis, the President must engage in decisionmaking that implicates important questions of constitutionality and legality. Whether to seek congressional authorization before engaging in war, what limits to set (and respect) on interrogation techniques, when to publicly release information regarding security efforts—all are issues over which the President exercises enormous practical control, and all can profoundly affect individual lives and the course of history. This Article examines executive branch legal interpretation: How can internal interpretive processes and standards foster or undermine adherence to the rule of law? What may be gleaned from recent failures? How might the courts and Congress not only hold Presidents accountable for particular failures to uphold the law, but also encourage processes that generally enhance the quality of executive branch legal advice and decisionmaking? This Article takes as its principal example the Bush Administration's interrogation policies. It considers past failures and, looking forward, what standards should govern the faithful execution of the laws. It builds upon a statement of Principles to Guide the Office of Legal Counsel, in which nineteen former Office of Legal Counsel lawyers set forth the best of longstanding practices in an effort to promote presidential fidelity to the rule of law.

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INTRODUCTION

Since the terrorist attacks of September 11, 2001, the Bush Administration has engaged in a host of controversial counterterrorism actions that threaten civil liberties and at times even endanger the physical safety of the targeted individuals. Prominent examples include the detention of enemy combatants, the use of extreme interrogation techniques and even torture, extraordinary renditions, secret overseas prisons, and warrantless domestic surveillance. To justify policies that would otherwise violate applicable legal constraints, President Bush and his lawyers have espoused an extreme view of expansive presidential power during times of war and national emergency, a view that draws especially on the President's constitutional role as commander-in-chief. For those who believe that the Bush Administration has misinterpreted relevant constitutional authorities, particularly when seeking to justify actions otherwise prohibited by law, the War on Terror brings new urgency to old questions: What can be done to prevent presidential aggrandizement and abuse of power including in the most trying of times, when the nation is at war or serious external threats otherwise threaten national security? What in our constitutional system can help to ensure that Presidents will respect the rule of law and adhere to constitutional and statutory limits on their national security policy options?

The most obvious checks on the President are the other two branches of the federal government: the U.S. Congress and the courts. Our constitutional system of separate and overlapping powers creates the potential for a vibrant legislature and judiciary to check a President who transgresses legal

boundaries and violates rights in order to accomplish policy ends.¹ Debate has raged, domestically and internationally, about the details of desirable external checks on the Bush Administration's counterterrorism policies. While the Republicans controlled Congress prior to 2007, most attention understandably focused on the courts, with commentators differing passionately about the level of deference the courts should afford the political branches² and about the judiciary's potential to safeguard civil liberties in times of emergency.³ Thus far, the U.S. Supreme Court has taken a relatively aggressive and nondeferential stance in favor of protecting those whose rights the President's policies may have violated.⁴ The Court's approach is warranted: Regardless of the underlying policies' substantive merits, the courts as well as Congress should hold the President

1. As James Madison wrote in *The Federalist Papers*, "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others." THE FEDERALIST NO. 51, at 267, 268 (James Madison) (George W. Carey & James McClellan eds., 2001). The constitutional structure affords the three branches—Madison's "departments"—considerable authority and means for checking each others' excesses and safeguarding their own powers against encroachment. Additional pressures come from outside the government: public opinion, American voters, advocacy organizations, foreign nations, and the press.

2. See, e.g., Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230 (2007); Julian Ku & John C. Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179 (2006); Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170 (2007). The Bush Administration has consistently urged the U.S. Supreme Court either to accord the President extreme deference or to refuse even to hear challenges to executive branch action on matters of national security. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 527 (2004) (plurality opinion) (citing the government's brief urging extreme deference to the President's enemy combatant determinations in light of "[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making"); see also Alberto R. Gonzales, Att'y Gen., Remarks at the American Enterprise Institute (Jan. 17, 2007), available at http://www.uscourts.gov/newsroom/Gonzalez_11707.pdf ("[A] judge will never be in the best position to know what is in the national security interests of our country.").

3. See, e.g., BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* (2006); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565 (2003); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003); William E. Scheuerman, *Emergency Powers*, 2 ANN. REV. L. & SOC. SCI. 257 (2006); Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273.

4. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (holding that the Bush Administration's military tribunals violated applicable law and that Common Article 3 of the Geneva Conventions applies to al Qaeda, notwithstanding Bush's conclusion to the contrary); *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that, as the law was then, the writ of habeas corpus extended to the petitioner prisoners at Guantanamo); *Hamdi*, 542 U.S. at 507 (plurality opinion) (holding that the government must provide a citizen it seeks to imprison as an "enemy combatant" with an opportunity to challenge the detention before a neutral decisionmaker).

accountable for attempts to implement policies with arrogant disrespect for legal constraints and for the coordinate branches' constitutional authorities.

Our recent history, though, has demonstrated the inherent inadequacies of the courts and Congress as external checks on the President. An approach of issue-by-issue review and oversight even by a vigilant judiciary and Congress will incompletely constrain a President who, in the name of national security, is willing to undermine the rule of law. This Article therefore seeks to elevate an essential source of constraint that often is underappreciated and underestimated: legal advisors within the executive branch.

The obstacles to judicial or congressional review of particular executive branch actions on matters of war and national security—especially during times of crisis—are familiar. The courts face (and create) difficult justiciability requirements, in part out of respect for executive authority and expertise. These impediments to judicial review mean, for example, that there may be no party who ever has standing to challenge a clearly unlawful governmental action. Courts may deny or delay relief even to parties with standing because of the political question doctrine, the state secrets privilege, deferential standards of review, or years of complex litigation.

With regard to Congress, oversight obviously tends to be least effective when the President's political party dominates, but even with the shift to Democratic control in 2007, significant obstacles remain to Congress's ability to check executive action. Congress tends to defer strongly to the commander-in-chief on matters of war and national security even in times of divided government. Legislative efforts face the possibility of a filibuster or a presidential veto.

Perhaps the greatest challenge to legislative oversight is that Congress has already enacted legislation with regard to many of the Bush Administration's most objectionable policies. Much of the controversy in fact stems from President Bush's claimed authority to refuse to comply with congressional statutes, including the Foreign Intelligence Surveillance Act (FISA),⁵ the anti-torture statute,⁶ and the numerous other laws that are

5. 50 U.S.C. §§ 1801–1862 (2000 & Supp. II 2002); see also U.S. Dep't of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, 81 IND. L.J. 1374 (2006).

6. 18 U.S.C. §§ 2340–2340A (2000). Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002) [hereinafter *Torture Opinion* or *Opinion*], available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.

the subjects of signing statements in which Bush asserts the right to refuse to enforce the laws in ways that conflict with his view of his office's constitutional authority.⁷ When Congress already has legislated and the President unjustifiably threatens nonenforcement, Congress is left with the options of resource-intensive oversight to attempt to police compliance, indirect retribution (such as through appropriations and appointments), and the blunt instrument of impeachment.

Executive branch secrecy further hinders both judicial and congressional review. At times, of course, secrecy is essential to preserving national security, but the Bush Administration has taken the level of executive branch secrecy to a new and unwarranted extreme. By its nature, secrecy undercuts the efficacy of external checks. Congress or potential litigants may not even know about unlawful executive action unless someone in the government violates administration policy, and perhaps statutory prohibitions, to leak information. Such leaks were responsible for the public disclosure of the Bush Administration's legal opinions and policies on coercive interrogations and torture,⁸ the National Security Administration's domestic surveillance program that operated outside the requirements of FISA,⁹ and the use of secret prisons overseas to detain and interrogate suspected terrorists.¹⁰ Ultimately, even with the current Supreme Court's relatively strong willingness to protect rights in the face of unlawful executive action, coupled with scrutiny from the press and advocacy organizations, the Bush Administration has engaged in years of largely unconstrained illegal practices.

7. See T.J. HALSTEAD, CONG. RESEARCH SERV. REPORT FOR CONG., *PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS* (2007); Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRES. STUD. Q. 515 (2005); Charlie Savage, *Bush Challenges Hundreds of Laws: President Cites Powers of His Office*, BOSTON GLOBE, Apr. 30, 2006, at A1. The Bush Administration sometimes declares a law unconstitutional and unenforceable to the extent it conflicts with the President's asserted constitutional authority, but more often the administration announces it will "interpret" the law—often inconsistently with the best reading of the text and legislative intent—to avoid a conflict with the administration's expansive view of the President's powers. For insightful discussions of the legitimacy of the executive branch's reliance on the constitutional avoidance doctrine, see Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006), and H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313 (2006).

8. See Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST, June 8, 2004, at A1.

9. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

10. See Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

On a daily basis, the President engages in decisionmaking that implicates important questions of constitutionality and legality. Whether to seek congressional authorization before committing the nation to war or other hostilities, what limits, if any, to set (or when set by Congress, to respect) on torture and other coercive interrogation techniques, when to publicly release information regarding the course of war or counterterrorism efforts—all are issues over which the President exercises enormous practical control, and all can profoundly affect individual lives and the course of history. The possibility of after-the-fact external review of questionable executive action is an inadequate check on executive excesses. Presidents also must face effective internal constraints in the form of executive branch processes and advice aimed at ensuring the legality of the multitude of executive decisions.

The proposition that the President's own legal advisors can provide an effective constraint on unlawful action understandably engenders a high degree of skepticism—especially in light of recent events. One of President Bush's legacies undoubtedly will be the deepening of Americans' cynicism about presidential adherence to the rule of law. The Bush Administration, however, also provides some evidence to the contrary, for example, in the resistance to advice given by the U.S. Department of Justice's Office of Legal Counsel (OLC) regarding torture from lawyers and other advisors elsewhere in the executive branch and later from within OLC itself.¹¹ Internal checks alone, of course, are insufficient. But we debase our commitment to democracy and justice if we do not view legal advice from within the executive branch as an essential component of efforts to safeguard civil liberties, the constitutional allocation of governmental authority, and the rule of law. We invite failure if we allow our cynicism to excuse presidential abuses as simply expected—in effect relieving Presidents (and those who serve them) of their obligation to take care that the laws be faithfully executed, as the U.S. Constitution commands.

11. See *infra* notes 45, 53, 54 and text accompanying note 53. On a related issue, the Department of Justice stood strong against President Bush and others in the White House on the legality of an early, apparently even more egregiously unlawful, version of the warrantless domestic surveillance program. Deputy Attorney General James Comey and the rest of the Department's top leadership stood firm, unwilling to approve the program even when then-Counsel to the President Alberto Gonzales sought to pressure a critically ill Attorney General John Ashcroft into approving the program. See Dan Eggan & Paul Kane, *Gonzales Hospital Episode Detailed*, WASH. POST, May 16, 2007, at A1.

This Article therefore considers questions of executive branch legal interpretation. How can internal interpretive processes and standards foster or undermine adherence to the rule of law? What norms and procedures should govern executive action? What may be gleaned from recent strains and failures? How might the courts and Congress not only hold Presidents accountable for particular failures to uphold the law, but also encourage processes that generally enhance the quality of executive branch legal advice and decisionmaking?

Presidential failures to comport with the law can be found throughout history, from administrations of both political parties, often on matters of war powers. This Article examines one particularly illuminating context in which to consider the necessity of internal legal constraints: The Bush Administration's controversial positions regarding the interrogation of detainees suspected of terrorism. The administration continues to withhold, in the name of national security, information and documents critical to a thorough review of these policies, but much is now publicly known. Most infamously, government lawyers in OLC gave executive branch policymakers dangerously flawed advice in the early months after the September 11 attacks regarding the legality of using torture to acquire information from detainees.¹² Although the substance of the advice has been almost universally condemned, and the Bush Administration publicly disavowed the advice after it was leaked, the failures that led to this debacle demand far greater scrutiny, both to determine accountability for past misdeeds and to promote future legal compliance.

Congress created a new urgency for that scrutiny by enacting the Detainee Treatment Act of 2005 (DTA)¹³ and the Military Commissions Act of 2006 (MCA),¹⁴ legislation that, in many circumstances, deprives the federal courts of jurisdiction to hear complaints of torture and other illegal interrogations by the U.S. government. Through these laws, Congress prohibited the government from subjecting any person to torture or cruel, inhuman, or degrading treatment. Congress, though, acceded to the Bush Administration's demands to limit dramatically the possibility of judicial review in the event the government violates those prohibitions or interprets them out of existence. For noncitizens whom the government imprisons outside of U.S. territory, the legality of the conditions of their

12. See Torture Opinion, *supra* note 6.

13. Pub. L. No. 109-148, 119 Stat. 2739 (2005) (to be codified in scattered sections of 10, 28, and 42 U.S.C.).

14. Pub. L. No. 109-366, 120 Stat. 2600 (2006) (to be codified in scattered sections of 10, 18, 28 and 42 U.S.C.).

confinement and interrogation depends more than ever on the executive branch's internal decisionmaking processes.¹⁵

Part I of this Article reviews the Bush Administration's interrogation policies and Congress's responses. Part II examines the standards and processes that should govern the legal advice that informs executive branch action. Taking as its principal example the formulation of detainee interrogation policy, it considers past failures and, looking forward, what standards should govern the faithful execution of laws such as the DTA and the MCA. Part II also endorses and builds upon a short statement of *Principles to Guide the Office of Legal Counsel*,¹⁶ reprinted in the appendix following this Article, in which nineteen former OLC lawyers set forth the best of longstanding practices in an effort to promote presidential fidelity to the rule of law. Finally, it calls for the Bush Administration and all subsequent administrations either to endorse those principles or develop their own; and it urges a congressionally led public dialogue about the proper role of presidential lawyers.

I. LEGAL CONSTRAINTS ON INTERROGATION DURING THE BUSH ADMINISTRATION

The images of U.S. soldiers abusing detainees at the Abu Ghraib prison in Iraq are well recognized and easily recalled. The celebratory photographs taken by those involved in the abuse, made public in April 2004, horrified the world. The United States' enemies, including those who engage in terrorism, used the photographs to mobilize support and attract new recruits.¹⁷

Shortly after the release of the Abu Ghraib photographs, someone leaked to the press an August 2002 legal memorandum in which OLC advised then-Counsel to the President Alberto Gonzales on the meaning of the federal statute¹⁸ that makes it a crime to commit torture (Torture Opinion or Opinion).¹⁹ Congress had enacted the 1994 statute to implement

15. That is, unless or until the Supreme Court rules that the Military Commissions Act of 2006 (MCA) violates a constitutional right to habeas corpus. See *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), cert. granted, 2007 WL 1954132 (June 29, 2007) (No. 06-1195) (holding that the detainees at the Guantanamo Bay military prison possess no right to petition for a writ of habeas corpus and suggesting that they possess no rights under the U.S. Constitution).

16. WALTER E. DELLINGER, DAWN JOHNSEN ET AL., *PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL* (2004) [hereinafter *GUIDELINES*], reprinted in 54 UCLA L. REV. 1559 app. 2.

17. See Philip Carter, *The Road to Abu Ghraib*, WASH. MONTHLY, Nov. 2004, at 25.

18. 18 U.S.C. §§ 2340-2340A (2000).

19. Torture Opinion, *supra* note 6.

the terms of a recently ratified treaty, the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment.²⁰ The Torture Opinion, though, goes to great lengths first to read the scope of the statute in an exceedingly narrow manner and then to methodically explore all conceivable arguments whereby persons who engage in aggressive interrogations—including torture—can escape conviction.

The timing of the leak of the Torture Opinion—in the immediate wake of the Abu Ghraib scandal—almost certainly was not coincidental. The critical open question at the time was whether the detainee abuse could be attributed to official policies of the U.S. government, as opposed to, as the Bush Administration claimed, “a few American troops who dishonored our country and disregarded our values.”²¹ Although no direct links have been proven between the Torture Opinion and those later convicted of the abuse,²² the Opinion suggested a broader problem of aggressive circumvention of torture prohibitions that went beyond isolated bad apples, thereby undercutting the official explanations and inflicting tremendous harm on the United States’ reputation.²³

A. OLC on the Legality of Torture

Numerous commentators have described, analyzed, and almost invariably criticized the Torture Opinion.²⁴ The Opinion begins by interpreting

20. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter *Convention Against Torture*].

21. George W. Bush, President, Remarks on Iraq and the War on Terror at the U.S. Army War College, Carlisle, Pennsylvania (May 24, 2004), in 40 WEEKLY COMP. PRES. DOC. 944, 947 (2004).

22. Nine soldiers have been convicted for their role in the Abu Ghraib prison abuses. See *The Abu Ghraib Files: Prosecutions and Convictions*, SALON, Mar. 14, 2006, http://www.salon.com/news/abu_ghraib/2006/03/14/prosecutions_convictions/index.html.

23. For a fascinating and detailed account of the development of the Bush Administration’s interrogation policy, see Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, THE NEW YORKER, Feb. 27, 2006, at 32.

24. For an outstanding compilation of posts on the Torture Opinion and related issues, see Postings of Jack Balkin, Martin Lederman et al. to Balkinization, *The Anti-Torture Memos: Balkinization Posts on Civil Liberties, the War on Terror and Presidential Power*, <http://balkin.blogspot.com/2006/12/anti-torture-memos.html> (Dec. 22, 2006) [hereinafter *The Anti-Torture Memos*]. Academic scholars have been critical of the Torture Opinion since the time of its release. See Adam Liptak, *Legal Scholars Criticize Memos on Torture*, N.Y. TIMES, June 25, 2004, at A14. The literature addressing the Opinion and its consequences is voluminous. See, e.g., David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005); Symposium, *War, Terrorism and Torture: Limits on Presidential Power for the Twenty-First Century*, 81 IND. L.J. 1355 (2006).

the meaning of torture as limited to the most extreme of acts: "The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function likely will result."²⁵ The pain must be "excruciating and agonizing."²⁶ Mental pain or suffering "must result in significant psychological harm of significant duration, e.g., lasting for months or even years."²⁷ The infliction of such pain must be the defendant's precise objective; it is not enough that the defendant knew that such pain and suffering were reasonably likely to result from his actions.²⁸

Even more controversial and ominous, the Torture Opinion goes on to suggest that even acts that come within this extremely crabbed definition of torture could not be successfully prosecuted. OLC made the extraordinary claim that, notwithstanding its facially clear application to government actors, the statute could not be interpreted to allow the prosecution of someone who commits torture "pursuant to the President's constitutional authority to wage a military campaign," because to do so would interfere with the President's commander-in-chief power. The Opinion broadly asserts that "Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield."²⁹ As Yale Law School dean and professor Harold Hongju Koh put it, the claim seems to be that commander-in-chief means unassailable "Torturer in Chief."³⁰ In exaggerating the President's war powers, the Opinion ignores entirely Congress's textually committed war powers³¹ and fails even to cite a directly relevant watershed Supreme Court opinion, *Youngstown Sheet & Tube Co. v. Sawyer*, in which Justice Jackson's famous concurring opinion sets forth the now-prevailing standards regarding congressional authority to limit presidential authority.³²

Finally, the Torture Opinion crafts creative defenses to "eliminate criminal liability" in the event that "an interrogation method . . . might

25. Torture Opinion, *supra* note 6, at 13.

26. *Id.* at 19.

27. *Id.* at 1.

28. *Id.* at 3-4.

29. *Id.* at 35.

30. Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND L.J. 1145 (2006).

31. Among the congressional war powers the Opinion fails to acknowledge are the authority to make rules for the government and regulation of the land and naval forces, U.S. CONST. art. I, § 8, cl. 14; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water, *id.* at cl. 11; and to define and punish piracies and felonies committed on the high seas and offenses against the law of nations, *id.* at cl. 10.

32. 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

arguably cross the line [into an act of torture] . . . and application of the statute was not held to be an unconstitutional infringement of the President's Commander-in-Chief authority." A defense of necessity would argue that torture—notwithstanding the statute's prohibition—was necessary to gain information to prevent a future terrorist attack: The harm of torture "would pale to insignificance compared to the harm avoided by preventing such an attack."³³ Similarly, the Opinion argues that a torturer could claim to have acted in self-defense: not the traditional defense of one's self, but an extension to defense of one's nation. The Opinion concludes that these defenses might justify interrogation methods that constitute torture.³⁴

The Torture Opinion focuses exclusively on just one statutory prohibition, which could give the impression that interrogations that fall just short of the Opinion's narrow interpretation of torture are not unlawful. In fact, several other laws further prohibit coercive forms of interrogation that would fail to meet even a broad definition of torture. The soldiers who committed the Abu Ghraib abuses, for example, were subject not only to the limits of the federal anti-torture statute, but also to far more extensive restrictions contained in the Uniform Code of Military Justice (UCMJ),³⁵ most notably prohibitions against cruelty, oppression, or maltreatment of a detainee.³⁶ The anti-torture statute itself implements a treaty that prohibits "cruel, inhuman and degrading treatment."³⁷ A final example: Common Article 3 of the Geneva Conventions³⁸ goes far beyond torture and prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture," and "outrages upon personal dignity, in particular humiliating and degrading treatment."³⁹ At the time of the Torture Opinion's issuance, violations of Common Article 3 were punishable war crimes under federal law.⁴⁰

Marty Lederman led the early effort to solve the mystery of why the Torture Opinion, without explanation, addressed only one of many restrictions on interrogation methods—and why the government cared so

33. Torture Opinion, *supra* note 6, at 41.

34. *Id.* at 39–46.

35. 10 U.S.C. § 801 (2000).

36. *Id.* § 893.

37. Convention Against Torture, *supra* note 20.

38. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

39. *Id.*

40. 18 U.S.C. § 2441 (2000). The MCA subsequently limited the War Crimes Act in this regard. See *supra* notes 14–15 and accompanying text.

much about clarifying the difference between torture and other prohibited forms of interrogation. Lederman authored a series of extraordinary posts on Balkinization, Yale Law School professor Jack Balkin's prominent blog, that have greatly assisted observers trying to make sense of the torture issue in the face of the Bush Administration's intense secrecy.⁴¹ Lederman deduced that in requesting the Torture Opinion, the administration did not have the military in mind at all, but instead the Central Intelligence Agency (CIA), for which it was seeking maximum flexibility—that is, the ability to use the most extreme methods possible without risking criminal liability—in interrogations of suspected al Qaeda operatives held at locations outside the United States.⁴² The administration elsewhere had interpreted all potentially relevant limitations, save the federal anti-torture statute, as inapplicable to CIA interrogators in such circumstances: The UCMJ by its own terms does not apply outside the military, and the administration took the controversial position that the protections in the Geneva Conventions do not apply to al Qaeda detainees.⁴³ In subsequently opposing congressional efforts to enact new prohibitions on highly coercive interrogation methods, the Bush Administration confirmed its desire to allow CIA extraterritorial interrogations to continue unrestricted, and President Bush personally acknowledged the existence of secret “black sites” overseas where such interrogations took place.⁴⁴

The Torture Opinion's extreme reading of the President's commander-in-chief power as overcoming a statutory prohibition on torture by its terms also could overcome the many other laws that prohibit highly coercive forms of interrogation. The Bush Administration refuses to reveal whether it actually has relied on such arguments and which interrogation techniques it has authorized. At times, President Bush and others in the

41. See The Anti-Torture Memos, *supra* note 24.

42. See Posting of Marty Lederman to Balkinization, Understanding the OLC Torture Memos (Part II), <http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part.html> (Jan. 8, 2005); Posting of Marty Lederman to Balkinization, Understanding the OLC Torture Memos (Part III), http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part_07.html (Jan. 8, 2005).

43. Memorandum from President George W. Bush to Vice President Dick Cheney et al., Humane Treatment of al Qaeda and Taliban Detainees, (Feb. 7, 2002) [hereinafter Bush Memo Re: Treatment of al Qaeda], available at <http://www.gwu.edu/%7Eensarchiv/NSAEBB/NSAEBB127/02.02.07.pdf>.

44. Michael A. Fletcher, *Bush Defends CIA's Clandestine Prisons*, WASH. POST, Nov. 8, 2005, at A15; Glenn Kessler, *Rice Defends Tactics Used Against Suspects*, WASH. POST, Dec. 6, 2005, at A1; Eric Schmitt, *Senate Moves to Protect Military Prisoners Despite Veto Threat*, N.Y. TIMES, Oct. 6, 2005, at A22; see also Posting of Marty Lederman to Balkinization, Judge Gonzales' Senate Responses, <http://balkin.blogspot.com/2005/01/judge-gonzales-senate-responses.html> (Jan. 18, 2005).

administration have implicitly denied that they acted upon the authority OLC claimed for the President. As soon as the Opinion leaked in June 2004, Bush and others—in the face of scathing criticism—disavowed the Opinion and declared that the U.S. government does not torture people.⁴⁵ With regard to detainees held by the U.S. Armed Forces, Bush had issued a directive on February 7, 2002 that went further and required the military to treat detainees humanely.⁴⁶

Bush's humane treatment directive did not extend to the CIA, however, and he has vigorously opposed congressional efforts to protect detainees from any extreme interrogation methods at the hands of the CIA. The government has repeatedly refused to confirm or deny the methods the CIA uses, citing concern that potential detainees could prepare for those methods if they know about them.⁴⁷ However, news reports based on interviews with former and current CIA officers describe six "enhanced interrogation techniques" instituted in March 2002 and used on suspected top members of al Qaeda incarcerated in secret locations outside the United States. They include "the cold cell," in which the prisoner is stripped naked, repeatedly doused with cold water and held in a cell kept near fifty degrees, and "waterboarding," in which the prisoner is smothered with water to make him feel he is drowning.⁴⁸ Both the cold cell and waterboarding have reportedly resulted in the deaths of prisoners at the hands of CIA agents.⁴⁹

Moreover, the military, both before and after the humane treatment directive, sanctioned interrogation methods that could not possibly be

45. President Bush declared: "America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture . . . in all territory under our jurisdiction. . . . Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere." George W. Bush, President, Statement on United Nations International Day in Support of Victims of Torture (June 26, 2004), in 40 WEEKLY COMP. PRES. DOC. 1167, 1167–68 (2004). The press has reported that even prior to the leak, a new head of the Office of Legal Counsel (OLC), Jack Goldsmith, took a more moderate view of presidential power and initiated a review of OLC's prior counterterrorism advice. See Michael Isikoff & Evan Thomas, *Bush's Monica Problem: The Gonzales Mess*, NEWSWEEK, June 4, 2007; Daniel Klaidman et al., *Domestic Spying: Bush Appointees Revolt*, NEWSWEEK, Feb. 6, 2006.

46. Bush Memo Re: Treatment of al Qaeda, *supra* note 43.

47. Carol D. Leonig & Eric Rich, *U.S. Seeks Silence on CIA Prisons*, WASH. POST, Nov. 4, 2006, at A1.

48. Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC News, Nov. 18, 2005, <http://abcnews.go.com/WNT/Investigation/story?id=1322866> ("The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner's face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt.").

49. *Id.*

described as humane.⁵⁰ On December 2, 2002, U.S. Secretary of Defense Donald Rumsfeld approved a long list of techniques for detainees held at the U.S. military prison at Guantanamo Bay, Cuba including forced nudity and the use of attack dogs to induce panic.⁵¹ After some lawyers and others in the executive branch raised serious concerns about the severity of interrogations at Guantanamo, a U.S. Department of Defense working group began studying the range of permissible interrogation methods. The working group issued a report on April 4, 2003⁵² that recommended retention of these and other extreme methods, but only after the working group was directed that it had to rely on OLC's legal interpretations and over the objections of working group members and military lawyers, including U.S. Navy General Counsel Alberto Mora.⁵³ In addition to the Torture Opinion, OLC issued a more specific opinion dated March 14, 2003—which the government still refuses to release to the public—that apparently authorized the military to use extreme interrogation techniques that are inconsistent with applicable legal prohibitions, presumably under the same sweeping interpretation of the commander-in-chief power adopted in the Torture Opinion.⁵⁴

50. The U.S. government not only has engaged directly in inhumane interrogations of suspected terrorists, it also has deported suspected terrorists for questioning to countries known to engage in torture and other cruel and inhumane practices in a program known as "extraordinary renditions." See Charkaoui v. Canada (Citizenship & Immigration), 2007 SCC 9, 29–30, [2007] S.C.J. No. 9 QUICKLAW (Feb. 23, 2007); Ian Austen, *Canada Will Pay \$9.75 Million to Man Sent to Syria and Tortured*, N.Y. TIMES, Jan. 27, 2007, at A5; Jane Mayer, *Outsourcing Torture*, THE NEW YORKER, Feb. 14, 2005, at 106; *Testimony Is Said to Implicate C.I.A. in Seizure of Suspect in Italy*, N.Y. TIMES, Feb. 16, 2007, at A5. But see Interview of the Vice President by Scott Hennen, WDAY at Radio Day at the White House (Oct. 24, 2006), available at <http://www.whitehouse.gov/news/releases/2006/10/20061024-7.html> (Vice President Cheney suggested in a radio interview that waterboarding is a "no-brainer" and does not constitute torture).

51. Memorandum from General Counsel William J. Haynes, II to Secretary of Defense Donald Rumsfeld, Counter-Resistance Techniques, (Nov. 27, 2002) (signed "approved" Dec. 2, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf>.

52. DEP'T OF DEF., WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS (Apr. 4, 2003) [hereinafter DOD WORKING GROUP REPORT], available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.04.pdf>.

53. See Mayer, *supra* note 23 (describing internal opposition to the Torture Opinion and the Bush Administration's severe interrogation policies and practices, highlighting the early and consistent opposition of U.S. Navy General Counsel Alberto Mora); Josh White, *Military Lawyers Fought Policy on Interrogations*, WASH. POST, July 15, 2005, at A1 (also discussing internal opposition).

54. Although the March 14, 2003 OLC opinion remains secret, the working group report reveals its existence. See DOD WORKING GROUP REPORT, *supra* note 52. Secretary Donald Rumsfeld issued a more moderate memorandum on April 16, 2004 that approved twenty-four of the thirty-five techniques identified by the working group. Memorandum from Secretary of Defense Donald Rumsfeld to the Commander, U.S. Southern Command

On December 30, 2004, six months after the leak and public disavowal of the Torture Opinion, OLC issued a new opinion (Replacement Opinion) that provides a more careful and accurate analysis of the federal anti-torture statute.⁵⁵ OLC also uses a far more appropriate tone, opening with a statement that torture is “abhorrent”⁵⁶ and acknowledging early on that many other sources of law regulate the detention and interrogation of detainees.⁵⁷ Rather than craft creative potential defenses, the Replacement Opinion states: “There is no exception under the [federal anti-torture] statute permitting torture to be used for a ‘good reason.’”⁵⁸ It also drops entirely discussion of the claimed commander-in-chief authority to torture notwithstanding the statutory prohibition, though it does not disavow that authority. Indeed, the Bush Administration has endorsed the same exceedingly broad view of presidential war powers in other contexts before and since.⁵⁹ The definition of torture remains extremely narrow, and a footnote reassures recipients of earlier OLC advice—namely, the CIA—that the changes in analysis and tone do not affect the bottom line: “While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office’s prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.”⁶⁰

B. Congressional Responses

Congressional concern about the Bush Administration’s interrogation practices eventually resulted in the enactment in 2005 of the DTA.⁶¹ In sweeping language that unequivocally applies equally to the CIA and

(Apr. 16, 2004). *Newsweek* has reported that in December 2003, a new assistant attorney general for OLC, Jack Goldsmith, informed the Department of Defense (DOD) that it had reconsidered the March 2003 opinion and DOD could no longer rely upon it. Klaidman, *supra* note 45.

55. Memorandum from Daniel Levin, Acting Assistant Att’y Gen. Office of Legal Counsel, U.S. Dep’t of Justice to James B. Comey, Deputy Att’y Gen., Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004) [hereinafter Replacement Opinion], available at <http://www.usdoj.gov/olc/18usc23402340a2.htm>.

56. *Id.* at 1.

57. *Id.* at 2 n.6 (citing, for example, the Geneva Conventions, the Uniform Code of Military Justice, 10 U.S.C. § 801 et seq., the Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261–3267, and the War Crimes Act, 18 U.S.C. § 2441).

58. *Id.* at 17.

59. See sources cited *supra* notes 5, 7.

60. Replacement Opinion, *supra* note 55, at 2 n.8.

61. Pub. L. No. 109-148, 119 Stat. 2739 (2005) (to be codified in scattered sections of 10, 28, and 42 U.S.C.).

the military, the DTA declares: "No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."⁶² President Bush had vigorously opposed the enactment of any such protections for many months, but he changed his position in the face of overwhelming congressional and popular support.⁶³ Although he could not stop the bill entirely, President Bush successfully lobbied Congress to add provisions that protect from liability those who engage in cruel, inhuman, or degrading treatment in violation of the law.⁶⁴ One section creates a defense in cases in which the accused did not know the practices were unlawful; good faith reliance on counsel is designated as an important factor in establishing the defense.⁶⁵ Other provisions deprive the courts of jurisdiction to hear challenges brought by alien detainees at Guantanamo to the conditions of their detention, including detainees subjected to cruel, inhuman, or degrading treatment.⁶⁶ Even with these governmental protections, when signing the DTA into law, President Bush issued a signing statement that appeared to claim the right as commander-in-chief not to comply with the law.⁶⁷

The Supreme Court interpreted the DTA in *Hamdan v. Rumsfeld*⁶⁸ and held that the jurisdiction-stripping provisions did not apply retroactively to preclude review of a case that was filed before the law's enactment.⁶⁹ *Hamdan* also specifically addressed the lawfulness of the military commissions established to try the Guantanamo detainees. In the course of deciding that issue, the Court held—contrary to the Bush

62. *Id.* § 1003 (to be codified at 42 U.S.C. § 2000dd).

63. See Schmitt, *supra* note 44.

64. *Id.*

65. Detainee Treatment Act of 2005 (DTA), § 1004(a), 119 Stat. at 2739 (to be codified at 42 U.S.C. § 2000dd).

66. *Id.* § 1005(a), (e) (to be codified at 10 U.S.C. § 801 and 28 U.S.C. § 2241). The DTA defines "cruel, inhuman, or degrading treatment" narrowly, as limited to what the Due Process Clause would prohibit, which is a "shocks the conscience" standard. *Id.* § 1003(d) (to be codified at 42 U.S.C. § 2000dd). It also establishes an exclusive review process that includes an appeal to the D.C. Circuit, but only for challenges related to the determination of the status of the alien being detained. *Id.* § 1005(e) (to be codified at 28 U.S.C. § 2241).

67. George W. Bush, President, Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (Dec. 30, 2005), in 41 WEEKLY COMP. PRES. DOC. 1918, 1919 ("The executive branch shall construe [the provision] relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power . . .").

68. 126 S. Ct. 2749 (2006).

69. *Id.* at 2764.

Administration's position—that the protections of Common Article 3 of the Geneva Conventions⁷⁰ apply to al Qaeda.⁷¹ *Hamdan* thereby threatened not only the Guantanamo military commissions, but also the administration's CIA extraterritorial interrogation program by suggesting that the government could not violate Common Article 3's prohibitions against "cruel treatment and torture" and "humiliating and degrading treatment."⁷²

Congress responded in 2006 with the MCA,⁷³ which in part repudiates *Hamdan*. The MCA does not take the extreme step—one that might have sparked an international crisis—of challenging the applicability of Common Article 3. Rather, the MCA limits the applicability of Article 3 only for purposes of what actions are subject to criminal sanctions, including what constitutes grave breaches.⁷⁴ Even as it limits remedies, the MCA repeats the DTA's prohibition on "cruel, inhuman, or degrading treatment" of any person in U.S. custody anywhere in the world.⁷⁵ But it interprets—many would say misinterprets—such prohibited treatment in an extremely narrow fashion and, beyond that, it expressly leaves considerable interpretive authority to the President.⁷⁶ It expands the jurisdiction-stripping provisions of the DTA and makes clear they operate retroactively to deprive courts of jurisdiction even in pending cases (including in *Hamdan* itself on remand).⁷⁷ And it flatly prohibits any person from invoking the Geneva Conventions as a source of rights in any U.S. court in any habeas corpus or other civil action in which the United States or any U.S. personnel is a party, thereby leaving compliance in the largely unreviewable hands of the executive.⁷⁸

On its face, the MCA's likely effect on checking extreme forms of interrogation would seem mixed. The MCA does impose genuine limits on permissible interrogation techniques (though those limits might not coincide with the proper interpretation of Common Article 3).⁷⁹ The President has a clear constitutional obligation to take care that CIA interrogations—even those performed overseas—of those suspected of terrorism do not

70. Geneva Convention III, *supra* note 38.

71. *Hamdan*, 126 S. Ct. at 2795–96.

72. *Id.*

73. Pub. L. No. 109-366, 120 Stat. 2600 (2006) (to be codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

74. *Id.* § 6(b)(1) (to be codified at 18 U.S.C. § 2441).

75. *Id.* § 6(c) (to be codified at 42 U.S.C. § 2000dd-0).

76. *Id.* § 6(a)(3) (to be codified at 18 U.S.C. § 2441).

77. *Id.* § 7(a)–(b) (to be codified at 28 U.S.C. § 2241(e)(1)–(2), (nt)).

78. *Id.* § 5 (to be codified at 28 U.S.C. § 2241(nt)).

79. *Id.* § 3 (to be codified at 10 U.S.C. § 948r).

violate legal prohibitions that now include “cruel, inhuman, or degrading treatment” as well as the protections of Common Article 3. That would seem to present a problem for the CIA interrogation program, which in the past reportedly has not met those standards and has included, for example, the near drowning of detainees through waterboarding. And yet, notwithstanding years of strenuous opposition to such restrictions, the Bush Administration celebrated the MCA as a great success and claimed it did not interfere with the CIA program. Press coverage confirms the consensus view that with the MCA, Bush “achieved a signal victory.”⁸⁰ By depriving the victims of illegal interrogations of judicial recourse to vindicate their rights, the MCA leaves great discretion with the executive branch to monitor itself. That is cause for grave concern, given the Bush Administration’s history of disregard for legal limits on detainee interrogations and its claims that the CIA program survives intact.⁸¹ The enactment of the MCA thus highlights the enormous importance of internal standards and processes to promote the legality of executive branch action.

II. GUIDELINES FOR RENDERING LEGAL ADVICE TO THE PRESIDENT

The Torture Opinion thrust into the public eye a previously obscure, though enormously influential, office within the Department of Justice: the Office of Legal Counsel. The constitutional text and structure make plain the President’s obligation to act in conformity with the law and to ensure that all in the executive branch do the same as they perform myriad responsibilities. To fulfill their oath of office⁸² and obligation to “take Care that the Laws be faithfully executed,”⁸³ Presidents require a reliable source of legal advice. In recent decades OLC has filled that role. Thus, OLC’s core function is to provide the legal advice that the President—and, by extension, the entire executive branch—needs to faithfully execute the laws.

80. Scott Shane & Adam Liptak, *News Analysis: Shifting Power to a President*, N.Y. TIMES, Sept. 30, 2006, at A1.

81. See Editorial, *Guilty Until Confirmed Guilty*, N.Y. TIMES, Oct. 15, 2006, at A11 (describing the MCA’s utter lack of remedies and external checks, and concluding that “[e]ven if our system were based on that sort of personal power and not the rule of law, it would be hard to trust the judgment of a president and an administration whose records are so bad”).

82. The Constitution provides that the President must take an oath to “preserve, protect and defend the Constitution.” U.S. CONST. art. II, § 1, cl. 8.

83. *Id.* art. II, § 3. The President’s responsibility to uphold the rule of law through the supervision of all who exercise executive authority would be apparent even if not made explicit in the Take Care Clause.

OLC functions as a kind of general counsel to the numerous other top lawyers in the executive branch who tend to send OLC their most difficult and consequential legal questions.⁸⁴ OLC's staff of about two dozen lawyers (most of whom are career employees, led by several political appointees) responds to legal questions from the counsel to the President, the attorney general, the general counsels of the various executive departments and agencies, and the assistant attorneys general for the other components of the Department of Justice. A relatively high percentage of OLC's work comes from the White House or otherwise involves the White House. Regulations require the submission of legal disputes between executive branch agencies to OLC for resolution.⁸⁵ By virtue of regulation and tradition, OLC's legal interpretations typically are considered binding within the executive branch, unless overruled by the attorney general or the President (an exceedingly rare occurrence).⁸⁶

OLC's advice therefore ordinarily must be followed by the entire executive branch, from the counsel to the President and cabinet officers to the military and career administrators, regardless of any disagreement or unhappiness. The President, however, may overrule the advice through formal means or simply by declining to follow it. To take a quasi-hypothetical example, if the CIA wanted to use waterboarding to interrogate a detainee but the Department of Justice's criminal division and the U.S. Department of State believed that doing so would be illegal, OLC would resolve that dispute. The CIA would be bound by an OLC conclusion that waterboarding was unlawful. The President or attorney general could lawfully override OLC only pursuant to a good faith determination that OLC erred in its legal analysis. The President would violate his constitutional obligation if he were to reject OLC's advice solely on policy grounds.

84. OLC lawyers are usually extraordinarily well credentialed; among those who have served as assistant attorneys general leading OLC are Justice Scalia, former Chief Justice Rehnquist, and other prominent lawyers, judges, and legal academics.

85. Exec. Order No. 12,146, 3 C.F.R. 409, 411 (1980); *see also* 28 C.F.R. § 0.25 (2006) (delineating the responsibilities delegated by the attorney general to OLC).

86. The literature on executive branch legal interpretation is vast and expanding, including scholarship regarding the standards that should govern OLC as it informs the legality of executive action. *See, e.g.,* Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, LAW & CONTEMP. PROBS., Summer 2004, at 105; Morrison, *supra* note 7; Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective From the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005); Symposium, *Executive Branch Interpretation of the Law*, 15 CARDOZO L. REV. 21 (1993). My descriptions of the work of OLC are supported by these publications and further are based on my experience serving in that office from 1993 to 1998, first as deputy assistant attorney general and then as acting assistant attorney general heading OLC.

Of course, even if OLC were to find waterboarding lawful, the President or other appropriate officials could make the policy determination not to use it as a method of interrogation. The President or the attorney general also could disagree with OLC's interpretation of the relevant law and prohibit waterboarding on legal grounds.

Former OLC lawyers, understandably, paid special attention when the Torture Opinion was leaked. Many were deeply outraged and saddened by what they saw as a dramatic and dangerous deviation from the office's tradition of accurate and principled legal advice. These concerns inspired nineteen OLC alumni to coauthor a short statement of the core principles that should guide the formulation of legal advice regarding contemplated executive action.⁸⁷ Their statement of ten principles, issued in December 2004 and entitled *Principles to Guide the Office of Legal Counsel (Guidelines)*, affirmatively describes how OLC should function. The *Guidelines* do not criticize or even mention the Torture Opinion (or any other specific opinion),⁸⁸ but they provide an extremely useful basis for evaluating both the process failures that led to the Torture Opinion and the processes that should govern, for example, the executive branch's interpretation and enforcement of the DTA and the MCA.

The Torture Opinion is an easy target for criticism, an extreme example of poor lawyering.⁸⁹ A strong case can be made that the Opinion does not meet the professional standards that define any transactional attorney's ethical obligations in advising a client.⁹⁰ More difficult than

87. GUIDELINES, *supra* note 16, app. 2 at 1603.

88. The memorandum that accompanied the transmittal of the statement to the attorney general explained that it was prompted in part by concerns about the Torture Opinion. Memorandum from Walter Dellinger, Dawn Johnsen et al. to John Ashcroft, Att'y Gen., et al. (Dec. 21, 2004), reprinted in 54 UCLA L. REV. 1559 app. 1.

89. Harold Hongju Koh has gone as far as to testify before the U.S. Congress: "[I]n my professional opinion, the August 1, 2002 OLC Memorandum is perhaps the most clearly erroneous legal opinion I have ever read." *Confirmation Hearing on the Nomination of Alberto R. Gonzales to Be Attorney General of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 158 (2005) (statement of Harold Hongju Koh, Dean, Yale Law School).

90. See, e.g., Wendel, *supra* note 24, at 120 ("Some measure of aggressiveness is permissible in litigation because of the checking mechanisms built into the adversary system Similarly, certain kinds of administrative proceedings . . . are accompanied by procedural checks In transactional representation, however, these checks and balances are absent, and the lawyer in effect assumes the role of judge and legislator with respect to her client's legal entitlements."). Wendel cites the Model Rules of Professional Conduct for support, in particular its statements that lawyers shall not "take positions that lack an adequate basis in law and fact," "knowingly fail to disclose adverse authority," or "knowingly make misstatements of fact." *Id.* at 120 n.199 (citing MODEL RULES OF PROF'L CONDUCT R. 3.1, R. 3.3(a)(2) & R. 3.3(a)(1) (1980)).

chronicling the Opinion's flaws, however, is creating meaningful standards to govern OLC lawyers in order to avoid future mistakes of this kind.

This Article focuses on the obligations of OLC and other government lawyers as they relate especially to the context of serving as legal advisor to the President. That context complicates the articulation of general standards. In describing the appropriate interpretive stance for advising the President, OLC lawyers, past and present, might be tempted to resort to an "I know it when I see it" test and urge that the best training for new OLC lawyers comes from actual exposure to the office's traditions.⁹¹ The Torture Opinion, though, demonstrates that not all OLC lawyers "see it" the same way. The power of unwritten tradition alone plainly is inadequate.

The *Guidelines* represent one valuable attempt to articulate standards for rendering legal advice to executive officials. They are aspirational in the sense that they describe best practices for OLC, albeit practices that have not invariably been followed. Deviations undoubtedly can be found in many administrations, often on matters concerning presidential power during times of war or national emergency, when pressures against legal adherence are greatest. But the *Guidelines* also are realistic in the sense that they intentionally were drawn to reflect "the longstanding practices of the Attorney General and the Office of Legal Counsel, across time and administrations."⁹² This Article's conclusions are consistent with the *Guidelines*, reprinted in their entirety following this Article, and in some instances expand on them in the same spirit of promoting adherence to the rule of law.

A. OLC's Interpretive Stance: Accuracy Versus Advocacy

The *Guidelines*' first principle articulates OLC's appropriate interpretive stance when formulating advice to "guide contemplated executive branch action."⁹³ Where the law is clear—that is, where only one reasonable interpretation exists—virtually all would agree that the President must

91. Cf. Nelson Lund, *The President as Client and the Ethics of the President's Lawyer*, LAW & CONTEMP. PROBS., Winter/Spring 1998, at 65, 80 ("For some government lawyers, especially the political appointees in the Department of Justice and the White House, the ordinary rules of professional ethics are not so useful. The genuinely difficult questions about right and wrong that they're most likely to face . . . are inevitably going to be resolved, not by professional ethics, but by personal standards of integrity and by . . . bargaining with their appointing official, the President.").

92. GUIDELINES, *supra* note 16, app. 2 at 1604.

93. *Id.*

adhere to it.⁹⁴ Questions typically end up at OLC, though, when what the law requires is not entirely clear and the President or other executive branch officers care about the answer. In these cases, what should be OLC's interpretive stance? Should OLC routinely provide legal opinions that set forth the strongest plausible arguments supportive of the desired policies, following what can be described as an advocacy model? Or should OLC strive for what it considers an accurate and honest appraisal of the relevant legal constraints?

The *Guidelines* come down squarely on the side of accuracy over advocacy, and most of its ten principles follow from and elaborate on the *Guidelines*' first and most fundamental principle:

OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action.⁹⁵

In short, OLC must be prepared to say no to the President. For OLC instead to distort its legal analysis to support preferred policy outcomes would undermine the rule of law and our democratic system of government. The Constitution expressly requires the President to "take Care that the Laws be faithfully executed." This command cannot be reconciled with executive action based on preferred, merely plausible legal interpretations that support desired policies, rather than an attempt to achieve the best, most accurate interpretations—especially when the enforcement of a federal statute is at stake. For OLC to present merely plausible interpretations framed as the best interpretations would, as the *Guidelines* acknowledge, "deprive the President and other executive branch decisionmakers of critical information and, worse, mislead them regarding the legality of contemplated action."⁹⁶ Alternatively, if such

94. The principle that the rule of law should constrain the President is virtually universally accepted, albeit not invariably followed. Perhaps the most infamous statement to the contrary came in a 1977 interview of President Nixon about the Watergate scandal. David Frost said to Nixon, "[s]o what in a sense you're saying is that there are certain situations . . . where the president can decide that it's in the best interests of the nation or something, and do something illegal." Nixon responded, "[w]hen the President does it that means that it is not illegal." Interview by David Frost with Richard Nixon (May 19, 1977), reprinted in N.Y. TIMES, May 20, 1977, at A16. This remarkable deviation does not undermine the principle, given that the statement typically evokes incredulity and its source was a President forced to resign in disgrace for unlawful acts.

95. GUIDELINES, *supra* note 16, app. 2 at 1604.

96. *Id.*

advice were given with a wink and a nod so that the President was not actually misled, OLC would be wrongfully empowering the President to violate his constitutional obligations.

As discussed further in the next Subpart, the Take Care Clause does not preclude Presidents from promoting their sincerely held legal views through appropriate means. Presidents also retain authority to reject OLC's advice and act instead upon their own understandings of the law, but only if they are acting based upon good faith, best legal interpretations. Presidents in practice rarely have acted contrary to the advice of OLC or the attorney general. History, though, provides a few instructive examples, beginning with George Washington's thoughtful consideration of the constitutionality of federal legislation to establish a national bank. Washington requested and received legal opinions from his cabinet, and ultimately agreed with his secretary of treasury Alexander Hamilton that the bank was legal, rather than with his attorney general who concluded to the contrary.⁹⁷ Franklin Roosevelt famously disagreed with his attorney general Robert Jackson about the constitutionality of a legislative veto provision in the Lend Lease Act and Jackson then memorialized Roosevelt's constitutional views, with which the Supreme Court ultimately agreed, in a memorandum later published in the *Harvard Law Review*.⁹⁸

Because the President makes the final call and bears ultimate responsibility for legal determinations as well as policy choices, OLC's advice should fully inform the President, as well as other readers, and address strong arguments counter to its conclusions. If the President or attorney general ever asks OLC to provide advice outside of OLC's typical interpretive stance and authoritative role, as when Jackson memorialized Roosevelt's views on the legislative veto, OLC should be sure it expressly and accurately describes the nature of such advice to ensure that it is not misinterpreted as OLC's best view of the law. Moreover, although OLC serves a role more akin to that of a judge than an advocate—and sometimes literally does resolve intrabranched disputes between parties on conflicting ends of a legal question—OLC's role is more complicated than that of a disinterested arbiter. OLC's charge is to help the President achieve desired policies in conformity with the law and that often involves

97. A leading constitutional law casebook begins very effectively by detailing how Washington and others wrestled with the constitutionality of a national bank. See PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* (2006).

98. See Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353 (1953).

actively devising alternatives to a legally flawed proposal. To faithfully execute the laws OLC lawyers, though, never properly inform the exercise of the President's obligation by misrepresenting what the law requires.⁹⁹

That the President should premise his actions on the administration's best—and not merely plausible—interpretations of the relevant law is a relatively uncontroversial principle, at least as a theoretical matter. Senators questioned Attorney General Alberto Gonzales, Deputy Attorney General Timothy Flanigan, and Acting Assistant Attorney General for OLC Steven Bradbury during their confirmation hearings about their views on the *Guidelines*, and they all indicated their general agreement.¹⁰⁰ In the weeks before President Clinton assumed office, I personally conducted numerous interviews as part of the executive branch transition effort with former and current OLC lawyers, congressional staffers and others who had worked with OLC. Virtually all, regardless of party or institutional affiliation, described the primary function of OLC as ensuring the legality of executive action, and they ranked the ability to say no to the President

99. Former Assistant Attorney General Randolph Moss, who served in OLC under President Clinton, put it well:

[I]f the Constitution and relevant statutes are *best* construed to preclude a proposed policy or action, it is largely irrelevant whether a reasonable argument might be made in favor of the legality of the proposal A reasonable argument might diminish the political costs of the contemplated action and it might avoid embarrassment in the courts, but it cannot provide the authority to act. Only the best view of the law can do that.

Moss, *supra* note 86, at 1316. The determination that Presidents should act upon the “best” view of the law, though, leaves open what is meant by the “best” interpretation—notably, to what extent the executive appropriately may act upon legal interpretations that differ from those of the Supreme Court. The question of executive interpretive independence is the subject of some dispute and is discussed in the next Subpart.

100. See, e.g., *Confirmation Hearing on the Nomination of Alberto R. Gonzales to Be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 229 (2005) (written responses of Alberto Gonzalez to questions from Senator Russell D. Feingold) (“I completely agree that it is, and has always been, the duty and function of the Office of Legal Counsel to provide the President and the Executive Branch with an accurate and honest analysis of the law, even if that analysis would constrain the pursuit of policy goals. If confirmed as Attorney General, I would work with the Assistant Attorney General for the Office of Legal Counsel to ensure that OLC continues to employ the practices necessary to meet the highest standards of legal analysis.”); *Confirmation Hearing on the Nomination of Timothy Elliott Flanigan to Be Deputy Attorney General: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 120 (2005) (written responses of Timothy Flanigan to questions from Senator Edward M. Kennedy) (“I have reviewed generally the [*Guidelines*] and agree with much of the document. I believe that the document reflects operating principles that have long guided OLC in both Republican and Democratic administrations.”); *Confirmation Hearings on Federal Appointments: Hearings Before the S. Comm. on the Judiciary*, 109th Cong. 766 (2005) (written responses of Steven Bradbury to questions from Senator Patrick Leahy) (“The [*Guidelines*] generally reflect operating principles that have long guided OLC in both Republican and Democratic administrations.”).

as an essential qualification for the job of heading OLC.¹⁰¹ Even John Yoo, widely believed to be the principal drafter of the Torture Opinion,¹⁰² purports to believe that the government's policy goals should not bias OLC's legal advice.¹⁰³

Measured by this standard, the Torture Opinion utterly fails. In what unmistakably is an advocacy piece, OLC abandoned fundamental practices of principled and balanced legal interpretation. The Torture Opinion relentlessly seeks to circumvent all legal limits on the CIA's ability to engage in torture, and it simply ignores arguments to the contrary. The Opinion fails, for example, to cite highly relevant precedent, regulations,

101. John McGinnis's writings suggest some of the most thoughtful alternatives to this view. He has described three interpretive models for OLC: "court-centered" and "independent authority," both of which can be viewed as variations on the "best, accurate" stance but that allow for different degrees of executive interpretive independence, and "situational," which "would not be concerned with expounding a consistent and principled jurisprudence . . . but with using any plausible principles to achieve the policy goal desired by his client." John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 377, 403 (1993). McGinnis described all three models as "plausible." *Id.* at 377. Elsewhere, McGinnis considered the value of any search for fixed constitutional meaning with specific regard to decisions about whether the use of military force requires congressional authorization. He argued that, in this context, the President and Congress are best restrained not by "rule centrism"—which involves a search for a fixed and determinate meaning of the War Powers Clause—but by "a form of spontaneous order—the result of accommodations and implicit bargaining between the branches." John O. McGinnis, *The Spontaneous Order of War Powers*, 47 CASE W. RES. L. REV. 1317, 1317–18 (1997).

102. See, e.g., Michael Hirsh et al., *A Tortured Debate*, NEWSWEEK, June 21, 2004, at 50 (reporting that the Torture Opinion was drafted by John Yoo); Al Kamen, *Taking Terrorism Law on the Road*, WASH. POST, Feb. 24, 2006, at A13 (describing Yoo as the "author of the famous Torture Memo").

103. In a July 19, 2005 interview with the PBS documentary series *Frontline*, Yoo described his view of OLC's role in the context of discussing the Torture Opinion:

I think the role is, what does the law say that applies to interrogation of enemy aliens with whom we're at war? And the primary statute is the [1994] torture statute. And the question is, what does a statute mean?

At the Justice Department, I think it's very important not to put in an opinion interpreting a law on what you think the right thing to do is, because I think you don't want to bias the legal advice with these other considerations. Otherwise, I think people will question the validity of the legal advice. They'll say, "Well, the reason they reached that result is that they had certain moral views or certain policy goals they wanted to achieve."

And actually I think at the Justice Department and this office, there's a long tradition of keeping the law and policy separate. The department is there to interpret the law so that people who make policy know the rules of the game, but you're not telling them what plays to call, essentially.

Frontline, The Torture Question (PBS television broadcast July 19, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html>.

and even constitutional provisions, and it misuses sources upon which it does rely.¹⁰⁴ Anthony Lewis captured well, and colorfully, the problem with how OLC seemed to perceive its role: "The memo reads like the advice of a mob lawyer to a mafia don on how to skirt the law and stay out of prison. Avoiding prosecution is literally a theme of the memorandum."¹⁰⁵

Yoo remains almost alone in continuing to assert that the Torture Opinion was "entirely accurate" and not outcome driven,¹⁰⁶ notwithstanding the Bush Administration's extraordinary repudiation of the Opinion. Other administration officials have acknowledged that the administration's approach to legal questions regarding terrorism has been "forward-leaning": "Legally, the watchword became 'forward-leaning,'" said a former associate White House counsel, Bradford Berenson, "by which everybody meant: 'We want to be aggressive. We want to take risks.'"¹⁰⁷

One way to test Yoo's claim is to consider whether OLC would have written the opinion in the same manner if the President had preferred to receive an OLC opinion that concluded the federal anti-torture statute actually did tie his hands. What if the question had come, for example, from an administration that was truly committed to treating all detainees lawfully and humanely but was under pressure from members of Congress

104. For example, in support of its definition of torture, the opinion relies on statutes that define emergency medical condition for the purpose of providing health benefits—which the opinion acknowledges is "a substantially different subject"—but it ignores relevant federal cases and regulations that actually address the meaning of torture. For more detailed criticisms of the Torture Opinion's reasoning, see sources cited *supra* note 24.

105. Anthony Lewis, *Making Torture Legal*, N.Y. REV. BOOKS, July 15, 2004, at 4.

106. JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* 169 (2006). Yoo argues that the initial Torture Opinion was superior to its replacement, which he describes as "a disservice to the personnel, especially those in the field, who had to rely on the Justice Department's advice to take risks in fighting the war on terrorism." *Id.* at 171. "The second opinion not only retracted the bright lines the 2002 memo attempted to draw, replacing them with vague language that gave less offense, it provided much less guidance or clarity." *Id.* Adrian Vermeule and Eric Posner are among the handful of scholars who defended the Opinion, but they defended it not on the merits, but rather on the grounds that "the memorandum's arguments are standard lawyerly fare, routine stuff" from an office "whose jurisprudence has traditionally been highly pro-executive." Adrian Vermeule & Eric A. Posner, *A 'Torture' Memo and Its Tortuous Critics*, WALL ST. J., July 6, 2004, at A22. Regarding the merits, they write that the Opinion's conclusion "may be right or wrong—and we, too, would have preferred more analysis of this point—but it falls within the bounds of professionally respectable argument." *Id.* They thus apparently disagree with the *Guidelines'* first principle.

107. Tim Golden, *After Terror, A Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004; see also Deborah Sontag, *Terror Suspect's Path From Streets to Brig*, N.Y. TIMES, Apr. 25, 2004 ("The president's response from 9/11 forward was to use every power and means at his disposal to try to prevent another attack," said Brad Berenson, a former associate White House counsel.").

who believed the President was not tough enough—who insisted that having the legal authority to cross the line into torture when questioning suspected al Qaeda leaders was in the United States’ national security interests? It is inconceivable that, in those counterfactual circumstances, OLC would have written the opinion as it did, interpreting the meaning of “torture” so narrowly or crafting the implausible defenses of necessity and self-defense. Even if written by the same lawyers—lawyers committed to an aggressively expansive theory of presidential authority—and even if it had reached the same ultimate conclusion, the reasoning and the issues addressed undoubtedly would have differed substantially.

The Torture Opinion’s section on the President’s commander-in-chief authority is similarly flawed, but it raises an additional set of questions relevant to the general OLC standards. The Opinion claims that Congress lacks the authority to enact legislation prohibiting the government from torturing those the President designates as “enemy combatants” in the “War on Terror”: “Congress can no more interfere with the President’s conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield.”¹⁰⁸ Like the rest of the Opinion, this section is misleading and poorly reasoned. It omits discussion of constitutional text and Supreme Court precedent inconsistent with its extreme view of the commander-in-chief power. It purports to assess the constitutionality of the federal anti-torture statute “[i]n light of the President’s complete authority over the conduct of war”; yet it fails even to mention that the Constitution expressly confers considerable war powers on Congress, including the power to make rules concerning captures on land and water¹⁰⁹ and to make rules for the government and regulation of the land and naval forces.¹¹⁰ The Opinion also fails to cite and apply the watershed Supreme Court opinion most relevant to assessing the constitutionality of the statute: Justice Jackson’s three-part framework set forth in *Youngstown Sheet & Tube Co. v. Sawyer*.¹¹¹ As written, this section of the Opinion, like the other sections, only makes sense as an advocacy piece, tailored to an administration that, as Yoo described it, “wanted the maximum flexibility for the president to win the war,” including the flexibility to act counter to statutory constraints.¹¹²

108. Torture Opinion, *supra* note 6, at 39.

109. U.S. CONST. art. I, § 8, cl. 11.

110. *Id.* at cl. 14.

111. 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

112. YOO, *supra* note 106, at 2.

Notwithstanding these flaws, Yoo seems sincere in his belief in the accuracy of the Opinion's conclusions with regard to the scope of the President's commander-in-chief power. Of far greater significance, the Bush Administration continues to espouse an extreme view of extensive presidential war powers beyond Congress's legislative reach. Although the Replacement Opinion dropped as "unnecessary"¹¹³ any discussion of the scope of the commander-in-chief power, President Bush has asserted the authority to ignore other statutory requirements that conflict with his constitutional views.¹¹⁴ In such circumstances, admonishing OLC lawyers—and ultimately the President—to adhere to "accurate" views of the law does not resolve the matter.

Presidential lawyers thus must confront whether and how they may legitimately promote and act upon legal views that they sincerely hold but that are not shared by the Court, Congress, or the mainstream of legal thought. The Bush Administration's highly controversial, and at times flawed and misleading, claims of authority to disregard statutes has prompted an understandable but, in part, misguided backlash against presidential interpretive authority, and presidential signing statements in particular. The Torture Opinion and other abuses warrant close scrutiny of the Bush Administration's positions both on specific issues and also on the general standards that govern its legal interpretations. Critics, though, should take care not to condemn legitimate methods of presidential legal interpretation when the true problem lies with the specific substance of the Bush Administration's flawed legal reasoning. The nature and extent of the President's authority to rely upon distinctive legal views is a surprisingly complicated question of tremendous consequence, and the subject of the next Subpart.

B. Distinctive Attributes of Presidential Legal Interpretation

The *Guidelines* touch briefly on the complexities that distinguish OLC interpretation from judicial interpretation, complexities that both allow for a measure of distinctive presidential interpretive authority and also impose special obligations on executive legal interpretation. As the *Guidelines* state, at times "OLC's legal analyses . . . should reflect the institutional traditions and competencies of the executive branch as well as the

113. Replacement Opinion, *supra* note 55, at 2.

114. See sources cited *supra* notes 5, 7.

views of the President who currently holds office.”¹¹⁵ At other times OLC “appropriately identifies legal limits on executive branch action that a court would not require” because “jurisdictional and prudential limitations do not constrain OLC as they do courts.”¹¹⁶

OLC’s scrutiny of proposed executive action sometimes should be more searching than that of the courts because courts sometimes do not fully examine the legality of executive action.¹¹⁷ This appropriately deferential review is a central reason OLC’s role is so critical. Courts employ a variety of jurisdictional and prudential limitations that either preclude review—such as standing and the political question doctrine—or that result in only partial review.¹¹⁸ Prominent examples include courts’ reluctance to intervene in negotiations between the President and Congress over issues of executive privilege and the use of military force. Under the *Chevron* doctrine, courts afford substantial deference to executive agencies’ interpretations of the statutes they are charged with implementing.¹¹⁹ The rational basis review standard that the courts routinely apply in reviewing the constitutionality of federal statutes, absent cause for more searching scrutiny, entails substantial interbranch deference. Congress occasionally will further limit the jurisdiction of courts to review political branch action, as it did in the DTA and the MCA.¹²⁰

In circumstances in which executive action, if undertaken, would likely encounter limited or no judicial review—as in the treatment of Guantanamo detainees, given the MCA’s limitations on jurisdiction—OLC’s review should not be subject to the same limitations. In considering whether a proposed action is lawful, the proper OLC inquiry is not simply whether the executive branch can get away with it, in the sense of avoiding judicial condemnation. To the contrary, as the *Guidelines* state, the President and OLC then have “a special obligation to ensure compliance with the law, including respect for the rights of affected individuals and the constitutional allocation of powers.”¹²¹ Without the possibility of judicial review and in the face of overwhelming secrecy, the legal rights of detainees the U.S. holds outside of U.S. territory—including their freedom from physical harm during interrogations—depend overwhelmingly

115. GUIDELINES, *supra* note 16, app. 2 at 1606.

116. *Id.*

117. See Pillard, *supra* note 86, at 687–98.

118. *Id.*

119. *Chevron v. NRDC*, 467 U.S. 837 (1984).

120. See Pub. L. No. 109-148, 119 Stat. 2739 (2005); Pub. L. No. 109-366, 120 Stat. 2600 (2006).

121. GUIDELINES, *supra* note 16, app. 2 at 1605.

on the President's good faith efforts to ensure that all government actors adhere to legal constraints. The Bush Administration's record and its celebration of the jurisdiction-stripping provisions of the MCA raise grounds for tremendous concern about whether and how the administration will enforce the MCA. No serious question exists, though, about the President's constitutional obligation to comply with the MCA's detainee protections—or about OLC's obligation to facilitate that compliance through its legal advice.

In some contexts, however, OLC's legal analysis may appropriately favor desired executive action precisely because executive branch entities possess relevant expertise or because the President holds views on the legal issue presented. The *Guidelines* refer briefly to the executive branch's authority to promote and act upon its own legal views, stating that OLC's legal interpretations may reflect, where appropriate, "the institutional traditions and competencies of the executive branch as well as the views of the President who currently holds office."¹²² In some instances, this presents no direct conflict with the other branches' legal views and expectations.

To take one example, the courts routinely afford the executive branch *Chevron* deference in appropriate circumstances, and Congress is well aware of that practice and may account for it in fashioning legislation. In reviewing the legality of proposed regulations to which courts would give *Chevron* deference, OLC should not ask simply whether the regulations would withstand judicial review—that is, whether they are arbitrary, capricious, or manifestly contrary to the statute.¹²³ Mirroring the judicial standard for deference would inadequately ensure that the regulation complied with the statute—if, for example, the agency were simply trying to take advantage of the deferential review it knew a court would give. OLC should, however, defer to actual agency expertise and political

122. *Id.* at 1606. Extensive academic writings address the issue of extrajudicial constitutional interpretation, and in recent years growing numbers of scholars have extolled the virtues of political branch interpretive independence and involvement in the development of constitutional understandings. See, e.g., Johnsen, *supra* note 86, at 108 n.15, 110–112 & nn.18–33, 114 n.36 (discussing participants in this debate over extrajudicial constitutionalism); Pillard, *supra* note 86, at 678–679 & nn.3–10 (same). Nina Pillard persuasively cautioned that, although the promise of extrajudicial constitutionalism is theoretically attractive, the literature to date inadequately considers the political branches' actual practices. Pillard's analysis helped fill that gap and led her to conclude that, especially with regard to the protection of individual rights, the executive branch "has failed fully to meet the challenges of interpreting and applying the Constitution on its own." Pillard, *supra* note 86, at 677. In the same spirit as the *Guidelines* and this Article's elaboration on the *Guidelines*, Pillard followed her critique with suggestions for reform to foster principled executive branch legal interpretation. *Id.* at 743–58.

123. See *Chevron*, 467 U.S. at 844.

choices among permissible alternatives. Judicial doctrine here (and elsewhere) contemplates a distinctive executive branch interpretive role.¹²⁴ Further, OLC typically and appropriately considers not only judicial precedent, but also executive branch tradition and precedent in the form of attorney general and OLC opinions. Such sources play a special role with regard to separation of powers issues where judicial doctrine is relatively scarce but executive branch sources tend to be extensive.¹²⁵

A far more suspect and complicated circumstance is presented by executive branch proposals that are premised on a legal view that flatly conflicts with the views of the Supreme Court or Congress. Presidents at times do disagree with prevailing judicial precedent or congressional sentiment, based on the advice of lawyers or their own legal understandings, and their alternative view may be principled and not merely policy driven. History provides many interesting examples of Presidents who openly engaged in principled constitutional interpretation or otherwise sought to promote legal change. Prominent examples include Thomas Jefferson on the constitutionality of the Alien and Sedition Acts of 1798, Abraham Lincoln on *Dred Scott v. Sandford*,¹²⁶ Franklin Roosevelt on congressional authority to address the Great Depression, and Ronald Reagan on many pressing issues of the day, from abortion to criminal procedure to congressional power.¹²⁷ When Presidents believe that the judiciary has made a “bad” decision, they can provide a valuable public voice for the contrary view. I have argued elsewhere that the legitimacy of presidential actions premised upon distinctive legal views depends on the context, and that chief among the relevant factors are the particular presidential power being exercised and the interpretive processes followed. In formulating legal views, Presidents and their advisors should

124. The appropriate approach to providing legal advice within the executive branch regarding an agency regulation that might warrant *Chevron* deference if reviewed by a court thus depends on a variety of factors including the vagueness of the statute, the extent to which Congress delegated authority to the relevant agency to fill legislative gaps, the agency's expertise, and the administration's policy agenda.

125. See H. JEFFERSON POWELL, *THE CONSTITUTION AND THE ATTORNEYS GENERAL* (1999); H. Jefferson Powell, *The President's Authority Over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527 (1999).

126. 60 U.S. (19 How.) 393 (1856).

127. For discussion of these and other examples, with citations, see Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 7, 19–21 [hereinafter Johnsen, *Presidential Non-Enforcement*]; Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 370–77, 383–99 (2003) [hereinafter Johnsen, *Reagan and the Rehnquist Court*].

always exercise principled deliberation, humility, and, as the *Guidelines* state, “due respect for the constitutional views of the courts and Congress.”¹²⁸

That Presidents in at least some circumstances possess the authority to promote a distinctive legal view is beyond serious question and helps explain many significant constitutional changes throughout U.S. history (some of them unquestionably for the better). Most clear, Presidents may act on their own constitutional views, even counter to the Court’s interpretations, when exercising authority that the Constitution assigns exclusively to them without limitation as to the reasons for the exercise of the authority. Presidents clearly may exercise the veto or pardon powers based on policy preferences, which may include the desire to promote a preferred constitutional view. Also beyond dispute, Presidents may publicly discuss their legal views, including their disagreement with the Court or Congress, and urge either of those bodies to change their views through litigation or legislation. Reagan’s Department of Justice took this to an extreme by developing a detailed blueprint for radically changing constitutional law on a host of issues.¹²⁹ And, as numerous Presidents have, they may appoint federal judges likely to implement their view of the law. Those who disagree with a President’s substantive views of course remain free to oppose such efforts—in Congress, in courts, in public debate, and at the polls.¹³⁰

128. GUIDELINES, *supra* note 16, app. 2 at 1606; see Johnsen, *supra* note 86, at 120–34. Former Acting Solicitor General and Assistant Attorney General for OLC Walter Dellinger has also written of the need for OLC lawyers to express not merely their own constitutional views but “to work within a tradition of reasoned, executive branch precedent, memorialized in formal written opinions.” Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. MIAMI L. REV. 107 (1995).

129. See Johnsen, *Reagan and the Rehnquist Court*, *supra* note 127, at 383–99.

130. The President and the attorney general may call upon OLC for assistance in any of these contexts. This Article discusses OLC’s core function of providing accurate legal advice to inform contemplated presidential or other executive branch action. As the *Guidelines* note, OLC’s work may also involve other functions and the appropriate interpretive stance might vary accordingly. See GUIDELINES, *supra* note 16, app. 2 at 1610 (“OLC sometimes provides legal advice that is not intended to inform the formulation of executive branch policy or action, and in some such circumstances an advocacy model may be appropriate.”). To take one common example, OLC at times assists the solicitor general and other Department of Justice litigating divisions in developing the government’s litigating position. When defending acts of Congress, the Department of Justice typically offers courts all reasonable arguments in their defense—even arguments that do not represent the best view of the law. Courts expect the government to take this stance. See Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073 (2001). OLC’s advice in this context is not binding on others in the executive branch and may reflect the Department’s traditional role as an advocate for the constitutionality of federal legislation. Whatever function it serves, OLC should always articulate precisely the nature of its advice: “OLC should be clear whenever it intends its advice to fall outside of OLC’s typical role as the source of legal determinations that are binding within the executive branch.” GUIDELINES, *supra* note 16, app. 2 at 1610. “Client agencies expect OLC to provide its best view of applicable legal constraints and if OLC acts otherwise without adequate warning, it risks prompting unlawful executive branch action.” *Id.*

The Bush Administration's claims go well beyond these widely accepted forms of advocacy and threaten to tarnish the legitimacy of valuable and appropriate presidential interpretive practices. For example, President Bush has come under severe and warranted attack for frequently refraining from vetoing bills he views as constitutionally objectionable and instead issuing signing statements in which he raises constitutional objections to legislative provisions while signing them into law. In response, the American Bar Association has issued a sweeping condemnation of not only President Bush's use of signing statements, but also their use by past Presidents.¹³¹ Signing statements that announce the President's legal views or intent regarding implementation of a law, however, provide the public with valuable information, which is especially rare and needed from the highly secretive Bush Administration. Critics should take care not to deter the appropriate use of signing statements as a form of presidential communication and should instead focus on evaluating the legal views expressed in the statements and any inappropriate executive action premised on those views.¹³²

Bush's claims of authority to act on his own legal views have been particularly controversial and deservedly condemned because he often has made them in the context traditionally viewed as the most suspect and least often justified: the refusal to enforce a statute. In addition to asserting what I will refer to as nonenforcement authority, Bush often has stated that the manner in which he interprets and enforces a statutory provision will be affected by what he views as his office's constitutional authority, consistent with the judicial canon of constitutional avoidance.¹³³

131. AM. BAR ASS'N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE (2006), http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf.

132. See Posting of David Barron, Dawn Johnsen et al. to Georgetown Law Faculty Blog, *Untangling the Debate on Presidential Signing Statements*, (July 31, 2006), http://gulcfac.typepad.com/georgetown_university_law/2006/07/thanks_to_the_p.html.

133. In its classic statement of the avoidance canon, the Supreme Court wrote that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Trevor Morrison and H. Jefferson Powell both have raised questions of great practical importance and theoretical interest about whether the executive branch should continue in this way to aggrandize executive power through what at least at times constitutes a misuse of the judicial canon of constitutional avoidance. See Morrison, *supra* note 7; Powell, *supra* note 7. Morrison does not reach a definitive conclusion, but he thoroughly discusses the relevant considerations and he details the Bush Administration's abuses of the canon. See generally Morrison, *supra* note 7. Powell concludes that, due to the demonstrated high risk of abuse, the executive branch should never use the avoidance canon "when the issue involves the Commander-in-Chief power or other questions about the separation of powers between Congress and the President." Powell, *supra* note 7, at 1315.

The Torture Opinion made both of these forms of claims of authority. If Bush or his lawyers instead had given a speech or testified before Congress urging amendment of the statutory prohibition on torture on the grounds that it unconstitutionally constrains the President as commander-in-chief—or if Bush had vetoed a bill on such grounds—Bush would have acted well within his authority. Objections would have appropriately focused on the merits of his constitutional argument. The Torture Opinion and many of Bush's signing statements raise the additional problem of the difficult question of the extent of the President's nonenforcement authority when confronted with a statutory provision that the President believes is unconstitutional.

Bush's abuses notwithstanding, in relatively rare circumstances, Presidents do have the authority to refuse to comply with statutes.¹³⁴ Congress occasionally enacts laws that contain unconstitutional provisions. Presidents and their lawyers at OLC therefore must consider the nature of presidential authority—and responsibility—when confronted with a statutory provision that they believe is unconstitutional. Presidents long have asserted the authority, at least in very narrow circumstances, to decline to enforce unconstitutional laws. The easiest cases for nonenforcement authority involve statutory provisions that are clearly unconstitutional under applicable Supreme Court precedent. For example, despite the Court's ruling in *INS v. Chadha*¹³⁵ to the contrary, Congress persists in enacting clearly unconstitutional provisions as parts of multiprovision

134. I have written previously in greater detail on the President's authority and responsibility with regard to unconstitutional statutes. See Johnsen, *Presidential Non-Enforcement*, *supra* note 127. For other views, see, for example, David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 61; Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1990); Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865 (1994); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

135. 462 U.S. 919 (1983). The *Chadha* Court acknowledged the presidential practice of signing multiprovision legislation despite the presence of constitutionally objectionable provisions. *Id.* at 942 n.13. The Court cited as an example President Franklin Roosevelt's decision to sign the Lend-Lease Act of 1941, due to the exigencies of World War II, despite the law's inclusion of an unconstitutional provision. *Id.* Well in advance of the Court's *Chadha* decision, Roosevelt concluded that a provision allowing Congress to terminate the law's authorization by concurrent resolution was unconstitutional. See *id.* ("[I]t is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds. For example, after President Roosevelt signed the Lend-Lease Act of 1941, Attorney General Jackson released a memorandum explaining the President's view that the provision allowing the Act's authorization to be terminated by concurrent resolution was unconstitutional."); see also Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353 (1953) (the attorney general memorandum memorializing Roosevelt's constitutional concerns).

legislation that require the executive branch to obtain approval from a single house of Congress or congressional committee before taking particular actions. Consistent with *Chadha*, Presidents view such provisions as unconstitutional and do not comply with them; they typically treat the provisions as instead requiring mere reporting to the designated entity.¹³⁶

Presidential nonenforcement is far more problematic, and far less often justified, when the Court has not provided clear direction and the constitutional issue is susceptible to reasonable dispute. In perhaps the most well-known and compelling such example, President Jefferson refused to prosecute anyone under the Alien and Sedition Acts of 1798—and pardoned those previously convicted—because he viewed the statute as unconstitutional.¹³⁷ His judgment that the law violated the First Amendment was hotly contested at the time and the Supreme Court did not expressly resolve the dispute (ultimately in Jefferson's favor) until 163 years later.¹³⁸ As this example reveals, presidential nonenforcement of a statute at times might entail protecting the constitutional rights of individuals. More often, though, nonenforcement arises in the context of a law that infringes on presidential authority—or more precisely, what a sitting President views as presidential authority. President Bush's constitutional objections overwhelmingly have involved expansive claims of presidential power.

The *Guidelines* do not take a position on the legitimacy or the scope of presidential nonenforcement authority and describe that issue as beyond the scope of the statement. The *Guidelines* simply acknowledge the

136. See NEIL KINKOPF, SIGNING STATEMENTS AND THE PRESIDENT'S AUTHORITY TO REFUSE TO ENFORCE THE LAW 3–4, available at <http://www.acslaw.org/files/Kinkopf-Signing%20Statements-Jun%202006-Advance%20Vol%201.pdf> (last visited July 21, 2007) (noting that “Congress has enacted hundreds of legislative vetoes since *Chadha*, and not even members of Congress expect the President to veto such legislation or to enforce the patently unconstitutional legislative veto provisions”).

137. Jefferson wrote to Abigail Adams of his decision to act on his own constitutional views, which were counter to several lower federal courts:

[N]othing in the Constitution has given [judges] . . . a right to decide for the Executive, more than to the Executive to decide for them. . . . The judges, believing the law constitutional, had a right to pass sentence of fine and imprisonment; because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution.

8 THE WORKS OF THOMAS JEFFERSON 311 (Paul Leicester Ford ed., G.P. Putnam's Sons 1897) (1905). Jefferson's refusal to enforce the statute occurred in a context in which the case in favor of nonenforcement authority is particularly strong because Presidents typically enjoy broad prosecutorial discretion.

138. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

traditionally very “rare” practice and address the “bare minimum” process the President should follow.¹³⁹ This Article, too, will turn now to the processes that should guide nonenforcement decisions and OLC advice-giving more generally. To conclude with a few final observations: Historically Presidents rarely have declined to enforce constitutionally objectionable statutes. Attorney General Benjamin Civiletti put it well in observing that when the President is confronted with a constitutionally objectionable statute, “it is almost always the case that he can best discharge the responsibilities of his office by defending and enforcing the Act of Congress.”¹⁴⁰ Factors that traditionally have supported nonenforcement include a constitutional defect that was clear (either on its face or under judicial precedent), an encroachment upon presidential power, or a constitutional violation unlikely to be justiciable absent nonenforcement.¹⁴¹ I have argued elsewhere that this practice of typically enforcing statutes that Presidents find constitutionally dubious properly reflects respect for the constitutional views of Congress and the courts and for the legislative process: The veto and points earlier in the legislative process are when the President ordinarily should act on constitutional concerns.¹⁴²

Because of intense secrecy, whether and to what extent Bush actually has refused to comply with statutory provisions remains unknown. He has, however, asserted the right to refuse to enforce statutes far more frequently than any previous President.¹⁴³ His vague and abbreviated

139. GUIDELINES, *supra* note 16, app. 2 at 1607.

140. The Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. Off. Legal Counsel 55 (1980) (memorandum from Attorney General Benjamin R. Civiletti) [hereinafter 1980 Civiletti Memorandum].

141. See Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199 (1994) (memorandum from Assistant Attorney General Walter Dellinger); 1980 Civiletti Memorandum, *supra* note 140. Under Presidents Ronald Reagan and George H. W. Bush, though, OLC at times has described presidential nonenforcement authority in far more sweeping terms. See Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. Off. Legal Counsel 18 (1992) (memorandum from Acting Assistant Attorney General Timothy E. Flanigan); Issues Raised by Foreign Relations Authorization Bill, 14 Op. Off. Legal Counsel 37 (1990) (memorandum from Assistant Attorney General William P. Barr); see also Johnsen, *Presidential Non-Enforcement*, *supra* note 127, at 44–52 (discussing prior executive branch practice and policy).

142. See Johnsen, *Presidential Non-Enforcement*, *supra* note 127 (evaluating the appropriate standards for nonenforcement and their application to President Clinton’s decision to enforce, but to refuse to defend, a statute that required him to fire anyone in the military who tested HIV-positive).

143. See HALSTEAD, *supra* note 7; Cooper, *supra* note 7; Savage, *supra* note 7. But see Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENTARY 307, 311 (2006) (“For the most part, the claims made in President Bush’s signing

explanations typically do not adequately inform Congress or the public about the precise nature of the alleged constitutional defect. Notwithstanding the extraordinary frequency of the assertions, the Bush Administration has never described the standards it follows in making nonenforcement decisions. The Torture Opinion, in particular, does not even acknowledge the profound challenges to the rule of law raised by presidential nonenforcement of statutes, let alone apply any limiting principles to the exercise of this authority.¹⁴⁴ Thus, what is known about the Bush Administration's approach to nonenforcement puts it far out of the mainstreams of presidential practice and legal thought.¹⁴⁵

C. OLC's Interpretive Processes: Safeguards for the Rule of Law

As the *Guidelines*' first principle instructs, the paramount principle that should guide OLC's work is the imperative to provide accurate and honest legal appraisals, unbiased by policymakers' preferred outcomes. Several of the *Guidelines*' remaining principles recommend internal executive branch processes to help achieve this ideal. The detailed nature of these recommendations—which cover everything from the form that requests for advice should take¹⁴⁶ to how many OLC deputy assistant attorneys general should sign off on advice before it is finalized¹⁴⁷—reflects the authors' strong conviction that regularized internal processes and mechanisms are critical to maintaining commitment to the first principle in the face of inevitable pressures to the contrary.¹⁴⁸

statements . . . are similar to the claims made by other recent presidents, such as President Clinton. In addition, there are other plausible explanations for the Bush administration's high number of challenges.").

144. Torture Opinion, *supra* note 6.

145. Commentators who advocate for a much broader scope of presidential nonenforcement authority typically argue that the Constitution is paramount among the laws the President must "take Care" to faithfully execute, and the President therefore must enforce the Constitution over an unconstitutional statute. As I have stated elsewhere, this formulation of the issue "begs a critical question: 'unconstitutional' in whose view? . . . When the executive and legislative branches disagree, and the judicial branch has not spoken, which branch's view of the Constitution should prevail?" Johnsen, *Presidential Non-Enforcement*, *supra* note 127, at 17.

146. "Whenever possible, agency requests should be in writing, should include the requesting agency's own best legal views as well as any relevant materials and information, and should be as specific as circumstances allow." GUIDELINES, *supra* note 16, app. 2 at 1608.

147. "Ordinarily OLC legal advice should be subject to multiple layers of scrutiny and approval; one such mechanism used effectively at times is a 'two deputy rule' that requires at least two supervising deputies to review and clear all OLC advice." *Id.* at 1609.

148. "OLC should maintain internal systems and practices to help ensure that OLC's legal advice is of the highest possible quality and represents the best possible view of the law." *Id.* at 1608.

The notion that when assessing a proposed action OLC should engage not in advocacy but in objective and accurate legal interpretation will not be intuitive to all observers (or to all new OLC attorneys) and therefore must be deliberately reinforced. Our law schools and legal culture teach that courts—not elected officials—are the appropriate neutral expositors of law. Indeed, many executive branch lawyers serving in other functions appropriately do act as legal advocates for the government, including in court and in front of OLC.¹⁴⁹ Additionally, cynicism pervades public attitudes about the ability of political actors to interpret the law in a principled fashion, and the Torture Opinion and other legal positions taken by the Bush Administration in the War on Terror certainly have reinforced and deepened that cynicism. Lawyers now may come to the executive branch with a distorted view of OLC, knowing only that OLC issued the infamous Torture Opinion and sanctioned the Bush Administration's other highly controversial national security policies.

OLC therefore greatly benefits its new attorneys, as well as OLC clients throughout the executive branch, when it clearly articulates the principles that guide its work. OLC should expressly instruct its attorneys from the outset of their service regarding the proper stance from which to provide advice whenever fulfilling the office's core function of guiding executive action. OLC also should make those standards available to the public, to inform Congress and the courts as they evaluate executive branch positions and to alert the press and the public as they seek accountability. OLC's failures during the Bush Administration and the resulting damage to OLC's reputation have created a compelling need for clarification of the standards that actually govern OLC's work.¹⁵⁰ The Bush OLC's excessive secrecy has compounded the damage to its reputation: Because OLC has released shockingly few of its legal opinions, observers cannot assess the extent to which it adheres to best practices. The *Guidelines* provide a strong starting point, for they reflect what nineteen former OLC attorneys viewed as the best traditions of the office. Every presidential administration should either publicly embrace them or announce its own set of guidelines.

Perhaps most essential to avoiding a culture in which OLC becomes merely an advocate of the administration's policy preferences is transparency

149. The President or attorney general also may call upon OLC to assist in other functions that may include advocacy. See *supra* note 130.

150. As the *Guidelines* state, "OLC can help promote public confidence and understanding by publicly announcing its general operating policies and procedures." GUIDELINES, *supra* note 16, app. 2 at 1609.

in the specific legal advice that informs executive action, as well as in the general governing processes and standards. The *Guidelines* state that “OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.”¹⁵¹ The *Guidelines* describe several values served by a presumption of public disclosure, beyond the general public accountability that accompanies openness in government. The likelihood of public disclosure will encourage both the reality and the appearance of governmental adherence to the rule of law by deterring “excessive claims of executive authority” and promoting public confidence that executive branch action actually is taken with regard to legal constraints.¹⁵² The *Guidelines* note as well that public discourse and “the development of constitutional meaning” may benefit from the executive’s important voice, valuable perspective, and expertise.¹⁵³

Of the *Guidelines*’ ten principles, this call for transparency is perhaps the most controversial, as well as the most susceptible to substantially different interpretation, even among those who endorse it. The *Guidelines* note that the executive branch undoubtedly will possess strong, even compelling, reasons for keeping some OLC advice confidential. The classic example is to protect national security interests, such as where the release of an OLC opinion might reveal the identity of a covert agent. Less obvious perhaps, OLC also has an interest in not releasing opinions that would embarrass the administration—or, more to the point, the individual or agency who requested the advice. More is at stake than political embarrassment: “For OLC routinely to release the details of all contemplated action of dubious legality might deter executive branch actors from seeking OLC advice at sufficiently early stages in policy formulation.”¹⁵⁴ Policymakers should not have to fear public disclosure of their hastily conceived ideas for potentially unlawful action—that is, as long as they abide by OLC’s advice. The public interest is served when government officials run proposals by OLC, and publication policy must not unduly deter the seeking of legal advice. Thus, the *Guidelines* state, “[o]rdinarily, OLC should honor a requestor’s desire to keep confidential any OLC advice that the proposed executive action would be unlawful, where the requestor then does not take the action.”¹⁵⁵

151. *Id.* at 1607.

152. *Id.*

153. *Id.*

154. *Id.* at 1608.

155. *Id.* This presumption in favor of confidentiality may be overcome by sufficiently weighty specific need.

A hypothetical helps illustrate: Assume that in the immediate wake of the Oklahoma City bombing, the counsel to the President had asked OLC to consider several necessarily rough and hurried prepared proposals, among them whether the government could torture and unilaterally wiretap the leaders of right-wing militias suspected of planning future attacks, notwithstanding federal statutes apparently to the contrary. If OLC advised that the proposed actions would be unlawful and the White House followed that advice and decided not to pursue the policies, there ordinarily would be relatively little need to publicly disclose the request or the response and good reason to keep them confidential. If, however, the White House acted contrary to OLC advice or if OLC issued an opinion interpreting the relevant law to allow the torture and warrantless wiretapping, the public would have a strong interest in seeing the OLC opinion in an appropriate, timely manner.

The *Guidelines* describe the need for public disclosure as particularly strong whenever the executive branch does not fully comply with a federal statutory requirement.¹⁵⁶ Although the *Guidelines* do not take a position on the legitimacy of presidential nonenforcement, they note its “rare” occurrence and call at a “bare minimum” for full public disclosure and explanation: “[A]bsent the most compelling need for secrecy, any time the executive branch disregards a federal statutory requirement on constitutional grounds, it should publicly release a clear statement explaining its deviation.”¹⁵⁷ The supporting legal analysis “should fully address applicable Supreme Court precedent.”¹⁵⁸ As the *Guidelines* also note, Congress has enacted a law that requires the attorney general to notify Congress if the Department of Justice determines either that it will not enforce a statutory provision on the grounds the provision is unconstitutional or that it will not defend a statute against constitutional challenge.¹⁵⁹

The Bush Administration, of course, has not complied with this public notice standard and generally has operated in extraordinary secrecy.

156. The Government Accountability Office (GAO) has investigated whether President Bush actually had refused to enforce statutory provisions regarding which he had raised constitutional objections in signing statements. Memorandum from Gary Kepplinger, Gen. Counsel, GAO to Senators Robert C. Byrd & John Conyers Jr., Presidential Signing Statements Accompanying the Fiscal Year 2006 Appropriations Acts (June 19, 2007), available at http://appropriations.senate.gov/News/2007_06_18_Text_of_GAO_Opinion_on_White_House_Signing_Statements.pdf. GAO found that Bush had not complied with six of the sample of nineteen provisions it had selected for its study. *Id.*

157. GUIDELINES, *supra* note 16, app. 2 at 1607.

158. *Id.*

159. *Id.*

Its coercive interrogation policy provides one striking example. The Bush Administration kept secret OLC's determination that the President had the constitutional authority to violate the federal anti-torture statute. The public learned of the Torture Opinion only through a leak almost two years after OLC issued it. During that time, the Opinion was held out as the definitive legal interpretation to the executive branch as a whole and was used to silence those who objected to the use of extreme interrogation techniques.

Given the Bush Administration's propensity to claim that it is simply engaging in statutory interpretation when it in effect is claiming the authority to disregard a statute, Congress should amend the current notification requirement to extend beyond cases in which the executive branch acknowledges it is refusing to comply with a statute. Presidents should explain publicly not only when they determine a statute is unconstitutional and should not be enforced, but also whenever they rely upon the constitutional avoidance canon to interpret a statute. As Trevor Morrison has explained, the most persuasive justification for allowing executive branch use of the avoidance canon—which promotes judicial restraint when used by courts—is to promote constitutional enforcement by requiring Congress to be clear about its intent when it comes close to a constitutional line. Executive use of the avoidance canon, like judicial use, protects constitutional norms by encouraging Congress to deliberate before coming close to violating them. This justification, which has the effect of forcing Congress to reconsider legislation, depends entirely on the executive branch disclosing its concerns to Congress.¹⁶⁰

But the Bush Administration has relied upon the avoidance doctrine in secret, depriving Congress of any opportunity to respond with clarifying legislation. Moreover, if the President refuses even to notify Congress when he refuses to comply with a statutory requirement, Congress—and the public—has little ability to monitor the executive branch's legal compliance and has significant reason for suspicion. President Bush's frequent use of vague, boilerplate language in signing statements, stating that he will interpret statutes consistent with his views of presidential powers, does not provide genuine guidance about whether and how the President will enforce the provision. The notification regarding either

160. See Morrison, *supra* note 7; Trevor W. Morrison, *Executive Branch Avoidance and the Need for Congressional Notification*, *SIDEBAR: ONLINE PUBL. COLUM. L. REV.*, Feb. 15, 2007, <http://clrsidebar.org/essays/executive-branch-avoidance>.

nonenforcement or the use of the avoidance canon should contain sufficient detail and analysis to truly inform the public.

Beyond the failure in transparency, details gleaned from the scant public record indicate that the Torture Opinion did not adhere to some of the other best practices advocated by the *Guidelines*. For example, OLC appears to have acted contrary to the *Guidelines*' suggestion that "[w]henver time and circumstances permit, OLC should seek the views of all affected agencies and components of the Department of Justice before rendering final advice."¹⁶¹ OLC apparently either never solicited or simply ignored the advice of the Department of State and the Criminal Division of the Department of Justice.¹⁶² Sensitive to such criticisms, OLC's Replacement Opinion reports that the Criminal Division "concurs" with its analysis.¹⁶³ The *Wall Street Journal* reported that OLC circulated drafts of this revised opinion and sought input from the Department of State as well as the CIA and Department of Defense.¹⁶⁴

The *Guidelines* also caution that "OLC typically should provide legal advice in advance of executive branch action, and not regarding executive branch action that already has occurred."¹⁶⁵ Otherwise, OLC will feel pressure not to opine that executive branch officials have engaged in unlawful activity. According to news reports, the CIA began using extreme interrogation methods, including waterboarding and cold cells, several months before OLC issued the Torture Opinion.¹⁶⁶ If the Torture Opinion instead had concluded that these interrogations violated the federal anti-torture statute, the interrogators could have faced harsh criminal penalties; that knowledge could create pressure on OLC to find no violation.

Related to this caution against post hoc advice, the *Guidelines* encourage executive branch "structures, routines and expectations" "to help ensure that OLC is consulted, before the fact, regarding any and all substantial executive branch action of questionable legality."¹⁶⁷ OLC, for its part,

161. GUIDELINES, *supra* note 16, app. 2 at 1609.

162. The *Washington Post* reported that the Torture Opinion was written with input from "a small group of conservative legal officials at the White House, the Justice Department and the Defense Department—and . . . generally exclud[ed] potential dissenters." R. Jeffrey Smith & Dan Eggen, *Gonzales Helped Set the Course for Detainees*, WASH. POST, Jan. 5, 2005, at A1.

163. Replacement Opinion, *supra* note 55, at 2.

164. Jess Bravin, *Interrogation Policy Proves Elusive*, WALL ST. J., Dec. 13, 2004, at A4.

165. GUIDELINES, *supra* note 16, app. 2 at 1608.

166. See Ross & Esposito, *supra* note 48 (reporting that harsh methods were used beginning in March 2002; the Torture Opinion was issued in August 2002). The *Guidelines* acknowledge that this problem may be unavoidable for some questions that involve continuing or recurring executive branch action. GUIDELINES, *supra* note 16, app. 2 at 1608.

167. *Id.* at 1609–10.

“must be attentive to the need for prompt, responsive legal advice that is not unnecessarily obstructionist.”¹⁶⁸ OLC’s advice often should not end with saying no to a proposed action, but should help the President and policymakers achieve objectives through alternative, lawful means. If instead OLC is perceived as unhelpful and unnecessarily negative, the President and others in the executive branch might avoid asking OLC about the legality of strongly desired policies.

CONCLUSION

Public cynicism notwithstanding, it is both possible and necessary for executive branch lawyers to constrain unlawful executive branch action. Ultimately, though, the President’s own attitude toward the rule of law will go a long way toward setting the tone for the administration. If the President desires only a rubberstamp, OLC will have to struggle mightily to provide an effective check on unlawful action. In addition to being prepared to say no, therefore, the assistant attorney general for OLC and other top Department of Justice officials must also be prepared to resign in the extraordinary event the President persists in acting unlawfully or demands that OLC legitimize unlawful activity. Even from within the Bush Administration, some cause for optimism can be found in reports of internal opposition to extreme interrogation policies, as well as in the threatened resignation of up to thirty Department of Justice officials if Bush had persisted in a domestic surveillance program the Department had determined was unlawful.¹⁶⁹ This is as it should be: Commitment to the rule of law must not be a partisan issue. Congress, the courts, and the public should all work to empower principled executive branch legal advisors—in administrations of both political parties—to safeguard our constitutional democracy.

168. *Id.* at 1609 “Although OLC’s legal determinations should not seek simply to legitimate the policy preferences of the administration of which it is a part, OLC must take account of the administration’s goals and assist their accomplishment within the law.” *Id.*

169. *See supra* note 11.

APPENDIX 1. GUIDELINES MEMORANDUM

To: Attorney General John Ashcroft, Judge Alberto R. Gonzales, and Acting
Assistant Attorney General Daniel B. Levin
From: Signatories to Attached Document
Re: Attached Principles to Guide the Office of Legal Counsel
Date: December 21, 2004

As President Bush begins his second term in office, we respectfully offer for your consideration the enclosed set of "Principles to Guide the Office of Legal Counsel." Prompted in part by concerns about the August 1, 2002 OLC memorandum "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A," disclosed last Summer, the undersigned former OLC attorneys have engaged in a series of conversations about that memorandum and also more generally about the practices OLC should follow in advising the President and the Executive Branch on the legality of contemplated action. In preparing these written guidelines, we in large part drew upon what we believe are longstanding, desirable OLC practices in administrations of both political parties. The Office of Legal Counsel plays a central role in upholding the rule of law in this great nation, and we take pride in our service there. We stand ready to be of any assistance in maintaining that important tradition.

APPENDIX 2. GUIDELINES

PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL

December 21, 2004

The Office of Legal Counsel (OLC) is the Department of Justice component to which the Attorney General has delegated the function of providing legal advice to guide the actions of the President and the agencies of the executive branch. OLC's legal determinations are considered binding on the executive branch, subject to the supervision of the Attorney General and the ultimate authority of the President. From the outset of our constitutional system, Presidents have recognized that compliance with their constitutional obligation to act lawfully requires a reliable source of legal advice. In 1793, Secretary of State Thomas Jefferson, writing on behalf of President Washington, requested the Supreme Court's advice regarding the United States' treaty obligations with regard to the war between Great Britain and France. The Supreme Court declined the request, in important measure on the grounds that the Constitution vests responsibility for such legal determinations within the executive branch itself: "[T]he three departments of government . . . being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions seems to have been purposely as well as expressly united to the executive departments." Letter from John Jay to George Washington, August 8, 1793, *quoted in* 4 *The Founders' Constitution* 258 (Philip B. Kurland & Ralph Lerner, eds. 1987).

From the Washington Administration through the present, Attorneys General, and in recent decades the Office of Legal Counsel, have served as the source of legal determinations regarding the executive's legal obligations and authorities. The resulting body of law, much of which is published in volumes entitled *Opinions of the Attorney General* and *Opinions of the Office of Legal Counsel*, offers powerful testimony to the importance of the rule-of-law values that President Washington sought to secure and to the Department of Justice's profound tradition of respect for the rule of law. Administrations of both political parties

have maintained this tradition, which reflects a dedication to the rule of law that is as significant and as important to the country as that shown by our courts. As a practical matter, the responsibility for preserving this tradition cannot rest with OLC alone. It is incumbent upon the Attorney General and the President to ensure that OLC's advice is sought on important and close legal questions and that the advice given reflects the best executive branch traditions. The principles set forth in this document are based in large part on the longstanding practices of the Attorney General and the Office of Legal Counsel, across time and administrations.

1. *When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action.*

OLC's core function is to help the President fulfill his constitutional duty to uphold the Constitution and "take care that the laws be faithfully executed" in all of the varied work of the executive branch. OLC provides the legal expertise necessary to ensure the lawfulness of presidential and executive branch action, including contemplated action that raises close and difficult questions of law. To fulfill this function appropriately, OLC must provide advice based on its best understanding of what the law requires. OLC should not simply provide an advocate's best defense of contemplated action that OLC actually believes is best viewed as unlawful. To do so would deprive the President and other executive branch decisionmakers of critical information and, worse, mislead them regarding the legality of contemplated action. OLC's tradition of principled legal analysis and adherence to the rule of law thus is constitutionally grounded and also best serves the interests of both the public and the presidency, even though OLC at times will determine that the law precludes an action that a President strongly desires to take.

2. *OLC's advice should be thorough and forthright, and it should reflect all legal constraints, including the constitutional authorities of the coordinate branches of the federal government—the courts and Congress—and constitutional limits on the exercise of governmental power.*

The President is constitutionally obligated to “preserve, protect and defend” the Constitution in its entirety—not only executive power, but also judicial and congressional power and constitutional limits on governmental power—and to enforce federal statutes enacted in accordance with the Constitution. OLC’s advice should reflect all relevant legal constraints. In addition, regardless of OLC’s ultimate legal conclusions concerning whether proposed executive branch action lawfully may proceed, OLC’s analysis should disclose, and candidly and fairly address, the relevant range of legal sources and substantial arguments on all sides of the question.

3. *OLC's obligation to counsel compliance with the law, and the insufficiency of the advocacy model, pertain with special force in circumstances where OLC's advice is unlikely to be subject to review by the courts.*

In formulating its best view of what the law requires, OLC always should be mindful that the President’s legal obligations are not limited to those that are judicially enforceable. In some circumstances, OLC’s advice will guide executive branch action that the courts are unlikely to review (for example, action unlikely to result in a justiciable case or controversy) or that the courts likely will review only under a standard of extreme deference (for example, some questions regarding war powers and national security). OLC’s advice should reflect its best view of all applicable legal constraints, and not only legal constraints likely to lead to judicial invalidation of executive branch action. An OLC approach that instead would equate “lawful” with “likely to escape judicial condemnation” would ill serve the President’s constitutional duty by failing to describe all legal constraints and by appearing to condone unlawful action as long as the President could, in a sense, get away with it. Indeed, the absence of a litigation threat signals special need for vigilance: In circumstances in which judicial oversight of executive branch action is unlikely, the President—and by extension OLC—has a special obligation to ensure compliance with the law, including respect for the rights of affected individuals and the constitutional allocation of powers.

4. *OLC's legal analyses, and its processes for reaching legal determinations, should not simply mirror those of the federal courts, but also should reflect the institutional traditions and competencies of the executive branch as well as the views of the President who currently holds office.*

As discussed under principle 3, jurisdictional and prudential limitations do not constrain OLC as they do courts, and thus in some instances OLC appropriately identifies legal limits on executive branch action that a court would not require. Beyond this, OLC's work should reflect the fact that OLC is located in the executive branch and serves both the institution of the presidency and a particular incumbent, democratically elected President in whom the Constitution vests the executive power. What follows from this is addressed as well under principle 5. The most substantial effects include the following: OLC typically adheres to judicial precedent, but that precedent sometimes leaves room for executive interpretive influences, because doctrine at times genuinely is open to more than one interpretation and at times contemplates an executive branch interpretive role. Similarly, OLC routinely, and appropriately, considers sources and understandings of law and fact that the courts often ignore, such as previous Attorney General and OLC opinions that themselves reflect the traditions, knowledge and expertise of the executive branch. Finally, OLC differs from a court in that its responsibilities include facilitating the work of the executive branch and the objectives of the President, consistent with the requirements of the law. OLC therefore, where possible and appropriate, should recommend lawful alternatives to legally impermissible executive branch proposals. Notwithstanding these and other significant differences between the work of OLC and the courts, OLC's legal analyses always should be principled, thorough, forthright, and not merely instrumental to the President's policy preferences.

5. *OLC advice should reflect due respect for the constitutional views of the courts and Congress (as well as the President). On the very rare occasion when the executive branch—usually on the advice of OLC—declines fully to follow a federal statutory requirement, it typically should publicly disclose its justification.*

OLC's tradition of general adherence to judicial (especially Supreme Court) precedent and federal statutes reflects appropriate executive branch respect for the coordinate branches of the federal government. On very rare occasion, however, Presidents, often with the advice of OLC,

appropriately act on their own understanding of constitutional meaning (just as Congress at times enacts laws based on its own constitutional views). To begin with relatively uncontroversial examples, Presidents at times veto bills they believe are unconstitutional and pardon individuals for violating what Presidents believe are unconstitutional statutes, even when the Court would uphold the statute or the conviction against constitutional challenge. Far more controversial are rare cases in which Presidents decide to refuse to enforce or otherwise comply with laws they deem unconstitutional, either on their face or in some applications. The precise contours of presidential power in such contexts are the subject of some debate and beyond the scope of this document. The need for transparency regarding interbranch disagreements, however, should be beyond dispute. At a bare minimum, OLC advice should fully address applicable Supreme Court precedent, and, absent the most compelling need for secrecy, any time the executive branch disregards a federal statutory requirement on constitutional grounds, it should publicly release a clear statement explaining its deviation. Absent transparency and clarity, client agencies might experience difficulty understanding and applying such legal advice, and the public and Congress would be unable adequately to assess the lawfulness of executive branch action. Indeed, federal law currently requires the Attorney General to notify Congress if the Department of Justice determines either that it will not enforce a provision of law on the grounds that it is unconstitutional or that it will not defend a provision of law against constitutional challenge.

6. *OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.*

OLC should follow a presumption in favor of timely publication of its written legal opinions. Such disclosure helps to ensure executive branch adherence to the rule of law and guard against excessive claims of executive authority. Transparency also promotes confidence in the lawfulness of governmental action. Making executive branch law available to the public also adds an important voice to the development of constitutional meaning—in the courts as well as among academics, other commentators, and the public more generally—and a particularly valuable perspective on legal issues regarding which the executive branch possesses relevant expertise. There nonetheless will exist some legal advice that properly should remain confidential, most notably, some advice regarding classified and

some other national security matters. OLC should consider the views regarding disclosure of the client agency that requested the advice. Ordinarily, OLC should honor a requestor's desire to keep confidential any OLC advice that the proposed executive action would be unlawful, where the requestor then does not take the action. For OLC routinely to release the details of all contemplated action of dubious legality might deter executive branch actors from seeking OLC advice at sufficiently early stages in policy formation. In all events, OLC should in each administration consider the circumstances in which advice should be kept confidential, with a presumption in favor of publication, and publication policy and practice should not vary substantially from administration to administration. The values of transparency and accountability remain constant, as do any existing legitimate rationales for secret executive branch law. Finally, as discussed in principle 5, Presidents, and by extension OLC, bear a special responsibility to disclose publicly and explain any actions that conflict with federal statutory requirements.

7. *OLC should maintain internal systems and practices to help ensure that OLC's legal advice is of the highest possible quality and represents the best possible view of the law.*

OLC systems and processes can help maintain high legal standards, avoid errors, and safeguard against tendencies toward potentially excessive claims of executive authority. At the outset, OLC should be careful about the form of requests for advice. Whenever possible, agency requests should be in writing, should include the requesting agency's own best legal views as well as any relevant materials and information, and should be as specific as circumstances allow. Where OLC determines that advice of a more generally applicable nature would be helpful and appropriate, it should take special care to consider the implications for its advice in all foreseeable potential applications. Also, OLC typically should provide legal advice in advance of executive branch action, and not regarding executive branch action that already has occurred; legal "advice" after the fact is subject to strong pressures to follow an advocacy model, which is an appropriate activity for some components of the Department of Justice but not usually for OLC (though this tension may be unavoidable in some cases involving continuing or potentially recurring executive branch action). OLC should recruit and retain attorneys of the highest integrity and abilities. OLC should afford due respect for the precedential value of OLC opinions from administrations of both

parties; although OLC's current best view of the law sometimes will require repudiation of OLC precedent, OLC should never disregard precedent without careful consideration and detailed explanation. Ordinarily OLC legal advice should be subject to multiple layers of scrutiny and approval; one such mechanism used effectively at times is a "two deputy rule" that requires at least two supervising deputies to review and clear all OLC advice. Finally, OLC can help promote public confidence and understanding by publicly announcing its general operating policies and procedures.

8. *Whenever time and circumstances permit, OLC should seek the views of all affected agencies and components of the Department of Justice before rendering final advice.*

The involvement of affected entities serves as an additional check against erroneous reasoning by ensuring that all views and relevant information are considered. Administrative coordination allows OLC to avail itself of the substantive expertise of the various components of the executive branch and to avoid overlooking potentially important consequences before rendering advice. It helps to ensure that legal pronouncements will have no broader effect than necessary to resolve the question at hand. Finally, it allows OLC to respond to all serious arguments and thus avoid the need for reconsideration.

9. *OLC should strive to maintain good working relationships with its client agencies, and especially the White House Counsel's Office, to help ensure that OLC is consulted, before the fact, regarding any and all substantial executive branch action of questionable legality.*

Although OLC's legal determinations should not seek simply to legitimate the policy preferences of the administration of which it is a part, OLC must take account of the administration's goals and assist their accomplishment within the law. To operate effectively, OLC must be attentive to the need for prompt, responsive legal advice that is not unnecessarily obstructionist. Thus, when OLC concludes that an administration proposal is impermissible, it is appropriate for OLC to go on to suggest modifications that would cure the defect, and OLC should stand ready to work with the administration to craft lawful alternatives. Executive branch officials nonetheless may be tempted to avoid bringing to OLC's attention strongly desired policies of questionable legality.

Structures, routines and expectations should ensure that OLC is consulted on all major executive branch initiatives and activities that raise significant legal questions. Public attention to when and how OLC generally functions within a particular administration also can help ensure appropriate OLC involvement.

10. *OLC should be clear whenever it intends its advice to fall outside of OLC's typical role as the source of legal determinations that are binding within the executive branch.*

OLC sometimes provides legal advice that is not intended to inform the formulation of executive branch policy or action, and in some such circumstances an advocacy model may be appropriate. One common example: OLC sometimes assists the Solicitor General and the litigating components of the Department of Justice in developing arguments for presentation to a court, including in the defense of congressional statutes. The Department of Justice typically follows a practice of defending an act of Congress against constitutional challenge as long as a reasonable argument can be made in its defense (even if that argument is not the best view of the law). In this context, OLC appropriately may employ advocacy-based modes of analysis. OLC should ensure, however, that all involved understand whenever OLC is acting outside of its typical stance, and that its views in such cases should not be taken as authoritative, binding advice as to the executive branch's legal obligations. Client agencies expect OLC to provide its best view of applicable legal constraints and if OLC acts otherwise without adequate warning, it risks prompting unlawful executive branch action.

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