

# U.C.L.A. Law Review

## National Security Lawyering in the Post-War Era: Can Law Constrain Power?

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### ABSTRACT

Do we face a rule of law crisis in U.S. national security law? The rule of law requires that people and institutions are subject and accountable to law that is fairly applied and enforced. Among other things, this requires that those bound by the law not be the judges in their own case. Does national security lawyering meet this standard? And if not, what should be done about that? This Article seeks to answer these questions. It begins by demonstrating a key source of the problem: There are almost no external constraints on national security lawyering. Congress and the courts have mostly opted out of making decisions in cases involving national security, our international partners find it difficult to discipline a hegemon, and the press and advocacy organizations are constrained by the fact that the matters on which they seek transparency are, generally speaking, classified, and thus revealing them is a crime. In short, the ordinary checks do not apply. The absence of any real oversight means that those interpreting the law are almost exclusively the lawyers for the very same actors regulated by that law—members of the U.S. executive branch. Drawing on historical research and interviews with former national security lawyers from the last four presidential administrations, this Article describes the group of lawyers most centrally involved in addressing national security law questions, now known as “the Lawyers Group.” Even at its best, the Lawyers Group process was insufficient to adequately protect the rule of law. The Trump administration, in apparently ignoring many of the legal constraints on the President’s national security authority, has laid bare problems that existed all along. In doing so, it has created an opportunity to strengthen the rule of law in national security lawyering as we move into a new presidential administration. It is up to us to seize it.

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## INTRODUCTION

On January 3, 2020, the United States launched a drone that killed Qassem Soleimani, an Iranian General and head of the Quds force. Commentators immediately started asking questions about the legal basis for the strike. The administration was silent. On January 10, Senator Tammy Duckworth wrote a letter to Secretary of Defense Mark Esper demanding an explanation: “I ask that no later than Monday, January 13, 2020, DoD post on its public website the specific legal memorandums or simply the list of authorities under which it acted.”<sup>1</sup> January 13 came and went without any formal legal explanation. Meanwhile, members of the U.S. Congress and the public cried foul, pointing out several likely legal violations, and Congress approved a nonbinding resolution denouncing the order.<sup>2</sup>

Some began to wonder: How are these kinds of legal decisions made? When the president decides to take an action that might embroil the country in a war, how does law come into the picture? (Or *does* it come into the picture?) And what remedies does the public or Congress have if a president seems determined to ignore the law?

This Article seeks to answer these questions and provide the broader historical and legal context for the process of national security lawyering. It shows that national security law is not like any other area of law. To begin with, the stakes are unusually high. National security law governs “those activities which are directly concerned with the [n]ation’s safety, as distinguished from the general welfare.”<sup>3</sup> The activities the law governs, then, are literally matters of life and

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1. Letter from Senator Tammy Duckworth to Mark Esper, U.S. Sec’y of Def. (Jan. 10, 2020), <https://www.justsecurity.org/wp-content/uploads/2020/01/20.01.10-Senator-Duckworth-Letter-to-Secretary-Esper-Legal-Authority-to-Conduct-Operation.pdf> [<https://perma.cc/89H5-36HL>].
  2. See Catie Edmondson & Charlie Savage, *House Votes to Restrain Trump’s Iran War Powers*, N.Y. TIMES (Jan. 9, 2020), <https://www.nytimes.com/2020/01/09/us/politics/trump-iran-war-powers.html> [<https://perma.cc/8YWK-55GS>]; Zachary Cohen & Pamela Brown, *Dems Question Order to Kill Iranian Military Leader. Trump Hasn’t Publicly Explained His Reasoning*, CNN (Jan. 4, 2020, 9:35 AM), <https://www.cnn.com/2020/01/03/politics/trump-soleimani-strike-legal-justification/index.html> [<https://perma.cc/QD9R-Z5BJ>]; Oona A. Hathaway, *The Soleimani Strike Defied the U.S. Constitution*, ATLANTIC (Jan. 4, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/soleimani-strike-law/604417> [<https://perma.cc/9DBH-NQ3P>].
  3. *Cole v. Young*, 351 U.S. 536, 543 (1956). “National security law” is often used but rarely defined. *Cole v. Young* is the only time the U.S. Supreme Court defined the term “national security.” The National Security Act of 1947, which popularized the term national security, uses the phrase thirty-nine times without once defining it. See National Security Act of 1947, ch. 343, 61 Stat. 495. The regulation that defines classification categories does so based on the harm that they do to “national security.” (For example: “The test for assigning Top Secret

death—and not just the life and death of individuals, but, at an extreme, the security, and even existence, of the nation as a whole.<sup>4</sup>

These high stakes are coupled with the absence of the usual constraints that accompany the presence of law. Courts in the United States have, with very limited exceptions, opted out of making decisions in cases involving national security. Yes, they will render decisions on matters relating to the detention of terrorism suspects, they have in the past made limited decisions relating to the power of the president to intervene in private businesses in wartime, and they weigh in on the permissible scope of government surveillance in criminal cases. But in the last several decades, the courts have refused nearly every opportunity to address many of the most important national security law questions. Congress, too, has been rendered largely irrelevant in the area of national security law, especially on issues relating to the use of force. Even though the United States has been at war around the globe for most of the last two decades, the vast majority of those serving in Congress have never voted to authorize a military operation. Among current members of Congress (as of the end of 2020), only 18 of 100 Senators and 57 of 435 Representatives were in office when the 2002 authorization for war against Iraq was enacted.<sup>5</sup> In addition, while constraints offered by our international partners on national security decisions that violate international law are important, they are

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classification is whether its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security.” 18 C.F.R. § 3a.11(a)(1) (2019)). But its definition of the term is not particularly revealing: “Information or material which requires protection against unauthorized disclosure in the interest of the national defense or foreign relations of the United States (hereinafter collectively termed national security) is classified Top Secret, Secret or Confidential, depending upon the degree of its significance to national security.” *Id.* § 3a.11(a) (emphasis omitted). Mariano-Florentino Cuéllar points to the political, contingent nature of the scope of what is understood as national security. See MARIANO-FLORENTINO CUÉLLAR, *GOVERNING SECURITY: THE HIDDEN ORIGINS OF AMERICAN SECURITY AGENCIES 190–93* (2013). That description is undoubtedly correct. Indeed, Justice Black made a similar point in the famous Pentagon Papers case: “The word ‘security,’” he explained, “is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the first Amendment.” *N.Y. Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring). Despite the malleability and lack of precision in the term national security, “national security law” is generally understood to refer to the law directly relating to the security of the nation—including domestic law on war powers and intelligence gathering, as well as international law governing the use of force (*jus ad bellum*) and the conduct of armed conflict (*jus in bello*).

4. Some of the dynamics described in this Article are true of executive branch lawyering more generally. National security law, however, is distinctive in the existential stakes of the matters governed, in the legally mandated secrecy, and in the almost uniform unwillingness of the courts to engage the merits of the legal issues. It also has a distinctive history and institutional structure, both of which are detailed in Parts II–III, *infra*.
5. Calculations by author. See *List of Current Members of the U.S. Congress*, BALLOTPEdia, [https://ballotpedia.org/List\\_of\\_current\\_members\\_of\\_the\\_U.S.\\_Congress](https://ballotpedia.org/List_of_current_members_of_the_U.S._Congress) [https://perma.cc/92HL-3GNA].

limited. After all, it is difficult to discipline a hegemon. Finally, the press and advocacy organizations play an important role in encouraging transparency and bringing abuses to light, but they are significantly constrained by the fact that the matters on which they seek transparency are, generally speaking, classified—and thus revealing them is a crime.

The absence of constraints is exacerbated by the fact that uses of force by the U.S. military and other national security decisions are often shrouded in secrecy. The intelligence on which the decisions are based is classified. The options under consideration are usually classified. The operations themselves are often classified—at least until they are over. And the legal analysis supporting the operations is often classified as well. The effects of the decisions, meanwhile, are largely felt abroad—by those on the receiving end of U.S. military action, who often have little effective voice in the United States. This has the effect of insulating legal decisions from public view and criticism. As a result, those interpreting the law are almost exclusively the lawyers for the very same actors regulated by that law—members of the U.S. executive branch. The ordinary checks do not apply.

This Article asks whether we face a rule of law crisis in U.S. national security law. The rule of law requires that people and institutions are subject and accountable to law that is fairly applied and enforced. Among other things, this requires that those bound by the law not be the judges in their own case. Does national security lawyering meet this standard? And if not, what should be done about that?

These questions are rarely asked, even though the field has become ubiquitous. The very term “national security law” was almost absent from scholarship before World War II. It emerged into public consciousness in 1947, the year Congress enacted the National Security Act, and its role in public discourse has grown steadily ever since.<sup>6</sup> The first class on National Security Law was taught by John Norton Moore at the University of Virginia in the early 1970s.<sup>7</sup> The first casebook in the field was published in 1990.<sup>8</sup> Today, nearly every law school offers classes on national security law, there are a number of case books and thousands of books and articles on national security law, and entire law journals

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6. A Google Ngram viewer shows that “national security law” hardly registered before the mid-1940s. Its use grew rapidly until around 1990, when it leveled off. In 2019, it appeared in .000009547 percent of all books (which may not seem like a lot, but is a fair number given that the books used in the Ngram are on a wide range of topics). See *Google Books Ngram Viewer*, GOOGLE BOOKS, <https://books.google.com/ngrams> [<https://perma.cc/2UAAU-HGV3>] (enter “national security law” in the search bar).

7. See NATIONAL SECURITY LAW, at xliii (John Norton Moore & Robert F. Turner eds., 2d ed. 2005).

8. JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW (1990).

are devoted to the subject.<sup>9</sup> But rarely do these works ask what it means to actually *practice* the law they describe. What does it mean to lawyer in a world where there are few to no external constraints ensuring that those to whom the law applies follow it?

To be clear, the question posed by this Article is not whether the lawyers involved in national security are devoted to the rule of law. The question instead is whether the *institutional structures within which they operate* are adequate to protect the rule of law in the national security arena. The arguments here are particularly applicable to law relating to use of force and less so to certain areas, such as surveillance of Americans, where the courts and Congress still play a significant role.<sup>10</sup>

To the extent that this question has been a subject of earlier work, that work has mostly focused on the Department of Justice's Office of Legal Counsel (OLC).<sup>11</sup> OLC exercises the authority of the attorney general under the Judiciary

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9. Four prominent examples are the Harvard National Security Journal (launched in 2010), the Texas National Security Review (launched in 2017), the National Security Law Journal (launched in 2012), and the Journal of National Security Law & Policy (launched in 2005).
  10. Moreover, higher stakes issues (such as whether to use military force against a state) are probably harder to constrain by law than are lower stakes issues (such as whether to surveil one person). International law can also be particularly susceptible to the problems described here, in part because some question its applicability and in part because the techniques and methods of international law interpretation are not always well understood. On the other hand, other states are more likely to respond to what they regard as clear violations of international law than they are to violations of domestic law. *See infra* Subpart I.C.
  11. *See, e.g.*, Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007); Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1 (2008); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010) [hereinafter Morrison, *Stare Decisis*]; Eric A. Posner, *Deference to the Executive in the United States After September 11: Congress, the Courts, and the Office of Legal Counsel*, 35 HARV. J.L. & PUB. POL'Y 213 (2012). Daphna Renan offers a broader account of "executive branch legalism." Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805 (2017). Bob Bauer and Mary DeRosa engaged in a thoughtful debate about the legal standard that should apply to national security lawyering. Compare Robert F. Bauer, *The National Security Lawyer, in Crisis: When the "Best View" of the Law May Not Be the Best View*, 31 GEO. J. LEGAL ETHICS 175 (2018) (questioning whether the "best view" standard should bind the OLC), with Mary DeRosa, *National Security Lawyering: The Best View of the Law as a Regulative Ideal*, 31 GEO. J. LEGAL ETHICS 277 (2018) (arguing in response to Bauer that the "best view" standard is important to high-quality national security lawyering). Others have wrestled with whether and how much the president is constrained by law, but do not wrestle with the issues raised here regarding national security lawyering. *See, e.g.*, BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 11 (2010) (arguing that the institutional dynamics of the last fifty years have made the American presidency into a "platform for charismatic extremism and bureaucratic lawlessness"); JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012) (arguing that less visible legal and political constraints have made the presidency unprecedentedly accountable); ERIC A.



Act of 1789<sup>12</sup> to provide the president and executive agencies advice on questions of law. Its core function is to “provide controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government.”<sup>13</sup> It is the most visible source of executive branch legal views, because it often publishes formal opinions.<sup>14</sup> Moreover, a number of alumni of the office are in the legal academy, and no small number of them have written articles drawing on their experience at the office. But in national security, the OLC has never been the central actor; it is one of many. And, indeed, it has become less important in recent years, both because of the scandal surrounding the “torture memos” issued by the office under President George W. Bush, and because its opinions often become public—even when the president’s team prefers to keep them under wraps. This Article thus aims to situate the OLC within the

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POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 4 (2010) (arguing that “the legally constrained executive is now a historical curiosity”); Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1097 (2013) (arguing that “one way that law might operate as a constraint [on the president] is through the simple fact that issues of presidential power are publicly criticized and defended in legal terms”); Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975 (2009) (examining the Constitution’s constraining effect on the executive branch); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1692 (2011) (reviewing ACKERMAN, *supra*) [hereinafter Morrison, *Constitutional Alarmism*]; Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381 (2012) (reviewing POSNER & VERMEULE, *supra*). Others have wrestled with various aspects of government lawyering. See, e.g., Terry Gill & Dieter Fleck, *The Role of the Military Legal Adviser*, in *THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS* 581 (2d ed. 2015); Jack Goldsmith, *Reflections on Government Lawyering*, 205 MIL. L. REV. 192 (2010); Gabriella Blum, *The Role of the Client: The President’s Role in Government Lawyering*, 32 B.C. INT’L & COMP. L. REV. 275 (2009); Nelson Lund, *The President as Client and the Ethics of the President’s Lawyers*, 61 LAW & CONTEMP. PROBS. 65 (1998).

12. Ch. 20, 1 Stat. 73.

13. Memorandum from David J. Barron, Acting Assistant Att’y Gen., Off. of Legal Couns., to Att’y’s of the Off. of Legal Couns. 1 (July 16, 2010), <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf> [https://perma.cc/Z9LT-78UQ] [hereinafter 2010 Best Practices Memo] (“This memorandum updates a prior memorandum, ‘Best Practices for OLC Opinions,’ issued May 16, 2005.”). The 2010 memo updated a best practices memo issued in 2005. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Off. of Legal Couns., to Att’y’s of the Off. of Legal Couns. (May 16, 2005), <http://www.justice.gov/olc/best-practices-memo.pdf> [https://perma.cc/N8US-9NCB] [hereinafter 2005 Best Practices Memo] (“This memorandum reaffirms the longstanding principles that have guided and will continue to guide OLC attorneys in preparing the formal opinions of the Office.”).

14. Other agencies express their views in writing as well, but they are not styled as opinions and perhaps for that reason have less force. A prominent example is the State Department Office of the Legal Adviser’s *Digest of United States Practice in International Law*, which is published annually. OFF. OF THE LEGAL ADVISOR, U.S. DEP’T OF STATE, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW*, <https://www.state.gov/digest-of-united-states-practice-in-international-law> [https://perma.cc/74SW-4BHC].

broader ecosystem of national security lawyering and offer an assessment of that broader ecosystem.

This Article also raises questions that prior works on U.S. national security law have rarely engaged: Not only *does* law constrain power in the national security area, but *should* it and *can* it? Some might argue, as Carl Schmitt did decades earlier in his foundational work, *The Concept of the Political*, that law should not and cannot prohibit or constrain war and related actions.<sup>15</sup> But the world rejected Schmitt's view, first in making the Kellogg-Briand Pact<sup>16</sup> the most widely ratified treaty in world history in 1929 and again in the post-World War II United Nations Charter requiring states to refrain from the "threat or use of force."<sup>17</sup> In doing so, it initiated a world order grounded in the very prohibition on war that he feared.<sup>18</sup> To embrace Schmitt's rejection of law in the arena of national security, then, is to reject the foundational principle of the modern international legal order.

The concerns about the rule of law in national security far precede the administration of President Donald Trump, but the actions of his administration—which is about to come to a close—have made longstanding problems much harder to ignore. The Trump administration has taken a number of actions that violate both domestic and international law, including bombing Syrian government installations in 2017 and 2018 in violation of the UN Charter and domestic war powers law,<sup>19</sup> offering continued support to the Saudi-led war in Yemen in violation of the Geneva Conventions,<sup>20</sup> and undertaking significantly more aggressive cyber operations around the world, including against Iran and

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15. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (1932).

16. Treaty for the Renunciation of War, Austl.-Can.-Czech-Eng.-Fr.-Ger.-India-Ir.-It.-Japan-N.Z.-Pol.-S.Afr.-U.S., Aug. 27, 1928, 46 Stat. 2343 [hereinafter Kellogg-Briand Peace Pact].

17. U.N. Charter art. 2, ¶ 4.

18. See OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017).

19. See Jack Goldsmith & Oona Hathaway, *Bad Legal Arguments for the Syria Airstrikes*, LAWFARE (Apr. 14, 2018, 1:54 PM), <https://www.lawfareblog.com/bad-legal-arguments-syria-airstrikes> [<https://perma.cc/CE7-K2KF>] [hereinafter Goldsmith & Hathaway, *Bad Arguments*]; Jack Goldsmith & Oona Hathaway, *The Downsides of Bombing Syria*, LAWFARE (Apr. 10, 2018, 2:59 PM), <https://www.lawfareblog.com/downsides-bombing-syria> [<https://perma.cc/4EVH-7AKL>] [hereinafter Goldsmith & Hathaway, *Downsides*].

20. See Oona A. Hathaway, Aaron Haviland, Srinath Reddy Kethireddy & Alyssa T. Yamamoto, *Yemen: Is the U.S. Breaking the Law?*, 10 HARV. NAT'L SEC. J. 1 (2019) (showing that the continued U.S. support for the Saudi-led war in Yemen likely violates both domestic and international law); Human Rights Council, Report of the Detailed Findings of the Group of Eminent International and Regional Experts on Yemen, U.N. Doc. A/HRC/42/CRP.1 (Sept. 3, 2019) (documenting violations of international humanitarian law by the Saudi-led coalition in Yemen).

Russia,<sup>21</sup> in likely violation of the UN Charter and domestic war powers law. It has also threatened many other actions that would have been illegal had they been carried out—including attacks on Iran and North Korea. And it has done all this with little explanation.

Whereas the Bush and Obama administrations at least offered some voluntary public explanations for their national security law decisions, the Trump administration has offered almost no public explanations of its views on most key national security law matters.<sup>22</sup> The absence of any significant effort by the Trump administration to legitimate its actions through public legal justification has pulled away a cloak of legitimacy that covered national security decisions in prior administrations. In the process, *it has laid bare an underlying rule of law crisis that existed all along*. In doing so, it may have generated conditions for significant institutional reform that has, until now, proven elusive. This moment of transition—from the Trump Administration to the new administration of President Joe Biden—offers a rare opportunity for such reform.

This Article proceeds in four Parts. Part I considers external constraints on national security lawyering—or, perhaps more accurately, the absence of external constraints. It explains that courts are rarely involved in national security matters. When cases involving national security matters are filed, the courts generally decline to reach the merits—dismissing instead on standing or other justiciability grounds. Congress provides limited oversight on legal reasoning in the national security arena in Congressional committees, but Congress focuses more on policy than legal reasoning. Foreign governments offer some constraint, as they may

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21. See, e.g., Warren P. Strobel, *Bolton Says U.S. Is Expanding Offensive Cyber Operations*, WALL ST. J. (June 11, 2019, 1:59 PM), <https://www.wsj.com/articles/bolton-says-u-s-is-expanding-offensive-cyber-operations-11560266199> [<https://perma.cc/4LDJ-K3MV>].

22. To date, there are five key exceptions: Paul C. Ney, Jr., Gen. Couns., U.S. Dep't of Def., *Legal Considerations Related to the U.S. Air Strike Against Qassem Soleimani* (Mar. 4, 2020), <https://www.defense.gov/Newsroom/Speeches/Speech/Article/2181868/dod-general-counsel-remarks-at-byu-law-school> [<https://perma.cc/8Y2L-HHZY>]; Paul C. Ney, Jr., Gen. Couns., U.S. Dep't of Def., *DOD General Counsel Remarks at U.S. Cyber Command Legal Conference* (Mar. 2, 2020), <https://www.defense.gov/Newsroom/Speeches/Speech/Article/2099378/dod-general-counsel-remarks-at-us-cyber-command-legal-conference> [<https://perma.cc/GX6K-QP93>]; Paul C. Ney, Jr., *Charney Lecture: The Rule of Law in International Security Affairs: A U.S. Defense Department Perspective*, 52 *VAND. J. TRANSNAT'L L.* 773, 789 (2019) (discussing the 2018 Syria opinion by OLC but saying nothing about a matter on which that opinion is silent: the international law basis for the 2018 Syria strikes); *April 2018 Airstrikes Against Syrian Chem.-Weapons Facilities*, 42 *Op. O.L.C.* 1 (2018) [hereinafter *April 2018 Airstrikes Against Syria OLC Memo*]; and *Reviewing Authorities for the Use of Military Force: Hearing Before the S. Comm. on Foreign Rel.*, 116th Cong. (2019) (testimony of Marik String, Acting Legal Adviser, U.S. Dep't of State), [https://www.foreign.senate.gov/imo/media/doc/072419\\_String\\_Testimony.pdf](https://www.foreign.senate.gov/imo/media/doc/072419_String_Testimony.pdf) [<https://perma.cc/CJ7D-25YB>].

refuse to cooperate with the United States if its operations violate international law. Yet this response has been rare, and even when there has been international opposition, the United States has demonstrated an increasing willingness to act unilaterally. Finally, the press and advocacy organizations play a role in checking the executive branch, primarily by publicizing contentious legal decisions, which are sometimes leaked by those disappointed by a legal decision. Even so, the effectiveness of these groups is hampered by massive overclassification, which forces those seeking to publicize decisions to risk civil and even criminal penalties to do so. As a result, all these actors are limited in their capacity to hold the executive branch to account for national security decisions that do not adhere to the law. This is not the result of any single decision or administration, but rather the consequence of a long-term erosion of external constraints. What this means, however, is that the rule of law now depends almost entirely on internal processes within the executive branch, which is often both the first and last word on legal issues relating to national security.

Part II outlines the structure of national security lawyering from 1947 to the present. Drawing on interviews with nearly two dozen lawyers involved at the highest levels of national security lawyering from the 1970s through the present and the author's own firsthand experiences, it traces the emergence of what is today referred to as the Lawyers Group—the group of lawyers most centrally involved in addressing national security law questions. In the process, this Part explores the ways in which the structures for lawyering have been reformed over the years in attempts to respond to breakdowns in legal oversight.

Part III focuses on national security lawyering under the Obama administration, what I call the “Lawyers Group Era.” The Obama administration sought to repudiate what was regarded by many as a lawless Bush administration by making law central to the decisionmaking process—arguably more central in this administration than in any previous one. This Part describes how the Lawyers Group worked under the Obama administration. It then turns a critical eye on this period of national security decisionmaking. As we reach the close of the Trump administration and beginning of the Biden administration, those seeking to promote the rule of law will likely cast back to the Obama-era Lawyers Group and perhaps seek to recreate it. But this Part shows that it was far from perfect. The system relied too much on the good intentions of those who participated in it. In doing so, it left the door wide open to abuses by a future administration. And while its participants expressed a strong commitment to the rule of law, they arrived at decisions that, at times, stretched existing legal authorities to their breaking point. Before we look to this era for guidance, then, we should not only celebrate its strengths, but also acknowledge its weaknesses. In short, the constraints of the

Lawyers Group Era were much too flexible and fragile and thus insufficient to adequately protect the rule of law in national security.

Part IV looks ahead. It considers whether and how it might be possible to impose more robust institutional constraints, thereby reviving the checks that are essential to a healthy legal system. As noted above, some may argue that this is unnecessary—that there is no problem that needs fixing. Law, they might argue, should not constrain power when it comes to protecting national security. Or, in a less extreme version, only very clear legal prohibitions should limit the president's options. Others may argue that law should constrain power but that existing constraints are adequate, or that formal constraints are unnecessary because the lawyers of the executive branch can be counted on to protect the rule of law. This Article rejects those arguments and concludes that it is both necessary and possible to strengthen rule of law in national security. Indeed, the Trump administration's very willingness to flaunt the legal limits on its national security decisions may have the effect of demonstrating the need for reform, thus opening a rare window of opportunity to make long-needed structural changes.

This Article outlines four new proposals, each aimed at strengthening an institutional counterweight to the U.S. executive branch. First, Congress needs the capacity to more effectively voice its own views on national security law matters. To do this, it needs more lawyers who understand national security law matters and are cleared into classified programs as well as an institutional counterweight to the Department of Justice's Office of Legal Counsel: a Congressional Office of Legal Counsel. Second, to allow the public to better understand the legal decisions made by the executive branch, the president should be required to provide an explanation, in writing, of the executive branch position on a national security legal matter if any relevant congressional committee requests it. Requiring the executive branch to offer a formal legal opinion on its significant national security decisions would increase transparency and oversight while also encouraging the airing of dissenting legal views in advance. Third, to encourage the courts to play a role in checking the president, new legislation should grant those same relevant congressional committees (or some other institutional body in Congress) standing to sue if the president fails to abide by domestic law obligations to consult with and obtain approval from Congress for actions for which the president lacks unilateral constitutional authority. Fourth, creating an international "outcasting council" of states would strengthen the capacity of participating states to penalize one another (including the United States) for international law violations. These proposals are meant to strengthen external constraints on lawless behavior in the national security arena, and thus promote the rule of law in national security. I conclude by

explaining why President Biden should not simply accept these limits but embrace them.

## I. THE CONTEXT FOR NATIONAL SECURITY LAWYERING

National security lawyering is unusual both because of the stakes involved and because of the context in which it takes place. In the period since World War II, the courts, Congress, international actors, the press, and advocacy organizations have become less willing and less able to constrain bad legal positions by the executive branch in the national security arena.<sup>23</sup> As a result, there are few consequences for operating on the basis of weak or flimsy legal arguments. Only on rare occasions do stories of legal wrongdoing spill into the public arena, forcing modest reforms. Hence, national security lawyers working for the executive branch have become both the first and last word on the vast majority of national security legal matters. This Part explores the limits of these external constraints, providing a backdrop for the next Part, which offers a deep dive into the system of national security lawyering that has emerged in the United States over the course of the post–World War II era.

### A. Courts

Courts have been reluctant to weigh in on national security matters since the Vietnam era. In a series of cases, the courts have repeatedly refused to reach the merits of national security issues, instead dismissing them on political question or standing grounds. As a result, with few exceptions, there is little chance that a court will review an executive branch decision on a national security issue on its merits.<sup>24</sup>

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23. Many have observed the impotence of the courts and the U.S. Congress to constrain the president in national security. Harold Hongju Koh's *The National Security Constitution* documented the historical dynamics of the relationships between the branches on foreign affairs matters, arguing that the president "almost always wins" in foreign affairs because of executive initiative, congressional acquiescence, and judicial tolerance. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 117 (1990). These dynamics have only grown more pronounced in the decades since. Michael Glennon similarly documented the "[r]eality of Madisonian [w]eakness" as he sought to explain the policy continuity between the administrations of President George W. Bush and President Barack Obama. MICHAEL J. GLENNON, *NATIONAL SECURITY AND DOUBLE GOVERNMENT* 39 (2015). John Hart Ely has also decried the impotence of Congress on war powers matters. JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993).

24. The chief exception to this rule has been detention cases, but, as is discussed later in this Subpart, instead of having a restraining effect, the courts' interpretations of the 2001 Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), in the detention context have migrated over to the targeting context, where they are not subject

The high-water mark for a court imposing restraint on the president in national security matters in recent years is the 1952 case, *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>25</sup> In what Chief Justice William Rehnquist later referred to as a “stinging rebuff” of President Harry Truman,<sup>26</sup> the U.S. Supreme Court restricted the power of the president to seize private property to aid the Korean War. Justice Jackson’s concurring opinion laid out three categories of presidential action, from highest to lowest authority: (1) cases in which the president was acting with express or implied authority from Congress; (2) cases in which Congress had thus far been silent; (3) cases in which the president was defying congressional orders.

This decision was quickly eclipsed, however, by an array of decisions that endorsed a deferential approach to presidential authority. Despite *Youngstown*, courts continued to rely on a decision that predated it: *United States v. Curtiss-Wright Export Corp.*,<sup>27</sup> which recognized the president’s unenumerated power as the “sole organ of the U.S. government” in foreign affairs and therefore held that the president possessed “plenary” foreign affairs powers that did not depend on congressional authorization.<sup>28</sup> This view was reaffirmed and expanded in 1981 in *Dames & Moore v. Regan*.<sup>29</sup> There, the Court found that the president’s decision to suspend claims by the private firm Dames & Moore against the treasury secretary to recover a debt of the Iranian government fell within the president’s plenary foreign affairs power. The Court relied not only on inferences from prior legislation, but also on a history of congressional acquiescence in executive claim settlement, thus apparently refining the *Youngstown* test. Similarly, in *INS v. Chadha*,<sup>30</sup> the Supreme Court invalidated the legislative veto, which had given Congress leverage over executive branch decisions, including in the war powers context—in significant part because it evaded the presentment requirement for

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to court review. Another key exception is cases on issues concerning surveillance, many of which are related to the legality of evidence used against criminal defendants. Indeed, there is an entire court devoted to approving U.S. government applications for foreign intelligence gathering activities, the Foreign Intelligence Surveillance Court, though some have questioned how much it constrains the executive branch. See, e.g., ELIZABETH GOITEIN & FAIZA PATEL, BRENNAN CTR. FOR JUST., WHAT WENT WRONG WITH THE FISA COURT 21–30 (2015), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_What\\_Went\\_%20Wrong\\_With\\_The\\_FISA\\_Court.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_What_Went_%20Wrong_With_The_FISA_Court.pdf) [<https://perma.cc/XR4A-TFQ7>]. This is one area where the courts do play an important checking function. As a result, the concerns raised in this Article apply with less force.

25. 343 U.S. 579 (1952).

26. WILLIAM H. REHNQUIST, THE SUPREME COURT 273 (Vintage Books 2002) (1987).

27. 299 U.S. 304 (1936).

28. *Id.* at 320.

29. 453 U.S. 654 (1981).

30. 462 U.S. 919 (1983).

legislation.<sup>31</sup> This had the effect of radically expanding presidential authority in the international lawmaking arena.<sup>32</sup> Together, these and other decisions accumulated to create a dynamic powerfully described by Harold Hongju Koh in his book *The National Security Constitution* as the “[p]roblem of [j]udicial [t]olerance.”<sup>33</sup>

Even more important than the cases in which the courts have deferred to the president, however, are the wide array of cases where they have refused to opine on the merits of cases presented to them—never even reaching the point at which they must determine whether deference to the executive is appropriate. Time and again, the courts have relied on the standing, state secrets, and political question doctrines to avoid difficult national security matters.<sup>34</sup> For instance, members of Congress have filed suit eight times since the enactment of the War Powers Resolution<sup>35</sup> to force presidents to comply with its requirements, but the courts dismissed the suits—four on political question or equitable discretion doctrine

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31. *Id.* at 946–51. The case involved the use of a one-House legislative veto, but the decision cast doubt on the validity of any legislative veto device, including that in the War Powers Resolution. For more, see MATTHEW C. WEED, CONG. RSCH. SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE (2019), <https://fas.org/sgp/crs/natsec/R42699.pdf> [<https://perma.cc/XQ86-HSYR>].
32. Oona A. Hathaway, *Presidential Power Over International Law: Restoring the Balance*, 119 YALE L.J. 140, 194–205 (2009).
33. KOH, *supra* note 23, at 134.
34. *Cf.* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 (D.C. Cir. 1984) (Bork, J., concurring) (“Questions touching on the foreign relations of the United States make up what is likely the largest class of questions to which the political question doctrine has been applied.”). For example, the U.S. Supreme Court relied on the political question doctrine to avoid deciding whether the president could unilaterally withdraw from the Antiballistic Missile Treaty without congressional assent. *Goldwater v. Carter*, 444 U.S. 996, 999 (1979). The U.S. District for D.C. found that the suit brought by the father of Anwar al-Aulaqi challenging al-Aulaqi’s targeting by the U.S. Department of Defense could not go forward because the plaintiff lacked standing and his claims were nonjusticiable under the political question doctrine. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 52 (D.D.C. 2010). Congressman Kucinich’s lawsuit alleging that President Obama violated the War Powers Resolution by failing to seek congressional approval for the military intervention in Libya was also thrown out on standing. *Kucinich v. Obama*, 821 F. Supp. 2d 110, 125 (D.D.C. 2011). Indeed, a line of cases has all but foreclosed the idea that an individual member of Congress or group of individual members can assert legislative standing to maintain a suit against a member of the Executive Branch. See, e.g., *Raines v. Byrd*, 521 U.S. 811 (1997); *Campbell v. Clinton*, 203 F.3d 19, 20 (D.C. Cir. 2000) (“The question whether congressmen have standing in federal court to challenge the lawfulness of actions of the executive was answered, at least in large part, in the Supreme Court’s recent decision in *Raines v. Byrd*.”); *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999). The courts have not always been so reluctant to reach the merits in such cases, but that changed starting in the 1970s. See Carlin Meyer, *Imbalance of Powers: Can Congressional Lawsuits Serve as Counterweight?*, 54 U. PITT. L. REV. 63, 84 (1992).
35. Pub. L. No. 93-148, 87 Stat. 555 (1973).



grounds, two on standing grounds, and two on ripeness grounds.<sup>36</sup> A 2016 case, *Smith v. Obama*,<sup>37</sup> illustrates the reluctance of the courts to intervene: There, a member of the U.S. armed forces challenged the legal basis for the anti-ISIS campaign in which he was a participant. The D.C. District Court dismissed the case on both standing and political question grounds.<sup>38</sup>

The failure of the courts to address the merits in cases raising challenges to presidential action on national security issues nearly always has a one-sided effect: National security decisions of the president stand. Congress, after all, can only act by passing laws subject to presidential veto. Given modern ideological polarization,<sup>39</sup> overcoming a presidential veto is functionally close to impossible. Thus far, none of President Donald Trump's eight vetoes has been overridden; only one of President Barack Obama's twelve vetoes was overridden.<sup>40</sup> The courts' embrace of prudential and nonjusticiability doctrines to avoid reaching the merits in national security cases means that the president nearly always has the effective power to act without judicial constraint.

The key exception to judicial abstention from national security cases in recent years has been cases challenging detention.<sup>41</sup> There has been an array of cases, most brought by persons held at Guantanamo Bay, Cuba, challenging their detention at Camp Delta.<sup>42</sup> But even these cases have perversely led to unreviewed expansion in the effective scope of presidential authority. Soon after it came into office, the Obama administration provided its interpretation of the scope of its

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36. MICHAEL JOHN GARCIA, CONG. RSCH. SERV., RL30352, WAR POWERS LITIGATION INITIATED BY MEMBERS OF CONGRESS SINCE THE ENACTMENT OF THE WAR POWERS RESOLUTION 1 (2012), <https://fas.org/sgp/crs/natsec/RL30352.pdf> [<https://perma.cc/7QPD-FQGA>].

37. *Smith v. Obama*, 217 F. Supp. 3d 283 (D.D.C. 2016), *vacated as moot sub nom. Smith v. Trump*, 731 F. App'x 8 (D.C. Cir. 2018).

38. *Smith's* appeal to the D.C. Circuit was dismissed as moot because he had resigned from the army. *See Smith*, 217 F. App'x at 9; *see also* Samuel R. Howe, Note, *Congress's War Powers and the Political Question Doctrine After Smith v. Obama*, 68 DUKE L.J. 1231 (2019).

39. Jacob S. Hacker & Paul Pierson, *Confronting Asymmetric Polarization*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 59 (Nathaniel Persily ed., 2015).

40. *Vetoes, 1789 to Present*, U.S. SENATE, <https://www.senate.gov/legislative/vetoes/vetoCounts.htm> [<https://perma.cc/LA8S-F972>].

41. As noted earlier, courts have also weighed in on issues relating to surveillance. *See supra* note 24.

42. *See, e.g., Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that the Suspension Clause applies to the detention of noncitizens at Guantanamo Bay); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion) (recognizing the power of the U.S. government to detain U.S. citizens as enemy combatants, but only if their due process rights are observed); *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that the federal habeas statute, 28 U.S.C. § 2241, conferred jurisdiction to determine the legality of military detention at Guantanamo); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (dismissing on jurisdictional grounds a habeas petition filed by a U.S. citizen captured and detained on U.S. soil).

authority to detain under the 2001 Authorization for Use of Military Force (AUMF). It argued that the AUMF authorized the detention of:

persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.<sup>43</sup>

The D.C. District and Circuit courts largely accepted the administration's position.<sup>44</sup> Congress, too, eventually joined the bandwagon, adopting nearly identical language in the National Defense Authorization Act for Fiscal Year 2012<sup>45</sup> in a section affirming the president's power to detain under the 2001 AUMF.<sup>46</sup>

So far, so good. But what happened next was more troubling. The interpretation of the AUMF articulated by the administration, and approved by Congress, for *detention* purposes, began to migrate into *targeting*. Though the courts never addressed whether the interpretation of the AUMF offered by the administration extended beyond detention, the administration began to treat the authority granted by the courts and Congress for detention purposes as if it also applied wholesale to targeting. Hence, "persons who were part of, or substantially supported, Taliban or al-Qaida forces" were treated as not only detainable, but also *targetable*.<sup>47</sup> That was true even though there is good reason to think that the

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43. Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, *In re Guantanamo Bay Detainee Litig.*, 624 F. Supp. 2d 27 (D.D.C. 2009) (No. 08-442) [hereinafter Respondents' Memorandum], <https://www.justice.gov/sites/default/files/opa/legacy/2009/03/13/memo-re-det-auth.pdf> [<https://perma.cc/PW2G-LBNL>].

44. See, e.g., *Ali Ahmed v. Obama*, 613 F. Supp. 2d 51, 54 (D.D.C. 2009) (uncritically accepting the administration's 2009 description of the scope of its detention authority as extending to "associated forces"). The D.C. Circuit even problematically concluded that "[t]he determination of when hostilities have ceased is a political decision, and we defer to the Executive's opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war." *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010); see also *Maqaleh v. Hagel*, 738 F.3d 312, 330 (D.C. Cir. 2013) ("Whether an armed conflict has ended is a question left exclusively to the political branches.").

45. Pub. L. No. 112-81, 125 Stat. 1298. The relevant section, section 1021, explicitly applied only to detention, as it was titled, "Affirmation of Authority of the Armed Forces of the United States to Detain Covered Persons Pursuant to the Authorization for Use of Military Force." *Id.* § 1021.

46. *Id.* § 1021(a).

47. See Jeh Charles Johnson, *National Security Law, Lawyers and Lawyering in the Obama Administration*, 31 YALE L. & POL'Y REV. 141, 145-46 (2012) (quoting Respondents' Memorandum, *supra* note 43, at 2); Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Annual Meeting of the American Society of International Law: The Obama Administration

authority to detain should exceed—perhaps far exceed—the authority to target with deadly force.<sup>48</sup> When this broad interpretation of targeting authority under the 2001 AUMF was challenged in court by the father of Anwar al-Aulaqi, the courts did what they nearly always do: dismissed the case on justiciability and standing grounds.<sup>49</sup> The partial willingness of the courts to police the president’s statutory authority—reaching the merits in detention cases but not in targeting cases involving the same statute—appears to have had a distorting effect. The courts’ decision to bless the administration’s interpretation of the statute in the detention context while refusing to review it in the targeting context to which it migrated created the false appearance of interbranch collaboration on a statutory interpretation that was neither tested in the courts nor confirmed by Congress.

In sum, the courts have largely abstained from participating in cases challenging the executive branch’s interpretation of national security law. The weak limiting role of the courts might be unproblematic if there were other constraints on the executive’s interpretation of its own authority—in particular, if Congress could be counted on to provide political constraints. Yet, once again, such constraints have proven largely illusory in practice.

## B. Congress

Congress plays a limited constraining role on the executive branch’s national security lawyering decisions. Its strongest formal power—the power to legislate and to control appropriations—is its most powerful tool. It is, however, also the most susceptible to paralysis. The widening ideological split of the past decade has limited the capacity of Congress to constrain the executive—and in particular to respond to executive action with which it does not agree or that it regards as illegal.

In 2001, Congress authorized the United States to go to war against those who carried out the 9/11 attacks and any nation, organization, or persons that harbored them. The U.S. military is still in Afghanistan nineteen years later, battling insurgent and terrorist forces. 2002 was the *last time* that Congress

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and International Law (Mar. 25, 2010) (“[I]ndividuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law.”).

48. See Oona Hathaway, Samuel Adelsberg, Spencer Amdur & Phillip Levitz, *The Power to Detain: Detention of Terrorism Suspects After 9/11*, 38 YALE J. INT’L L. 123 (2013) (arguing for detention of terrorism suspects under criminal law, which has much broader application than does international law in authorizing the use of force).

49. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 52 (D.D.C. 2010). In *Smith v. Obama*, the court raised nonjusticiable political questions in addition to its determination that the U.S. military officer lacked standing. See *Smith v. Obama*, 217 F. Supp. 3d 283 (D.D.C. 2016), *vacated as moot sub nom. Smith v. Trump*, 731 F. App’x 8 (D.C. Cir. 2018).

authorized a use of force, authorizing the president to invade Iraq. In 2003, the U.S. military toppled then-President Saddam Hussein, but that was not the end of the U.S. military presence in Iraq. The United States has battled the insurgent groups that emerged in the aftermath of the U.S. invasion ever since. Based on nearly two-decades-old authority,<sup>50</sup> the U.S. government is also using force against extremist groups outside Iraq and Afghanistan: The United States reportedly has troops in combat in twelve additional countries, including Syria, Yemen, and Somalia.<sup>51</sup> And let's not forget the war in Libya, launched by President Barack Obama in 2011,<sup>52</sup> and the use of force against the Syrian government by President Donald Trump in April 2017 and again in April 2018—neither of which were authorized by Congress at all.<sup>53</sup> The absence of any congressional vote on any of these military engagements has resulted in weak democratic accountability for the many conflicts the United States has

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50. Some claim that it is sufficient that Congress continues to vote to pay for the wars through authorizing the military budget, but authorization and appropriations are two very different things. For an extended argument on this point, see Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447 (2011).
51. See Stephanie Savell & 5W Infographics, *This Map Shows Where in the World U.S. Military Is Combatting Terrorism*, SMITHSONIAN MAG., Jan./Feb. 2019, <https://www.smithsonianmag.com/history/map-shows-places-world-where-us-military-operates-180970997/> [<https://perma.cc/6T55-DP2M>]; Annika Lichtenbaum, *U.S. Military Operational Activity in the Sahel*, LAWFARE (Jan. 25, 2019, 8:00 AM), <https://www.lawfareblog.com/us-military-operational-activity-sahel> [<https://perma.cc/9KAG-X4UC>]. Although many of the groups the United States is targeting have some current or historic ties to al-Qaeda, many of them are also indigenous to the countries where they operate.
52. See Bruce Ackerman & Oona Hathaway, Opinion, *Death of the War Powers Act?*, WASH. POST (May 17, 2011), [https://www.washingtonpost.com/opinions/death-of-the-war-powers-act/2011/05/17/AF3Jh35G\\_story.html](https://www.washingtonpost.com/opinions/death-of-the-war-powers-act/2011/05/17/AF3Jh35G_story.html) [<https://perma.cc/H2YJ-PTJR>]; Bruce Ackerman & Oona Hathaway, *Obama's Illegal War*, FOREIGN POL'Y (June 1, 2011, 5:05 PM), <https://foreignpolicy.com/2011/06/01/obamas-illegal-war-2> [<https://perma.cc/V36A-RL68>].
53. See Spencer Ackerman, Ed Pilkington, Ben Jacobs & Julian Borger, *Syria Missile Strikes: US Launches First Direct Military Action Against Assad*, GUARDIAN (Apr. 7, 2017, 1:58 PM), <https://www.theguardian.com/world/2017/apr/06/trump-syria-missiles-assad-chemical-weapons> [<https://perma.cc/5ZTS-CBQP>]; Cory A. Booker & Oona A. Hathaway, *A Syria Plan That Breaks the Law*, N.Y. TIMES (Jan. 23, 2018), <https://www.nytimes.com/2018/01/23/opinion/syria-tillerson-constitution-trump.html> [<https://perma.cc/XTA9-DT5Q>]; Goldsmith & Hathaway, *Bad Arguments*, *supra* note 19; Goldsmith & Hathaway, *Downsides*, *supra* note 19. An Office of Legal Counsel (OLC) opinion argued that the president could lawfully direct airstrikes on facilities associated with Syria's chemical weapons capability "because he had reasonably determined that the use of force would be in the national interest." April 2018 Airstrikes Against Syria OLC Memo, *supra* note 22, at 1.

engaged in during much of the last two decades,<sup>54</sup> which have cost trillions of dollars and thousands of American lives.<sup>55</sup>

Political incentives work against members of Congress getting closely involved in national security legal decisions. The public tends not to prioritize or understand national security law, so incentives for members of Congress to take stands on matters of legal policy are weak unless some other interest is involved. Congress is increasingly paralyzed in the national security arena—often by choice (the costs of voting and getting it wrong are high, whereas abstaining places almost all the political risk on the executive branch). As a result, in the war powers context, a reasonable starting assumption is that Congress will not vote an authorization up or down. Hence, if the president wants to act, he has every incentive to invent a justification based on a preexisting statute or take action based on his constitutional authority alone.

We saw precisely this dynamic at work in the debate over the authority for conducting military operations against the Islamic State. In August 2014, President Obama began military operations against the Islamic State in Syria and Iraq. In the course of these operations, the president filed seven separate war powers reports. None of these reports cited a war declaration or existing legislative authority, suggesting that the president regarded the operations as falling within his constitutional authority alone.<sup>56</sup> Yet when the sixty-day mark established by the War Powers Resolution for use of force not authorized by Congress neared,

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54. Some argue that presidential elections, which occur every four years, provide accountability. There are reasons, however, to think they do not. First, due to term limits, direct accountability is only effective during a president's first term. Second, presidential elections are multi-issue elections. The candidates' position on the use of military force is only one of many issues of importance to voters. Although 54 percent of registered voters surveyed by the Pew Research Center thought Clinton would do the better job of making wise foreign policy decisions (compared to 36 percent who thought Trump would), Trump became president. (The two were closer on the question of "defending the country from future terrorist attacks," with Trump having the slight edge at 48 percent to Clinton's 43 percent). PEW RSCH. CTR., 2016 CAMPAIGN: STRONG INTEREST, WIDESPREAD DISSATISFACTION 36 (2016), <https://www.pewresearch.org/politics/2016/07/07/4-top-voting-issues-in-2016-election> [<https://perma.cc/27QS-R2BF>].

55. As of 2017, the wars in Afghanistan, Iraq, Syria, and Pakistan alone had cost American taxpayers \$5.6 trillion since they began in 2001. Gordon Lubold, *U.S. Spent \$5.6 Trillion on Wars in Middle East and Asia: Study*, WALL ST. J. (Nov. 8, 2017, 1:18 AM), <https://www.wsj.com/articles/study-estimates-war-costs-at-5-6-trillion-1510106400> [<https://perma.cc/VPP2-VTW6>]. Congress did not expressly approve or put a stop to the CIA interrogation program from 2002 to 2009. Members of Congress argued that they had not been fully aware of the program, while administration lawyers claimed they had been regularly briefed. See Scott Shane & Carl Hulse, *List Says Top Democrats Were Briefed on Interrogations*, N.Y. TIMES (May 8, 2009), <https://www.nytimes.com/2009/05/09/us/politics/09detain.html?referringSource=articleShare> [<https://perma.cc/K97M-YZEM>].

56. WEED, *supra* note 31, at 46–47.

meaning that the president would need to cease military operations or seek statutory authority from Congress to continue, the administration suddenly announced that the operations against the Islamic State were *already* authorized, presumably under the 2001 AUMF and, to a lesser degree, the 2002 Iraq AUMF.<sup>57</sup> This decision drew howls of criticism from both sides of the aisle.<sup>58</sup> A series of hearings ensued, at which members of Congress criticized the administration's decision to proceed on the authority Congress had granted more than a decade earlier for entirely different purposes.<sup>59</sup> The president continued to maintain that the existing AUMFs granted him authority to act even as he asked Congress to pass a new AUMF specifically granting him authority to take military action against the Islamic State.<sup>60</sup> Congress, however, proved either unwilling or unable to take action, likely believing that the political risks far outweighed the benefits (and knowing that the operations would proceed nonetheless). As a result, the U.S. military campaign against the Islamic State continues today in both Syria and Iraq without any additional statutory authorization beyond that granted by Congress in 2001 and 2002.

It is possible that Congress has not held a vote to authorize military action since 2002 not because it is unable to but because it finds it politically convenient not to do so. But that is not a defense. Protecting the constitutional requirement that Congress play a role in authorizing military action and other national security

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57. See President Barack Obama, Statement by the President on ISIL (Sept. 10, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/09/10/statement-president-isil-1> [<https://perma.cc/E5VP-VHE4>] (“I have the authority to address the threat from ISIL.”).

58. See, e.g., Amanda Taub, *Experts: Obama’s Legal Justification for the War on ISIS is “a Stretch”*, VOX (Sept. 12, 2014 8:20 AM), <https://www.vox.com/iraq-crisis/2014/9/12/6134159/is-obamas-new-isis-strategy-legal> [<https://perma.cc/P3NL-G87N>]; Robert Chesney, *The 2001 AUMF: From Associated Forces to (Disassociated) Successor Forces*, LAWFARE (Sept. 10, 2014, 11:46 PM), <https://www.lawfareblog.com/2001-aumf-associated-forces-disassociated-successor-forces> [<https://perma.cc/WND8-MRBZ>]; Steve Vladeck, *ISIL as Al Qaeda: Three Reactions*, LAWFARE (Sept. 11, 2014, 1:52 AM), <https://www.lawfareblog.com/isil-al-qaeda-three-reactions> [<https://perma.cc/82DS-8JFC>].

59. See, e.g., *The President’s Request for Authorization to Use Force Against ISIS: Military and Diplomatic Efforts: Hearing Before the S. Comm. on Foreign Rel.*, 114th Cong. (2015).

60. In 2015, President Barack Obama called on Congress to “vote to authorize the continued use of military force against these [ISIS] terrorists,” but Congress ultimately took no action. President Barack Obama, Address to the Nation by the President (Dec. 6, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/12/06/address-nation-president> [<https://perma.cc/R9FN-FNSN>]. The president continued operations against ISIS under the theory that they were authorized by the 2001 Authorization for the Use of Military Force, a position first explained publicly by Department of Defense General Counsel Stephen Preston several months earlier. Stephen W. Preston, Gen. Couns., U.S. Dep’t of Def., *The Legal Framework for the United States’ Use of Military Force Since 9/11* (Apr. 10, 2015), <https://www.defense.gov/Newsroom/Speeches/Speech/Article/606662/the-legal-framework-for-the-united-states-use-of-military-force-since-911> [<https://perma.cc/N8CC-KJHR>].

decisions that fall outside the president's unilateral constitutional authority is not simply about defending the prerogative of members of Congress to play a role in national security decisions, but it is also about allowing voters to hold them to account for those decisions. Congress's willingness to be deprived of authority in order to avoid accountability is not a defense of that deprivation but is rather a further indictment of it.

Congress has voted in favor of appropriations bills that include funds to continue these wars, but that is also not an answer to the concerns raised here. The War Powers Resolution is clear that appropriations are not a substitute for authorizations.<sup>61</sup> Indeed, if authorizations could masquerade as votes on appropriations, that would further dilute the capacity of the public to hold their representatives accountable. It is exceptionally difficult for members of Congress to reject defense appropriations bills, which often pile funding for all ongoing defense operations into a single piece of legislation, thus necessitating a vote against the entire package to avoid supporting even a small part. Appropriations bills may also be fashioned as "emergency funding" necessary to provide essential supplies to troops in the field—making them especially costly for members Congress to oppose.<sup>62</sup>

Taking advantage of Congressional paralysis, President Trump has made even more unprecedented assertions of unilateral presidential authority to wage war. To take one example: Trump ordered military operations against Syrian chemical weapons facilities in April 2017 and again in April 2018 without ever seeking authorization from Congress. In May 2018, the Department of Justice's OLC issued an opinion declaring that "the President could lawfully direct them because he had reasonably determined that the use of force would be in the national interest and that the anticipated hostilities would not rise to the level of a war in the constitutional sense"—effectively embracing a theory of unilateral presidential authority to use military force in all but the most extreme circumstances.<sup>63</sup>

To its credit, Congress has sought to push back on some of the Trump administration's assertions of authority. In 2018, Congress restricted funding for Trump's foreign policy decisions by imposing limits in the 2019 National Defense Authorization Act on troop withdrawals from South Korea, dealings with Russia,

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61. War Powers Resolution, Pub. L. No. 93-148, § 8(a)(1), 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541–48).

62. See Ackerman & Hathaway, *supra* note 50, at 491–96.

63. April 2018 Airstrikes Against Syria OLC Memo, *supra* note 22, at 1. The opinion builds on and echoes another opinion authored by Caroline Krass during the Obama administration. Auth. to Use Military Force in Libya, 35 Op. O.L.C. 1 (2011).

and ongoing arms sales to the Saudi-led coalition (which is waging war in Yemen and has committed a series of war crimes in the process). Trump responded by issuing a signing statement identifying “constitutional concerns” and promising not to enforce the limitations.<sup>64</sup> In July 2019, both houses of Congress again voted to restrict arms sales to the Saudi-led coalition. Trump vetoed the measure, insisting on continuing the sales. Congress failed to override the veto.<sup>65</sup>

During the last several decades, Congress has relied less on legislation and more on hearings and other less formal powers that allow it to highlight questionable executive decisions. But hearings on national security matters are often closed, which means the reasoning is not subject to public inspection. If they are open, officials are reluctant to say anything of importance. Congress does not generally have the staff or tools to do more than raise questions. There are a relatively limited number of lawyers in Congress with clearance to examine classified matters. One historic source of congressional leverage, holding up presidential nominations that require U.S. Senate approval, has been rendered largely useless both by the adoption in 2013 of the “nuclear option” on executive branch nominations and federal judicial appointments (which allows party-line votes to confirm nominees) and by the unprecedented willingness of President Trump to place “acting” officials in key roles for years at a time.<sup>66</sup> As a result, Congress has few means to challenge a truly intransigent executive branch except through impeachment or by withdrawing funding. But even these tools have limited utility. No president has been convicted by the Senate and removed from office (though it is likely that President Richard Nixon’s impeachment and expected conviction precipitated his resignation). Withdrawing funding is also a tool of limited utility in this age of massive defense budgets. As Bruce Ackerman and I have argued elsewhere, limitations on appropriations were once an effective tool for constraining the president, but that power has been gutted in the modern

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64. Scott R. Anderson, *What to Make of Trump’s NDAA Signing Statement*, LAWFARE (Aug. 23, 2018, 12:17 PM), <https://www.lawfareblog.com/what-make-trumps-ndaa-signing-statement> [https://perma.cc/P4KL-M76R].

65. See Mark Landler & Peter Baker, *Trump Vetoes Measure to Force End to U.S. Involvement in Yemen War*, N.Y. TIMES (Apr. 16, 2019), <https://www.nytimes.com/2019/04/16/us/politics/trump-veto-yemen.html> [https://perma.cc/F9G4-TF3A]; Deirdre Shesgreen, *Senate Fails to Override President Trump’s Veto of Yemen War Measure to End U.S. Role*, USA TODAY (May 2, 2019, 3:16 PM), <https://www.usatoday.com/story/news/world/2019/05/02/senate-fails-override-president-trumps-veto-bill-end-u-s-role-yemen-military-support-saudi-arabia/3641777002> [https://perma.cc/NRC8-XMDM].

66. Aaron Blake, *Trump’s Government Full of Temps*, WASH. POST (Feb. 21, 2020, 3:30 AM), <https://www.washingtonpost.com/politics/2020/02/21/trump-has-had-an-acting-official-cabinet-level-job-1-out-every-9-days/> [https://perma.cc/9MER-CHB5].



era.<sup>67</sup> And, as noted above, President Trump has signaled his unwillingness to accept even modest limitations on his spending authority if the limitations conflict with his own aims.

Congress's capacity to constrain the president's unilateral decisions in national security has been eroding for decades. Recent events have served to expose a weakness that has long been present, laying bare the inability and unwillingness of Congress to act as an effective check on the president's national security actions.

### C. Other States

Other states play an unappreciated, but important, role in constraining illegal behavior by the executive branch in the national security arena. Foreign governments may refuse to cooperate with the United States government if it engages in activities that violate international law.<sup>68</sup> They may engage in law enforcement through what Scott Shapiro and I have called "outcasting"—refusing to cooperate with states that engage in illegal behavior.<sup>69</sup>

States are legally constrained from aiding or assisting illegal behavior by another state. Under Article 16 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, a state that "aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that state."<sup>70</sup> States that are mindful of

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67. See Ackerman & Hathaway, *supra* note 50, at 476–96 (detailing the "[p]ower of the [p]urse and its [i]nstitutional [t]ransformation" from the nation's founding to 2011). This did not even address the use of presidential signing statements to press back on congressional limitations. For instance, after signing into law the National Defense Authorization for Fiscal Year 2019, President Trump issued a signing statement identifying "constitutional concerns" with more than fifty of the act's provisions, including several meant to impose limits on the president's use of funds for certain military purposes. See Anderson, *supra* note 64.

68. Other states are much less likely to act as a constraint on behavior that violates U.S. domestic law than they are to act as a constraint on behavior that violates international law. Relatedly, Ashley Deeks describes a number of external checks on the U.S. government from foreign actors, including litigation abroad implicating U.S. policies, naming and shaming by foreign leaders, and peer constraints. See Ashley Deeks, *Checks and Balance From Abroad*, 83 U. CHI. L. REV. 65, 76–86 (2016).

69. Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 324–39 (2011).

70. Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 16 (2001). Though remaining formally "Draft Articles," they were adopted by the International Law Commission after which the General Assembly "commend[ed] them to the attention of Governments." G.A. Res. A/Res/56/83 (Jan. 28, 2002). They are widely cited.

their international legal obligations will, for this reason, refuse to assist the United States if it openly violates international law.

Foreign allies' concerns about their legal obligations not to aid and assist unlawful behavior are reinforced by litigation risk. Although the United States is outside the jurisdiction of the European Court of Human Rights, its European allies are not. In *El-Masri v. The Former Yugoslav Republic of Macedonia*,<sup>71</sup> for example, a German national of Lebanese origin claimed that he had been the victim of a secret "rendition" operation by the United States CIA. The ECHR found that his account was established beyond a reasonable doubt and that the Former Yugoslav Republic of Macedonia was responsible for his torture and ill treatment both in Macedonia and after his transfer to the United States authorities, in violation of Articles 3, 5, 8, and 13 of the European Convention of Human Rights.<sup>72</sup> In the following years, the ECHR similarly found that Italy, Poland, Romania, and Lithuania violated international human rights law by being complicit in the capture, detention, and torture of prisoners in secret U.S. detention facilities in Europe.<sup>73</sup> The unfavorable rulings have reinforced European allies' commitment to exercise independent legal judgment when cooperating with U.S. counterterrorism activities.

The unwillingness of other states to aid and assist unlawful behavior can provide a significant constraint. Military operations are especially vulnerable to allies' refusal to provide access to bases and to permit overflight by military planes. During the U.S. invasion of Iraq in 2003, for example, some countries refused to provide the United States with base access and overflight permission.<sup>74</sup> Similarly, states that regarded U.S. detention practices to be unlawful refused to allow facilities to be located in their countries and, in some cases, prohibited flight

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71. *El-Masri v. Yugoslav Repub. of Macedonia*, App. No. 39630/09, 2012-VI Eur. Ct. H.R. 263.

72. *Id.* at 265–69.

73. *Al Nashiri v. Romania*, App. No. 33234/12, Eur. Ct. H.R. (judgment, May 31, 2018) (finding that Romania violated the human rights of petitioner because of its complicity in the CIA's illegal actions); *Zubaydah v. Lithuania*, App. No. 46454/11, Eur. Ct. H.R. (judgment, May 31, 2018) (finding that Lithuania violated the human rights of petitioner because of its complicity in the CIA's illegal actions); *Nasr v. Italy*, App. No. 44883/09, Eur. Ct. H.R. (judgment, May 23, 2016) (finding violations of the European Convention on Human Rights for the abduction and detention of plaintiff by CIA agents with the knowledge and assistance of Italian officials); *Al Nashiri v. Poland*, App. No. 28761/11, Eur. Ct. H.R. (judgment, Feb. 16, 2014) (holding that Poland had acted in violation of the European Convention on Human Rights when it knowingly and intentionally enabled the CIA to hold plaintiffs in secret detention in Poland).

74. Barry James, *Nation Also Bans Military Overflights: Austria Bars U.S. Troops From Crossing Country*, N.Y. TIMES (Feb. 15, 2003), <https://www.nytimes.com/2003/02/15/news/nation-also-bans-military-overflights-austria-bars-us-troops-from.html>.

layovers or transfers involving detainees.<sup>75</sup> There are also more informal peer constraints: Departments or agencies in other countries may be unwilling to collaborate with their counterparts in the United States government if they believe the United States is acting in violation of international law.

As important as the constraint provided by other states can be, however, it remains limited. First, it applies only to violations of international law, not U.S. domestic law. Second, international constraints are strongest in situations where the United States requires cooperation to achieve its objectives. It will have a much less significant effect in cases where the United States does not require cooperation from other states—and, increasingly, the United States has proven willing to go it alone on a variety of foreign policy matters, including military operations. Third, states that rely on U.S. cooperation may be reluctant to refuse to cooperate with the United States even if it is engaging in illegal behavior. That is because the United States remains central to the security and prosperity of states around the world (what Scott Shapiro and I have called “too big to outcast”).<sup>76</sup> As a result, states will be reluctant to refuse to cooperate except in extreme cases.<sup>77</sup>

We have seen this reluctance in practice. During the 2003 Iraq War, some European countries refused to allow U.S. troops to cross their territory by road, rail, or air, on the grounds that the war had not been authorized by the UN Security Council and thus was illegal.<sup>78</sup> But there were no apparent consequences when the United States used force illegally against Syria in 2017 and again in 2018. There have been no overt consequences for the wars waged since 2002 against various Islamic extremist groups under an interpretation of the international right of self-defense that few states have embraced. And, looking further back, there were no consequences for waging the Kosovo War in 1998 to 1999, in violation of the UN Charter, or the invasion of Panama to depose Manuel Noriega in 1989 to 1990, or any number of other actions by the United States that stretched, and sometimes broke, international law.

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75. Comm. on Legal Aff. & Hum. Rts., *Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States*, ¶ 19.4, Doc. 10957 (June 12, 2006), <https://pace.coe.int/pdf/74ae9a8401f1bebc3c1f94f7388f1181dbc095163326667a8259ffe25682ae848428feba12/doc.%2010957.pdf> [<https://perma.cc/E4RL-8WA2>] (calling on member states to “prohibit the transfer of persons suspected of involvement in terrorism to countries that practise torture”).

76. See HATHAWAY & SHAPIRO, *supra* note 18.

77. States also face incentives to do the kind of creative lawyering documented in this Article in an effort to find a way to permit cooperation with the United States.

78. James, *supra* note 74.

#### D. The Press and Advocacy Organizations

The press, sometimes referred to as the Fourth Branch, can play a powerful role in constraining illegal actions in U.S. national security by bringing violations to light. In the last decade, a cadre of reporters devoted to national security matters has succeeded in drawing out details of the national security lawyering process that would otherwise have remained hidden from view. Charlie Savage's excellent book *Power Wars* pulled together his years of reporting on the inner circle of Obama administration national security lawyers.<sup>79</sup> He is far from alone. There are a number of journalists who now focus all or nearly all of their time on national security matters, including Ellen Nakashima, James Risen, Scott Shane, Spencer Ackerman, Shane Harris, Missy Ryan, and many others. They often obtain documents—through Freedom of Information Act (FOIA) lawsuits and through leaks—that provide the public insights into lawyering decisions that would otherwise go unseen. And they often work hand-in-hand with advocacy organizations devoted to transparency in U.S. national security, the American Civil Liberties Union (ACLU) chief among them.

The influence of the press and advocacy organizations can be seen in the events that led to the release of memos written by the OLC from 2002 through 2004 authorizing the U.S. government to torture suspected terrorists. It began with a series of leaks. In December 2002, Dana Priest and Barton Gellman wrote about a secret CIA interrogation center in Afghanistan, and in March 2003, Carlotta Gall wrote about a criminal investigation into the death of an Afghan man in American custody.<sup>80</sup> In July 2003, Amnesty International released a report alleging that U.S. and other Coalition Forces in Iraq had abused detainees.<sup>81</sup> Over the course of the next year, reporters and advocacy organizations confirmed these reports and brought more details to light.<sup>82</sup> The U.S. government eventually released a number

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79. CHARLIE SAVAGE, *POWER WARS: THE RELENTLESS RISE OF PRESIDENTIAL AUTHORITY AND SECRECY* (rev. ed. 2017).

80. Dana Priest & Barton Gellman, *U.S. Decries Abuse But Defends Interrogations*, WASH. POST (Dec. 26, 2002), <https://www.washingtonpost.com/archive/politics/2002/12/26/us-decries-abuse-but-defends-interrogations/737a4096-2cf0-40b9-8a9f-7b22099d733d/> [https://perma.cc/MQ6K-U6JR]; Carlotta Gall, *Threats and Responses: Prisoners; U.S. Military Investigating Death of Afghan in Custody*, N.Y. TIMES (Mar. 4, 2003), <https://www.nytimes.com/2003/03/04/world/threats-responses-prisoners-us-military-investigating-death-afghan-custody.html> [https://perma.cc/RZ96-P92X].

81. Press Release, Amnesty Int'l, Iraq: Continuing Failure to Uphold Human Rights (July 23, 2003), <https://www.amnesty.org/download/Documents/108000/mde141592003en.pdf> [https://perma.cc/PTY5-R8AS].

82. For example, pictures of the abuse were first aired by CBS's *60 Minutes II* (CBS television broadcast Apr. 28, 2004). See also Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER (Apr. 30, 2004), <https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>

of memos authored by lawyers in the OLC approving of torture as a result of FOIA requests by the ACLU. The rest of the memos slowly emerged, revealing an extensive set of legal rationales offered to support techniques that are widely regarded as torture.<sup>83</sup>

A similar process occurred during the U.S.-led 2011 NATO intervention in Libya. Savage reported on an interbranch disagreement among lawyers from the Office of White House Counsel, Department of State, Department of Justice, and Department of Defense over whether the president was obligated by the War Powers Resolution to terminate or scale back the intervention in Libya after May 20, 2011, if he did not receive congressional authorization.<sup>84</sup> Had it not been for his reporting, little would have been known of the internal debate on the legal issues within the administration—and the decision by the president himself to make a close legal call.

But there are severe limits to the effectiveness of advocacy organizations and the press as a constraint. The press has to depend on individuals with information to divulge that information, often in ways that are in tension—if not outright conflict—with their employment and other legal obligations. Relying on leaks, in other words, means relying on the willingness of individuals involved to disclose information to the press—which often requires them to break the law. Depending on government actors to behave illegally in order to constrain illegal behavior is, to say the least, an imperfect solution. Relying heavily on leaks may also make the press vulnerable to being used by leakers to shape the public discussion.<sup>85</sup>

Legal constraints bind not only those who leak information, but potentially reporters and transparency advocates as well. In May 2019, the Department of Justice indicted the eccentric founder and leader of WikiLeaks, Julian Assange, on seventeen counts of violating the Espionage Act for obtaining and publishing

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[<https://perma.cc/GK8V-S45Y>]; Kathleen Clark & Julie Mertus, *Torturing the Law*, WASH. POST (June 20, 2004), <https://www.washingtonpost.com/archive/opinions/2004/06/20/torturing-the-law/1558a309-4ed9-406d-9e6d-77c50e2b3ad7> [<https://perma.cc/7A85-W4Z9>].

83. Joby Warrick, *CIA Tactics Endorsed in Secret Memos: Waterboarding Got White House Nod*, WASH. POST (Oct. 15, 2008), <https://www.washingtonpost.com/wp-dyn/content/article/2008/10/14/AR2008101403331.html> [<https://perma.cc/Q2RY-EJ8P>]; see also Neil A. Lewis, *A Guide to the Memos on Torture*, N.Y. TIMES, <https://archive.nytimes.com/www.nytimes.com/ref/international/24MEMO-GUIDE.html?mcubz=3> [<https://perma.cc/6NN9-VYZE>].

84. Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES (June 17, 2011), <https://www.nytimes.com/2011/06/18/world/africa/18powers.html> [<https://perma.cc/K5Z8-64QN>].

85. For more on the role—and strategic use—of leaks, see David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2010), and David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013).

classified documents nine years earlier.<sup>86</sup> Assange's case was the third in which the government brought Espionage Act<sup>87</sup> charges against someone not affiliated with the U.S. government.<sup>88</sup> But it was the very first time the Justice Department had obtained an indictment with such charges based exclusively on the act of publication.<sup>89</sup> The indictment raised fears among journalists that the Department of Justice might begin using the Espionage Act to prosecute journalists. Indeed, the language in the act is extremely broad<sup>90</sup>—as broad as, if not broader than, the laws used by the governments of Turkey and China to prosecute journalists.<sup>91</sup> The charges, many worry, are for behavior that investigative journalists in the United States engage in on a daily basis. For example, Jameel Jaffer of the Knight First Amendment Institute at Columbia University has labeled the indictment of Assange “a frontal attack on press freedom.”<sup>92</sup> The Department of Justice and those defending its charges argued that Assange was not a real journalist and WikiLeaks is not a news outlet. But in its reporting on the indictment, the *New York Times* noted that the charges against Assange were for actions that it too had taken. Indeed, it had obtained precisely the same documents as WikiLeaks, also without government authorization, and had also published subsets of the files, albeit with the names of informants withheld.<sup>93</sup>

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86. Charlie Savage, *Assange Indicted Under Espionage Act, Raising First Amendment Issues*, N.Y. TIMES (May 23, 2019), <https://www.nytimes.com/2019/05/23/us/politics/assange-indictment.html> [<https://perma.cc/PMK2-54WH>].

87. Espionage Act of 1917, ch. 30, 40 Stat. 217 (codified as amended in scattered sections of 18, 22, and 50 U.S.C. and codified in relevant part at 18 U.S.C. §§ 792–798).

88. Danielle Brian & Scott. H. Amey, *Assange's Indictment: A Threat to Everyone*, JUST SEC. (June 27, 2019), <https://www.justsecurity.org/64719/assanges-indictment-a-threat-to-everyone> [<https://perma.cc/7QPB-NF98>]. One of the previous cases involved the 2005 prosecution of Steven Rosen and Keith Weissman, employees of the American Israel Public Affairs Committee, for allegedly conspiring with Pentagon analyst Larry Franklin to receive and disseminate classified information about Iran. That case was dropped after the federal district court interpreted the Act to require a high evidentiary threshold. The other case dated to 1971, in which Anthony Russo was prosecuted for helping Daniel Ellsberg copy the Pentagon Papers—a case that collapsed due to prosecutorial misconduct. Gabe Rottman, *Special Analysis of the May 2019 Superseding Indictment of Julian Assange*, REPS. COMM. FOR FREEDOM PRESS (May 30, 2019), <https://www.rcfp.org/may-2019-assange-indictment-analysis> [<https://perma.cc/5N3K-ZUD9>].

89. Rottman, *supra* note 88; Gabe Rottman, *The Assange Indictment Seeks to Punish Pure Publication*, LAWFARE (May 24, 2019, 8:16 PM), <https://www.lawfareblog.com/assange-indictment-seeks-punish-pure-publication> [<https://perma.cc/C3P7-WKKE>].

90. See Espionage Act of 1917.

91. Ned Levine, *Espionage Acts in Turkey, China, and the United States* (unpublished paper) (forthcoming).

92. Savage, *supra* note 86.

93. *Id.*

Rules protecting classified information from disclosure force those involved in revealing that information to accept substantial legal risk to bring it to the public's attention. And that risk is growing, thanks not only to the Assange indictment but also to more aggressive prosecutions of leakers that began under the Obama administration.<sup>94</sup> The main available legal tool for government transparency—FOIA requests—occasionally succeeds, as it did in prompting the release of the OLC memos on torture. But, more often than not, FOIA requests run into the same problem: Classified information is almost always protected from forced disclosure under Exemption 1.<sup>95</sup>

The impotence of the courts, Congress, foreign states, the press, and advocacy organizations in checking the executive branch on national security law matters means that the first and last word on most such matters comes from the executive branch itself—specifically from the national security lawyers working in the White House and executive agencies. To understand how U.S. national security law functions, then, one must understand the system of lawyering in the executive branch—who is empowered to render judgments on key legal issues, how disagreements are addressed, and who is consulted on important legal matters. Therefore, it is to national security lawyering—and its history—that this Article now turns.

## II. THE HISTORY OF NATIONAL SECURITY LAWYERING IN THE UNITED STATES<sup>96</sup>

The modern national security lawyering system in the United States has been constructed over the past seven decades alongside the national security state itself.

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94. Leonard Downie Jr. & Sara Rafsky, *Leak Investigations and Surveillance in Post-9/11 America*, CPJ (Oct. 10, 2013), <https://cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911> [<https://perma.cc/G7CR-54YB>] (documenting aggressive prosecutions of leakers during the Obama Administration).

95. 5 U.S.C. § 552(b)(1) (2006), *amended by* OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (protecting from disclosure under FOIA information that has been deemed classified “under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy” and is “in fact properly classified pursuant to such Executive order”).

96. This Part draws on interviews with sixteen former government lawyers who held positions dating back to the beginning of the Reagan administration. The interviews took place between July 2017 and September 2019. The interviewees held positions as State Department legal adviser or acting State Department legal adviser (5); NSC legal adviser (4); deputy NSC legal adviser (3); general counsel or acting general counsel at the Department of Defense (3); CIA general counsel (2); and White House counsel (1). Some held multiple positions over the course of their careers. I spoke to at least three lawyers in lead positions in each presidential administration from President Ronald Reagan onward. Because I built an understanding of how lawyering happened over the course of multiple conversations with several people, I often

But while there have been a number of accounts of the creation of the national security state, the creation and evolution of the legal structures have generally been ignored. Examining the construction of the system we have today allows us to see how we came to have what might otherwise appear to be a puzzling legal structure and how previous generations attempted to address breakdowns in the system—enabling us to learn from both their successes and failures.

It is important to emphasize that this is not meant to be a complete account of national security lawyering in the United States since World War II. My aim here is instead to begin mapping the lawyering structures: to illuminate who was in position to make key legal decisions, what formal or informal measures existed for interagency coordination, and what, if any, internal constraints there have been on executive branch lawyers. I also consider whether these structures enabled lawyers to constrain executive action that pressed against or crossed over legal limits.

#### A. National Security Lawyering in the Early National Security Council Era

The National Security Act of 1947<sup>97</sup> radically reorganized the postwar national security apparatus. It created the Air Force and placed it, together with the Navy and Army—previously independent departments—under a single department head: the new Department of Defense.<sup>98</sup> It also established the Joint Chiefs of Staff—the military counterpart to the civilian Department of Defense—and a new agency for intelligence collection: the Central Intelligence Agency (CIA).<sup>99</sup> Last, it created a new National Security Council (NSC). The new NSC would “advise the President with respect to . . . policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security.”<sup>100</sup> The statutory members of the council included the president and vice president, the secretary of state, the new secretary of defense, and secretaries and undersecretaries of other executive departments appointed by the

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do not attribute any particular observation to any individual interview; I confirmed every significant point with at least two interviewees. Where I quote an interview, I identify the speaker. In a few cases, the interviewee requested anonymity. Where I rely specifically on an anonymous interview, I identify it as such. In many cases, however, I used the anonymous interviews simply to confirm information learned in the course of other interviews.

97. Ch. 343, 61 Stat. 495 (1947).

98. *Id.* §§ 201–02, 207–08.

99. *Id.* § 102.

100. *Id.* § 101(a).



president. The director of the CIA did not initially sit on the NSC, but instead served as an adviser to it.

Each of the agencies chiefly involved in national security had a legal staff headed by a general counsel or equivalent. The State Department legal adviser's position was the first, created in 1931.<sup>101</sup> The Department of Justice's OLC was created in 1934, but it was not until 1951 that an assistant attorney general was appointed to lead it.<sup>102</sup> The Office of Counsel to the President (often referred to colloquially as "White House Counsel") was created in 1943.<sup>103</sup> From its inception in 1947, the CIA had a general counsel—a position held by Lawrence R. Houston from the beginning until 1973.<sup>104</sup> At the Department of Defense, one of the three special assistants to the secretary was initially charged with providing legal advice.<sup>105</sup> In 1953, the Department of Defense created its own Office of the General Counsel.<sup>106</sup> For the most part, these lawyers worked independently, providing legal advice within their agencies. On occasion, they would informally consult with one another on matters where they had overlapping concerns. But there was

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101. Act of Feb. 23, 1931, ch. 276, § 30, 46 Stat. 1207, 1214. The new position replaced the Department of Justice employee who had functioned as the Department of State's chief legal officer to that point. *Id.* Green Hackworth served in the position from its inception in 1925 until 1946, when he was named a judge of the International Court of Justice. Marjorie M. Whitman, *Green Haywood Hackworth, 1883–1973*, 68 AM. J. INT'L L. 91 (1974).
102. See LUTHER A. HUSTON, *THE DEPARTMENT OF JUSTICE* (1967). The office was called the Executive Adjudication Division in 1951 and renamed the Office of Legal Counsel in 1953.
103. Bruce Ackerman explains that the creation of the position was something of an "accident." See ACKERMAN, *supra* note 11, at 110–12. President Franklin D. Roosevelt wanted a friend, Judge Sam Rosenman, to serve on his staff and offered him the new title of "counsel to the president," but the attorney general remained the chief legal adviser until Nixon hired John Dean for the job. Dean was ambitious and built the position into an all-purpose legal office for the president. The size of the office grew from five to forty under President Clinton, was cut back to fifteen by President George W. Bush, but rose to thirty by the end of his time in office. *Id.*
104. The position of General Counsel was established in 1947. Lawrence R. Houston had served as assistant general counsel of the CIA's precursor, the Office of Strategic Services (OSS), general counsel of its War Department successor organization, the Strategic Services Unit, and general counsel of the Central Intelligence Group (CIG), before becoming the CIA's first general counsel. Houston had in fact helped draft the legislation that abolished the CIG and established the CIA. *History of the Office*, CIA (Sept. 16, 2016, 11:36 AM), <https://www.cia.gov/offices-of-cia/general-counsel/history-of-the-office.html> [https://perma.cc/2T5A-AGEJ].
105. That position was taken over by the assistant secretary of defense (legal and legislative affairs) in 1949, which lasted until the Office of General Counsel was established. See HISTORICAL OFF., OFF. OF THE SEC'Y OF DEF., DEPARTMENT OF DEFENSE KEY OFFICIALS: 1947–2004, at 35 (2004), <https://web.archive.org/web/20110721034250/http://osdhistory.defense.gov/docs/DOD%20Key%20Officials%201947-2004.pdf> [https://perma.cc/UG4A-UP8G]. That position was then taken over by the assistant secretary of defense (legal and legislative affairs) in 1949. *Id.*
106. The position of general counsel at the Department of Defense was finally established by Reorganization Plan No. 6 of 1953 and by Defense Directive 5145.1, 24 August 1953. *Id.* In 1996, a statute mandated for the first time that the general counsel be appointed by the president and confirmed by the Senate. *History of the Office*, *supra* note 104.

no formal organizational structure that brought them together on a regular basis. Put simply, there was no system for interagency legal cooperation on national security matters.

To the extent that there was a formal process for resolving interagency disagreements on legal matters during this period, it was through referral to the OLC at the Department of Justice. In a process that continues today, an agency or multiple agencies can request advice from OLC. OLC evaluates each agency request to determine whether it merits a signed written opinion.<sup>107</sup> Before drafting an opinion, OLC solicits the views of interested agencies, carries out independent research on the issues, and internally reviews the draft opinion, before finalizing the opinion for submission to the interested agencies. Opinions are not published as a matter of course. Instead, they are reviewed by the internal publication review committee, which determines if the matter is significant enough to merit publication. Even when an opinion is of public interest, OLC will not publish an opinion if “disclosure would reveal classified or other sensitive information relating to national security.”<sup>108</sup> In part as a consequence, relatively few OLC opinions relating to national security issues have been published, though that number increased over the years. Before 1960 there were only two published OLC opinions relating to war powers issues,<sup>109</sup> but four were published in the 1960s<sup>110</sup> and six in the 1970s.<sup>111</sup>

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107. The modern process for deciding whether to write an opinion is as follows: The deputy assistant attorney general and an attorney-adviser may determine that the issue is not sufficiently “focused and concrete” or otherwise proper for resolution by the OLC. A written opinion is strongly advised “when the legal question is the subject of a concrete and ongoing dispute between two or more executive agencies.” 2010 Best Practices Memo, *supra* note 13, at 2–3. For a thoughtful account of some of the challenges facing lawyers in the OLC, see Goldsmith, *supra* note 11.

108. 2010 Best Practices Memo, *supra* note 13, at 5.

109. Presidential Auth. as Commander in Chief of the Air Force, 1 Op. O.L.C. Supp. 463 (1947); The President’s Power in the Field of Foreign Rels., 1 Op. O.L.C. Supp. 49 (1937).

110. Use of Marshals, Troops, & Other Fed. Pers. for Law Enf’t in Miss., 1 Op. O.L.C. Supp. 493 (1964); Legal & Prac. Consequences of a Blockade of Cuba, 1 Op. O.L.C. Supp. 486 (1962); Auth. Under Int’l Law to Take Action if the Soviet Union Establishes Missile Bases in Cuba, 1 Op. O.L.C. Supp. 251 (1962); Auth. of the President to Blockade Cuba, 1 Op. O.L.C. Supp. 195 (1961).

111. Presidential Powers Relating to the Situation in Iran, 4A Op. O.L.C. 115 (1979) (prepared in the hours immediately following the seizure of the American embassy); Auth. to Use Troops to Prevent Interference With Fed. Emps. by Mayday Demonstrations & Consequent Impairment of Gov’t Functions, 1 Op. O.L.C. Supp. 343 (1971); Constitutionality of the McGovern-Hatfield Amend., 1 Op. O.L.C. Supp. 339 (1970); The President & the War Power: S. Viet. & the Cambodian Sanctuaries, 1 Op. O.L.C. Supp. 321 (1970); Presidential Auth. to Permit Incursion Into Communist Sanctuaries in the Cambodia-Viet. Border Area, 1 Op. O.L.C. Supp. 313 (1970); Effect of a Repeal of the Tonkin Gulf Resol., 1 Op. O.L.C. Supp. 195 (1970).

The 1973 War Powers Resolution,<sup>112</sup> which required the President to report to Congress on military operations, spurred more regular collaboration between agency lawyers. According to former deputy White House counsel (1970–1972) and two-time White House counsel (1981–1986 and 2007–2009) Fred Fielding, “there was an informal getting together of general counsels when needed.”<sup>113</sup> Those informal gatherings were generally held in the office of the White House counsel. A key focus of the meetings was the war powers reports that the administration had to provide to Congress under the War Powers Resolution.

As William Howard Taft IV, the Department of Defense general counsel from 1981 to 1984, put it, “the main occasion for coordination was war powers issues.”<sup>114</sup> In the early years of the Reagan administration, Ted Olson from the Justice Department’s OLC, State Department Legal Adviser Abe Sofaer, and Taft met in Fielding’s office. They discussed whether and how to file war powers reports, generally issuing statements “consistent with” the War Powers Resolution, so as not to concede the constitutionality of the reporting requirement.<sup>115</sup> They also considered the legal issues governing the use of force, “including the legality and necessity, proportionality of the use of force.”<sup>116</sup> The chief lawyer for the Joint Chiefs was often present as well, and would outline the military options that had been presented to the president. The meetings, however, were not common as they were held only when a pressing legal issue required coordination. Moreover, according to Sofaer, who served as State Department legal adviser from 1985 to 1990, those called together often had little or no advance warning as to what matter would be briefed, and so could not really prepare in advance.<sup>117</sup> The heads of the offices attended alone, without any of the staff that would become common in later years (if they could not attend, their deputies would attend in their stead). Sofaer, at least, believes that the opinions he and the rest of the lawyers offered mattered—and that they “had at least a marginal impact in essentially suggesting that a particular option not be utilized, for example,” especially when there was consensus among the group.<sup>118</sup>

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112. War Powers Resolution, Pub. L. No. 93-148, § 8(a)(1), 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541–48).

113. Telephone Interview with Fred Fielding, Former White House Couns. (July 30, 2019).

114. Telephone Interview with William H. Taft IV, Former Gen. Couns., U.S. Dep’t of Def. (July 18, 2017) [hereinafter Taft Interview].

115. *Id.*

116. Telephone Interview with Abraham D. Sofaer, Former Legal Advisor, U.S. Dep’t of State (July 24, 2019) [hereinafter Sofaer Interview].

117. *Id.*

118. *Id.*

There were some turf wars. For instance, Sofaer insisted that the State Department control international arbitration and litigation in international fora. Attorney General William French Smith, however, was loath to give up that control. Sofaer won the battle: President Reagan signed a memo stating that the State Department would be in charge of international arbitration and cases before the International Court of Justice, while the Department of Justice would handle domestic litigation (cases involving trade were handled through another process altogether), a division of labor that has largely held to this day.<sup>119</sup>

Although there was informal collaboration among lawyers from the enactment of the War Powers Resolution through the mid-1980s, the national security lawyering still primarily took place within agency silos. Agency counsel provided legal advice to their principals, and those principals then acted accordingly. Indeed, even when the lawyers met to discuss a shared legal concern, they did not produce a joint document. Instead, the White House counsel chaired the meeting and took notes on the conversation. Each person in attendance would return to their office, note what issues were discussed, and take the meeting into account when offering advice to their principals. But, as Sofaer put it, “we could give our views to the General Counsel at the Department of Defense,” but “we wouldn’t necessarily see what they said when they returned to the Department.”<sup>120</sup>

It is worth noting that, unlike in later decades, interagency meetings during this period always took place in person. According to Sofaer, the State Department did not even have the capacity to hold secure video conferences until the end of his period of government service in 1990. In his view, meeting in person allowed for more candid conversations: “What are people willing to say when there are six people in the room and what are they willing to say when there are 60 people listening in, some of whom might be off camera. I bet they are much less willing to be forthcoming [when meetings are not held in person].”<sup>121</sup>

The system of siloed lawyering had the advantage of streamlined simplicity. But the weakness of this informal, decentralized system of national security lawyering became widely apparent when the Iran-Contra scandal broke.

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119. Taft Interview, *supra* note 114. Sofaer confirmed Taft’s recollection, clarifying that domestic litigation included not just litigation in U.S. courts but litigation in “regular national court[s]” abroad. Email from Abraham D. Sofaer, Former Legal Advisor, U.S. Dep’t of State, to author (Jan. 21, 2020) (on file with author).

120. Sofaer Interview, *supra* note 116.

121. *Id.*

## B. The Iran-Contra Scandal and Its Aftermath: 1985–1992

When it was created, the National Security Council included no dedicated legal staff.<sup>122</sup> Though it was charged with reviewing covert operations, that review was almost entirely for policy, not legal, issues. The Iran-Contra scandal, however, ushered in a variety of internal reforms, including the creation of a new Legal Adviser for the NSC, in an effort to prevent such a scandal from happening again.

In late 1985, members of President Ronald Reagan’s administration came up with a plan to free American hostages held by Hezbollah in Lebanon. Though the official government policy was not to negotiate with terrorists, they devised a plan to do just that: The United States would secretly facilitate the sale of arms to Iran, which was desperate for weapons because it was under an American-sponsored arms embargo. Israel would ship weapons to Iran, which was then expected to help secure the release of American hostages being held by Hezbollah, a group connected to and supported by the Iranian Islamic Revolutionary Guard Corps. The United States would then resupply Israel, and Israel would pay the United States for the arms. Lieutenant Colonel Oliver North, deputy director for political-military affairs on the National Security Council, later added another wrinkle, secretly diverting a portion of the proceeds from the Israeli arms sales to provide covert support for Nicaraguan rebels known as the “Contras,” in clear violation of both domestic and international law.<sup>123</sup> Indeed, the United States was later sued by Nicaragua in the International Court of Justice for its support for the Contras, where it suffered an embarrassing public loss.<sup>124</sup>

Abe Sofaer, who was legal adviser at the Department of State at the time, believes that the only lawyers who knew about the plans were the CIA general counsel and the NSC general counsel. The rest of the national security community lawyers were never informed.<sup>125</sup> On November 3, 1986, when news first emerged in a Lebanese paper that National Security Adviser Bud McFarlane had visited Iran

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122. Indeed, there was no national security adviser until 1953. One day after his inauguration, President Dwight Eisenhower asked Robert Cutler, a campaign adviser and speechwriter, to examine the national security advisory system. Cutler recommended the creation of a new special assistant chosen by the president to serve as the “executive officer” of the council—setting its agenda, appointing committees and standing groups, briefing the president, and generally serving as a bridge between the president and the council. Eisenhower agreed, and he asked Cutler to fill the new position. DOUGLAS T. STUART, *CREATING THE NATIONAL SECURITY STATE: A HISTORY OF THE LAW THAT TRANSFORMED AMERICA* 241–43 (2008).

123. JOHN TOWER, EDMUND S. MUSKIE & BRENT SCOWCROFT, *REPORT OF THE PRESIDENT’S SPECIAL REVIEW BOARD* app. B (1987) (detailing the events that led up to the Iran-Contra scandal).

124. *See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14 (June 27).

125. Sofaer Interview, *supra* note 116.

on an official meeting, President Reagan denied that the United States had sold arms to Iran, as did McFarlane. Sofaer had no reason to think they were not being truthful. He later discovered he had been kept entirely out of the loop.<sup>126</sup> A press release issued by the administration claimed that “no U.S. laws have been or will be violated and that our policy of not making concessions to terrorists remains intact,”<sup>127</sup> a claim that turned out to be plainly false.

On November 14, 1986, committees in both houses of Congress called for briefings by administration officials. In the process of preparing for those hearings, White House Counsel Peter Wallison convened a group of general counsels from the agencies, including Abe Sofaer of State; Charles Cooper from the OLC at the Department of Justice; Paul Thompson, counsel to NSC; H. Lawrence Garrett, general counsel at the Department of Defense; and David Doherty, general counsel of the CIA.<sup>128</sup> As Sofaer later explained, “Wallison asked Cooper to explain why, in Cooper’s view, the arms sales in 1986 were lawful, despite not having been reported to Congress. In general, Cooper’s argument was well received.”<sup>129</sup> Sofaer, however, reports having been skeptical about the chronology they were provided—particularly about claims, which would later prove to be false, that members of the administration believed that no weapons had been sold to the Iranians before January 17, 1986, when the president signed a Finding authorizing the sales. Sofaer reports having been “skeptical as to whether we lawyers were being told the full story.”<sup>130</sup> He later came to the conclusion that “the White House’s refusal to brief me and the other Administration lawyers reflected an intention to lie to Congress.”<sup>131</sup> His account of the events surrounding the scandal reflects that many of the lawyers for the various agencies had been deliberately misled.<sup>132</sup>

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126. *Id.*; see also Abraham D. Sofaer, *Iran-Contra: Ethical Conduct and Public Policy*, 40 Hous. L. Rev. 1081, 1083–84 (2003).

127. 1 LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS: INVESTIGATIONS AND PROSECUTIONS 527 (1993).

128. Sofaer Interview, *supra* note 116; see also Sofaer, *supra* note 126, at 1090.

129. Sofaer, *supra* note 126.

130. *Id.* at 1091.

131. *Id.* at 1095.

132. Former CIA General Counsel Stanley Sporkin knew only about portions of the events. According to Sofaer, “Meese [President Reagan’s attorney general] learned from . . . Sporkin that the CIA had been well aware of the November 1985 shipment and that Sporkin had drafted the December 5, 1985 Finding in order to retroactively approve the CIA’s involvement.” *Id.* at 1102. This is supported by the Tower Commission Report. TOWER ET AL., *supra* note 123, at B-38-40. Sporkin was also one of the primary authors of the January 17, 1986 Finding. *Id.* at III-13. Though the retroactive Finding raises obvious questions, it was not clear at the time that such retroactive Findings were impermissible. Clarifying the requirement that Findings always must be signed in advance was an important reform that came out of the

With his credibility at risk, President Reagan appointed an independent counsel to investigate potential legal violations. The independent counsel concluded that the complex arrangement broke a number of laws, and six administration officials were indicted and convicted as a result.<sup>133</sup> A number of others only escaped conviction due to preemptive pardons, and several others were investigated but not prosecuted.<sup>134</sup> Although the president personally signed a retroactive Finding authorizing the transfer of weapons for hostages, he avoided being held directly responsible because it was far from clear that he was aware of what had taken place.<sup>135</sup>

Many of the lawyers in the administration had, like Sofaer, been kept out of the loop. NSC General Counsel Thompson was the most entangled in the underlying events. The independent counsel report concluded that “Thompson was not involved in the operational details of either the Iran arms initiative or the contra-resupply effort. In his position as military assistant to McFarlane and Poindexter, however, Thompson did become involved in the criminal acts of others in Iran/contra.”<sup>136</sup> While the independent counsel found “strong evidence for a possible false statements and obstruction case against Thompson,” it decided not to prosecute him.<sup>137</sup>

The OLC continued to issue a number of opinions on war powers and other national security law matters throughout the 1980s, each one building on the one before it, gradually expanding claims of unilateral executive authority in the process.<sup>138</sup> But it had played a small role in the events that led to the Iran-Contra

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Tower Commission Report. Doherty was interviewed but not mentioned in the report, and Thompson was not interviewed, but there is a single reference to him in the report. But as described below, *see infra* text accompanying notes 136–137, Thompson’s role was investigated by Independent Counsel Walsh. *See* WALSH, *supra* note 127, at 137–46. He was found to have engaged in potentially illegal acts, though he was not charged.

133. *The Iran-Contra Convictions*, WASH. POST (Feb. 2, 1990), <https://www.washingtonpost.com/archive/politics/1990/02/02/the-iran-contra-convictions/0c8be0ac-801b-44e0-9c3f-791ca03b0bfe> [<https://perma.cc/5RVY-84X3>].

134. *Summary of Prosecutions*, UNDERSTANDING IRAN-CONTRA AFFS., [https://www.brown.edu/Research/Understanding\\_the\\_Iran\\_Contra\\_Affair/prosecutions.php](https://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/prosecutions.php) [<https://perma.cc/LRV8-Y986>].

135. Sofaer Interview, *supra* note 116; Sofaer, *supra* note 126, at 1108–09.

136. *See* WALSH, *supra* note 127, at 137.

137. *Id.*

138. The 1980s saw an uptick in published OLC war powers opinions. *E.g.*, Constitutionality of Proposed Statutory Provision Requiring Prior Cong. Notification for Certain CIA Covert Actions, 13 Op. O.L.C. 258 (1989); Use of the Nat’l Guard to Support Drug Interdiction Efforts in the D.C., 13 Op. O.L.C. 91 (1989); Application of the Mansfield Amend. to the Use of U.S. Mil. Pers. & Equip. to Assist Foreign Gov’ts in Drug Enf’t Activities, 10 Op. O.L.C. 122 (1986); Overview of the War Powers Resol., 8 Op. O.L.C. 271 (1984); Effective Date of the Reporting Requirement Imposed by the Multinational Force in Lebanon [sic] Resol., 7 Op. O.L.C. 197 (1983); Exec. Power With Regard to the Libyan Situation, 5 Op. O.L.C. 432 (1981); Use of

affair, because it remained almost entirely dependent on the White House and agencies to bring legal matters to it. It was institutionally incapable, therefore, of detecting legal concerns in matters on which it was not consulted. Assistant Attorney General Charles J. Cooper, who was appointed by Attorney General Edwin Meese to conduct the internal inquiry into the affair, later described how he had realized at a meeting of senior officials that they were embellishing a cover story for the shipment of arms to Iran. That, he later claimed, was his first inkling that there was something wrong.<sup>139</sup>

In addition to appointing an independent counsel to investigate legal violations, President Reagan appointed a commission to investigate the events and recommend reforms. The Tower Commission (named after its chair, former senator John Tower) produced a report that concluded that the plans were never subject to rigorous review below the cabinet level, and in particular “[t]here appeared little effort to face squarely the legal restrictions and notification requirements applicable to the operation.”<sup>140</sup> When agencies raised questions, “[t]hese concerns were dismissed without, it appears, investigating them with the benefit of legal counsel.”<sup>141</sup>

The Tower Commission adopted a recommendation that the executive branch establish a standalone position of legal adviser to the NSC. This proposal was first made in 1973 by John Norton Moore in an article in *Foreign Affairs*.<sup>142</sup> Moore went to work as counselor at the State Department Legal Adviser’s Office shortly after publishing the article. While in that position, he persuaded the legal adviser to propose that White House Counsel John Dean create an NSC legal adviser position. The proposal, however, went no further than that. As Moore

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Potatoes to Block the Me.-Can. Border, 5 Op. O.L.C. 422 (1981); Use of Mil. Pers. to Maintain Order Among Cuban Parolees on Mil. Bases, 4B Op. O.L.C. 643 (1980); Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185 (1980); see also Memorandum from Theodore B. Olson, Assistant Att’y Gen., Off. of Legal Couns., to Fred F. Fielding, Couns. to the President (Mar. 23, 1984), <https://www.justice.gov/olc/page/file/936126/download> [<https://perma.cc/Y3ZL-C8SQ>].

139. Walter Pincus & Dan Morgan, *High-Level Iran Cover-Up Shown in Testimony, Documents*, WASH. POST (June 26, 1987), <https://www.washingtonpost.com/archive/politics/1987/06/26/high-level-iran-cover-up-shown-in-testimony-documents/cac93232-ddbd-4f26-a1ec-fbe4af6b918d> [<https://perma.cc/MQ2H-DXE9>].

140. TOWER ET AL., *supra* note 123, at IV-5.

141. *Id.*

142. John Norton Moore, *Law and National Security*, 51 FOREIGN AFF. 408 (1973). The idea had been endorsed by the State Department legal adviser but never implemented. Jennifer N. Marett, Note, *The National Security Council Legal Adviser: Crafting Legal Positions on Matters of War and Peace*, 8 J. NAT’L SEC. L. & POL’Y 1, 9 (2015). Moore later reiterated the recommendation in a letter to the Tower Commission, and the proposal was incorporated into its recommendations.



later explained, “[i]t went to John Dean’s office at a time when he was consumed with Watergate and it fell into a black hole.”<sup>143</sup> Fourteen years later, Moore revived the proposal in a letter to the Tower Commission, and the commission adopted it. In addition to recommending some changes to NSC procedures, it recommended that the “position of Legal Adviser to the NSC be enhanced in stature and in its role within the NSC staff.”<sup>144</sup> The president agreed, and on March 31, 1987, President Reagan issued National Security Decision Directive (NSDD) 266, implementing several of the reforms proposed by the Tower Commission, including the structure and procedures of the NSC described in the report. The directive created a new position of legal adviser on the NSC staff, which replaced the general counsel position previously held by Thompson.

There was initially some uncertainty about how prominent the new NSC legal adviser would be and whether the position would have any staff. Moore was brought in to make the case for establishing the office as a significant new entity with staff, and, after some discussion, that recommendation was adopted.<sup>145</sup> The new NSC legal adviser would be responsible for providing legal counsel to the national security adviser and NSC staff on “the full range of their activities.”<sup>146</sup> The new legal adviser would also assist the national security adviser in “ensuring that legal considerations are fully addressed in the NSC process and in interagency deliberations.”<sup>147</sup> For this purpose, the legal adviser would have access to all information and deliberations “as may be required.”<sup>148</sup> The legal adviser was also directed to work “cooperatively with the Counsel to the President, the Legal

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143. Telephone Interview with John Norton Moore, Former Couns., U.S. Dep’t of State Legal Adviser’s Off. (Aug. 12, 2019) [hereinafter Moore Interview].

144. TOWER ET AL., *supra* note 123, at V-6. Both Moore and Rostow confirmed that the position of legal adviser did not exist before the Tower Commission. They both thought the reference to “enhanc[ing]” the position rather than creating it was due to the fact that, as Rostow put it, “Frank Carlucci knew what the Tower Commission was going to recommend and installed Paul [Thompson] as the first NSC Legal Adviser before the Tower Commission report was complete.” Email from Nicholas Rostow, Former Deputy Legal Adviser, Nat’l Sec. Council, to author (Aug. 9, 2019) (on file with author). The new legal adviser position was more substantial than the previous NSC general counsel position because it was entirely dedicated to the NSC. As Rostow explained, “[p]reviously, there had been an NSC general counsel but never a fully dedicated general counsel. For example, Thompson was military assistant and general counsel and Bob Kimmitt had been Executive Secretary [statutory head of the NSC staff] and general counsel.” *Id.*

145. As Moore describes it, Frank Carlucci staged a literal debate between him and a former deputy legal adviser at the Department of State over the nature of the position, with Moore arguing for a more substantial office with independent authority and a staff. Moore Interview, *supra* note 143.

146. National Security Decision Directive 266, at 5 (Mar. 31, 1987).

147. *Id.*

148. *Id.*

Adviser of the Department of State, and with senior counsel to all other NSC members, advisers, and participants.”<sup>149</sup> Finally, not only was a deputy appointed to assist with the work, but the legal adviser position also stood outside the White House counsel’s office—an effort to make it institutionally independent from the political pressures that swept up the lawyers involved in the Iran-Contra scandal.

Paul Schott Stevens became the first official legal adviser to the NSC,<sup>150</sup> and Nicholas Rostow the first deputy legal adviser. They understood their job was to help promote “‘greater sensitivity to matters of law’ in the workings of the NSC.”<sup>151</sup> When Stevens left at the start of the George H.W. Bush administration to work at the Department of Defense, Rostow became legal adviser.

It was not always easy. Boyden Gray, who was White House counsel from 1989 to 1993, was not pleased with the creation of the NSC legal adviser position. He was concerned that it would dilute his own authority in providing legal advice within the White House, and not entirely without reason. As Stephen Rademaker (Rostow’s deputy) put it, “Boyden Gray’s view was that his primary obligation was to be sure there was no scandal. And the greatest risk for a scandal was NSC.”<sup>152</sup> He therefore wanted to keep a close eye on it. Indeed, he had wanted to appoint the NSC legal adviser. But Brent Scowcroft, then national security adviser, wanted Rostow, who knew the job because he had been serving as deputy. Gray did manage to persuade President Bush to allow him to appoint Rostow’s deputy, and he appointed Rademaker. Rademaker, then, was dual hatted: He served as associate White House counsel (under Gray’s supervision) and as deputy legal adviser to the NSC under Rostow. Rostow saw this (rightly) as a move to keep him under close watch. Rostow said of Rademaker, “[h]e was a spy but he turned out not to be a very good spy,” and they worked well together.<sup>153</sup> Rademaker agreed:

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149. *Id.*

150. Press Release, White House, Appointment of Eight Special Assistants to the President for National Security Affairs (Feb. 11, 1987), <https://www.reaganlibrary.gov/archives/speech/appointment-eight-special-assistants-president-national-security-affairs> [https://perma.cc/E94J-E4GV] (announcing the appointment of eight members of the NSC staff as special assistants to the president for national security affairs, including Paul Schott Stevens as NSC legal adviser, reporting to National Security Adviser Frank Carlucci); see also *Former NSC Legal Adviser Paul Stevens Named New Standing Committee Chair*, ABA NAT’L SEC. L. REP., Oct. 1995, at 1, 1 (“[H]e served as the first Legal Adviser to the National Security Council in 1987.”).

151. Paul Schott Stevens, *Room for “Maneuver”: Some Policy Issues in the Iran-Contra Affair*, 11 HOUS. J. INT’L L. 159, 160 (1988) (quoting President’s Address to the Nation, 23 WEEKLY COMP. PRES. DOC. 219, 222 (Mar. 4, 1987)).

152. Phone Interview with Stephen Rademaker, Former Deputy Legal Adviser, Nat’l Sec. Council (Aug. 20, 2019) [hereinafter Rademaker Interview].

153. Phone Interview with Nicholas Rostow, Former Deputy Legal Adviser, Nat’l Sec. Council (Aug. 12, 2019) [hereinafter Rostow Interview II].

“For the first year I was there, [Rostow] made it his mission to drive me out. By the end of four years working together, he was no longer trying to drive me out and we were working together well.”<sup>154</sup>

Although the interagency lawyers working group would not be formally created until 1993, the lawyers created an informal group of their own. It was almost entirely focused on war powers reporting, as it had been before the Iran-Contra scandal. As NSC legal adviser, Rostow took over drafting war powers reports from the White House counsel, and the lawyers gathered as needed to review these drafts. As Rostow put it, “whenever there was anything where it seemed wise for the lawyers to get together, they got together.”<sup>155</sup> Though President Bush joined his predecessors in not accepting the constitutionality of the War Powers Resolution,<sup>156</sup> the lawyers still went to “great pains to comply with it.”<sup>157</sup> Rademaker reports that, “[w]henever there was a use of force, we would convene lawyers from the CIA, State, Defense, Justice, the White House, and Joint Chiefs. We would put the issue under the microscope and decide if we had to report. Were forces actually introduced? Were they ‘armed’ forces? We wanted to do as little as possible to comply but we wanted to comply.”<sup>158</sup> Occasionally, related issues would arise. For example, in the run up to Desert Storm, the lawyers debated whether the United States could target Saddam Hussein or whether doing so would be an illegal assassination.<sup>159</sup>

The Iran-Contra scandal thus generated an institutional response: the creation of a new legal office at the NSC, with a legal adviser formally independent of the White House Counsel’s Office and its political concerns. Coordination across agencies, however, remained largely informal and focused primarily on war powers matters. In addition, internal institutional jealousies within the White House blunted the capacity of the NSC legal adviser to play an important role in reviewing significant legal decisions on national security matters. This change, however, became the starting point for more substantial reforms that would lead to what is today known as the interagency “Lawyers Group.”

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154. Rademaker Interview, *supra* note 152.

155. Rostow Interview II, *supra* note 153.

156. War Powers Resolution, Pub. L. No. 93-148, § 8(a)(1), 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541–48).

157. Rademaker Interview, *supra* note 152.

158. *Id.*

159. *Id.*

### C. The Beginning of the “Lawyers Group”: 1993–2001

Congress had played only a small role in intelligence reform in the immediate aftermath of the Iran-Contra scandal. In 1991, however, after conducting its own review of the scandal, Congress enacted the Intelligence Authorization Act.<sup>160</sup> The Senate Intelligence Committee observed that the law on covert action was “ambiguous, confusing and incomplete,” presidential approvals were unclear, and the “statutory requirements for informing the intelligence committees of covert actions are subject to misinterpretation.”<sup>161</sup> The act mandated that the president be the final approving authority for covert action programs. The president also had to authorize a “Finding” in advance and affirm (in writing) that the program was in support of “identifiable foreign policy objectives.”<sup>162</sup>

The Intelligence Authorization Act helped precipitate a transformation in the way in which covert operations were reviewed and approved by the NSC. National Security Directive 79 (originally classified Top Secret/Codeword but declassified in May 2018)<sup>163</sup> was approved by President George H.W. Bush on his last day in office and outlined a process for approval and review of covert action.<sup>164</sup> The cover note, signed by Brent Scowcroft, made explicit that the directive was meant to conform NSC decisionmaking practices to the Intelligence Authorization Act. The directive laid out a process for creating and approving the Findings that the president was required to make. Among other things, it stated that the NSC would review each proposed Finding and memorandum of notification. The goal of these reforms was to reduce the chance that a member of the NSC would engage in Oliver North–style rogue projects that could get the administration in trouble.

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160. Intelligence Authorization Act, Pub. L. No. 102-88, 105 Stat. 429 (1991). The act repealed the 1974 Hughes-Ryan Amendment, which was not only the first post-Watergate effort at intelligence reform, but also initially introduced the requirement that the president make a “Finding” before undertaking a covert operation and file a “memorandum of notification.” MICHAEL E. DEVINE, CONG. RSCH. SERV., R45421, CONGRESSIONAL OVERSIGHT OF INTELLIGENCE: BACKGROUND AND SELECTED OPTIONS FOR FURTHER REFORM (2018), <https://fas.org/sgp/crs/intel/R45421.pdf> [<https://perma.cc/W4VW-76HC>]. One of the many reports on the act recounted that, “[a]t the outset, it became clear from the Intelligence Committee’s intensive preliminary Iran-Contra inquiry that significant changes were required in the covert action oversight framework.” S. REP. NO. 101-358, at 14 (1990).

161. S. REP. NO. 102-85, at 34 (1991).

162. Intelligence Authorization Act § 602.

163. National Security Directive 79 (Jan. 19, 1993).

164. NSD 79 rescinded NSDD 286, which was enacted by President Ronald Reagan in 1987 and left in place by President H.W. Bush. *Id.* President Bush issued NSD 1 in the first weeks of his presidency to slightly modify the organization of the National Security Council. *Id.*

The Intelligence Authorization Act was not the only reason for the directive, however. Alan Kreczko, who became President Clinton's first NSC legal adviser in April 1993, recalled that the decision in 1990 to seize Humberto Álvarez Machaín—a Mexican doctor believed to have been involved in the kidnapping, torture, and killing of Enrique Camarena Salazar, a U.S. Drug Enforcement Administration (DEA) agent—in Mexico and bring him to the United States for trial helped precipitate a review of the process for approving such operations.<sup>165</sup> The operation was carried out by paid agents of the DEA and approved by the DEA. The DEA agent who arranged the kidnapping “believed that the United States Attorney General’s Office had also been consulted.”<sup>166</sup> The Department of Justice, however, failed to send the operation for interagency review.

The events, which eventually resulted in a Supreme Court case and caused serious embarrassment to the U.S. government,<sup>167</sup> exposed the fact that the existing system for review of covert operations did not effectively cover all covert operations, as defined in the National Security Act of 1947.<sup>168</sup> In particular, it did not cover “traditional law enforcement activities conducted by United States Government law enforcement agencies or routine support to such activities,”<sup>169</sup> which the Department of Justice had apparently interpreted to mean its activities were exempted from review. The new NSD 79 made clear that the procedures it put in place did not just apply to activities planned and carried out by the CIA; the procedures applied to the activities of all agencies. The directive stated that:

In all cases, covert action by the Central Intelligence Agency (CIA) *or by any Executive department, agency, or entity in foreign countries* requires, under the terms of section 503(a) of the Act, Findings by the President that such “action is necessary to support identifiable foreign policy objectives of the United States and is important to the national security

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165. Telephone Interview with Alan Kreczko, Former Legal Advisor, Nat’l Sec. Council (Sept. 2, 2019) [hereinafter Kreczko Interview].

166. *United States v. Caro-Quintero*, 745 F. Supp. 599, 603 (C.D. Cal. 1990). William Barr was the head of the Criminal Division at the Department of Justice at the time. See David Johnston, *Washington at Work; Political Lifeguard at the Justice Dept.*, N.Y. TIMES (Aug. 30, 1990), <https://www.nytimes.com/1990/08/30/us/washington-at-work-political-lifeguard-at-the-justice-dept.html> [<https://perma.cc/7W6A-GWKK>].

167. See *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

168. National Security Act of 1947, Pub. L. No. 235, ch. 343, 61 Stat. 495. Covert action is defined as “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly,” except intelligence or counterintelligence activities, traditional diplomatic or military activities, traditional law enforcement activities, and activities to support overt activities. *Id.* § 602.

169. *Id.*

of the United States.” No covert action may be conducted except under the authority of, and subsequently to, such Finding by the President.<sup>170</sup>

The date on the directive is January 19, 1992, but the date on the cover letter issuing the directive is January 19, 1993—a full year later. It may have been pushed out as a mere matter of good housekeeping at the close of a Presidential administration.<sup>171</sup> But one former member of the NSC staff remembers that the Department of Justice opposed the new directive, probably because it swept some of its operations within the process for approving covert operations, which was more cumbersome than the internal agency process.<sup>172</sup> But, as the first Bush presidency drew to a close, NSC legal adviser Nicholas Rostow pressed the directive through over the Department of Justice’s opposition. Perhaps in part to ameliorate some of the Justice Department’s concerns, NSD 79 specified that, in addition to members of the intelligence community, the attorney general and the director of the Office of Management and Budget would be invited to attend any meeting of the NSC that addressed covert action.<sup>173</sup>

In addition to clarifying the scope of NSC review of any new covert action, the directive laid out a procedure for a Deputies Committee—a sub-cabinet level interagency group responsible for review of covert actions. This committee would be chaired by the deputy assistant to the president for national security affairs (deputy national security adviser) and comprised of a representative of the Office of the Vice President, the undersecretary of state for political affairs, the undersecretary of defense for policy, the CIA’s deputy director for operations, the vice chairman of the Joint Chiefs of Staff, the deputy director of the Office of Management and Budget, the deputy attorney general, or other senior officials of equivalent rank within such executive departments and agencies. The meeting

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170. National Security Directive 79, *supra* note 163 (emphasis added).

171. The index lists it as January 19, 1993. *National Security Directives (NSD) [Bush Administration, 1989–93]*, FED’N AM. SCIENTISTS, <https://fas.org/irp/offdocs/nsd/index.html> [<https://perma.cc/88HG-8X6C>].

172. Telephone Interview with Alan Kreczko, Former Legal Advisor, Nat’l Safety Council (Sept. 2, 2019) [hereinafter Kreczko Interview]. According to Nicholas Rostow, the one-year delay was primarily a matter of priorities. The NSC was effectively following the rules articulated in the NSD 79, thus there was no urgency in issuing the NSD. But with the end of President Bush’s term and a transition to a new president, it was “a matter of good housekeeping” to formalize the procedures for the next administration. Rostow Interview II, *supra* note 153.

173. The attorney general, as the chief law enforcement officer, could offer legal policy advice. The director of the Office of Management and Budget was presumably included in part to aid compliance with new budgetary obligations in the Intelligence Authorization Act. Kreczko Interview, *supra* note 172. This was confirmed by Nicholas Rostow. Interview with Nicholas Rostow, Former Deputy Legal Adviser, Nat’l Sec. Council (Sept. 5, 2019) [hereinafter Rostow Interview III].

was to be attended by the NSC legal adviser. The directive also specified that any new presidential Finding would have to be in writing and prospective.

To assist it in its work, the Deputies Committee was permitted to establish working groups, and the directive required the creation of just one working group: a legal working group. This legal group—which would become known as the “Lawyers Group”—was to include “the NSC Legal Adviser, the Counsel to the President, the Legal Adviser of the Department of State, a senior representative of the Attorney General, the General Counsels of the Department of Defense and the CIA, and the Legal Adviser to the Chairman of the Joint Chiefs of Staff.”<sup>174</sup> This group, NSD 79 stated, “shall be convened as necessary or desirable to ensure that legal considerations are fully addressed in connection with proposed or ongoing covert action.”<sup>175</sup>

National Security Directive 79 was issued by President Bush on his last full day in office. The very next day, the newly sworn-in President Bill Clinton issued his own directive, Presidential Policy Directive 2.<sup>176</sup> It enlarged the membership of the NSC and made clear that the new administration would place greater emphasis on economic issues in formulating national security policy, but it left much of the process outlined in the Bush directive in place. The new regular members of the NSC included the secretary of the treasury, the U.S. representative to the United Nations, the assistant to the president for national security affairs, the assistant to the president for economic policy, and the chief of staff to the president.<sup>177</sup>

Those who participated in the Lawyers Group meetings during the Clinton years describe it as collegial. As Mike Matheson, acting State Department legal adviser in the Clinton administration, put it: “I never felt that there was a political channel. There wasn’t a sense of hidden discussions. It was a transparent and rational process.”<sup>178</sup> On some issues, the interagency group of lawyers did not attempt to come to a consensus but instead deferred to the agency whose portfolio most directly involved the matter. As Stephen Preston, who worked in the Clinton administration as well as the Obama administration, put it, “it was a relatively peaceful time; there were many fewer operational decisions to be made. We just didn’t have the same number and intensity of wars and operations going on in the

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174. National Security Directive 79, *supra* note 163.

175. *Id.*

176. Presidential Directive 2 (Jan. 20, 1993), <https://fas.org/irp/offdocs/pdd/pdd-2.pdf> [<https://perma.cc/C673-V5Q6>]. It is worth noting that “National Security Directive” and “Presidential Directive” are simply different names for the same kind of document in different administrations.

177. *Id.*

178. Telephone Interview with Michael Matheson, Former Legal Advisor, U.S. Dep’t of State (July 31, 2019).

1990s.”<sup>179</sup> Perhaps partly as a result, the Lawyers Group was not as high profile as it would become in the Obama administration. Mary DeRosa, who served as NSC legal adviser at the very end of the Clinton administration and again in the Obama administration, recalled that during the Clinton administration, she never met directly with the president.<sup>180</sup> Except in the case of a few high-profile foreign policy events, the central focus of the White House during this relatively peaceful time was on domestic matters.

The working group of lawyers was created for the purpose of supporting the NSC in its review of covert actions, and the lawyers who participated in that process were generally at the deputy level—the deputy NSC legal adviser (then James Baker, who later became NSC legal adviser), deputy general counsel at the Department of Defense, etc. Baker produced a summary of the issues on which the group coordinated that was available to the principal legal advisers at the agencies. In general, however, the lead lawyers for the agencies did not play a role unless an issue was very significant—for example, if it was going to be briefed to the principals (the secretary of state, defense, etc.) or to the president.<sup>181</sup> This reflected in part the lesser significance of counterterrorism operations in this period.

This was not, however, the only interagency gathering of lawyers working on national security issues. At the beginning of the Clinton administration, a group led by NSC legal adviser Alan Kreczko and Morton Halperin (who first worked as a consultant to the secretary of defense and the undersecretary of defense for policy, then as special assistant to the president and senior director for democracy at the NSC) undertook a review of war powers issues. They brought together Conrad Harper, who was legal adviser at State; Walter Dellinger, who headed the Office of Legal Counsel at Justice; and Jamie Gorelick, then general counsel at the Department of Defense. Together they reviewed the war powers positions of the administration and came to a shared interagency view, which helped drive collaboration among that group on future war powers issues—perhaps at a higher level than might otherwise have been the case. Whether intentional or not, this informal collaboration mirrored collaboration on war powers issues among this same group of agency lawyers that had taken place in earlier administrations.

This group also periodically gathered to discuss a range of other issues. Early in the Clinton presidency, there was an NSC Deputies Committee meeting on disarmament issues. At the meeting, one of the participants stated that an option

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179. Telephone Interview with Stephen Preston, Former Gen. Couns., U.S. Dep’t of Def. (Aug. 12, 2019) [hereinafter Preston Interview].

180. Telephone Interview with Mary DeRosa, Former Legal Advisor, Nat’l Sec. Council (Aug. 27, 2019) [hereinafter DeRosa Interview].

181. Kreczko Interview, *supra* note 172.



under consideration was not possible because his lawyer said it was illegal. That “brought the meeting to a halt.”<sup>182</sup> Sandy Berger (then deputy national security adviser and chair of the meeting), came out of the meeting and said he did not want that to happen again. He told Kreczko, “I want you to convene your group; if there is a legal issue, sort it out before the meeting.”<sup>183</sup> For Kreczko, it was “a happy event.”<sup>184</sup> He now had authority to lead interagency coordination among the lawyers on issues that came before the Deputies Committee. As a result, “if there was a significant legal issue, we would work it out beforehand. If it needed to be briefed, I would go and brief it at the beginning of the meeting.”<sup>185</sup> Typically, the group included the same three who had collaborated on the war powers issues—Harper, Dellinger, and Gorelick. In addition, depending on the issue, it might include Elizabeth Rindskopf, the General Counsel at the CIA. In addition, Harper, Dellinger, and Gorelick often had lunch at the White House mess to informally discuss significant issues in each of the agencies on which coordination, though not necessary, would build awareness and trust.

The collaborative environment did not lead to entirely uncontroversial legal decisions. Rademaker, who left the NSC in 1992 and spent most of the Clinton presidency working on the Committee on Foreign Relations staff in the U.S. House of Representatives, remembered that a key difference between the Lawyers Group of the Obama era and the informal group of lawyers that had assembled during the first Bush administration was that “the War Powers Resolution is a dead letter [today].”<sup>186</sup> In his view, the Clinton administration played a key role in undermining the War Powers Resolution<sup>187</sup> because it was willing to push the resolution’s boundaries to the breaking point. Republicans were not going to do much to press back. After all, “it had always been a Democrat law.”<sup>188</sup> In Rademaker’s view, once Clinton showed he was willing to work around the statute, that was pretty much the end of it.<sup>189</sup> For example, early in his presidency, President Clinton committed troops to Somalia to assist in alleviating a humanitarian disaster. He did so, however, without seeking congressional authorization. Congressman Benjamin Gilman, the ranking Republican Member of the House Committee on Foreign Affairs, and Senator Jesse Helms, ranking

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182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. Rademaker Interview, *supra* note 152.

187. War Powers Resolution, Pub. L. No. 93-148, § 8(a)(1), 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541–48).

188. Rademaker Interview, *supra* note 152.

189. *Id.*

Republican member of the Senate Committee on Foreign Relations, wrote to Secretary of State Warren Christopher asking the administration to justify its claim that “the U.S. Armed Forces in Somalia are not in a situation of hostilities or imminent involvement in hostilities within the meaning of the War Powers Resolution. In our opinion, recent events in Mogadishu call for a reexamination of this conclusion.”<sup>190</sup> They went on to detail the active fighting that had been taking place, particularly in Mogadishu. Wendy Sherman, then assistant secretary of state for legislative affairs, responded that the sixty-day clock in the War Powers Resolution did not apply because the U.S. military operations were “intermittent” rather than “sustained,” and therefore the clock had not been triggered.<sup>191</sup> The letter also noted that the operations were undertaken in support of a United Nations humanitarian mandate “and have not been directed at the forces of a sovereign state, but rather at bandits or warlords.”<sup>192</sup> Congressman Gilman and Senator Helms responded that these novel interpretations of the resolution meant that “[a]nother casualty of Somalia has been the war powers resolution.”<sup>193</sup>

The informal collaborative group of lawyers during the Clinton administration generally deferred to the agency in whose portfolio the issue most squarely landed. The Department of State, for example, took the lead on international law issues. When the Clinton administration decided to intervene in Kosovo, the lawyers deferred to the Department of State on the international legal issues. The lawyers at State, however, could not agree on an international legal basis for the intervention, and so the administration never offered one, choosing instead, as one lawyer who was involved put it, to “mumble, rather than announce a new doctrine of humanitarian intervention.”<sup>194</sup> As a result, the United States–led NATO intervention in Kosovo took place without any effort by the United States to state a clear international legal basis for its actions. Only the United Kingdom, Belgium, and the Netherlands specifically identified a right of humanitarian intervention as a legal basis for their action.<sup>195</sup>

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190. 139 CONG. REC. 22,752 (1993).

191. *Id.* at 753.

192. *Id.*

193. *Id.*

194. Telephone Interview with Anonymous (July 19, 2017). The OLC memo on the intervention also said nothing about the international legal basis. See *Authorization for Continuing Hostilities in Kos.*, 24 Op. O.L.C. 327 (2000).

195. U.N. SCOR, 54th Sess., 3988th mtg. at 12, U.N. Doc. S/PV.3988 (Mar. 24, 1999) (statement of the United Kingdom); *id.* at 8 (statement of the Netherlands). The Dutch representative observed, “[D]iplomacy has failed, but there are times when the use of force may be legitimate in the pursuit of peace. The Netherlands feels that this is such a time.” *Id.* Belgium argued in the ICJ proceedings on the legality of NATO’s intervention that “the Kingdom of Belgium takes the view that this is an armed humanitarian intervention, compatible with Article 2,

These decisions reflected the view of many of the national security lawyers during this period that their job was to offer the president advice on whether a course of action the president and his policy advisers wanted to take was “legally available.” They could state their view as to what was the “best” view of the law, but they should be clear that when they did so, they were speaking to legal policy, not legal constraints. James Baker, who was deputy legal adviser to the NSC from 1994 to 1997 and legal adviser from 1997 to 2000, explained in his excellent book, *In the Common Defense*, his view that “lawyers must take care to distinguish between what is law and what is legal policy.”<sup>196</sup> In his view, the job of the lawyer is to identify legal options, as “[t]he identification of a preferred course as between lawful options is legal policy.”<sup>197</sup> Indeed, even “[t]he identification of a better argument among available arguments is legal policy,” and “[i]dentification of the long-term and short-term impact of legal argument is legal policy.”<sup>198</sup> He elaborated:

[f]or example, will other states assert the same right to act as the United States asserts, and if so, what are the long-term costs and benefits of the United States asserting such authority? If a constitutional argument is legally available to the president, will it nonetheless generate a congressional or public response disproportionate to the benefits of using the argument?<sup>199</sup>

Alan Kreczko, who was legal adviser when Baker was deputy, did not disagree but put it somewhat differently: “I was always careful to distinguish between law and policy. It was important for us to stick to the law.”<sup>200</sup>

This approach leaves the president with extremely wide latitude to act. As Baker notes, “many national security law questions are not yes or no questions.”<sup>201</sup> Even those that seem to be obvious may, over time, become less obvious. The meaning of the War Powers Resolution is just one example. Whereas the first Bush administration would have considered the proposition that the clock restarts with every operation in the same location as a legally unavailable interpretation of the

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paragraph 4, of the Charter, which covers only intervention against the territorial integrity or political independence of a State.” *Legality of Use of Force (Yugoslavia v. Belg.)*, Verbatim Record, CR 99/15, at 12 (May 10, 1999, 3:00 PM) (Eng. Translation), <https://www.icj-cij.org/files/case-related/105/105-19990510-ORA-02-00-BI.pdf> [<https://perma.cc/84Y8-PG52>].

196. JAMES E. BAKER, *IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES* 316–17 (2007).

197. *Id.* at 317.

198. *Id.*

199. *Id.*

200. Kreczko Interview, *supra* note 172.

201. BAKER, *supra* note 196, at 317.

resolution, the Clinton administration considered it available. And whereas the idea that an appropriation for a military operation could stand in for an authorization of that operation would have been considered legally unavailable under the first Bush administration, it was considered available under the Clinton administration. In a world where internal legal opinions are rarely made public and the courts almost never weigh in, is there any legal position that is foreclosed? Mary DeRosa, who over time came to the view that national security lawyers should instead aim to give the president and his advisers the “best view” of the law, put it this way: “Figuring out what the boundaries are of what is ‘legally available’ is really, really difficult. You can persuade yourself of a lot of things when you’re doing that work. It just gives too much leeway.”<sup>202</sup>

#### D. September 11 and Its Aftermath: 2001–2009

The costs of that leeway became clear after the horrific attacks on the United States on September 11, 2001. After those attacks, the George W. Bush administration made a rash of decisions that would come to haunt the national security community. This story has been told extensively,<sup>203</sup> so I will not repeat it at length here, but a few key points are worth noting.

The hallmark of this period for the purposes of this Article is not simply the willingness of an array of lawyers in the administration to bless legal positions that the Bush administration itself later came to recognize were not supported by the law. The breakdown in the substantive interpretation of the law was enabled, if not encouraged, by an institutional breakdown in the process of arriving at legal positions. It is this institutional crisis that this Subpart briefly reviews.

During the Bush-Cheney administration, the interagency national security Lawyers Group may have been “sidelined,” as Charlie Savage put it in *Power Wars*,<sup>204</sup> but it did continue to meet.<sup>205</sup> According to John Bellinger, who was national security legal adviser during the first Bush term,<sup>206</sup> the Lawyers Group was

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202. DeRosa Interview, *supra* note 180. DeRosa engaged in a fascinating debate with Bob Bauer on the best view of the law. See Bauer, *supra* note 11; DeRosa, *supra* note 11.

203. See, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007).

204. SAVAGE, *supra* note 79, at 64.

205. John Bellinger contested this claim. See John Bellinger, *Charlie Savage and the NSC Lawyers Group*, *LAWFARE* (Nov. 8, 2015, 11:25 AM), <https://www.lawfareblog.com/charlie-savage-and-nsc-lawyers-group> [<https://perma.cc/K9GJ-J7LQ>].

206. Bellinger served as the legal adviser for the Department of State from 2005–2009, as senior associate counsel to the president and legal adviser to the NSC at the White House from 2001–2005, and as counsel for national security matters in the criminal division of the Department of Justice from 1997–2001. *Id.*

primarily convened to review existing and proposed covert actions—its formal purpose as defined by NSD 79. He recalls that it met on a regular basis and that, early on, “we were reviewing all the old covert action authorities from the Clinton Administration.”<sup>207</sup> Any time there was a new Finding or “MON” (Memorandum of Notification), the group would meet to review it. Bellinger also recalled that he would “occasionally use the Lawyers Group for other things.”<sup>208</sup> For example, the group convened periodically to review sensitive intelligence operations that were not covert actions. Although secure video conferencing technology was available, Bellinger recalled that almost all the Lawyers Group meetings took place in person. War powers decisions were largely done “on the papers.”<sup>209</sup> Bellinger could not recall ever meeting in person to discuss a war powers report.

One key difference between the Bush administration and the Clinton administration is that, during the Bush administration, there were no informal, collegial gatherings of the chief lawyers of the main national security agencies—at least there were none involving the NSC legal adviser. At times, in fact, the relationship between the legal adviser and lawyers at the agencies was quite tense. When Bellinger called a meeting to discuss the Geneva Conventions, the Department of Defense General Counsel Jim Haynes refused to participate. As Bellinger recalled, “he said he only reported to the counsel to the President,” not to the NSC legal adviser.<sup>210</sup>

After the 9/11 attacks, Bellinger chaired an NSC Policy Coordinating Committee comprised of interagency lawyers and counter-terrorism policy officials that addressed issues relating to the detention of al-Qaeda and Taliban suspects, including issues relating to Guantanamo, but this group did not address intelligence issues. On most other national security lawyering matters, however, White House Counsel Alberto Gonzales took decisions into his own hands. Gonzales created a parallel process for vetting legal decisions that largely excluded Bellinger.<sup>211</sup> It also largely left out William Howard Taft IV, the State Department

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207. Telephone Interview with John Bellinger, Former Legal Advisor, U.S. Dep’t of State (July 31, 2019).

208. *Id.*

209. *Id.*

210. *Id.*

211. A Department of Justice Office of Professional Responsibility report on the CIA’s use of “enhanced interrogation techniques” on suspected terrorists notes that “by the Spring of 2002, [Bellinger] had confrontations with John Yoo over the OLC’s failure to include him, as the NSC Legal Adviser, in OLC opinions that affected national security and that, in some cases, he was not even aware that OLC opinions had been issued on important legal issues.” OFF. OF PRO. RESP., U.S. DEP’T OF JUST., INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS 38 (2009), <https://>

legal adviser, and the legal adviser to the chairman of the Joint Chiefs of Staff, Captain Jane Dalton.<sup>212</sup> The new White House Counsel–led group, which dubbed itself the “War Council,” included Department of Defense General Counsel, Jim Haynes; Office of Legal Counsel Deputy Assistant Attorney General, John Yoo; the Vice President’s General Counsel, David Addington; Gonzales; and Timothy Flanigan, Gonzales’s deputy. This small group addressed a wide range of national security issues with relatively little input or involvement from the other lawyers in the administration.

There are a number of issues on which this small group came to legal conclusions that would later be rejected and, in some cases, reviled.<sup>213</sup> And in memo after memo, Yoo (sometimes joined by Robert Delahunty)<sup>214</sup> and others in the Department of Justice’s OLC articulated a vision of unfettered and unconstrained presidential power.<sup>215</sup> One infamous topic of these memos was whether the prohibition on torture placed limits on interrogations. What was permitted “enhanced interrogation,” and what was “torture” prohibited by law? To define torture, Yoo (in a memo signed by Jay S. Bybee, then head of the office) looked not to international law, but to domestic criminal law, which defines torture as the intentional infliction of “severe physical or mental pain or suffering . . . upon another person within his custody or physical control.”<sup>216</sup> To be

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nsarchive2.gwu.edu/news/20100312/OPRFinalReport090729.pdf [https://perma.cc/TG5M-HUTB].

212. This point was made in several interviews I conducted with those involved. In addition, President Bush’s first National Security Adviser (later Secretary of State) Condoleezza Rice claimed in her memoir that Vice President Dick Cheney and his counsel David Addington circumvented Rice and her NSC legal adviser, John Bellinger, as well as lawyers in the Departments of State, Defense, and Justice. CONDOLEEZZA RICE, *NO HIGHER HONOR: A MEMOIR OF MY YEARS IN WASHINGTON* 104–06 (2011).
213. In one of his earliest legal memos, John Yoo wrote to Tim Flanigan, deputy White House counsel, outlining an expansive vision of presidential power that claimed that Congress cannot “place any limits on the President’s determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make.” The President’s Constitutional Auth. to Conduct Mil. Operations Against Terrorists & Nations Supporting Them, 25 Op. O.L.C. 188, 214 (2001).
214. See, e.g., Steven H. Miles, *The Robert Delahunty Torture-Memo Controversy at St. Thomas*, MINNPOST (Sept. 1, 2009), <https://www.minnpost.com/community-voices/2009/09/robert-delahunty-torture-memo-controversy-st-thomas> [https://perma.cc/F6T6-32PB] (detailing Delahunty’s role in writing several of the memos).
215. See *Torturing Democracy: Documents by Chronology*, NAT’L SEC. ARCHIVE, <https://nsarchive2.gwu.edu/torturingdemocracy/documents> [https://perma.cc/6RQK-NUW7]; see also OFF. OF PRO. RESP., *supra* note 211 (describing the OLC memos authorizing torture and the process by which they were created).
216. Memorandum from Off. of the Assistant Att’y Gen., to Alberto R. Gonzales, Couns. to the President, at 3 (Aug. 1, 2002) (quoting 18 U.S.C.A. § 2340(1)), <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020801-1.pdf> [https://perma.cc/NGH8-A9WN].

severe enough to be prohibited, he concluded, it had to be “of the most extreme nature.”<sup>217</sup> The physical pain had to be so extreme that it is “equivalent in intensity to the pain accompanying . . . organ failure, impairment of bodily function, or even death.”<sup>218</sup> For psychological pain to qualify, it “must result in significant psychological harm of significant duration, e.g., lasting for months or even years.”<sup>219</sup>

Taft, who was then State Department legal adviser, received a draft of one of Yoo’s memos in early 2002 and wrote a memo to Yoo raising concerns about the legal analysis. Taft argued that, contrary to Yoo’s position, members of the Taliban Militia were entitled to have their status determined individually. Taft explained that “[w]e find untenable the draft memorandum’s conclusion that this is unnecessary,” and explained that “all three premises” on which the conclusion was based “are wrong.”<sup>220</sup>

Taft later explained that “the upshot of my memo was that they cut me out of the loop going forward.”<sup>221</sup> From then on, he was rarely consulted on key legal matters addressed by Gonzales’s group. Sometimes Taft and his team found workarounds to get the State Department’s view into administration documents. For example, the department managed to get its views reflected in Supreme Court and Court of Appeals briefs because Curtis Bradley, who served as counselor on international law at the Department of State from January to December 2004, had a “backchannel” to his frequent coauthor and friend, Jack Goldsmith, who served as assistant attorney general at the Office of Legal Counsel from 2003 to 2004 and was special counsel to the Department of Defense from 2002 to 2003. It was only after the torture memos leaked in June 2004 and provoked an outcry, Taft explained, that “they decided that [limiting decisions to a small group of hand-picked lawyers] was not a good way to operate and they started a new process that required interagency cooperation.”<sup>222</sup>

By the time the memos leaked, Goldsmith, who succeeded Jay Bybee as the head of OLC, had already withdrawn the so-called torture memos and advised agencies not to rely on them. After Goldsmith resigned under pressure in July

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217. *Id.* at 27.

218. *Id.* at 1.

219. *Id.*

220. Memorandum from William H. Taft, IV, Legal Adviser, U.S. Dep’t of State, to John C. Yoo, Deputy Assistant Att’y Gen., at 1 (Jan. 11, 2002), <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020111.pdf> [<https://perma.cc/2E5P-SGY5>].

221. Taft Interview, *supra* note 114.

222. *Id.*

2004, Attorney General John Ashcroft issued a one paragraph opinion reauthorizing the use of torture.<sup>223</sup>

During the second term of the Bush administration, the extremely narrow legal circle broadened somewhat. When Condoleezza Rice became secretary of state and made John Bellinger her legal adviser, he became more involved in many significant legal policy decisions, at least as they pertained to State Department matters.<sup>224</sup> Nonetheless, the circle of lawyers involved in key national security legal decisions remained smaller during the Bush administration than it had been during the Clinton administration. In July 2007, the White House doubled down on its opinion concerning torture with an executive order stating that “members of al Qaeda, the Taliban, and associated forces are unlawful enemy combatants who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war.”<sup>225</sup> In the final days of the Bush presidency, however, Stephen Bradbury, then Principal Deputy Assistant Attorney General at the Office of Legal Counsel, issued a “memorandum for the files” concerning a number of OLC opinions from 2001 to 2003, which stated that “propositions contained in the opinions identified below do not currently reflect, and have not for some years reflected, the views of OLC.”<sup>226</sup>

The public debate over the role of OLC that ensued after the disclosure of the infamous memos raised the profile of the office and politicized its role. In 2006, *Newsweek* characterized OLC as “the most important government office you’ve never heard of.... Its carefully worded opinions are regarded as binding precedent—final say on what the president and all his agencies can and cannot

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223. Charlie Savage, *Reaction to C.I.A. Torture Report*, N.Y. TIMES (Dec. 9, 2014), <https://news.blogs.nytimes.com/2014/12/09/cia-torture-report/#the-one-paragraph-torture-memo-2> [https://perma.cc/69NA-FNY4].

224. In this role, Bellinger took steps to publicly explain the Bush Administration’s legal reasoning on national security issues. See, e.g., John Bellinger, Remarks at the London School of Economics: Legal Issues in the War on Terrorism (Oct. 31, 2006), <https://2009-2017.state.gov/s/l/2006/98861.htm> [https://perma.cc/MZ8T-382E]; Roger Alford, *Sincere Appreciations to John Bellinger*, OPINIO JURIS (Jan. 26, 2007), <http://opiniojuris.org/2007/01/26/sincere-appreciations-to-john-bellinger> [https://perma.cc/99GM-U85Y] (describing Bellinger’s participation in an online discussion).

225. Exec. Order No. 13,440, 3 C.F.R. 13,440 (2007). That Order went against the legal advice offered by Bellinger, then State Department Legal Adviser, in February of that year that detainees were protected by Common Article 3 of the Geneva Conventions. Letter from John Bellinger, Legal Advisor, U.S. Dep’t of State, to Steven G. Bradbury, Acting Assistant Att’y Gen., Off. of Legal Counsel, U.S. Dep’t of Just. (Feb. 7, 2007), <https://www.state.gov/wp-content/uploads/2019/05/44-Bellinger-letter-on-enhanced-interrogation-techniques.pdf> [https://perma.cc/EZ5Z-Z5XT].

226. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen. (Jan. 15, 2009), <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memostatusolcopinions01152009.pdf> [https://perma.cc/83TJ-EHL6].



legally do.”<sup>227</sup> Of course, after *Newsweek* had written about it, many more people had heard of the office. One effect of the publicity around the torture memos and the withdrawal of other memos issued by the Bush administration’s OLC after the 9/11 attacks was a waning of the office’s influence. The scandal undermined confidence in the capacity of OLC to play an objective and constraining role. The OLC worked to regain trust by outlining best practices during the Bush administration in 2005 and the Obama administration in 2010,<sup>228</sup> but the damage to the office’s reputation would prove difficult to cure.<sup>229</sup>

Throughout the post-war period, the response to breakdowns in the national security legal process—and the unlawful behavior that resulted—was almost always to insist on better *internal* processes. After the Iran-Contra scandal brought to light illegal behavior by the NSC, the response was to create a new legal adviser position and, later, a lawyers’ working group to review covert actions. And when the Bush administration was found to have authorized unlawful action, the response was again to seek internal process improvements—in particular, the administration withdrew opinions and later adopted a commitment to reviewing actions under a “best view of the law” standard.

Such internal reforms are good and wise. But it is far from clear that they are adequate to protect the rule of law—particularly given the unique context of national security lawyering, which effectively guarantees little to no external oversight. Good internal process, we have learned, is not a guarantee of lawful decisions. And even excellent internal process can be easily, instantly, and quietly reversed unless legally mandated. The Article turns next, then, to the Obama administration—which is arguably the height of the executive branch’s internal commitment to the rule of law.

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227. Daniel Klaidman, *Palace Revolt*, NEWSWEEK (Feb. 5, 2006, 7:00 PM), <https://www.newsweek.com/palace-revolt-113407> [<https://perma.cc/NT37-MGLL>]. While OLC’s opinions are treated as binding as a matter of convention, whether they in fact are binding is a matter of some dispute. See discussion *infra* note 306.

228. 2010 Best Practices Memo, *supra* note 13; 2005 Best Practices Memo, *supra* note 13.

229. Indeed, after the revelation of the torture memos, only two Senate-confirmed assistant attorney generals have been appointed to lead the office—Virginia Seitz, who served from 2011 to 2013, and Steven A. Engle, who was sworn in on November 13, 2017. See Tony Mauro, *Virginia Seitz Leaves DOJ Office of Legal Counsel*, LEGAL TIMES (Feb. 24, 2014), LEXIS; *Meet the Assistant Attorney General*, U.S. DEP’T JUST. OFF. LEGAL COUNS. (Jan. 11, 2018), <https://www.justice.gov/olc/staff-profile/meet-assistant-attorney-general> [<https://perma.cc/3DKY-76ES>]. Every other nominee has been spurned by the Senate. See Charlie Savage, *Obama Nominee to Legal Office Withdraws*, N.Y. TIMES (Apr. 9, 2010), <https://www.nytimes.com/2010/04/10/us/politics/10johnsen.html> [<https://perma.cc/ZPA7-CPRX>]. The frequent absence of a presidentially nominated, Senate-confirmed leader contributed to the diminishment of OLC’s role within the executive branch.

### III. THE LAWYERS GROUP ERA

This brings us to the period that preceded the Trump administration, what I will call the “Lawyers Group Era.” During this period, the Lawyers Group, which had existed since the beginning of the Clinton administration, became the central legal decisionmaking institution for national security law matters.

There were several reasons the Lawyers Group became more central under Obama than it had ever been before. To begin with, President Obama was himself a lawyer—indeed, a constitutional lawyer—and he was personally devoted to ensuring that his administration acted in ways that were consistent with the law. During the campaign, he had expressed a clear commitment to legal values, famously stating that, “[t]he President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation.”<sup>230</sup> The Obama administration also immediately took steps to repudiate what many members of the new administration regarded as a lawless Bush administration. Two days after entering office, President Obama issued Executive Order 13491, which repudiated and revoked all legal guidance on interrogation between September 11, 2001, and January 20, 2009.<sup>231</sup> On the same day, he issued Executive Order 13492 ordering the closure of the Guantanamo Bay detention camp in Cuba and an individual review of all Guantanamo detainees and Executive Order 13493 ordering the identification of alternative venues for the detainees.<sup>232</sup>

The Lawyers Group also became more central than it had been at least in part because the Obama administration was faced with numerous difficult foreign policy issues. Indeed, as Stephen Preston put it:

On day 1 of the Obama administration, we had an order of magnitude more intense and broad set of operational and policy issues than we had ever faced during the relatively peaceful period of the Clinton administration . . . . We thought we were busy at the beginning of the Obama Administration. But then you get the Arab Spring, civil war in

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230. Charlie Savage, *Barack Obama’s Q&A*, BOS. GLOBE (Dec. 20, 2007), <http://archive.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA> [<https://perma.cc/JZ4G-AKZX>].

231. Exec. Order No. 13,491, 3 C.F.R. 13,491 (2009).

232. These two executive orders would prove utterly ineffectual due to congressional opposition, and Obama would leave office eight years later with Guantanamo Bay still holding law of war detainees, though admittedly many fewer than when he entered office. Spencer Ackerman, *Obama to Leave Office With More than 40 Detainees Still in Guantánamo Bay*, GUARDIAN (Jan. 18, 2017), <https://www.theguardian.com/us-news/2017/jan/18/guantanamo-bay-detainees-obama-final-transfers> [<https://perma.cc/2JYV-9JU7>].

Syria and the emergence of ISIS, you get the Russian invasion of Crimea. That as much of anything drove the need to meet more frequently.<sup>233</sup>

It also meant that the lawyers involved were more senior than they had been under Clinton. In the Clinton administration, Lawyers Group meetings were often attended by more junior lawyers. Under Obama, the most senior lawyers regularly took part in the meetings.

The Lawyers Group Era merits in depth review for several reasons. First, it represents the most significant focus on interagency legal process of any administration to date. Commitment to law was evidenced from the president on down. Not only were the lawyers of the Lawyers Group more central in this administration than in any previous modern administration, but many of the national security policy officials were themselves lawyers, including, of course, the president himself. A careful examination of this period in national security lawyering therefore allows us to evaluate whether belief in and commitment to law are sufficient to ensure rule of law in national security. Second, with the Trump administration about to come to a close and the Biden administration about to begin, it is an important moment to reflect on how best to design the national security lawyering apparatus. Though there is yet to be a full account of lawyering in the Trump administration, there are many signs that the Lawyers Group system has been, if not entirely dismantled, frequently ignored or bypassed. As the Biden administration takes office, the natural model to look to for those seeking to promote law will be the Lawyers Group Era. It is worth casting a critical eye, then, on this model.<sup>234</sup>

### A. The Lawyers Group During the Obama Administration

During the Obama administration, the working group of lawyers first created by NSD 79 in 1993 primarily to assist the NSC in reviewing covert action joined with the informal gathering of the top lawyers at the agencies most involved in national security matters to create a single entity generally referred to as “the Lawyers Group.” Regular participants included the general counsel of the Department of Defense, the legal adviser to the chairman of the Joint Chiefs of Staff, the legal adviser of the Department of State, the NSC legal adviser and deputy

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233. Preston Interview, *supra* note 179.

234. For a critical examination of the legal rationales developed for the targeted killing program in the Obama administration, see JAMEEL JAFFER, *THE DRONE MEMOS* (2016). Charlie Savage’s *Power Wars* also explores the ways in which the Obama administration lawyers developed national security legal rationales. CHARLIE SAVAGE, *POWER WARS: INSIDE OBAMA’S POST-9/11 PRESIDENCY* (2015).

counsel to the president, and the assistant attorney general in charge of the Department of Justice's OLC.<sup>235</sup> In addition, the group included the general counsel of the CIA (who had previously been intermittently included in the gathering of senior lawyers), the general counsel of the Office of the Director of National Intelligence (an office first created in 2004 based on a recommendation in a report issued by the 9/11 Commission), and lawyers from other agencies, such as Treasury or Homeland Security, as needed. Each of the lawyers in the group led a staff of lawyers—ranging from about 10,000 lawyers in the Department of Defense (roughly eighty of whom work in the general counsel's office) to just a handful of lawyers in the NSC's legal adviser's office.<sup>236</sup>

There was reluctance among the Obama administration lawyers to rely too heavily on the OLC to review national security legal matters. While they still called on OLC on occasion, the new president's staff decided to emphasize interagency collaboration on national security lawyering, making the closed and controversial decisions of the Bush administration much less likely. They placed the Lawyers Group at the center of the process; during the Obama administration, hardly any important novel national security law issue was decided without going through this group of lawyers.

Run of the mill, day-to-day decisions were made at the staff attorney level within the agencies through conversations and exchanges of drafts between lawyers and their policy clients. For instance, a lawyer working in the Office of the General Counsel in the Department of Defense whose portfolio included legal issues surrounding Syria would speak to lawyers in the department's Office of Middle East Policy (and specifically the Syria desk) at least daily. At those meetings, attorneys would offer advice regarding the legality of proposed courses of action. In many cases, proposed actions were routine and therefore legal issues were well settled and did not require additional legal input. In other cases, a proposed action might be novel in some respect, but the legal issues well settled—in which case it would not be elevated to the level of the general counsel at the department, let alone the full Lawyers Group.

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235. This reflects practice in 2014–2015, when the author served as Special Counsel to the General Counsel at the U.S. Department of Defense.

236. There is almost no academic writing about the Lawyers Group. Much of the account in this Subpart is based on firsthand experiences serving as Special Counsel for National Security Law for the General Counsel at the U.S. Department of Defense from 2014–2015, as well as interviews with current and former participants in the Lawyers Group process. One of the rare inside views of national security lawyering in print is James E. Baker's *In the Common Defense*. BAKER, *supra* note 196. It describes national security lawyering but does not specifically describe the Lawyers Group. Another recent exception is Charlie Savage's *Power Wars*, *supra* note 79, but the book is written from the perspective of a journalist, rather than a participant in the process.

When policymakers sought to pursue a course of action that raised novel legal issues, the Lawyers Group was almost always consulted. There were two primary paths by which a legal issue reached the Lawyers Group. First, lawyers from the agency with the lead on the issue could bring a challenging novel legal issue to the Lawyers Group for consideration. Second, the matter could come to several members of the Lawyers Group at once, as they each worked to provide advice to their policy clients engaged in an interagency policymaking process coordinated through the NSC. National security policy decisions began with the Deputies Committee. If approved by the deputies, the matter moved to a meeting of the principals (the Principals Committee) and, if approved, then the NSC, chaired by the president.<sup>237</sup> The lawyering was frequently “synced up,” or coordinated, with these meetings, a process that began under the leadership of NSC Legal Adviser Alan Kreczko in the Clinton administration.

At each stage, read ahead papers were circulated within the agencies (sometimes mere hours before the meetings), and lawyers within the agencies worked to advise their clients on the available legal options while obtaining information about their clients’ policy preferences. The Lawyers Group coordinated legal advice across agencies, though the extent of the coordination depended on the novelty and urgency of the issue, as well as whether the legal questions had surfaced early enough for lawyers to consult with one another in advance of the meetings. Significant issues were generally the subject of multiple meetings, during which policy options were refined. As policy positions matured, so too did the legal advice. By the time an issue reached the NSC, the Lawyers Group usually would have developed an interagency position on the legality of the

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237. The National Security Act of 1947 established the NSC “to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security.” National Security Act of 1947, Pub. L. No. 235, ch. 343, § 101(a), 61 Stat. 495, 496. The NSC consists of the president, the vice president, the secretary of state, and the secretary of defense as statutorily designated members, with the chairman of the Joint Chiefs of Staff and the director of national intelligence as statutorily designated advisers. Others may be included as the president may designate, a group that has varied from administration to administration. Under President Obama, the secretary of the treasury and the adviser to the president for national security affairs were members, and the chief of staff, White House counsel, adviser to the president for economic policy, attorney general, and director of the office of personnel management had a standing invitation to attend. Others were frequently invited, including the secretary of homeland security and the U.S. representative before the United Nations. The Principals Committee included members of the NSC (or their designates) minus the president and usually minus the vice president and was chaired by the adviser to the president for national security affairs. The Deputies Committee included deputy secretary-level officials from those same departments and agencies and was chaired by the deputy adviser to the president for national security affairs or the adviser to the president for homeland security and counterterrorism.

proposed course of action and, where there were concerns, suggestions for how to meet them while still pursuing the principals' policy objectives.

In contrast with James Baker's position when he was NSC legal adviser in the Clinton administration, the Lawyers Group during the Obama administration sometimes addressed issues of pure legal policy. For example, when the U.S. government was due to report before a human rights body such as the Committee Against Torture, the Lawyers Group coordinated the legal policy positions to be announced.<sup>238</sup> Because the State Department led the delegation and oversaw the written report that preceded the oral hearing, the lawyers in the Legal Adviser's Office at the Department of State began by putting together position papers, talking points, and draft question and answer sheets (Q&As) on issues that it expected would come up at the session. On each topic that was expected to be raised, the line attorneys that worked on the issue drafted a position. Once the State Department settled on a proposed position, it sought input from other lawyers at agencies with equities at stake in the matter, eventually including the entire Lawyers Group—a process that led to a certain degree of infighting that sometimes spilled out into the open.<sup>239</sup>

Over the course of the Obama administration, the Lawyers Group collaborated more and more through Secure Video Teleconferencing (SVTC) rather than in person. Overall, meetings through SVTC were much more common than in earlier administrations—probably because the technology was more accessible and the group desired the regular, ongoing collaboration made easier by the video technology.<sup>240</sup> SVTC was commonly used to air issues and

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238. See JUST SEC., FULL TRANSCRIPT: US THIRD PERIODIC REPORT TO UN COMMITTEE AGAINST TORTURE (2014), <https://www.justsecurity.org/17628/full-transcript-united-states-appearance-committee-convention-torture> [<https://perma.cc/G7CB-3QX6>]. The *New York Times* reported on some of this interagency discussion. See Charlie Savage, *Obama Could Reaffirm a Bush-Era Reading of a Treaty on Torture*, N.Y. TIMES (Oct. 18, 2014), <https://www.nytimes.com/2014/10/19/us/politics/obama-could-reaffirm-a-bush-era-reading-of-a-treaty-on-torture.html> [<https://perma.cc/RWE3-KLQ7>].

239. See Savage, *supra* note 238.

240. Meetings that took place by video also allowed for multiple participants from each agency. The Situation Room at the White House—the common meeting spot for in-person Lawyers Group meetings during the Obama administration—holds about thirty people, just under half at the table and the rest in rows along the wall. An in-person meeting thus limits each agency to two to three lawyers each. By contrast, Secure Video Teleconferencing (SVTC) allows each agency to bring along as many participants as they can fit in their secure video facility—the Department of Defense alone could bring as many as thirty lawyers to the meeting (though it more typically brought closer to six to ten). Another advantage of SVTC (or disadvantage, depending on your perspective) is that the camera for SVTC rarely covers the entire room. As a result, participants could sit off-camera, listening to the exchange. The system also allowed intradepartment chatter, as the microphone is usually turned off for all but those speaking to

begin the process of developing a consensus in advance of producing a written product. In addition, the Lawyers Group collaborated on written documents, including talking points and Q&As, via secure email (usually on the “high side”—Top Secret/Special Compartmented Information (TS/SCI)).

Over time, the lawyers developed a practice of creating a brief document to summarize their shared views on a matter that was going to be addressed in an upcoming NSC Deputies Committee or Principles Committee meeting. These were often called “non-papers” to emphasize their informality.<sup>241</sup> The goal of those involved was to create a top-line summary of the key points of agreement among the lawyers. The documents were rarely more than a few pages and contained few, if any, footnotes. They were also unsigned, often undated, and bore little resemblance to a formal legal opinion. These “non-papers” allowed the NSC legal adviser to deliver the consensus view of the Lawyers Group at NSC meetings with great confidence that it reflected the shared views of the group. The informality of the documents had the added benefit of potentially insulating them from FOIA requests.

This insulation was a particular advantage in light of the greater awareness of the OLC sparked by the torture memo scandal. Indeed, as the Obama administration continued, it became increasingly clear that its practice of writing opinions made them vulnerable to disclosure. In 2011, for example, Caroline Krass, then acting assistant attorney general for the OLC, wrote an opinion on legal issues surrounding the U.S. intervention into Libya. Under public pressure, it was soon released.<sup>242</sup> That opinion appeared to assume that the intervention involved the introduction of U.S. forces “into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”<sup>243</sup> This

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the entire group. Crosstalk and commentary during these muted periods can be opportunities to exchange information and comment about the proceedings as they are ongoing.

241. The term non-paper may have been borrowed from the practice in international relations of preparing an “aide-mémoire,” a proposed agreement or negotiating text that is circulated informally among delegations for discussion. Such documents are often referred to as non-papers and often have no identified source, title, or attribution. *See, e.g.*, ANTHONY TEASDALE & TIMOTHY BAINBRIDGE, *THE PENGUIN COMPANION TO EUROPEAN UNION* (4th ed. 2012) (“A non-paper is an informal document, usually without explicit attribution, put forward in closed negotiations within EU institutions....”). In international practice, however, such documents facilitate the negotiation of permanent, usually public, documents. In the Lawyers Group context, a non-paper is often the form in which the final, usually classified, legal advice is delivered to the NSC.

242. *Auth. To Use Mil. Force in Libya*, 35 Op. O.L.C. 1 (2011).

243. *See id.* at 3–5 (describing steps taken “[c]onsistent with” reporting requirement of the War Powers Resolution, which requires the President report to Congress within 48 hours of taking certain actions, including introduction of U.S. forces “into hostilities or into situations where

generated some embarrassment when the administration later concluded that the intervention did not constitute “hostilities” under the Resolution.<sup>244</sup> The *New York Times* later reported about what it claimed was an internal dispute between the Department of Justice, Department of Defense, and the OLC on the matter, further adding to the embarrassment.<sup>245</sup>

Another OLC opinion written that year was released under court order. After the United States killed alleged American terrorist Anwar al-Aulaqi, the *New York Times* and ACLU filed a FOIA request for the memo drafted by the office on the legality of targeting an American citizen abroad.<sup>246</sup> The Justice Department refused to release the memo, prompting the *New York Times* and ACLU to file suit, which they won. On appeal, the Second Circuit affirmed, rejecting the Justice Department’s claims that the memo was exempt from FOIA under 5 U.S.C. § 552(b)(1), which exempts national security matters from disclosure, and § 552(b)(5), which protects agency records that are predecisional and deliberative.<sup>247</sup> After losing in court, OLC released the memo, with classified information redacted.<sup>248</sup>

Although it is impossible to document with certainty the impact of the forced disclosure of the al-Aulaqi memo and other memos on OLC opinions, a possible—indeed likely—effect was a greater wariness among executive agencies to request formal written opinions, as well as a similar reluctance on the part of the OLC to write them.<sup>249</sup> Ironically, the desire for transparency and openness may

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imminent involvement in hostilities in clearly indicated by the circumstances”); *see also* War Powers Resolution, 50 U.S.C. § 1543(a).

244. *See Libya and War Powers: Hearing Before the S. Comm. on Foreign Affs.*, 112th Cong. (2011) (testimony of Harold Koh, Legal Advisor, U.S. Dep’t of State), <http://www.law.uh.edu/faculty/eberman/NSL/HaroldKohTestimony-Libya-and-War-Powers-June-28-2011.pdf> [<https://perma.cc/EX6K-2TN6>].

245. Savage, *supra* note 84; *see also* SAVAGE, *supra* note 79, at 645–49.

246. Benjamin Weiser, *U.S. Ordered to Release Memo in Awlaki Killing*, N.Y. TIMES (Apr. 21, 2014), <https://www.nytimes.com/2014/04/22/nyregion/panel-orders-release-of-document-in-targeted-killing-of-anwar-al-awlaki.html> [<https://perma.cc/EBK2-HF9G>].

247. *N.Y. Times Co. v. U.S. Dep’t of Just.*, 752 F.3d 123, 127, 144 (2d Cir. 2014).

248. *See* Memorandum from Off. of the Assistant Att’y Gen., to the U.S. Att’y Gen., Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Legal Operations Against Shaykh Anwar al-Aulaqi (July 16, 2010), [https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/06/23/National-Security/Graphics/memodrones.pdf?tid=a\\_inl\\_manual](https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/06/23/National-Security/Graphics/memodrones.pdf?tid=a_inl_manual) [<https://perma.cc/A9V5-RRVE>].

249. The critique offered here is very different from the critique offered by Bruce Ackerman. Ackerman argues that the OLC generates “a legal product that looks like a judicial opinion.” ACKERMAN, *supra* note 11, at 99. But those appearances are deceiving, he explains, because it is not, in fact, an objective decisionmaker but instead a partisan of executive power and authority. *See id.* He acknowledges that this only works if the OLC approves the president’s initiative, which can lead to forum shopping, particularly a turn toward the White House counsel’s office. *See id.* at 100. But Ackerman does not notice the shifting practice in recent



have helped push legal decisionmaking into more informal modes that were not as susceptible to similar disclosure. Indeed, in arguing against disclosure, the Department of Justice cited both attorney-client privilege and the deliberative process privilege, claiming that disclosure of its opinion would chill agencies from requesting formal written advice.<sup>250</sup> That may have proven prescient.

### B. Drawbacks of the Lawyers Group Era

The Obama administration's decision to rely heavily on the Lawyers Group was meant to counteract many of the problems that plagued national security decisionmaking in the prior administration. The Obama administration designed an institutional structure that required interagency collaboration that would, it was hoped, prevent the events that led to the torture memos from ever happening again. All decisions would be vetted by the Lawyers Group, rather than by a small number of handpicked lawyers. And decisions would, when possible, be made with the consensus of all the members of the group. As Tom Donilon, who served as national security adviser in the Obama administration for several years and was himself a lawyer, put it in remarks to reporter Charlie Savage, "[t]here were real, severe process failures in the Bush administration that led to poor decisions, in my opinion. I was determined to make it better in this administration. Number one, as the national security adviser, as the deputy, I insisted on bringing the consideration of legal issues into the [NSC] process, which it has not been during the Bush administration."<sup>251</sup> Although the goals that led to the reinvigoration of the Lawyers Group are deeply admirable, the decision had downsides that are not often appreciated.

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years away from OLC opinions and toward more informal Lawyers Group decisionmaking. Indeed, like nearly everyone else who writes on national security lawyering, he does not mention the Lawyers Group.

250. Reply Brief for Defendants-Appellees-Cross-Appellants at 10–15, *ACLU v. U.S. Dep't of Just.*, 844 F.3d 126 (2d Cir. 2016) (No. 15-2956) (“[U]nder the ACLU’s theory, the government could no longer have confidence that attorney-client communications and deliberations regarding such decisions will remain confidential, as virtually any legal advice and analysis concerning the authorities and concepts discussed in the DOJ White Paper and OLC-DOD Memorandum could be subject to compelled disclosure unless they were classified.”). This chilling effect may be more likely in some contexts than in others. Where executive branch officials want a shield from future criminal prosecution, for example, they will still request an OLC memo even if they fear it could ultimately be disclosed. More generally, officials may be more likely to seek an OLC memo when they worry the action might be challenged in court, as the memo provides an indication of what the Justice Department will be willing to defend.

251. SAVAGE, *supra* note 79, at 65.

## 1. Secrecy

Due to the classified nature of its work, deliberations of the Lawyers Group take place almost entirely in secret. The conversations are held in secure rooms and exchanges of paper largely take place on computer systems that require security clearances to access. Exchange of information between these systems and unclassified systems is extremely cumbersome—requiring an elaborate reclassification and transfer process. Many of the documents are themselves classified, meaning that only a closed circle of government employees can legally view them.<sup>252</sup> The only cases where deliberations sometimes take place on unclassified systems are instances where the group discusses talking points, Q&A documents, speeches, or material intended for a congressional hearing—materials that are, in other words, intended for imminent public release.

Obama-era Lawyers Group papers were never released to the public. Indeed, when Lawyers Group deliberations addressed covert operations, as they sometimes did, they were expressly intended never to be acknowledged, much less openly addressed. The conclusions found their way into the public eye through a diverse set of channels, but only rarely in a coherent legal narrative. The Lawyers Group decisions informed answers given by White House and prominent agency officials at press conferences, were the basis for opening statements and answers to questions at congressional hearings, and informed speeches by government officials. But these methods of disclosure had some notable deficiencies: First, they provided legal rationale in bits and pieces. Second, they generally provided the legal conclusion but little or none of the legal reasoning necessary to arrive at that conclusion.

These features, in turn, gave rise to a small industry of legal commentators who are experts at reading the clues offered by the administration in an effort to piece together the legal rationale behind administration decisions. These commentators write for blogs, most prominently the (then) right-of-center *Lawfare*, which had become essential reading for national security experts hoping to divine the reasoning behind critical decisions, and its left-of-center counterpart, *Just Security*. Like expert trackers who can look at the ashes of a fire, broken twigs, and trampled grass and know who was there and for how long, these

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252. Ashley Deeks writes of the virtues, and shortcomings, of what she calls “secret reason-giving.” She cites as one example reports made by the Lawyers Group. See Ashley S. Deeks, *Secret Reason-Giving*, 129 *YALE L.J.* 612, 678 n.243 (2020) (citing an earlier draft of this Article). Publicity is generally understood to be essential to the rule of law, thus making secret reason-giving over law more problematic than secret reason-giving over policy, particularly in situations where the secret reasons are not subject to any external review.

commentators can look at answers given at press briefings, statements made at hearings, and administration speeches to produce a picture of the legal rationale justifying administration decisions. (Their former colleagues and friends still in government sometimes offered more overt clues.) But just like trackers, they can be thrown off the scent or deliberately led astray. And while they can figure out part of the picture, inevitably there is much that is impossible to know without more information.

The Obama administration occasionally gave a fuller glimpse into the legal reasoning behind its decisions through significant speeches that laid out the conclusions of the Lawyers Group in greater detail. There were nine such speeches in the Obama administration—beginning with State Department Legal Adviser Harold Koh’s speech at the American Society of International Law in 2010, which defended the legality of drone strikes, and ending with State Department Legal Adviser Brian Egan’s speech in November 2016 on international law as it applies in cyberspace.<sup>253</sup> But even though these speeches provided a more complete narrative regarding the legal positions of the administration, they generally read—as one might expect—like speeches, not legal opinions or briefs. They were, moreover, ruthlessly vetted by multiple agencies, often leaving little of real, new legal significance. It was notable if a speech provided greater clarity on even one or two new points.

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253. Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Speech at Annual Meeting of the American Society of International Law (Mar. 25, 2010), <https://2009-2017.state.gov/s/l/releases/remarks/139119.htm> [<https://perma.cc/N42X-GJ2J>]; Brian Egan, Legal Adviser, U.S. Dep’t of State, Remarks on International Law and Stability in Cyberspace (Nov. 10, 2016), <https://www.law.berkeley.edu/wp-content/uploads/2016/12/egan-talk-transcript-111016.pdf> [<https://perma.cc/7RVT-BNX7>]. In between, there were speeches by Assistant to the President for Homeland Security and Counterterrorism John Brennan at Harvard in 2011, Attorney General Eric Holder at Northwestern in March 2012, Department of Defense General Counsel Jeh Johnson at Yale and Oxford, both in 2012, Stephen Preston as CIA General Counsel at Harvard in 2012 and as DoD General Counsel at the American Society of International Law (ASIL) in 2015, and another by Brian Egan at ASIL in 2016. Brian Egan, *International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations*, 92 INT’L L. STUD. 235 (2016); John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, *Strengthening Our Security by Adhering to Our Values and Laws* (Sept. 16, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> [<https://perma.cc/T6WY-ZZ4H>]; Eric Holder, U.S. Attorney Gen., Remarks at Northwestern University School of Law (Mar. 5, 2012), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law> [<https://perma.cc/5ZW8-QWUV>]; Johnson, *supra* note 47; Jeh Charles Johnson, Gen. Couns., U.S. Dep’t of Def., *The Conflict Against Al Qaeda and Its Affiliates: How Will It End?* (Nov. 30, 2012), <https://www.lawfareblog.com/jeh-johnson-speech-oxford-union> [<https://perma.cc/HQ58-RZ3Z>]; Stephen W. Preston, Gen. Counsel, Cent. Intelligence Agency, Remarks at Harvard Law School (Apr. 10, 2012), *reprinted in* 6 J. NAT’L SEC. L. & POL’Y 1 (2012); Preston, *supra* note 60.

This form of secrecy and incomplete disclosure of legal reasoning produces an insular legal conversation, which, over time, can lead to internal government positions that are far removed from the accepted public understandings of important legal issues. In each instance that the Lawyers Group grappled with a legal issue, it relied on earlier decisions made by the group. Those earlier decisions, in turn, were almost always made under similarly insular conditions. Whereas the initial decisions may have pressed just a bit beyond existing legal doctrine, the next decision may press a bit beyond that decision, and the next further than that. In this way, the analysis can veer further and further from what the public and legal scholars understand to be the accepted legal rule. There is, then, a kind of insular common law in national security lawyering that is rarely known or understood by outsiders and is not subject to external review or correction.<sup>254</sup> As the isolated islands of the Galapagos produced unique varieties of birds over centuries of isolation, so too does the isolated ecosystem of U.S. executive branch national security lawyering produce its own legal understandings that bear less and less resemblance to the rules from which they originally derived.<sup>255</sup> Within the world they inhabit, these rules remain widely accepted and unquestioned even if they would have difficulty surviving scrutiny if exposed to public inspection.

## 2. The Paradox of a Consensus-Driven Process

Given how many elite lawyers are involved—many of them former Supreme Court clerks, elite law firm partners, and well-known litigators—the written product of the Lawyers Group in the Obama administration might initially strike one as surprising. The typical Lawyers Group paper was a few single-spaced pages

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254. See generally Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001) (applying the theory of path dependence to law and showing that it can help explain otherwise inexplicable legal outcomes).
255. One often-overlooked cost of the secrecy and insularity of the legal debates and discussions in national security lawyering is the resulting mismatch between the U.S. government's views of international law and those of experts and other states. This can sometimes make it difficult for the United States to coordinate and collaborate with other states. There have been some efforts to overcome this problem with direct discussions between the legal advisers of a small number of likeminded states, but these discussions are limited in scope. See, e.g., Elizabeth Wilmschurst & Michael Wood, *Self-Defense Against Nonstate Actors: Reflections on the "Bethlehem Principles"*, 107 AM. J. INT'L L. 390 (2013) ("While these principles 'are published under [the author's] responsibility alone,' they have 'nonetheless been informed by detailed discussions over recent years with foreign ministry, defense ministry, and military legal advisers from a number of states who have operational experience in these matters.'" (alteration in original) (quoting Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 769, 773 (2012))).

long, contained just a handful of legal citations, and outlined the key conclusions on what is often an extremely difficult and important legal question.

It is important to bear in mind that the “non-paper” was not meant as a formal legal memo. It was, instead, a summary of the key conclusions of the participants in the Lawyers Group process. The aim of the process is consensus—only rarely were agencies overruled. Gaining consent from all the agencies and their many lawyers can be a herculean task. The documents thus tended to focus on the so called “top line points”—points on which agreement can be secured across agencies with diverse interests and viewpoints. Avoiding details made it possible to avoid disagreements on matters that were nonessential. But it could also mean that legal conclusions were not firmly grounded—and different agencies may have had different reasons for arriving at similar conclusions.

As the Obama administration matured, the Lawyers Group increasingly operated on a consensus basis. That can be an important check on the legal process: In theory, a single agency has the capacity to slow down or even halt the development of a legal position if it regards it as problematic. Indeed, this emphasis on consensus can provide a significant constraint on unlawful behavior. It can prevent a rogue lawyer from acting independently—under a consensus rule, no lawyer can operate independently. Any member, moreover, can scuttle a decision by objecting.

But the emphasis on consensus can have an unexpected effect as well: It can lead to the suppression of dissent. Where each member of the group knows that the group makes decisions on a consensus basis and where failure to make a decision is not an option, a member who has concerns may be less likely to raise them.<sup>256</sup> Consensus thus may, unexpectedly, cause lawyers not to raise concerns, as no member wants to be held responsible for undermining the team effort by preventing resolution of a legal issue that must be resolved. As a result, concerns about the legal reasoning may not be aired, or may be raised only very tentatively and dropped quickly, to avoid placing the group in a bind. Of course, the

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256. This is not quite the same thing as the classic “groupthink” problem in foreign policy, but it is a close cousin. See IRVING L. JANIS, *VICTIMS OF GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES* (2d ed. 1972). There is a considerable literature on the importance of dissent to effective group decisionmaking. See, e.g., Jolanda Jetten & Matthew J. Hornsey, *Deviance and Dissent in Groups*, 65 *ANN. REV. PSYCH.* 461 (2014); Carsten K. W. De Dreu & Michael A. West, *Minority Dissent and Team Innovation: The Importance of Participation in Decision Making*, 86 *J. APPLIED PSYCH.* 1191 (2001); Robert S. Dooley & Gerald E. Fryxell, *Attaining Decision Quality and Commitment From Dissent: The Moderating Effects of Loyalty and Competence in Strategic Decision-Making Teams*, 42 *ACAD. MGMT. J.* 389 (1999); Stefan Schulz-Hardt, Marc Jochims, & Dieter Frey, *Productive Conflict in Group Decision Making: Genuine and Contrived Dissent as Strategies to Counteract Biased Information Seeking*, 88 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 563 (2002).

consensus rule of the late Obama administration was merely custom—as is the entire Lawyers Group process—but it nonetheless exerted strong social pressure not to raise difficult legal concerns. Because the Lawyers Group operated on consensus during this period, there was little need to call in the OLC to referee a dispute between agencies. That, in turn, meant fewer formal OLC opinions and more informal Lawyers Group “non-papers.”

The Lawyers Group papers in the Lawyers Group Era were not only short and lacking in detail, but they were also nearly always unsigned and often undated. There is no “to” or “from”; instead, there is usually just a simple subject heading at the top of the page. The first footnote often indicated that lawyers from the agencies that make up the Lawyers Group have concurred in the opinion, but without naming names. Again, all of this reflects the purpose of the document, which is to serve as a summary of legal views from which the NSC legal adviser can speak during NSC meetings. The reluctance to formalize the “non-paper,” or to identify those who have concurred in it by name, may also be an understandable response to the disclosure of earlier national security opinions and the consequent reluctance of current administration lawyers to be identified with particular national security legal decisions. This anonymity, however, has the effect of divesting any lawyer involved of individualized responsibility for the document and its content.

### 3. The Legal Standard

The OLC’s “best practices” memo states that the office:

[M]ust provide advice based on its *best understanding of what the law requires*—not simply an advocate’s defense of the contemplated action or position proposed by an agency or the Administration. Thus, in rendering legal advice, OLC seeks to provide an accurate and honest appraisal of applicable law, even if that appraisal will constrain the Administration’s or an agency’s pursuit of desired practices or policy objectives.<sup>257</sup>

This legal standard may seem so obvious that it should go without saying, but history suggests otherwise. The standard was adopted in response to what is widely agreed to have been a failure of the OLC to meet this standard in its infamous torture memos. The express elaboration of the legal standard in the best practices memo was done precisely to avoid such failures at the OLC in the future

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257. Barron, *supra* note 13, at 1 (emphasis added).

and to restore some of the confidence that had been lost after the disclosure of what many regarded as poorly reasoned legal opinions.

The Obama-era Lawyers Group never developed a formal “best practices” akin to those issued by the OLC in part because it operated more informally; it did not provide formal legal opinions of the kind contemplated by the OLC guidelines. Hence, the shift from reliance on the OLC’s formal opinions to reliance on more informal Lawyers Group determinations had the effect of moving decisionmaking on contested national security issues from a forum in which there is a formal obligation to arrive at the “best understanding of what the law requires” to one where there is not.

Determining the best view of the law requires a good faith effort to determine what an impartial decisionmaker would consider the correct interpretation of the law, all things considered—that is, an effort to predict what a reasonable, impartial judge would say about the law. The OLC is structured to render court-like judgments of the law. It even sometimes mirrors the legal process, seeking written and oral input from agencies with contrasting views of the legal issues. That process is far from perfect, of course. It is rightly charged with consistently arriving at positions that expand the outer boundaries of presidential authority. The point here is not that the OLC process is ideal, but that the Lawyers Group process lacks even the features found in the OLC process that might encourage consideration of alternative views.

In part because it operated on a consensus model, the Obama-era Lawyers Group did not always fully air both sides of an argument in its final product. Each member of the group was responsible to the head of an agency that was, in many cases, seeking to take the very action under legal review. Though the legal standard is rarely articulated, this could lead lawyers to ask not what is the “best” reading of the law, but whether an argument favoring a desired course of action was, as it is often put, “legally available.” The gap between the two legal standards can be significant: A legally available argument is an argument a legal advocate might make on behalf of a client. Lawyers often make legal arguments that they do not necessarily regard as the best view of the law, but that they consider plausible.

The very secrecy and insularity of the national security lawyering process renders it difficult to demonstrate the way in which this legal standard operates in practice and the influence it has on the outcomes of legal inquiries. An extraordinary event in the United Kingdom disclosed in the 2016 Chilcot Report, however, opens a unique window into how legal standards in the national security arena can have a transformative impact.

In 2009, Prime Minister Gordon Brown announced an inquiry into the United Kingdom's role in the Iraq War beginning in 2002.<sup>258</sup> After seven years of investigation, the inquiry, led by Sir John Chilcot, finally issued its extensive and unprecedented report. The report, known colloquially as the Chilcot Report, offered an unusual inside look into the United Kingdom's decision to go to war. The report and the evidence accompanying it reveal the importance of the legal standard applied to the legal authorities and the role of the United States in persuading the United Kingdom that a low legal standard was not only appropriate, but also had been met.

Lord Peter Goldsmith, the attorney general of the United Kingdom at the time, was responsible for determining whether the planned invasion of Iraq was legal. In more than 200 pages of testimony before the committee conducting the inquiry,<sup>259</sup> Lord Goldsmith made clear that for months he maintained that international law did not permit an invasion without a new Security Council resolution. He was joined in this view by Sir Michael Wood, then the Foreign and Commonwealth Office legal adviser (the equivalent of the U.S. State Department legal adviser), and Elizabeth Wilmshurst, his colleague in that office. On January 30, 2003, he wrote to Prime Minister Blair that “notwithstanding the additional arguments put to me since our last discussion, I remain of the view that the correct legal interpretation of resolution 1441 is that it does not authorise the use of military force without a further determination by the Security Council.”<sup>260</sup> Foreign Secretary Jack Straw, upset by Wood's advice that a second resolution was legally required, refused to accept it. Goldsmith responded by admonishing Straw:

It is important for the Government that its lawyers give advice which they honestly consider to be correct: that is what they are there for . . . . To do otherwise would undermine their function as a legal adviser in giving independent, objective and impartial advice . . . . [I]f a Government legal adviser genuinely believes that a course of action would be unlawful, then it is his or her right and duty to say so.<sup>261</sup>

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258. Nicholas Watt, *Gordon Brown Ready to Announce Iraq War Inquiry*, GUARDIAN (June 14, 2009, 8:04 PM), <https://amp.theguardian.com/politics/2009/jun/14/iraq-war-inquiry-gordon-brown> [https://perma.cc/HA2X-G4C8].

259. Testimony of Lord Goldsmith Before the Iraq Inquiry (Jan. 27, 2010), <http://www.iraqinquiry.org.uk/media/235686/2010-01-27-transcript-goldsmith-s1.pdf> [https://perma.cc/K9NZ-CFQM] [hereinafter Testimony of Lord Goldsmith].

260. Letter from Lord Goldsmith, U.K. Att'y Gen., to Prime Minister Tony Blair (Jan. 30, 2003), <http://www.iraqinquiry.org.uk/media/76159/2003-01-30-Minute-Goldsmith-to-Prime-Minister-Iraq.pdf> [https://perma.cc/4WB6-V5KM].

261. Letter from Lord Goldsmith, U.K. Att'y Gen., to Jack Straw, U.K. Foreign Sec'y (Feb. 3, 2003), <http://www.iraqinquiry.org.uk/media/218284/2003-02-03-minute-goldsmith-to-foreign-secretary-untitled.pdf> [https://perma.cc/L4SB-U7WA].



Goldsmith then visited the United States, where he met with a number of U.S. lawyers.<sup>262</sup> On February 12, 2003, the day after he returned to the United Kingdom, Goldsmith told a junior colleague that he now believed that a “reasonable case” could be made that Resolution 1441 revived the authorization to use force in Resolution 678.<sup>263</sup> At the end of February, he met with the Prime Minister’s advisers in Downing Street and told them of his revised view that there was “a reasonable case that a second resolution was not necessary.”<sup>264</sup> Goldsmith put this advice in writing on March 7, explaining that the safest legal course would be to secure a further resolution, but that a “reasonable case” could be made that legal authority existed under 1441 (a position defended in his testimony during the inquiry).<sup>265</sup> When later asked by the inquiry what he meant when he said there was “a reasonable legal case,” he explained that it was a case “you would be content to argue in court, if it came to it, with a reasonable prospect of success.”<sup>266</sup> He further elaborated that “a reasonable case doesn’t mean of itself that, if this matter were to

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262. Goldsmith testified that in February, he met with State Department Legal Adviser William Taft IV, Alberto Gonzales (then White House counsel), Condoleezza Rice, and several other senior officials in the State and Defense departments. They were, he noted, “speaking with absolutely one voice on this issue.” Testimony of Lord Goldsmith, *supra* note 259, at 109–10. The Americans were of the clear view that “we have a right to go without this resolution.” *Id.* at 111. The United States had by this point considered the legal case for war against Iraq in three memos by the Justice Department’s Office of Legal Counsel. The first, by Jay Bybee on October 23, 2002, gave two justifications for using military force in Iraq: implied or implicit UN Security Council authorization (through Resolution 688) and anticipatory self-defense—both arguments, Goldsmith’s testimony makes clear, the British lawyers had early on rejected as manifestly implausible. Auth. of the President Under Domestic & Int’l Law to Use Mil. Force Against Iraq, 26 Op. O.L.C. 143 (2002). A second opinion, signed by John Yoo on November 8, 2002, considered whether Resolution 1441 altered the legal authority to use military force against Iraq (concluding that it did not). Effect of a Recent United Nations Sec. Council Resol. on the Auth. of the President Under Int’l Law to Use Mil. Force Against Iraq, 26 Op. O.L.C. 199 (2002). The third, also by Yoo, on December 7, 2002, addressed whether false declarations on WMDs by Iraq constituted further material breaches that would permit the use of force under 1441. Whether False Statement or Omissions in Iraq’s Weapons of Mass Destruction Declaration Would Constitute a “Further Material Breach” Under U.N. Sec. Council Resol. 1441, 26 Op. O.L.C. 217 (2002).

263. Testimony of Lord Goldsmith, *supra* note 259, at 125.

264. *Id.* at 70.

265. *Id.* at 130; see Oona A. Hathaway, *What the Chilcot Report Teaches Us About National Security Lawyering*, JUST SEC. (July 11, 2016), <https://www.justsecurity.org/31946/chilcot-report-teaches-national-security-lawyering> [<https://perma.cc/R9UM-566V>].

266. Testimony of Lord Goldsmith, *supra* note 259, at 97–98. After coming under pressure from the military and the treasury solicitor for a more definitive answer, Goldsmith later adopted a more clear-cut position. But when he made his crucial turn, he did so by applying this “reasonable legal case” standard.

go to court, you would necessarily win . . . . On the other hand, the counter view can reasonably be maintained.”<sup>267</sup>

The inquiry recognized that the legal decision to authorize the intervention in Iraq without a second UN Security Council resolution may have turned on the legal standard applied, and it put forward a number of questions to those who participated in the decisionmaking process.<sup>268</sup> It spent considerable time exploring the meaning of a “reasonable case.”<sup>269</sup> It is difficult to know with certainty, but the evidence in the Chilcot Report appears to support the conclusion that Lord Goldsmith’s shift in legal standard from the best view of the law to a “reasonable case” standard was important to his shift from a position that the intervention would be illegal without a second resolution to a decision to, as he put it, give the “green light” to the intervention.<sup>270</sup> It shows, too, a lawyer (and not just any lawyer, but the attorney general of the United Kingdom), struggling to define the proper legal standard even as he is seeking to render advice on an immensely politically charged legal matter. Goldsmith shifts between a standard akin to that applied by the OLC after the issuance of its best practices memos in 2010 and 2015<sup>271</sup> and one closer to a “legally available” standard without ever stepping back to separately assess the proper legal standard. This rare insider glimpse at the difficulties faced by Lord Goldsmith is suggestive, at least, of the kinds of pressure

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267. *Id.* at 174; *see also* 5 COMM. OF PRIVY COUNSELLORS, HC 265-V, THE REPORT OF THE IRAQ INQUIRY 103 (2016) (noting Lord Goldsmith’s view that there is little difference between a “reasonable case” and a “respectable legal argument”).

268. One question the inquiry explored was whether the legal standard applied was—and should be—lower because the matter involved a question of international law. In a supplementary memorandum, Foreign Secretary Jack Straw asserted that, because recourse to courts was not available, international law was less certain. 5 COMM. OF PRIVY COUNSELLORS, *supra* note 267, at 72. Sir Michael Wood (the former Foreign and Commonwealth Office legal adviser) disagreed with this view, arguing that the truth was the precise opposite: “[B]ecause there is no court, the Legal Adviser and those taking decisions based on legal advice have to be all the more scrupulous in adhering to the law . . . .” *Id.* at 71. Elizabeth Wilmshurst similarly argued that “simply because there are no courts, it ought to make one more cautious about trying to keep within the law, not less.” *Id.*

269. As the inquiry analyzed the “reasonable case” standard, it became clear that Goldsmith’s shift on the legal standard came about in part because he was persuaded that the “reasonable case” approach had also been applied to the United Kingdom’s Kosovo intervention, thus providing a direct legal precedent:

I had originally been not that instinctively in favour of this “reasonable case” approach, but these precedents were helpful, because, although Kosovo was a different legal basis, the point was that the British Government had committed itself to military action on the basis of legal advice that there was a reasonable case. That was the precedent. It had been pressed upon me that that was the precedent in the past.

*Id.* at 102.

270. *Id.* at 103.

271. 2010 Best Practices Memo, *supra* note 13; 2005 Best Practices Memo, *supra* note 13.

that can bear on national security lawyers and the temptation to shift legal standards when pressures are high and the law far from clear.<sup>272</sup>

The stakes for the law, moreover, are extremely high. Coupled with the informality of the legal process, its secrecy, and the consensus-driven process for rendering legal advice in the hardest cases, applying a weaker legal standard can mean that the law constrains a government's actions only when the proposed decision is clearly and unequivocally in direct and blatant violation of the law—and perhaps not even then. John Brennan, in describing his experience with the Lawyers Group in the Obama administration, explained that “I have never found a case that our legal authorities, or legal interpretations that came out from that lawyers group, prevented us from doing something that we thought was in the best interests of the United States to do . . . . Is there a right answer? Truth is elusive—as is ‘right.’”<sup>273</sup>

If what is right is elusive in national security, the rule of law is even more so. Although the lawyers working in national security during the Lawyers Group Era prioritized the law more than those during any period in living memory, and the Obama administration instituted internal reforms meant to strengthen the rule of law and prevent the terrible violations of the recent past, the system nonetheless proved imperfect. Lawyers were too often placed in an impossible situation. They were tasked with assisting their clients in pursuing the clients' policy goals—and, indeed, they rightly understood this to be the essential function of their position and of the offices they led. But in offering advice to their clients, they faced few external constraints, their decisions were made almost entirely in secret, there was pressure not to frustrate the effort to generate consensus, and the legal standard they were to apply was unclear. Lawyers operating in that environment are not in

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272. Others have commented on Lord Goldsmith's struggles. See, e.g., Bob Bauer, *Lawyers Under Pressure: Thoughts on the Chilcot Inquiry*, LAWFARE (July 11, 2016, 3:43 PM), <https://lawfareblog.com/lawyers-under-pressure-thoughts-chilcot-inquiry> [<https://perma.cc/2LML-WS6J>].

273. SAVAGE, *supra* note 79, at 278. Savage later describes a conversation with Ben Rhodes in which he asked if any examples came to mind of times “when the Obama administration has not done something it wanted to do because the lawyers said it would be illegal.” *Id.* at 484. Rhodes cited only the “Daqduq dilemma”: Brennan wanted to take Ali Musa Daqduq, a senior Hezbollah leader in U.S. custody who was believed to have been involved in attacks on U.S. troops, out of Iraq for prosecution in the United States. The lawyers said there was no legal way to do it without Iraqi consent. When an agreement could not be reached, Daqduq was transferred to Iraqi custody and later released. *Id.* This supports the conclusion that law plays a different role in detention, in part because that is the one area in which the courts have consistently weighed in. Brennan's comment, it should be noted, does not account for the possibility that options were not presented to him for consideration because lawyers had earlier identified them as not legally available.

the position to single-handedly defend the rule of law. That is not the fault of the lawyers; it is the fault of the institutional structure within which they operate.

What's more, a system that relies so heavily on internal constraints and the commitment of the lawyers operating within it to defend the rule of law is exquisitely vulnerable to reversal at the very moment legal constraints are needed most. Though, as noted earlier, this Article does not attempt to document the national security lawyering process within the Trump administration, there is ample evidence that it broke down. Administration lawyers have very rarely spoken publicly to explain the national security legal positions of the administration and have made little effort to defend a string of national security decisions that have been widely criticized as illegal.<sup>274</sup> The constraints the Lawyers Group Era put in place were, it is now clear, much too fragile.

#### IV. LOOKING AHEAD

##### A. Is There a Problem to Solve?

Before turning to possible solutions, the first question to ask is whether there is a problem that needs to be solved. After all, some might read the foregoing and conclude that the legal process in national security works pretty much as it should.

The position that the current state of affairs is not in need of reform frequently takes one of three forms. First is the position that matters as important as national security law are not susceptible to rule of law; they are inherently political and pretending otherwise is a recipe for self-deception (or worse). A softer version of this position holds that law is important, but policy matters more. Indeed, the Obama administration was criticized at times for allowing lawyers to play too much, rather than too little, of a role in shaping policy options in the national security arena.

Second is the position that the rule of law is in fact very much present. Those who hold this view point to what Charlie Savage's *Power Wars* describes as the Obama administration's uniquely lawyerly mindset.<sup>275</sup> Moreover, those who subscribe to the concept of "internal separation of powers" argue that the interagency process, imperfect as it is, supplies substantial constraints.<sup>276</sup> Yes, they acknowledge, legislative abdication is the reigning modus operandi. But the civil

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274. There are limited exceptions. See *supra* note 22 (citing sources).

275. SAVAGE, *supra* note 79, at 690–94 (describing the "Lawyerly Administration").

276. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within*, 115 YALE L.J. 2314, 2322–42 (2006) (describing constraints imposed by bureaucratic overlap, civil service protections, internal adjudication, and reporting requirements).

service, which is not beholden to any particular administration, creates checks and balances within the executive branch in foreign affairs. Another version of this account is offered by Jack Goldsmith in his excellent book, *Power and Constraint*.<sup>277</sup> He argues that there are many more checks and constraints on the president than may at first appear. Even if classical constitutional checks and balances are weaker than might have been intended, lower level forces, inside and outside government, play a key role in checking the presidency.

Third is the position that rule of law is weak or nonexistent, but that is only because it is unnecessary. The lawyers working for the president can be counted on to be committed to the rule of law and thus can be trusted to make decisions guided by the fundamental commitments of American democracy. If things ever get really bad, the rule of law will kick in—the president could be impeached, Congress could legislate, and courts might even strike down executive actions. The fact that none of these things has happened is not evidence of the absence of rule of law but instead evidence that things are working reasonably well, all things considered.

There is appeal in each of these views, but each falls short. On the first: It is important to resist the claim that the most destructive power in the world cannot be constrained by law. Indeed, the U.S. Constitution is premised on the belief that government can be constrained by law. The problem posed in the national security realm—the control of destructive power of the state—is merely a species of the more general challenge of restraining state power with law. If we give up on law in this context, it is not clear why we should cling to it more generally.<sup>278</sup> Indeed, the contention that law should not limit national security policy is a species of an argument often attributed to Carl Schmitt, whose work has been admired for its brilliance but also reviled as fundamentally illiberal and inconsistent with the rule of law.<sup>279</sup>

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277. GOLDSMITH, *supra* note 11; see also Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 63 (2011) (arguing that the traditional processes of executive branch legal interpretation places significant constraints on executive branch decisionmaking).

278. Cf. Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009) (demonstrating that international law and U.S. constitutional law face common challenges).

279. See OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* 215–97 (2017) (discussing Schmitt's life and ideas, including his legal philosophy and his work as a lawyer for the Third Reich); Heiner Bielefeldt, *Deconstruction of the "Rule of Law": Carl Schmitt's Philosophy of the Political*, 82 ARCHIVES FOR PHIL. L. & SOC. PHIL. 279, 279 (1996) (describing Schmitt's work and showing that "it is more than a coincidence that his construction of the rule of law ends up in Fascism"); David Luban, *Carl Schmitt and the Critique of Lawfare*, 43 CASE W. RES. J. INT'L L. 457, 468–69 (2010) (arguing that "lawfare" critics owe a debt to Schmitt); Bill Scheuerman, *The Rule of Law Under*

As Scott Shapiro and I recount in *The Internationalists*, Schmitt's famous work, *The Concept of the Political*, denounced the proposal that states renounce—or outlaw—war, which had been made in a speech in Germany by James T. Shotwell.<sup>280</sup> “The concept of the state,” Schmitt wrote, “presupposes the concept of the political.”<sup>281</sup> Politics, in turn, presupposes the possibility of war. What defines the political is its intensity. “The political,” he argued, “is the most intense and extreme antagonism, and every concrete antagonism becomes that much more political the closer it approaches the most extreme point, that of the friend-enemy grouping.”<sup>282</sup> The enemy concept entails the “ever present possibility of combat.”<sup>283</sup> Conflicts with the enemy are existential threats: “The friend, enemy and combat concepts receive their real meaning precisely because they refer to the real possibility of physical killing.”<sup>284</sup> The friend-enemy distinction thus finds its extreme expression in interstate war. The power to wage war is both necessary and distinctive to states: “[T]he right to demand from its own members the readiness to die and unhesitatingly to kill enemies.”<sup>285</sup> Schmitt argued that outlawing war was impossible, because, as he put it, a world without war “would be a world without the distinction of friend and enemy and hence a world without politics.”<sup>286</sup> He explained, “[w]ere this distinction to vanish then political life would vanish altogether”—and, with it, the state.<sup>287</sup>

Modern law regulating war is grounded in the very prohibition on war that inspired Schmitt's objections. National security lawyering is precisely the attempt to use law to constrain war in ways Schmitt believed would mean the end of the state. Indeed, when the world rejected Schmitt's view in favor of his intellectual opponent—Shotwell—it rejected with it the claim that law was incapable of constraining war. The 1928 Kellogg-Briand Pact<sup>288</sup> began a transformation from a world order grounded in the principle that war was a legal and legitimate means for righting wrongs to one grounded in the prohibition on war. The transformation culminated in the United Nations Charter and four 1949 Geneva Conventions regulating the conduct of war. To embrace Schmitt's rejection of law

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*Siege: Carl Schmitt and the Death of the Weimar Republic*, 14 HIST. POL. THOUGHT 265 (1993) (exploring Schmitt's critique of the liberal rule-of-law ideal).

280. HATHAWAY & SHAPIRO, *supra* note 279, at 217–19.

281. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 19 (George Schwab trans., Univ. of Chi. Press expanded ed. 2007) (1932).

282. *Id.* at 29.

283. *Id.* at 32.

284. *Id.* at 33.

285. *Id.* at 46.

286. *Id.* at 35.

287. *Id.* at 50–51.

288. Kellogg-Briand Peace Pact, *supra* note 16.

in the arena of national security, then, is to reject the foundational principle of the modern international legal order.<sup>289</sup>

The second position—that rule of law is present—is surely true. The system is not devoid of legal and political constraints, as the overview above demonstrates. But the presence of *some* constraints is not enough. The question is whether the constraints are adequate to the task of ensuring rule of law in national security law. The answer, it is now clear, is no. Decisions rendered by the Lawyers Group, made up entirely of agents of the executive branch, are rarely subject to any meaningful review. As a result, our current system falls far short of the minimum rule of law bar, and we ought to be concerned about that. Indeed, many of those who once argued that existing political checks were sufficient have been given pause by the Trump administration and its willingness to repeatedly engage in behavior that is inconsistent with the law and traditional normative constraints.

Standard political constraints are less effective in the national security context than in any other policy area. The possibility for abuse of power abounds. In part because almost all the decisions take place in secret, often even the most basic political constraints cannot function effectively to discipline the exercise of power. And in the absence of external constraints, even clear lines begin to blur, and what was obviously out of bounds can suddenly be up for grabs.<sup>290</sup> In addition, many of those affected by the violence that can result from national security law decisions have no voice in U.S. politics or standing in its legal system. People die as a result of these decisions—around half a million people have died, for example, as a direct result of U.S.-led wars in Iraq, Afghanistan, and Pakistan since 2001.<sup>291</sup> The vast majority of those subject to U.S. violence abroad have no one to represent them in the U.S. political system.

The third position—that rule of law will kick in when needed—suggests that law exists only to constrain in times of crisis. Well-functioning institutions, however, cannot rely exclusively on the goodwill of central institutional actors to

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289. The weaker version of this view, put forward by Eric Posner and Adrian Vermeule in their book, *Executive Unbound*, holds that “the major constraints on the executive, especially in crises, do not arise from law or from the separation-of-powers framework defended by liberal legalists, but from politics and public opinion.” POSNER & VERMEULE, *supra* note 11, at 4. The problem with that argument in the national security context, however, is that politics and public opinion cannot operate on national security decisions that are taken entirely in secret—as most are.

290. Consider, for example, the expansion of the 2001 AUMF. *See* text accompanying *supra* notes 42–49 (discussing the expansion).

291. NETA C. CRAWFORD, HUMAN COST OF THE POST-9/11 WARS: LETHALITY AND THE NEED FOR TRANSPARENCY 1 (2018), <https://watson.brown.edu/costsofwar/files/cow/imce/papers/2018/Human%20Costs%2C%20Nov%208%202018%20CoW.pdf> [<https://perma.cc/UH9L-ZD53>].

act when the time is right. The constitutional system depends on checks and balances precisely to constrain political institutions and ensure that political power is not concentrated in a small number of hands. Moreover, if rule of law constraints are allowed to atrophy, there is little reason to expect that they will be poised to effectively respond at times when the system is most at risk.

All but those who hold the first view—that power ought not be constrained by law in the national security context—would view reforms to strengthen the rule of law as worthwhile, even if not essential. I therefore turn next to four proposals for strengthening the rule of law in national security.<sup>292</sup>

### **B. Four Proposals to Strengthen Rule of Law in National Security**

There is a tendency among scholars who bemoan the collapse of checks and balances to exhort the branches that have fallen down on the job to reverse course. This sometimes leads to a focus on a few obvious answers: Courts should be encouraged to adjudicate in cases involving national security matters rather than seeking out any number of ways to avoid reaching the merits. Congress should be encouraged to take its war powers responsibilities seriously and act to either authorize military interventions or defund unauthorized military interventions rather than carping from the sidelines while dodging responsibility. The problem with such solutions is that simply exhorting institutions to behave differently is not likely to result in different behavior or bring about meaningful change. The case law on nonjusticiability is now firmly entrenched. In a common-law legal system such as ours, undoing that consistent line of cases is unlikely without congressional action. But in an era of unprecedented political polarization, a meaningful congressional response is equally unlikely (though the end of the Trump presidency may open up a brief window for legislative reform—more on that below).<sup>293</sup>

It is important to acknowledge that while the Obama-era lawyering process was imperfect, it was nonetheless a significant improvement over what came before and orders of magnitude better than what followed. For all its weaknesses, the process of interagency coordination over legal matters exemplified by the

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292. In addition to these proposals, I have elsewhere recommended a series of reforms to the War Powers Resolution to bring Congress back into the war powers conversation. See Oona A. Hathaway, *How to Revive Congress's War Powers*, TEX. NAT'L SEC. REV., Nov. 2019, at 41, <https://tnsr.org/roundtable/policy-roundtable-the-war-powers-resolution> [<https://perma.cc/56AH-5LDP>].

293. JACOB S. HACKER & PAUL PIERSON, OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY (2005) (describing our polarized political system, which impedes reform).



Obama administration was a significant step forward from the too-often ad hoc legal process of the George W. Bush administration. The Trump administration, meanwhile, has often seemed content to ignore the law altogether.

There are, moreover, a number of internal reforms that could go some distance toward addressing some of the concerns raised here: First, the national security Lawyers Group could expressly adopt a “best view of the law” standard similar to that adopted by the OLC in the wake of the torture memos scandal.<sup>294</sup> Second, members of the Lawyers Group could be encouraged to express dissenting views. For example, it would be possible to task legal staff with presenting a “red team” perspective within the Lawyers Group—that is, to make the argument against the legal position under consideration. That could assist in overcoming the consensus paradox described above. Third, there could be greater emphasis on voluntary transparency regarding the legal rationale for national security decisions—for example, providing insight into legal positions through speeches, release of white papers, and press releases. As Part II demonstrated, however, relying on internal reforms has been the reflexive—and inadequate—response of the past to national security law breakdowns. Those internal reforms have proven insufficient and all too easily undone.

For real, lasting reform, we need structural reform that empowers the institutions dealing with national security law and policy to act differently than they have in the past. That does not necessarily require the creation of new institutions.<sup>295</sup> It does, however, require giving existing institutions new tools. Here I outline four proposals to do just that. This is not necessarily an exhaustive list. The common thread across these proposals is that they aim to empower each of the players in the system with the institutional credibility to effectively counter

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294. This proposal inevitably meets with some pushback from those who have served as national security lawyers. As one put it, “I think it reflects a normative view that the role of the national security lawyer should be to restrain policymakers rather than to enable them.” Email from Former Couns., Nat’l Sec. Council, to author (Apr. 23, 2020, 10:05 AM) (on file with author). This is a reasonable concern, but in the absence of adequate external constraints, national security lawyers need to both enable *and* constrain if law is to be effective. The better solution, however, is stronger, more effective external constraints—which is the subject of the four proposals below. Notably, an article on the role of the military legal adviser appears to adopt a “best view” approach, though it does not call it that. See Gill & Fleck, *supra* note 11, at 590 (“Legal advisors should be able to identify potential legal problems and the areas where legal uncertainty exists and advise their commanders as to whether the course proposed is legal, illegal, or falls into an area of legal uncertainty.”).

295. In contrast, in *The Decline and Fall of the American Republic*, Bruce Ackerman calls for the creation of a Supreme Executive Tribunal, comprised of independent judges, to evaluate the president’s assertions of executive authority when they are challenged by members of Congress. ACKERMAN, *supra* note 11, at 141–79. That proposal is not inconsistent with those suggested here.

the U.S. presidency. The proposals also empower actors outside the executive branch to participate more fully in interpreting and enforcing the law that governs the executive branch's actions, thereby strengthening the rule of law in the national security arena.

One final observation: These proposals all rely on Congress to act.<sup>296</sup> One might reasonably wonder whether, given the failure of Congress to act thus far, this Article falls into the trap identified above—expecting an institution that has repeatedly failed to behave differently. Perhaps the problem is not the absence of good ideas, this line of thinking goes, but a basic breakdown in democracy that no proposal short of broad institutional reform (itself unlikely) can solve. As noted at the end of this Subpart, however, there is reason for optimism that Congress might act now even though it has failed to do so in the past. The irony of the Trump administration is that the more terrible its abuses, the greater the support for reforming the systems he has abused. In recent years, Congress has shown renewed interest in war powers issues, for instance passing a law rejecting ongoing support for the Saudi-led coalition in Yemen.<sup>297</sup> Congressional muscles for reform in the national security law arena may be awakening, and if President-elect Biden is willing to support reform, as I argue for at the close of this Subpart, real change may finally be possible.

### **1. Strengthen Congress as a Legal Counterweight to the President by Creating a Congressional OLC**

The political dynamics described in Part I mean that Congress as a whole is not well positioned to respond to actions of executive overreach and illegality in the national security arena. There are few political rewards and potentially significant political costs to pressing back on executive overreach, and mustering the consensus in Congress to overturn a presidential veto is nearly impossible.

And yet, Congress as an institution can still be strengthened as a counterweight to the president. The key is to create institutional structures that allow Congress to respond to the president without resorting to the full legislative process. In particular, there is a problem at which reform could take aim without requiring members of Congress to discover a newfound passion for national security matters: As described in Part I, the courts' unwillingness to reach the

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296. The fourth—the Outcasting Council—could in theory be pursued without U.S. participation and therefore without any congressional support. But it would be more likely to come into existence if the United States is a party, which in turn would require the support of Congress.

297. See, e.g., S.J. Res. 7, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-joint-resolution/7/text> [<https://perma.cc/QN6M-4J2H>].

merits on national security law issues has created a legal vacuum that is filled almost exclusively by the legal opinions of the executive branch. In particular, the OLC at the Department of Justice offers official-looking legal opinions that are all too often treated almost as if they are decisions of a court.<sup>298</sup> But the “opinions” provided by OLC are decidedly not rendered by an impartial decisionmaker. The office sits within the executive branch and is structured to support the president. It is therefore no surprise that, even after adoption of the “best view of the law” guidance, the OLC has arrived at decisions that consistently favor expansive presidential authority.<sup>299</sup> Meanwhile, there is no comparable counterweight on the congressional side. Because those claims are never tested in court and there is no institution situated to respond to them, it is no surprise that the opinions of the OLC continue to evolve further and further toward greater deference to unilateral presidential authority.

To effectively counterbalance the executive branch, Congress not only needs more lawyers who understand national security law matters and are cleared into classified programs, but most importantly, it also needs an institutional counterweight to the Department of Justice’s OLC. The congressional committees that work on national security matters have, at best, a small handful of lawyers cleared to assist members in their work. Each of the agencies that works on national security matters, on the other hand, has a significant office of lawyers tasked with evaluating the law on the matters on which they work. For instance, the Department of Defense alone has roughly 10,000 lawyers (though, admittedly, only a fraction of them work on national security legal policy issues). Congress is simply consistently outgunned when it comes to legal disputes because the small number of lawyers working on the matters do not have the bandwidth to consistently and effectively push back against excessive claims made by the executive branch on a range of issues—from war powers to detention and interrogation to targeted killing.

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298. There are two additional formal tools that the executive branch uses to put forward its legal views: presidential signing statements and Department of Justice “views letters”—letters written by the Department of Justice to Congress expressing the “views of the Department of Justice” as to a pending piece of legislation. On views letters, see Jean Galbraith, DOJ Views Letters, Transparency, and Historical Practice (Aug. 21, 2019) (unpublished draft). Moreover, other executive branch lawyers occasionally weigh in by delivering public speeches—speeches which have traditionally been vetted through an interagency process that includes OLC.

299. In addition, there is institutional bias against publishing opinions in which OLC determines a proposed executive branch action is unconstitutional. As a result, all the published OLC opinions on national security matters approve of the actions proposed—creating a public narrative of almost unconstrained authority. Interview with Cristina Rodriguez, Former Att’y, Off. of Legal Couns., in New Haven, Conn. (Dec. 9, 2019).

Congress needs its own institutional voice on legal matters. The Department of Justice's OLC was created by Congress in 1934. There is no reason that Congress could not do this again—this time creating a Congressional Office of Legal Counsel (C-OLC). Much like the executive branch OLC, the new office would be available to address legal questions that arise in the branch it serves. It would, moreover, be able to issue its *own* legal opinions on issues of contested legal authority. Imagine how different the legal landscape in national security would look if it was not dominated almost exclusively by the executive branch view of issues that implicate separation of powers.

An obvious concern that may arise is whether the office would be captured by politics. Here, the Congressional Research Service (CRS) is a sign that it is possible to create an office to serve Congress that is not subject to partisan whims. Indeed, to the extent that there is any consistent legal analysis from Congress, it already comes from the CRS, which provides “policy and legal analysis to committees and Members of both the House and Senate, regardless of party affiliation.”<sup>300</sup> It has an ethos of providing “analysis that is authoritative, confidential, objective and nonpartisan.”<sup>301</sup> CRS is an office within the Library of Congress, which in turn is led by the Librarian of Congress—a person appointed by the president with the advice and consent of the Senate, for a term of ten years. There are other similar examples of offices that provide nonpartisan support to Congress.<sup>302</sup> Consider, for example, the Government Accountability Office (GAO). That office describes itself as “an independent, nonpartisan agency that works for Congress . . . . GAO examines how taxpayer dollars are spent and provides Congress and federal agencies with objective, reliable information to help the government save money and work more efficiently.”<sup>303</sup> Like the Librarian of

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300. *Congressional Research Service Careers*, LIBR. CONG., <http://www.loc.gov/crsinfo> [<https://perma.cc/K8QJ-XB2C>].

301. *Id.*

302. Indeed, in their forthcoming article, Abbe Gluck and Jesse Cross identify seven nonpartisan legislative institutions in Congress (five in addition to the Congressional Research Service [CRS] and the government Accountability Office [GAO]), all of them founded to give Congress the expertise and power to resist executive overreach. Abbe R. Gluck & Jesse M. Cross, *The Congressional Bureaucracy*, 160 U. PA. L. REV. (forthcoming 2020) (“[T]he congressional bureaucracy was explicitly founded so that Congress could *reclaim* power and safeguard its own autonomy against an executive branch that was encroaching on the legislative process.”).

303. *About GAO: Overview*, GAO, <https://www.gao.gov/about> [<https://perma.cc/54EH-LDNX>]. Indeed, the GAO already publishes its own decisions and opinions on federal fiscal law in the so-called Red Book. OFF. OF THE GEN. COUNS., GOV'T ACCOUNTABILITY OFF., PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (4th ed. 2016). My thanks to Troy McKenzie for first pointing out the GAO as a relevant example. The Joint Committee on Taxation (JCT) is another particularly appropriate example. Indeed, as Daniel Hemel pointed out to me, there are a

Congress, the Comptroller General who heads the GAO is appointed to a set term (fifteen years), providing continuity of leadership and insulation from day-to-day partisan politics. Similarly, the new General Counsel of the Congressional OLC should be appointed for a set term—ideally ten years. And that appointment should be made jointly by the Speaker of the House of Representatives and the President pro tempore of the Senate after considering recommendations received from the House and Senate Judiciary committees.<sup>304</sup> In this way, the new C-OLC can be insulated from day-to-day politics and allowed to provide legal analysis to Congress that is attentive to the longer-term best interests of the institution.

Some might ask whether a C-OLC would have the same authority as the executive branch OLC. The executive branch OLC's authority stems in significant part from the OLC's capacity to issue opinions treated as binding within the executive branch.<sup>305</sup> It is important to note, however, that while it is often claimed that OLC opinions bind the executive branch, experts disagree on this point. The arguments in favor of treating the opinions as binding are based on statutes—passed, of course, by Congress. Those statutes grant authority to the attorney general to resolve disputes in the executive branch and to litigate on behalf of the president.<sup>306</sup> There is no reason that Congress could not grant its own OLC

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number of institutional tools in the tax arena that could serve as templates for some of the proposals here, including legislative branch lawyering (there are more than forty lawyers at the JCT), mandatory notification (IRS decisions with a greater-than-specified economic impact trigger a requirement to notify the JCT), transparency (26 I.R.C. § 6103(f) (2018) requires disclosure to committees of Congress when they make a written request), restrictions on political appointees (there are only two at the IRS: the commissioner and chief counsel), and individual lawyer accountability (IRS revenue rulings typically end with a “drafting information” section that names the attorney responsible).

304. This is similar to the process used to select the Director of the Congressional Budget Office, who is appointed to a four-year term by the Speaker of the House of Representatives and the President pro tempore of the Senate after considering recommendations from the House and Senate Budget Committees. MEGAN S. LYNCH, CONG. RSCH. SERV., RL31880, CONGRESSIONAL BUDGET OFFICE: APPOINTMENT AND TENURE OF THE DIRECTOR AND DEPUTY DIRECTOR (2019), [https://www.everycrsreport.com/files/20191016\\_RL31880\\_b697f7a224a281cbce87a49f6489fc052dbb9201.pdf](https://www.everycrsreport.com/files/20191016_RL31880_b697f7a224a281cbce87a49f6489fc052dbb9201.pdf) [<https://perma.cc/CB8C-4AYW>].

305. I am grateful to John Manning for this observation.

306. OLC asserts that its opinions are binding on two grounds: (1) the attorney general's “statutory obligation to render opinions” when requested to do so by one of the heads of the other executive departments regarding any “questions of law arising in the administration of their” duties—an obligation delegated by the attorney general to the OLC; (2) the attorney general's statutory responsibility to “conduct litigation on behalf of the United States,” which includes the exclusive authority to determine the position of the United States on the proper interpretation of legal issues. See *Application of the Davis-Bacon Act to Urban Dev. Projects that Receive Partial Fed. Funding*, 11 Op. O.L.C. 92, 97–98 (1987). Andrew Crespo has written critically of the claim. Andrew Crespo, *Is Mueller Bound by OLC's Memos on Presidential Immunity?*, LAWFARE (July 25, 2017, 9:00 AM), <https://www.lawfareblog.com/mueller-bound-olcs-memos-presidential-immunity> [<https://perma.cc/Z79Z-HZS9>]. Trevor Morrison has

the authority to determine the legislative branch's view on the law in the same way that it has granted the Department of Justice's OLC the authority to determine the executive branch's view of the law.

Notably, the Offices of General Counsels of the House and the Senate already possess the capacity to litigate on behalf of their respective legislative bodies. Consider, for example, the recent litigation regarding the reallocation of money appropriated to the Department of Defense to build a wall on the border. In its suit against the Trump administration, the House is represented by its General Counsel, Douglas N. Letter. There, the U.S. Court of Appeals for the D.C. Circuit found that the House had standing to proceed with the case and remanded to the district court for further proceedings.<sup>307</sup> The House general counsel thus has the authority to formulate a legal position for the House in court—precisely the same as one of the two statutory bases on which the Justice Department's OLC's authority to render binding opinions for the executive branch is based. The Senate likewise has an Office of the Legislative Counsel. That office primarily assists in preparing and reviewing legislation. It also has an Office of Senate Legal Counsel, which provides “legal assistance and representation to senators, committees, officers, and employees of the Senate on matters pertaining to their official duties.”<sup>308</sup>

Indeed, the proposal of a Congress-wide Office of Legal Counsel is not entirely new. In 1978, there was a proposal to create an Office of Congressional Legal Counsel to serve both houses. House conferees at the time objected because they believed the two houses had different institutional positions.<sup>309</sup> Instead, Congress created an Office of Senate Legal Counsel,<sup>310</sup> leaving the House with its preexisting General Counsel to the Clerk of the House of Representatives—an

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also acknowledged that “the bindingness of the Attorney General's (or, in the modern era, OLC's) legal advice has long been uncertain.” Morrison, *Stare Decisis*, *supra* note 11, at 1464. Morrison notes that, though the issue has never been formally resolved, by tradition the advice is treated as binding. *Id.*

307. See *U.S. House of Representatives v. Mnuchin*, 976 F.3d 1 (D.C. Cir. 2020). Under current practice, the Speaker of the House appoints the general counsel with the input of the Bipartisan Legal Advisory Group that includes House leaders from both parties. The position is defined in House Rule II, Section 8(a). U.S. HOUSE OF REPRESENTATIVES, 116TH CONG., RULES OF THE HOUSE OF REPRESENTATIVES 3 (2019).

308. MATTHEW E. GLASSMAN, CONG. RSCH. SERV., RS22891, OFFICE OF SENATE LEGAL COUNSEL 1 (2014).

309. Rebecca May Salokar, *Legal Counsel for Congress: Protecting Institutional Interests*, 20 CONG. & PRESIDENCY 131, 137 (1993). In 1990, Harold Koh recommended creating a “Congressional Legal Adviser,” similar to the Legal Adviser at the Department of State or OLC at the Department of Justice, to coordinate the work of the various international affairs committee staff counsel, among other tasks. KOH, *supra* note 23, at 169–71.

310. Ethics in Government Act of 1978, Pub. L. No. 95-521, § 701(a), 92 Stat. 1824, 1875.

office that later became a standalone House Office of the General Counsel. That was likely a missed opportunity. But the legislation that creates the Senate legal counsel's office nonetheless remains of interest because it was initially drafted for the creation of a joint office and thus is set up to be a nonpartisan office.<sup>311</sup> Whereas the general counsel in the House works directly with the Speaker, the Senate legal counsel reports directly to the "Joint Leadership Group" of the Senate—a group comprised of the president pro tempore, the majority and minority leaders, and the chair and ranking minority member from both the Committee on Rules and Administration and the Committee on the Judiciary. Most legal actions by the Senate legal counsel require the approval of two-thirds of this group.<sup>312</sup>

This proposal is not meant to displace the existing House and Senate legislative offices, which would continue to provide legal services to their respective houses and their members; instead, it is meant to create a new office that would offer legal opinions on significant legal matters on behalf of Congress as a whole. In this respect, it would be situated vis-à-vis the existing legal offices in the same way that the executive OLC is situated vis-à-vis the litigating offices in the Department of Justice, such as the Office of the Solicitor General or Civil Appellate.<sup>313</sup> While these offices engage in advocacy, the OLC offers legal assessment of executive authorities. It has been successful in reflecting a view of executive authority that has been remarkably consistent across administrations, Republican and Democratic. The goal of a Congressional OLC would be to offer a viewpoint that reflects a similar bipartisan view of congressional prerogatives. Again, the CRS, GAO, and other similarly situated nonpartisan congressional institutions demonstrate that this is not only desirable, but also possible.

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311. "The Senate Legal Counsel and the Deputy Senate Legal Counsel are appointed for a tenure of two congresses (four years) by the President pro tempore of the Senate, in consultation with the majority and minority leaders, and by approval of a Senate resolution." Salokar, *supra* note 309, at 139.

312. See 2 U.S.C. § 288b(a). For more history of the House and Senate offices, see Salokar, *supra* note 309, at 139. See also MATTHEW E. GLASSMAN, CONG. RSCH. SERV., RS22890, HOUSE OFFICE OF GENERAL COUNSEL 1 (2014); Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571 (2014); Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, 61 LAW & CONTEMP. PROBS. 47 (1998); *About: Prior General Counsels*, OFF. GEN. COUNS. U.S. HOUSE REPRESENTATIVES, <https://ogc.house.gov/about/prior-general-counsels> [<https://perma.cc/63L3-F96E>].

313. Depending on the direction of the caselaw on congressional standing, it may also turn out to be institutionally wise to empower a joint legal counsel with the capacity to litigate on behalf of both houses of Congress at once. See *infra* Subpart IV.B.3.

## 2. **Bring the Courts Back in by Giving Congressional Committees Standing to Sue**

What if there is a blatant act of illegality and the executive branch is intransigent? As noted above, the courts have been reluctant to weigh in on interbranch disputes. But as long as the courts abstain, the president wins by default. Congress therefore needs a better tool for bringing such matters to the courts.

In suggesting this, it is important to acknowledge that the courts have frequently responded to such challenges not only by resorting to justiciability doctrines to avoid reaching the merits, but also, in those rare cases where they do reach the merits, in deferring to and thus affirming the president's authority. That is likely to be even more true in the coming years, given the current makeup of the Supreme Court, in which all but two justices (Justice Sonia Sotomayor and Justice Amy Coney Barrett) have worked in the executive branch earlier in their careers and thus are often sympathetic to claims of executive authority. Yet, there are some cases where the alternative for Congress is simply to acquiesce in an illegal assertion of authority—where the courts are, put simply, the only option. And the courts have at times pressed back on extreme claims of executive authority; *Youngstown Sheet & Tube Co. v. Sawyer*<sup>314</sup> and *Boumediene v. Bush*<sup>315</sup> serve as particularly emblematic examples.

Some might question the capacity of courts to assess national security law matters. True, not all judges have experience working with classified national security matters. But judges often make weighty decisions on matters on which they have little direct experience. National security is, in a sense, no different. And the kinds of issues on which the courts would most likely be asked to weigh in are familiar issues of statutory interpretation and separation of powers—issues that are commonly in front of the courts. It is worth noting as well that courts address national security matters all the time. The hundreds of law of war detention cases, criminal prosecutions for terrorism, and cases concerning intelligence collection involve interpretation of national security law. There is even a court, the Foreign Intelligence Surveillance Court, that is made up of Article III judges and devoted exclusively to evaluating applications made by the U.S. Government for approval of investigative actions for foreign intelligence purposes. Thus, the claim that

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314. 343 U.S. 579 (1952).

315. 553 U.S. 723 (2008).



courts are uniquely ill-suited to rule on national security law matters crumbles under closer inspection.<sup>316</sup>

As noted in Part I, members of Congress have repeatedly sought to challenge presidential national security decisions only to have their cases dismissed on standing or political question grounds. In 1997, the Supreme Court in *Raines v. Byrd*<sup>317</sup> held that members of Congress have standing to sue only if they have a personal injury to a private right (for example, having their salary denied) or an institutional injury that amounts to vote nullification.<sup>318</sup> A 2011 case addressing congressional members' standing to challenge presidential action, *Kucinich v. Obama*,<sup>319</sup> applied this holding to deny ten members of Congress standing to challenge the lawfulness of the U.S. participation in military operations against Libya. The U.S. District Court for the District of Columbia found that the jurisprudence "all but foreclosed the idea that a member of Congress can assert legislative standing to maintain a suit against a member of the Executive Branch."<sup>320</sup> The court reasoned that the case fell "squarely within the holding" of *Raines*, which "teaches that generalized injuries that affect all members of Congress in the same broad and undifferentiated manner are not sufficiently 'personal' or 'particularized,' but rather are institutional, and too widely dispersed to confer standing."<sup>321</sup>

It is possible, however, that a house of Congress might authorize a congressional committee to sue the executive branch to challenge the legality of national security decisions or might sue on its own behalf. In *United States v. American Telephone & Telegraph Co. (AT&T)*,<sup>322</sup> the D.C. Circuit found that, because the House had passed a resolution authorizing Congressman John Moss to intervene on behalf of a subcommittee of the House of Representatives and of the House, he would be permitted to participate in the case on behalf of the House

316. See Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225 (describing and arguing against the common view that national security cases should be treated differently by the courts).

317. 521 U.S. 811 (1997).

318. *Id.* at 829–30. To establish vote nullification, the member must show that the vote "ha[s] been overridden and virtually held for naught." *Coleman v. Miller*, 307 U.S. 433, 438 (1939).

319. 821 F. Supp. 2d 110 (D.D.C. 2011).

320. *Id.* at 115–16.

321. *Id.* at 117–18 (emphasis omitted) (quoting *Kucinich v. Bush*, 236 F. Supp. 2d 1, 4, 7 (D.D.C. 2002)); see also *Blumenthal v. Trump*, 949 F.3d 14 (D.C. Cir. 2020) (per curiam) (finding that 215 individual members of Congress lacked standing to challenge the president's actions as violations of the Foreign Emoluments Clause because "[t]his case is really no different from *Raines*"); see generally ALISSA M. DOLAN, CONG. RSCH. SERV., R43712, ARTICLE III STANDING AND CONGRESSIONAL SUITS AGAINST THE EXECUTIVE BRANCH (2014) (examining and analyzing case law on congressional standing).

322. 551 F.2d 384 (D.C. Cir. 1976).

because the House as a whole had Article III standing and could designate a member to act on its behalf.<sup>323</sup> Courts in *Committee on Judiciary, U.S. House of Representatives v. Miers*<sup>324</sup> and *Committee on Oversight & Government Reform v. Holder*<sup>325</sup> concluded that the holding in *AT&T* was not inconsistent with *Raines*, and they similarly found congressional committees had Article III standing because they were expressly authorized by Congress and had concrete and particular injuries to their respective powers.<sup>326</sup> Moreover, in *Miers*, the district court made it clear that standing turned on the fact that “the Committee (through Chairman Conyers) has been expressly authorized by House Resolution to proceed on behalf of the House of Representatives as an institution.”<sup>327</sup> It explained that:

[T]he fact that the House has issued a subpoena and explicitly authorized this suit . . . is the key factor that moves this case from the impermissible category of an individual plaintiff asserting an institutional injury (*Raines, Walker*) to the permissible category of an institutional plaintiff asserting an institutional injury (*AT & T I, Senate Select Comm.*).<sup>328</sup>

Similarly, in 2014, House Resolution 676 authorized the Speaker of the House to bring “one or more civil actions on behalf of the House of Representatives in a Federal court of competent jurisdiction” against the president or other executive branch officials or employees for their failure to implement the Patient Protection and Affordable Care Act (ACA).<sup>329</sup> On November 21, 2014, the House of Representatives filed a lawsuit against the Departments of Health and Human Services and the Treasury, pursuant to House Resolution 676.<sup>330</sup> The D.C. District Court found that the House did not have standing to sue for improperly amending the ACA, but it did have standing to pursue the claims that the

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323. *Id.* at 391 (“[W]e need not consider the standing of a single member of Congress to advocate his own interest in the congressional subpoena power . . . . It is clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf.”).

324. 558 F. Supp. 2d 53 (D.D.C. 2008).

325. 979 F. Supp. 2d 1 (D.D.C. 2013).

326. *See Miers*, 558 F. Supp. 2d at 68 (“The Committee and several supporting amici are correct that *AT & T I* is on point and establishes that the Committee has standing to enforce its duly issued subpoena through a civil suit. Moreover, *Raines* and subsequent cases have not undercut either the precedential value of *AT & T I* or the force of its reasoning.”).

327. *Id.* at 71 (emphasis omitted).

328. *Id.*

329. H.R. Res. 676, 113th Cong. (2014).

330. *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53 (D.D.C. 2015); *see also* ALISSA M. DOLAN, CONG. RSCH. SERV., R44450, HOUSE OF REPRESENTATIVES V. BURWELL AND CONGRESSIONAL STANDING TO SUE (2016) (describing and analyzing *Burwell*).

administration had violated the Constitution by spending funds Congress did not appropriate.<sup>331</sup> The Obama administration appealed the case, but the suit was stayed and eventually settled. That left the district court's decision in place.

The Supreme Court further refined the scope of standing in 2019 in *Virginia House of Delegates v. Bethune-Hill*.<sup>332</sup> There, Virginia voters sued two Virginia state agencies and four election officials that had participated in redrawing legislative districts for the state's Senate and House of Delegates, charging that the redrawn districts were racially gerrymandered in violation of the Fourteenth Amendment's Equal Protection Clause. The Virginia House of Delegates and its Speaker intervened as defendants. The district court found in favor of the plaintiffs and ordered the districts be redrawn. Virginia's attorney general decided not to pursue an appeal, but the House of Delegates decided to go it alone.<sup>333</sup> The Supreme Court found that the House "lacks authority to displace Virginia's Attorney General as representative of the State" and that "the House, as a single chamber of a bicameral legislature, has no standing to appeal the invalidation of the redistricting plan separately from the State of which it is a part."<sup>334</sup>

While it is difficult to know precisely how far the holding in *Bethune-Hill* extends, the peculiar nature of the case does not prevent a resolution of a single house of Congress from granting standing to an institution of Congress to sue in situations where there is a concrete and particular injury to their respective powers—and it certainly does not prevent a joint resolution of both houses from doing so. The Court found that the state could press the appeal, but Virginia law gives the authority and responsibility to represent the state's interests in civil litigation exclusively to the Attorney General.<sup>335</sup> Consistent with this view of the case, the U.S. Court of Appeals for the District of Columbia, sitting en banc in *Committee on the Judiciary of the U.S. House of Representatives v. McGahn*, decided that the House Judiciary Committee, acting on behalf of the full House of Representatives, had standing to seek judicial enforcement of its duly issued subpoena to former White House Counsel Don McGahn.<sup>336</sup> And in *U.S. House of*

331. *Burwell*, 130 F. Supp. 3d at 76 ("The Court concludes that the House of Representatives has alleged an injury in fact under its Non-Appropriation Theory—that is, an invasion of a legally protected interest that is concrete and particularized.")

332. 139 S. Ct. 1945 (2019).

333. *Id.* at 1949–50.

334. *Id.* at 1950.

335. Indeed, the attorney general concluded that proceeding with the case was against the best interests of the State. As the Court noted in closing, "Virginia would rather stop than fight on. One House of its bicameral legislature cannot alone continue the litigation against the will of its partners in the legislative process." *Bethune-Hill*, 139 S. Ct. at 1956.

336. Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 968 F.3d 755 (D.C. Cir. 2020) (en banc). The en banc court remanded the case back to the original panel for

*Representatives v. Mnuchin*, the U.S. Court of Appeals for the District of Columbia found that the House had standing to proceed with a case alleging that the executive branch violated the Appropriations Clause and Administrative Procedure Act when transferring funds to build a physical barrier along the southern border of the United States.<sup>337</sup>

Consistent with *Raines*, *Bethune-Hill*, *McGahn*, and *Mnuchin*, one or both houses of Congress could challenge an act by the executive branch that has concrete and particular injuries to their respective powers. A resolution of one or both houses of Congress could authorize a congressional committee to sue for the same purpose. For instance, a House resolution could authorize the House Foreign Affairs Committee to sue over the use of appropriated funds for purposes not permitted under the 2001 AUMF<sup>338</sup> or other express congressional authorization, in violation of the Constitution and the War Powers Resolution.<sup>339</sup> On a smaller scale, a resolution could permit suit by a congressional committee that requests but does not receive the legal opinion described in the Subpart below. In this way, Congress might encourage the courts to reengage on national security matters. A similar technique could be applied to address the political question doctrine.<sup>340</sup> Indeed, the political question doctrine is easier to address via statute because the doctrine is purely prudential, and therefore discretionary.

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further proceedings in light of its decision that the Committee had standing under Article III of the U.S. Constitution.

337. U.S. House of Representatives v. Mnuchin, 976 F.3d 1 (D.C. Cir. 2020).

338. Pub. L. No. 107-40, 115 Stat. 224 (2001).

339. Pub. L. No. 93-148, 87 Stat. 555 (1973).

340. A number of courts have indicated that a congressional resolution disapproving of the president's use of force and the president's continued military operations could render the matter justiciable. *See, e.g., Doe v. Bush*, 257 F. Supp. 2d 436, 438 (D. Mass. 2003) (holding that judicial resolution of a war powers dispute would be appropriate "only when the actions taken by Congress and those taken by the Executive manifest clear, resolute conflict"); *Lowry v. Reagan*, 676 F. Supp. 333, 339 (D.D.C. 1987) (suggesting that if Congress enacted legislation to enforce the War Powers Resolution and the president ignored it, there would be "a question ripe for judicial review"); *Crockett v. Reagan*, 558 F. Supp. 893, 899 (D.D.C. 1982) ("[W]ere Congress to pass a resolution to the effect that a report was required under the WPR, or to the effect that the forces should be withdrawn, and the President disregarded it, a constitutional impasse appropriate for judicial resolution would be presented."). Another rule that may deserve closer scrutiny, and perhaps congressional input, is the state secrets privilege, an evidentiary rule developed by the courts that allows the exclusion of evidence based on affidavits submitted by government officials claiming that court proceedings may disclose information that poses a threat to national security.

### 3. Inform the Press and Public by Granting Congressional Committees the Power to Request a Legal Explanation

Political accountability relies on the press, and therefore the public, to know what political actors are doing. Where, as in national security lawyering, decisions and legal positions are often kept secret, that accountability cannot occur. The absence of any public legal justification disables the press and public from responding effectively to actions based upon poor legal reasoning.<sup>341</sup> Congress is also limited by the secrecy of the executive branch's legal positions on important national security matters. The absence of any realistic prospect that legal positions will be made public, moreover, creates a dynamic among administration lawyers that discourages dissent, even when the legal basis for an action is obviously weak.

To address these problems and shift the dynamics in the right direction, Congress should pass a statute requiring the executive branch to respond to a request from a relevant congressional committee—the most obvious are the Senate Armed Services Committee, the Senate Foreign Relations Committee, the Senate Select Committee on Intelligence, the House Foreign Affairs Committee, the House Armed Services Committee, or the House Permanent Select Committee on Intelligence—for an explanation, in writing, of the legal position of the executive branch on a national security matter. The key here is empowering a committee to act on its own. While a house of Congress may be tied up in bureaucratic knots—or may prioritize other matters—individual committees often have policy entrepreneurs with the knowledge and commitment to seek legal explanations.

The request would need to be made in writing to the president and signed by the leadership of the committee seeking the explanation of the legal position. It would need to pose a precise legal question regarding a known national security matter. And the executive branch would be required to respond in writing within fifteen days. It is worth noting that the capacity of Congress to draft such requests would be strengthened if it were to adopt the first proposal (creating a Congressional Office of Legal Counsel) above, so that it has the lawyers it needs to spot an emerging legal issue, draft a precise request for explanation, and then evaluate the quality of the response.

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341. Jack Goldsmith observes that “[t]he indispensable prerequisite to scrutiny on presidential auto-interpretation of its authorities, and to the legal excesses as a result of such auto-interpretation, is transparency.” Jack Goldsmith, *The Irrelevance of Prerogative Power, and the Evils of Secret Legal Interpretation*, in *EXTRA-LEGAL POWER AND LEGITIMACY: PERSPECTIVES ON PREROGATIVE* 214, 227 (Clement Fatovic & Benjamin A. Kleinerman eds., 2013) (emphasis omitted).

There is already a statutory requirement that the director of national intelligence and heads of all departments, agencies, and entities involved in intelligence activities provide to the congressional intelligence committees “any information or material concerning intelligence activities (*including the legal basis under which the intelligence activity is being or was conducted*), other than covert actions, which is within their custody or control, and which is requested by either of the congressional intelligence committees in order to carry out its authorized responsibilities.”<sup>342</sup> Another provision requires that the same executive branch officials “furnish to the congressional intelligence committees any information or material concerning covert actions . . . which is in the possession, custody, or control of any department, agency, or entity of the United States Government and which is requested by either of the congressional intelligence committees in order to carry out its authorized responsibilities.”<sup>343</sup> These provisions are significantly limited: They apply only to intelligence activities, which are meant to remain confidential and presumably classified, thereby making it difficult for agencies to publicly question legal justifications offered. They also mandate the production of previously existing documents and information, which opens up the disclosure of this information to a variety of legal objections, most notably that the legal advice is privileged. Indeed, the president’s signing statement to 50 U.S.C. § 413 declared that the “executive branch shall construe provisions in the Act that mandate submission of information to the Congress . . . in a manner consistent with the President’s constitutional authority to supervise the unitary executive branch and to withhold information that could impair foreign relations, national security, the *deliberative processes* of the Executive, or the performance of the Executive’s constitutional duties.”<sup>344</sup> That caveat may have created a significant gap in the reporting regime.

This proposal is not an effort to require disclosure of Lawyers Group papers (or “non-papers”) and deliberations. Doing so would be unwise. If transparency is required of the Lawyers Group, the decisionmaking will simply be driven elsewhere, or will be conducted in a nondisclosable form. Indeed, just as the forced disclosure of formal OLC opinions appears to have precipitated a reduction in the number of such opinions, requiring the disclosure of written Lawyers Group non-papers would likely reduce the number of Lawyers Group papers. As a result,

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342. 50 U.S.C. § 413a(a)(2) (emphasis added) (requiring reporting of intelligence activities other than covert actions).

343. 50 U.S.C. § 413b(b)(2) (presidential approval and reporting of covert actions).

344. *President’s Statement on the Intelligence Reform and Terrorism Prevention Act*, WHITE HOUSE (Dec. 17, 2004) (emphasis added), <https://georgewbush-whitehouse.archives.gov/news/releases/2004/12/20041217-15.html> [<https://perma.cc/6XDH-5CGY>].

such a requirement would not change the underlying problem: National security law decisions would continue to be made, but they would simply take a different form. And as the shift from more formal OLC opinions to more informal Lawyers Group papers has had costs, the shift from Lawyers Group papers to a less-disclosable alternative would likely have costs as well.

Instead, the proposal here is to require the executive branch to provide an explanation to Congress written expressly for that purpose. It would need to be written in a way that would allow it to be made public. It therefore could not contain classified information (though it may include a classified appendix). Such an explanation is almost always possible in general terms. Indeed, these kinds of explanations already find their way into talking points, prepared Q&As, and speeches.

The explanation provided by the administration would not only be in writing and in an unclassified form, but it would also be *signed* by the chief legal officers of the agencies involved. The undated, unsigned Lawyers Group memos do not hold those who contribute to them accountable for their contents. Requiring legal officers to sign the explanation presented to Congress would ensure accountability and would therefore likely produce more careful attention to the quality of the argument.

Although the explanation provided to Congress would be provided *ex post*, the knowledge that such an explanation may be requested would likely drive more careful lawyering *ex ante*. In particular, it would incentivize lawyers who are concerned that a legal decision will be difficult to justify to voice concerns as the legal position is being shaped. If the group may be forced to explain itself after the fact, voicing valid legal concerns early will no longer be regarded as simply frustrating the efforts of the team to arrive at a consensus. It would instead be regarded as serving the best interests of the group, protecting its members from recrimination for poor or indefensible legal judgment down the road.

This approach builds on regulatory models based on disclosure, rather than substantive regulation. The central innovation of the National Environmental Policy Act of 1969,<sup>345</sup> for example, is the procedural mechanism of the environmental impact statement (EIS).<sup>346</sup> Before a federal agency undertakes an environmentally destructive activity, it is required to prepare an EIS describing not only the positive and negative environmental effects of a proposed action, but also any alternative actions that could be taken to achieve the same ends.<sup>347</sup> Rather than

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345. Pub. L. No. 91-190, 83 Stat. 852 (1970).

346. Michael Herz, *Parallel Universes: NEPA Lessons for the New Property*, 93 COLUM. L. REV. 1668, 1668 (1993).

347. *Id.* at 1679.

imposing substantive limits, the requirement to prepare an EIS aims to use a procedural disclosure requirement to ensure well-informed, careful decisionmaking. Similarly, the procedural innovation requiring the executive branch to provide legal justifications for national security decisions at the request of a congressional committee uses mandated, targeted disclosure to encourage better decisionmaking.

The disclosure requirement will have to be carefully designed to discourage shifting military actions from Title 10 operations to Title 50 operations. If the reporting rule is only narrowly applied to the use of military force by the Department of Defense under Title 10 of the U.S. Code, it could encourage a further shift in authority to the CIA, which largely operates under Title 50 of the U.S. Code.<sup>348</sup> That could have the perverse effect of creating less, rather than more, transparency, because intelligence operations are vigorously guarded from public view. To address this problem, it will be necessary to define the scope of the request power to include uses of force regardless of the source of legal authority under which they take place. It is important to note that disclosure of the legal basis for an operation may present special challenges where the use of force cannot be openly acknowledged without violating the prohibition on disclosure of covert actions, which are, by definition, not meant to be acknowledged publicly.<sup>349</sup> The obvious solution—adding a process for classified review for legal explanations in these circumstances—threatens to undermine the very purpose of adopting open and public legal justifications of administration decisions in the first place.<sup>350</sup>

It is important to note that the incentive to shift operational authority from Title 10 and the Department of Defense to Title 50 and the CIA is not limited to this context but is instead systemic. There has long been a need for greater clarification of the constraints on Title 50 operations, particularly those that

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348. See Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SEC. L. & POL'Y 539 (2012); Andru E. Wall, *Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action*, 3 HARV. NAT'L SEC. J. 85 (2011).

349. 50 U.S.C. § 3093(e) (defining covert action as: "an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly").

350. For more on the legal framework for covert action, see, for example, ALFRED CUMMING, CONG. RSCH. SERV., RL33715, *COVERT ACTION: LEGISLATIVE BACKGROUND AND POSSIBLE POLICY QUESTIONS* (2009); James E. Baker, *Covert Action: United States Law in Substance, Process, and Practice*, in *THE OXFORD HANDBOOK OF NATIONAL SECURITY INTELLIGENCE* 587 (Loch K. Johnson ed., 2010); Scott J. Glick, *FISA's Significant Purpose Requirement and the Government's Ability to Protect National Security*, 1 HARV. NAT'L SEC. J. 87 (2010); and Jennifer D. Kibbe, *Covert Action, Pentagon Style*, in *THE OXFORD HANDBOOK OF NATIONAL SECURITY INTELLIGENCE*, *supra*, at 569.



deploy lethal force. The advent of remotely piloted aircraft has exacerbated the difficulties in recent years, as Title 50 authorities have been used for kinetic operations—commonly known as “targeted killings”—that would traditionally have been carried out under Title 10 (what Robert Chesney has termed the CIA’s “kinetic turn”).<sup>351</sup> The requirement that the executive offer public legal justifications for uses of force that have become public could, in fact, assist in policing the line between Title 10 and Title 50 operations. After all, if several members of Congress have learned of U.S. involvement (through other than classified sources, of course), then the “covert” nature of the mission has already been compromised.

#### 4. Empower Other States by Creating an Outcasting Council

Fourth, the United States could take steps to increase the capacity of international partners to place pressure on one another—including the United States—by creating an “outcasting council” to respond to international law violations.<sup>352</sup> The United Nations Security Council is tasked with maintaining international peace and security. It has the exclusive capacity to authorize a use of force by a sovereign state against another for the purpose of enforcing the law.<sup>353</sup> The Security Council is also able to mandate that all the members of the United Nations abide by economic sanctions, as well as enact coordinated voluntary sanctions. The Security Council, however, is severely hampered in its ability to act by the veto that the Charter grants to the permanent five members of the Council: China, Russia, the United Kingdom, the United States, and France. If one of them objects, a resolution authorizing an action to respond to unlawful action by a member state will fail.

From the very beginning of the United Nations, the veto held by the permanent members stymied the Council from playing the international law enforcement role some had envisioned. Andrei Gromyko, the first Soviet representative to the new United Nations, quickly became known as Mr. Nyet (Mr. No) for his frequent use of the veto in the Security Council.<sup>354</sup> The United States

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351. Chesney, *supra* note 348, at 566.

352. This idea draws from my joint work with Scott Shapiro, with whom I coined the term “outcasting” to refer to a set of tools for enforcing international law. See, e.g., HATHAWAY & SHAPIRO, *supra* note 279, at 336–51; Hathaway & Shapiro, *supra* note 69, at 324–39.

353. U.N. Charter art. 2, ¶ 4; *id.* art. 42. The only other express exception in the Charter is the permission to use self-defense against an armed attack. *Id.* art. 51.

354. Craig R. Whitney, *Andrei A. Gromyko: Flinty Face of Postwar Soviet Diplomacy*, N.Y. TIMES (July 4, 1989), <https://www.nytimes.com/1989/07/04/obituaries/andrei-a-gromyko-flinty-face-of-postwar-soviet-diplomacy.html> [<https://perma.cc/J93G-DFJ2>]. He used the veto twenty-five times during the two years he served. *Id.*

did not use the veto until 1970, but it has deployed it frequently since. As of March 7, 2020, Russia/USSR has used its veto 143 times, the United States 83, the United Kingdom 32, France 18, and China 16.<sup>355</sup> Most important, the veto means that the United Nations is ineffectual when it comes to disciplining the members of the Security Council or those closely allied with them.

But while the Security Council must authorize any use of force by a state against another, it need not authorize an effort to use economic sanctions. Yes, it is easier to put in place coordinated sanctions through the council, but it is possible to do so without it. Witness the extensive coordinated sanctions against Russia after its illegal seizure of Crimea. The European Union, United States, and a number of other states worked together to put in place sanctions that had a significant effect on the Russian economy.<sup>356</sup>

The problem with using sanctions in this way is that it often requires reinventing the wheel each time. The coalition has to be reconstructed from scratch for each event. But there is no reason that it must be this way. It would be entirely possible for a group of nations to form their own “Outcasting Council.” That council could adopt procedural requirements for approving and adopting coordinated sanctions against a state that violates the international law governing the use of force (or, for that matter, other international laws). The decisions of the Outcasting Council could not be vetoed by the Security Council, because economic sanctions are not prohibited by the Charter. Creating a standing body for coordinating sanctions in such cases could provide a valuable counterweight to the Security Council by allowing states that do not have seats on the Council to have a say in responding to the illegal actions by even powerful states that hold a veto—including the United States. In this way, the international community might be able to more effectively respond to actions by the United States and other Security Council members that violate the international law on use of force, providing some countervailing pressure against decisions to proceed with actions that violate international law. Moreover, if the Outcasting Council specifically tied its use of sanctions to violations of international law and explained its actions with care, it could even generate a body of documents interpreting international law that could have an effect far beyond the particular cases before it, thus creating a thicker body of international law interpretations on a range of issues.

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355. *U.N. Security Council Working Methods: The Veto*, SEC. COUNCIL REP. (Dec. 16, 2020), <https://www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php> [<https://perma.cc/VT37-2T89>].

356. HATHAWAY & SHAPIRO, *supra* note 279, at 371–95.

### C. Why a New President Should Accept—and Even Encourage—Limits

It may seem unlikely that, once president, Joe Biden would give up authority to act unilaterally. And if the president does not support the initiatives described above, they are unlikely to be enacted. After all, constructing veto-proof majorities in Congress in today's polarized climate is all but impossible. And if history is any guide, presidents don't give away power. Indeed, the presidency is institutionally structured to protect and expand existing authorities, including authorities to act unilaterally. President Obama, for example, entered office publicly committed to a vision of presidential authority in the national security arena that was more limited and modest than his predecessors. Charlie Savage, then a reporter for the *Boston Globe*, famously asked if a president could bomb Iran without congressional permission. In response, Obama said not unless necessary to stop "an actual or imminent threat to the nation."<sup>357</sup> When asked whether the "Constitution empower[s] the president to disregard a congressional statute limiting the deployment of troops," he said, "No, the President does not have that power."<sup>358</sup> Nonetheless, as described in earlier parts of this Article, the Obama administration routinely pushed against the outer limits of the law, and in some cases even pushed over that edge in asserting unilateral presidential authority to exercise force. Why should we expect President-elect Biden to behave any differently once he is in office?

There is one reason to be optimistic about the possibilities for reform: President Donald Trump. Particularly toward the end of President Obama's presidency, there were several events that conspired to take the wind out of any effort to rein in the power of the presidency. First, the Republican-led Congress was completely and utterly intransigent, making it impossible for the president to accomplish much of anything working in concert with Congress. Even passing an increase of the debt limit, which had long been pro forma, became an exercise in frustration and gamesmanship. As a result, Obama, who had been skeptical of unilateral actions, ended up embracing them.<sup>359</sup> Second, the political state of affairs of the Obama years was the perfect situation for quietly stripping away limits on unilateral presidential authority over national security. Many of the efforts to expand presidential power in the area of national security have always been more popular among Republicans than Democrats. So, when the Obama

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357. Savage, *supra* note 230.

358. *Id.*

359. See Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES (Apr. 22, 2012), <https://www.nytimes.com/2012/04/23/us/politics/shift-on-executive-powers-let-obama-bypass-congress.html> [<https://perma.cc/N6FP-MSWP>].

administration interpreted the War Powers Resolution<sup>360</sup> in 2011 in ways that gutted the limits on the president's power to overstay the sixty-day limits on hostilities without congressional approval, many Republicans silently cheered. Democrats who normally would have been more likely to oppose stretching legal authority in this arena were largely silent because they did not want to undermine a Democratic president already under significant pressure—they knew getting congressional approval would be an uphill battle he could very well lose (and they were likely happy for the political insulation that his unilateral actions provided). Third, most political observers assumed that President Obama would be succeeded by former Secretary of State Hillary Clinton. The idea of passing on a less limited presidency in the area of national security seemed like a good bet, at least to those who were in the Obama administration, many of whom must have assumed Clinton would behave responsibly as president. Further, they were undoubtedly keenly aware that Clinton was likely to face the same political response from Republicans in Congress as Obama had; even if the Democrats looked likely to take the House, the Senate was pretty clearly out of reach. Why hobble Clinton's presidency from the get-go?

Then Donald Trump was elected. An unconstrained presidency looks different—at least to Democrats—in light of the last several years. Many of those who helped chip away at the limits on presidential authority over national security during the Clinton and Obama years are suddenly talking again about imposing institutional limits. There is greater awareness that placing that much power in the hands of a single person is dangerous, and simply relying on elections to select principled, thoughtful, law-abiding, and cautious leaders does not always work. Institutional constraints may be frustrating when one holds power, but that is precisely why they are essential.

### CONCLUSION

This Article raises the question of whether law can constrain power in the national security arena. The short answer is that it can: There are rule of law reforms that could strengthen the capacity of external actors to much more effectively ensure that national security decisions are consistent with legal constraints. The harder question is whether we have the will to take the steps necessary to do so. Indeed, with President-elect Joe Biden preparing to take office, it is a unique moment to step back and assess the institutions and practices that

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360. War Powers Resolution, Pub.L. No. 93-148, § 8(a)(1), 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541–48).

govern national security lawyering. They are, after all, are responsible for ensuring that the rule of law is observed in some of the most important decisions the American government makes—the decisions to deploy the use of deadly force against others and to put the lives of Americans at risk in the process. The Obama administration heavily relied on consensus-driven decisionmaking in the Lawyers Group. It did so in large part to ensure it would not repeat the mistakes of the administration that preceded it—no longer could White House staff seek out favored lawyers in an agency to bless a desired course of action with an implausible legal opinion. It succeeded at addressing this danger. In the process, however, it adopted a set of practices with pathologies of its own. The Trump administration, in apparently ignoring many of the legal constraints on the president’s national security authority, has laid bare problems that existed all along. In doing so, it has created an opportunity to strengthen the rule of law in national security lawyering as we move into a new administration. It is up to us to seize it.