A Call for Institutional Reform of the Office of Legal Counsel

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INTRODUCTION

The Office of Legal Counsel (OLC) has been deemed "the most important government office you've never heard of" by *Newsweek* magazine.[1] Indeed, the office is extraordinarily powerful, standing as the legal arbiter of what the executive branch can and cannot do. With great power, so the saying goes, comes great responsibility—to fairly and forthrightly interpret the law, to hold the government back when it risks overreaching, and to settle disputes with an even hand. Yet during the Administration of George W. Bush, OLC let partisan political interests and ideology interfere with its function as fair-minded authority. As a result, the office has sanctioned—and the executive branch has pursued—legally unsound policies. This conduct most prominently entered the public consciousness in two incidents: the sanctioning of torture by U.S. military forces[2] and the politicization of hiring at the Department of Justice.[3] The nomination of OLC head Dawn Johnsen has also recently prompted controversy.[4]

This Essay explains what went wrong in the Office of Legal Counsel during the Bush Administration and suggests institutional reform to prevent such problems in the future. I begin by showing how OLC's conduct violated widely held norms within the legal community. Though many observers have focused on OLC's actions authorizing torture, this Essay contends, on the basis of more recently released documents, that the office's role permitting warrantless wiretapping within the United States was a unique violation of lawyerly values.

The Essay then analyzes the source of the problems within OLC. I argue that politicization of OLC by outsiders such as Monica Goodling[5] was not actually a violation of existing norms. On the contrary, the structure of OLC has traditionally lent itself to being particularly political. To remedy the situation, OLC should be restructured to attract a corps of less partisan

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[1] Daniel Klaidman et al., *Palace Revolt*, NEWSWEEK, Feb. 6, 2006, at 34.

[2] *See* David Johnston & Neil A. Lewis, *Bush's Counsel Sought Ruling About Torture*, N.Y. TIMES, Jan. 5, 2005, at A1.

[3] *See* Eric Lichtblau, *Report Faults Aides in Hiring at Justice Dept.*, N.Y. TIMES, July 29, 2008, at A1.

[4] *See infra* notes 11–12 and accompanying text.

[5] *See infra* note 33 and accompanying text.

attorneys who remain at the office for a longer period of time. This restructuring would involve creating a higher proportion of career civil servants within the office and taking steps to minimize attorney turnover. Next, the Essay considers a common suggestion to improve the Office of Legal Counsel, increasing the public availability of OLC opinions. I suggest a refinement to this idea—a method to encourage, but not require, OLC opinions to be made public—and also critique the usefulness of publicity for improving the quality of OLC opinions. Finally, the Essay concludes by considering the effect of reforming OLC on future battles over the division's leader.

I. Abuses at OLC

The Office of Legal Counsel evaluates for the rest of the executive branch whether a proposed course of conduct can be legally pursued. The office, located within the Department of Justice, receives queries from the White House and executive agencies requesting guidance on the legality of a proposed course of action.[6] OLC responds with memoranda giving answers to such questions—which, since such matters are often highly unlikely to reach a court of law, often decide what the federal government can and cannot do.[7] OLC also serves as adjudicator when executive branch agencies disagree about legal matters.[8] The parties seeking guidance from OLC agree in advance to be bound by OLC's decision.[9] In return, OLC endorsement of the legality of a particular course of action provides a stamp of approval—a "Get Out of Jail Free Card"—for the party seeking the opinion.[10]

Most recently, the Office of Legal Counsel has been embroiled in controversy regarding the appointment of its leader. President Obama nominated Dawn Johnsen, a law professor at the University of Indiana, to serve as the Assistant Attorney General for OLC, a position Johnsen held temporarily during the Clinton Administration.[11] Her nomination has languished for many months in the Senate over professed Republican concerns that she is a

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[6] *See* Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. Rev. 1559, 1576–77 (2007); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 Mich. L. Rev. 676, 710–13 (2005).

[7] *See* Pillard, *supra* note 6, at 711–13.

[8] *Id.* at 712.

[9] *Id.* at 711.

[10] *See* Jack Goldsmith, The Terror Presidency: Law and Judgment Inside the Bush Administration 97 (2008); *see also* Peter Marguiles, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 Md. L. Rev. 1, 47–48 (2009) (noting OLC's "legitimation function").

[11] Eric Lichtblau, *Obama Pick to Analyze Broad Powers of President*, N.Y. Times, Jan. 7, 2009, at A22. Johnsen has written fairly extensively about the Office of Legal Counsel itself, including some of the issues considered herein. *See* Johnsen, *supra* note 6; Dawn E. Johnsen, *What's a President to Do?: Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. Rev. 395 (2008) [hereinafter *Interpreting the Constitution*].

"liberal ideologue."[12] This contretemps comes on the heels of notorious controversy and abuses at OLC during the previous administration.

The most widely known example of OLC abdicating its responsibilities during the Bush Administration was the legal memorandum sanctioning the torture of enemy combatants by U.S. military forces.[13] Many commentators have amply explained why this document, written by Deputy Assistant Attorney General (AAG) John Yoo and signed by Assistant Attorney General Jay Bybee, violates both legal and moral values.[14]

However, more recently released information indicates that another OLC memorandum is, in fact, uniquely *legally* egregious (and therefore arguably worse than the torture memo). This memorandum, also written by then Deputy AAG Yoo, authorizes the U.S. government to conduct surveillance on foreign nationals without warrants. In addition to being morally reprehensible, the memorandum regarding torture made a variety of poor legal arguments. Perhaps most memorably, the torture memorandum imported the definition of "severe pain" from an unrelated statute governing Medicaid reimbursement, giving the phrase a meaning wholly implausible in the torture context.[15] Although Yoo made legal arguments in the torture memorandum that were indeed quite poor, the memorandum regarding surveillance went beyond making bad arguments. The surveillance memorandum actually *misrepresented* the very statute it purported to interpret. This type of misrepresentation is a unique violation of legal norms because it is the sole type of erroneous legal argument for which courts sanction litigants. The torture memorandum made poor legal arguments, but only the surveillance memorandum lied about a statute. Thus, although the torture memorandum exhibited poor legal reasoning, the surveillance memorandum's outright misrepresentation was even more suspect.

The Yoo surveillance memorandum remains confidential.[16] But another memo, released in the initial days of the Administration of President Obama, describes with some specificity the legal argument of the initial Yoo surveil-

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[12] Neil A. Lewis, *In Senate Judiciary Wars, G.O.P. Struggles With Role*, N.Y. TIMES, Mar. 31, 2009, at A20; *see also* Alexander Bolton, *Senator Reid Faces Pressure from Some Left-Leaning Groups on Justice Pick*, THE HILL, Oct. 30, 2009, at 3, *available at* http://thehill.com/homenews/senate/65547-reid-faces-pressure-from-left-on-controversial-justice-pick.

[13] Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), *available at* http://www.washingtonpost.com/wp-srv/politics/documents/cheney/torture_memo_aug2002.pdf.

[14] *See, e.g.*, GOLDSMITH, *supra* note 10, at 146–50 (on the memo's weak legal reasoning); DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 178–80 (2007) (legal reasoning); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005) (immorality). *But see* Eric Posner & Adrian Vermeule, Op-Ed., *A 'Torture' Memorandum and its Tortuous Critics*, WALL ST. J., July 6, 2004, at A22.

[15] *See* W. Bradley Wendel, *Deference to Clients and Obedience to Law: The Ethics of the Torture Lawyers (A Response to Professor Hatfield)*, 104 NW. U.L. REV. COLLOQUY 58, 69 (2009), *available at* http://www.law.northwestern.edu/lawreview/colloquy/2009/29/.

[16] *See* Posting of Orin Kerr to The Volokh Conspiracy, http://volokh.vcom/posts/1236036389.shtml (Mar. 2, 2009, 18:26 EST) (on file with the Harvard Law School Library).

lance memo.[17] This more recent memorandum therefore offers a novel window into how legally outrageous OLC's analysis became.[18]

In interpreting the Foreign Intelligence Surveillance Act (FISA),[19] the Yoo surveillance memorandum invoked the "general rule of construction that statutes will not be interpreted to conflict with the President's constitutional authorities absent a clear statement that Congress intended to do so."[20] Relying on the President's constitutional power to make war, Yoo concluded that FISA did not prevent the National Security Agency from conducting surveillance without warrants on foreign nationals residing in the United States during wartime.[21] However, as the recent memorandum points out,[22] FISA quite explicitly makes mention of the President's wartime authority, limiting his ability to conduct warrantless surveillance to fifteen days.[23] Yoo apparently made no mention of this provision, despite the fact that it was obviously a relevant part of the very statute he was analyzing.

This omission is a uniquely egregious violation because it breaks a rule that is particularly sacrosanct within the legal community: legal arguments must not intentionally misrepresent legal authority.[24] That violating this principle is the sole type of erroneous legal argument for which courts routinely punish attorneys reveals that this rule is exceptionally sacred among lawyers.[25] The evidence suggests that Yoo's memorandum would warrant such Rule 11 sanctions were it filed in any court in the United States.

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[17] Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001, at 6–8 (Jan. 15, 2009) [hereinafter Bradbury Memo], *available at* http://www.justice.gov/opa/documents/memostatusolcopinions01152009.pdf.

[18] In addition to the commentary in the newly released Bradbury Memo, there is also reason to believe some of the arguments from the still unreleased surveillance memorandum appeared publicly in a December 2005 statement from the Department of Justice's Office of Legislative Affairs. *See* Letter from William E. Moschella, Assistant Att'y Gen., Office of Legislative Affairs, to Sen. Pat Roberts, Chairman, Senate Select Comm. on Intelligence et al. (Dec. 22, 2005), *available at* http://www.epic.org/privacy/terrorism/fisa/nsaletter122205.pdf. This statement uses the same objectionable tactic—intentionally misrepresenting legal authority—as the surveillance memorandum reportedly does. *See* Letter from Curtis A. Bradley, Richard & Marcy Horvitz Professor of Law, Duke Univ., et al. to Sen. Bill Frist, Majority Leader, U.S. Senate et al. 3–4 (Jan. 9, 2006), *available at* http://epic.org/privacy/terrorism/fisa/dojreply.pdf.

[19] 50 U.S.C. §§ 1801–1811 (2000).

[20] Bradbury Memo, *supra* note 17, at 7.

[21] *Id.*

[22] *Id.* ("[T]he application of this canon . . . is problematic and questionable, given FISA's express references to the President's authority.").

[23] 50 U.S.C. § 1811 (2000).

[24] *See* FED. R. CIV. P. 11(b)(2).

[25] *See, e.g.*, Truck Treads, Inc. v. Armstrong Rubber Co., 129 F.R.D. 143, 151 (W.D. Tex. 1988) (imposing legal sanctions for "a substantial mischaracterization of existing law"). Rule 11 also provides sanctions for dilatory or unnecessarily costly motions and the misrepresentation of facts to a court. FED. R. CIV. P. 11(c).

The rationale of Rule 11 is clearly explained in the authoritative treatise on the matter by Judge William Schwarzer.[26] "A lawyer must not misstate the law [or] fail to disclose adverse authority . . . . If the rule on which he relies is circumscribed or conditioned so as to preclude its application to the case, he is obligated to disclose that fact."[27] By failing to mention FISA's wartime provision in his very analysis of the president's wartime authority, Yoo ignored an explicit provision clearly proscribing the behavior in question. This is exactly the type of abuse Rule 11 seeks to prohibit. Such a misrepresentation of legal authority would clearly warrant court sanctions.[28]

The Yoo memorandum exhibits disregard for the lawyer's role as crafter of persuasive argument on the basis of relevant legal authority. Such a document would have little value outside of the unique context of OLC. The reasoning would be essentially useless if rendered by a lawyer in litigation or in virtually any transactional context.[29] Rather, the memorandum seems clearly intended to sanction a policy that no court would ever consider.

The memorandum also reflects an insidious distortion of OLC's role. In cases where judicial review of the government's actions is unlikely to occur, OLC lawyers should be *especially* vigilant to represent legal authority accurately and provide sound opinions, given OLC's quasi-judicial role.[30] The surveillance memorandum thus reflects a particularly outrageous example of the behavior for which the Bush OLC has been widely, and rightly, condemned.[31] I will now consider why OLC failed and what might be done to prevent such failures in the future.

II. What Went Wrong?

The objectionable memoranda from OLC should not be viewed as arising singularly from the Bush Administration, but rather as a result of OLC's institutional structure. The broad politicization of the Justice Department during the Bush Administration has been the topic of much media attention and scrutiny.[32] In particular, the official investigation into the controversial actions of Monica Goodling specifically censured her for recommending a "conservative" candidate to a civil service position in the Office of Legal

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[26] Courts have cited the treatise more than 650 times. William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181 (1985).

[27] *Id.* at 193.

[28] The behavior also clearly violates the more restrictive Rules of Professional Conduct. *See* Model Rules of Prof'l Conduct R. 3.3(a)(2) (2001).

[29] *See* W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 Cornell L. Rev. 67, 120 (2005).

[30] Memorandum from Walter E. Dellinger, Assistant Att'y Gen., Office of Legal Counsel, et al., Principles to Guide the Office of Legal Counsel (Dec. 21, 2004), *reprinted in* Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. Rev. 1559 app. 2, at 1608 (2007).

[31] *See, e.g.*, Johnsen, *Interpreting the Constitution*, *supra* note 11.

[32] *See, e.g.*, Charlie Savage, *White House Pushed List of 'Loyalists' for Hire*, N.Y. Times, July 31, 2008, at A17.

Counsel.[33] "Attorney-advisor positions in OLC are career, not political, positions."[34] While much of the criticism of Goodling's behavior was probably justified, the condemnation of her action with respect to the Office of Legal Counsel was unwarranted. In other sections of the Justice Department, the Bush years may have represented a deviation from existing norms.[35] On the other hand, the staff of OLC, including supposedly career "attorney-advisors," has been partisan for some time.[36] Monica Goodling's offense was simply putting into words what had been the unspoken reality across several administrations.

Nonetheless, interference with OLC from the outside does not seem to have been the cause of the egregious torture and FISA memos. In the past, OLC's insulation from outside forces has been heralded as a praiseworthy feature of the office.[37] There is little reason to believe this norm was violated in the Bush Administration. Yoo himself reports that the torture memorandum was requested and written using ordinary procedures.[38] Independent media accounts have verified this assertion.[39]

Rather than interference from without, the problem with OLC is the composition of its staff within. The structure of OLC lends itself to a particularly ideological corps of attorneys. In this regard, a comparison with the Office of the Solicitor General (SG) is instructive. The SG's office has a longstanding and sterling reputation for political neutrality that has survived the Bush Administration unscathed.[40]

OLC lawyers tend to be particularly partisan for two reasons. First, a disproportionate percentage of the top ranks of the office, all four deputies,

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[33] Goodling was a high-ranking political appointee in the Bush Justice Department to whom then Attorney General Alberto Gonzales delegated substantial authority for personnel decisions. She was later censured, amidst much media attention, for a wide variety of illegal activity relating to politicized hiring of legally nonpartisan civil servants, including at the Office of Legal Counsel. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, ET AL., AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 37–39 (2008), *available at* http://www.justice.gov/oig/special/s0807/final.pdf; *see also* Lichtblau, *supra* note 3.

[34] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, ET AL., *supra* note 33, at 43.

[35] *See* Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-in Approach*, 106 COLUM. L. REV. 708, 746–47 (2006) (noting politicization of the Voting Section); William R. Yeomans, *An Uncivil Division*, LEGAL AFF., Sept.–Oct. 2005, at 20, *available at* http://www.legalaffairs.org/issues/September-October-2005/argument_yeomans_sepoct05.msp (noting politicization of Civil Rights Division generally).

[36] *See infra* notes 40–47 and accompanying text.

[37] *See* Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337, 373 (1993).

[38] *See* JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 170 (2006).

[39] *See* Klaidman et al., *supra* note 1.

[40] *See, e.g.*, Thomas W. Merrill, *High-level, "Tenured" Lawyers*, 61 LAW & CONTEMP. PROBS. 83, 95–99 (1983); Burt Neuborne, *Testimony Before the Subcommittee on Oversight of the House Judiciary Committee*, 21 LOY. L.A. L. REV. 1099, 1102 (1988). *But see* LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW (1987).

are political appointees.[41] While the Solicitor General is also a political appointee, three of his four deputies are career civil servants.[42] Second, the turnover rate of attorneys within OLC is much higher than in the SG's office. Whereas the career deputies in SG provide stability at the top of the office's hierarchy, the political appointees at the deputy level in OLC by definition "roll over" with each change in administration. Likewise, while staff lawyers often make long careers in the Solicitor General's office,[43] lower level attorney-advisors in OLC routinely stay put for two to three years.[44] Since most OLC attorney-advisor positions turn over within each administration, the political appointees at the top can easily staff the rest of the office with like-minded lawyers.[45]

The result of this institutional structure is that both top brass and foot soldiers in OLC are essentially political. The contrast with the SG's office is stark. Knowledgeable observers have long attributed the independence of the SG's office to its stable cohort of civil servants.[46] This independence has revealed itself in various high profile incidents. For example, when Reagan Solicitor General Rex Lee had to recuse himself from a particular matter, a senior civil servant who served through the Carter Administration became Acting SG in Lee's stead.[47] Remarkably, the brief that the Acting SG submitted to the Supreme Court indicated his resistance to Reagan's position.[48] By comparison, each and every opinion written by the nominally career OLC attorney-advisors is revised by two political appointee deputies as well as the political head of the office.[49]

The political nature of OLC is substantially exacerbated by the type of lawyers the office tends to attract and their career ambitions. OLC's heady

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[41] For a thorough theoretical treatment of the distinction between political appointees and career civil servants, see generally Merrill, *supra* note 40.

[42] Pillard, *supra* note 6, at 716.

[43] *Id.* at 708 n.95.

[44] John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 425 (1993).

[45] *Id.* at 425; *see also* David Fontana, *A New Kind of Adviser*, NEW REPUBLIC, May 6, 2009 (noting that "many of the important lawyers in OLC" are "[t]ypically . . . affiliated with the political party of the president."). There are, of course, some notable exceptions to this general rule: Democrat Harold Koh, for example, served as an attorney-advisor in the Reagan Administration.

[46] *See, e.g.*, Richard G. Wilkins, *An Officer and an Advocate: The Role of the Solicitor General*, 21 LOY. L.A. L. REV. 1167, 1170 (1988) (attributing the office's independence to "the simple fact that the bulk of the Solicitor General's staff consists of civil service employees who are not subject to removal for political or ideological reasons").

[47] Drew S. Days III, *In Search of the Solicitor General's Clients: A Drama With Many Characters*, 83 KY. L.J. 485, 491 (1994); Donald B. Ayer, Deputy Solicitor Gen., Office of the Solicitor Gen., Remarks at Reagan II Panel (Sept. 12–13, 2002), *in* Theodore B. Olson, *Rex E. Lee Conference on the Office of the Solicitor General of the United States*, 2003 BYU L. REV. 1, 88 (2003).

[48] Days, *supra* note 47, at 491; Ayer, *supra* note 47, at 88–89. *But see infra* note 55 and accompanying text. For more detail on the relationship between political appointees and career civil servants in the SG's office, see Merrill, *supra* note 40, at 84.

[49] Pillard, *supra* note 6, at 716; YOO, *supra* note 38, at 170.

task attracts an ambitious group of lawyers who seem to be particularly "on the make." The career advantages of working at OLC are well known. For example, the office is a notoriously good springboard to the federal judiciary.[50] It was no accident that Jay Bybee, who had expressed a desire for a judgeship, signed Yoo's torture memo. Bybee's subsequent elevation to the Ninth Circuit marked only the latest step on the well-trod path to the judiciary from OLC, alumni of which include Samuel Alito, Antonin Scalia, and William Rehnquist.[51] Such lawyers need no outside pressure to conform to a partisan point of view; they have their own incentives to please their political masters. Likewise, lawyers such as Yoo himself have been characterized as "issue entrepreneurs," who ambitiously push a particular ideological agenda in the academy, government, and elsewhere.[52]

The upshot of this analysis is that the trouble at OLC was not an insidious corruption of the office by the Bush Administration. Rather, OLC's problem was that it was populated by lawyers like Yoo and Bybee in the first place. This situation should be remedied by changing the institutional structure of OLC.

III. Institutional Reform of OLC

The current structure of OLC, as described above, attracts an especially ambitious corps of attorneys, who tend to be noticeably political and stay in the office for a particularly short period of time. Reducing the number of political appointees in the office is the change most easily obtained. However, altering the type of attorneys attracted by the office and increasing their tenure will be more difficult. Doing so, though, will ultimately be necessary to alleviate the political tenor of the office.

The first step in reforming OLC is the simplest: the proportion of political appointees at the deputy level should be changed. Currently, all the deputies are political appointees. The SG's office manages just fine with a single political appointee among its four deputies, and OLC should at least adopt this scenario. Indeed, to bring the maximum amount of nonpartisanship to the office, all of OLC's political deputies should be replaced with career civil servants. The Assistant AG at the head of the office would still be a political appointee and therefore keep the office accountable to the President.

It is hard to see what problem this change would cause for OLC's effective operation. In the SG's office, the so-called "principal deputy" position—the Deputy SG that is a political appointee—was created after the incident, described above, in which the civil servant indicated his disagree-

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[50] McGinnis, *supra* note 44, at 422.
[51] *Id.* at 422 n.178.
[52] *See* Marguiles, *supra* note 10, at 48.

ment with the administration's policy in the government's brief.[53] However, an analogous situation should not occur at OLC. Since the office does not advocate for a particular side in an adversarial proceeding, there should never be need for a civil servant to advocate for a governmental position that she believes is unsound. On the contrary, the very purpose of OLC is to stand as a check on the government's position.

It might be argued that other executive branch actors would be less likely to bring important questions of law to a less partisan OLC. After all, those seeking OLC opinions are often themselves political appointees, and such officials might be reluctant to take legal questions to an office more aggressive about checking presidential prerogative. Instead, these officials might bring legal questions to even more partisan attorneys, such as agency general counsel or White House Counsel, or, even worse, simply take legally questionable action without asking for a legal opinion.

In practice, however, the substantial incentives for seeking an OLC opinion should limit this reaction to a less partisan OLC. Legal opinions from White House Counsel and other general counsels do not carry the authoritative weight of OLC opinions, since everyone knows their role is to support the respective political principals of their offices. Only OLC opinions have the "Get Out of Jail Free Card" quality to them.[54] Indeed, OLC opinions would actually become more authoritative were the office made less partisan, increasing the incentive to seek OLC opinions. If executive officers want their prospective action to be officially stamped as legal, they should be forced to seek such approval from a truly independent body. Furthermore, to the degree that OLC opinions are sought to resolve legal conflict between executive actors, this function would not be affected at all by having a less partisan arbiter.

Steps should also be taken to promote less partisanship among the nominally career staff at OLC. To start, reducing the number of political deputies may have something of a "trickle down" effect. The bar on using political affiliation explicitly in hiring should allow civil servants to minimize the degree to which political appointees are able to hire like-minded lawyers.[55] More senior career attorneys should ensure that the civil service model is a reality, rather than just the shell game exhibited by the Goodling episode.

Ultimately, however, the nonpartisanship of both deputies and attorney-advisors will depend on lawyers within OLC remaining in the office for a longer time, across the administrations of different parties. Again, there should be something of a top-down effect, as the greater number of civil servants at the top will create an environment in which a ritual changing of

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[53] Merrill, *supra* note 40, at 90–91; Ayer, *supra* note 47, at 88–89; *see also supra* notes 47–48 and accompanying text.

[54] *See supra* note 10 and accompanying text.

[55] *Cf.* Yeomans, *supra* note 35 (describing how decreased involvement by career attorneys in Civil Rights Division affected hiring).

the guard with each new administration is not taken for granted. Only then will lawyers represent viewpoints more diverse than those of the administration currently in charge. Having lawyers remain at OLC for a longer period of time would bring other advantages. Lawyers who make a career at the office will naturally care more about maintaining the office's reputation for lawfulness.[56] By contrast, temporary staffers like Yoo are unlikely to have much loyalty to the office itself and are more likely to see OLC as a vehicle for pushing their political agenda.[57] This reputational consideration would provide a welcome countervailing force to the political pressures of the moment.

Further action should thus be taken to encourage attorneys to make careers at OLC. Others have suggested that the office inherently lends itself to short tenures, because "attorneys at OLC do not gain litigation or other readily transferable knowledge from their experience."[58] But this conclusion is not inevitable. For one thing, it is not clear why not developing skills that are useful elsewhere will necessarily cause lawyers to leave OLC. One could just as easily think that not learning transferable skills would lend itself to lawyers remaining in the office. Government lawyers routinely make careers in other agencies that demand skills unrelated to private practice. In any case, to the degree that not gaining expertise drives lawyers to leave OLC, this problem is not irresolvable. Rather, it is itself a feature of institutional structure. Lawyers at OLC, rather than being generalists, could be assigned a particular subject matter specialty in which they would gain transferable experience over several years. Attorneys could also be encouraged to stay at OLC by raising salaries in the division.

Perhaps the hardest problem to solve is fundamentally changing the type of lawyers attracted to OLC. The office, standing as it does as the arbiter of executive branch action, will naturally tend to attract a particularly ambitious set of attorneys. The best avenue for reform here, then, is probably on the demand, not the supply side. Rather than hiring ambitious young lawyers fresh out of clerkships,[59] OLC could hire mid-career lawyers who are looking to settle into an important government position for a longer period of time. This reform would work particularly well if coupled with increased specialization at OLC, as mid-career lawyers are likely to have particular subject matter expertise gained in private practice or elsewhere. Attempting to hire employees more inclined to stay with the organization for a long period of time is standard fare for employers of all kinds. There is no particular reason the same preference could not become a part of the culture at OLC.

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[56] *Cf.* Merrill, *supra* note 40, at 95–99 (describing "reputation building" justification for reform of Solicitor General's Office).

[57] *See* Marguiles, *supra* note 10, at 3 (criticizing "issue entrepreneurship" that, like Yoo's, "privileges short-term interests").

[58] McGinnis, *supra* note 44, at 424–25.

[59] *See id.* at 424–25 n.186.

IV. Making OLC Opinions Public

Several commentators have suggested an alternative proposal for reforming the Office of Legal Counsel: increasing the number of OLC opinions made publicly available.[60] Though this idea has been around for some time,[61] calls for greater openness have renewed apace with the extreme abuses of the Bush Administration.[62] This reform would probably have prevented some of the worst opinions; as Cornelia Pillard notes, OLC retracted the torture memorandum after it was made public.[63] However, as even advocates of increased publicity have pointed out, there are practical limits on how much of OLC's work can be made public. Many of the matters dealt with by OLC are by their very nature confidential, and making more memos public might simply discourage executive officers from seeking advice on questionably legal conduct.[64]

Instead of requiring the publication of OLC opinions, it might be possible to adopt a less intrusive reform that would instead encourage government officials to voluntarily make more opinions public. This reform would be to treat only published OLC opinions as having legitimating authority.[65] In other words, rather than having OLC opinions secretly legitimate questionable conduct for governmental actors, unpublished opinions could be treated as useful but nonbinding advisory opinions from OLC. A government official seeking an OLC opinion would proceed in accordance with the current practice in requesting the opinion on a proposed course of conduct.[66] However, if OLC decided the action was legally sound, the official would be faced with the choice of either making the decision public and going forward with OLC blessing or keeping the opinion private and having only an advisory opinion that the dubious conduct was legal.

The advantage of this approach, as opposed to any mandatory publication process, would be that government officials would still be able to re-

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[60] Others have floated additional proposals for reforming the Office of Legal Counsel in the wake of Bush Administration abuses. Most dramatically, Professor Bruce Ackerman has suggested abolishing the office completely and replacing it with a court-like tribunal that would consider briefs, hear oral argument, and sit in multimember panels. Bruce Ackerman, *Abolish the White House Counsel: And the Office of Legal Counsel, Too, While We're at It*, Slate, Apr. 22, 2009, http://www.slate.com/id/2216710 (on file with the Harvard Law School Library). For a similar proposal, see Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 Yale L.J. 2314, 2336–41 (2006). The more modest proposals I suggest, however, would be significantly easier to implement than these radical ideas.

[61] *See* Harold Hongju Koh, *Protecting the Office of Legal Counsel From Itself*, 15 Cardozo L. Rev. 513, 515, 517–23 (1993).

[62] *See, e.g.*, Dellinger, *supra* note 30, at 4; Johnsen, *supra* note 6, at 1596–97 (describing "transparency" as "most essential"); Pillard, *supra* note 6, at 749–51.

[63] Pillard, *supra* note 6, at 739.

[64] Johnsen, *supra* note 6, at 1597–98.

[65] I thank seminar participants at Yale Law School and especially Jerry Mashaw for this idea.

[66] *See supra* notes 7–10 and accompanying text.

quest OLC opinions on the full host of national security and other possibly sensitive matters. Indeed, if OLC decided that the proposed conduct was illegal, the official would have a clear answer to the question without risking public criticism for even considering the idea. However, if OLC decided that the conduct was, in fact, legal, that judgment would only have legitimating authority if the opinion was made public. Thus, OLC opinions would no longer serve the role of secretly giving legitimacy to extremely aggressive interpretations of the law. Government officials would have an incentive to make OLC opinions public, and many more opinions would probably be published, but there would be no disincentive for seeking OLC's opinion.

On the other hand, increased publicity might not, under certain circumstances, actually deter OLC from rendering faulty legal advice. On the contrary, publicity might sometimes encourage and exacerbate the politicization of OLC opinions. In cases in which the law and public opinion are at odds, a politically sensitive OLC might well choose the popular, albeit illegal option.[67] Though the torture policy received widespread condemnation upon its release, it is much less clear that the surveillance memos would have received such criticism. The FISA policy appeared at least initially to be quite popular with the American people.[68] The political nature of OLC described above might actually amplify this problem, as ambitious, partisan-minded lawyers are probably particularly sensitive to publicity.

Increased transparency is thus unlikely to be the silver bullet that saves the Office of Legal Counsel. Rather, institutional reforms that make OLC less political will ultimately be necessary.

Conclusion

In light of the recent controversy over the appointment of Dawn Johnsen,[69] one beneficial side effect of reforming OLC might be the prevention of future battles over the office's leader. If OLC employed nonpartisan career attorneys who did not rotate with each administration, then the identity of OLC's leader would be less significant. The Assistant Attorney General for OLC would no longer be charged with essentially rebuilding the office from scratch, but instead would have the more modest task of providing direction to a fairly stable body.[70] A minimal opportunity to reshape the

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[67] *Cf.* The Federalist No. 78 (Alexander Hamilton).

[68] *See* Jonathan Weisman, *Democrats Target Rumsfeld: Lawmakers to Seek a Vote of No Confidence in Defense Secretary*, Wash. Post, Sept. 1, 2006, at A09 (referring to "a majority of Americans who back the effort"). The policy's popularity has subsequently been contested. *See Polls Show Americans Approve of . . . Some Stuff We Just Made Up*, Democracy America, Feb. 29, 2008, http://www.economist.com/blogs/democracyinamerica/2008/02/polls_show_americans_approve_o.cfm (on file with the Harvard Law School Library).

[69] *See supra* notes 11–12 and accompanying text.

[70] *Cf.* John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 Stan. L. Rev. 799, 810–11 (1992) (describing limits of political appointee's role in reshaping the Solicitor General's office).

office would limit the incentive for a protracted struggle like the one over Johnsen's confirmation.

On the other hand, it is difficult to tell whether these reduced incentives would in practice actually produce less acrimony over the OLC nominee. The current Republican leadership has not hesitated to hold up the confirmation of even fairly uncontroversial appointments.[71] This hotly partisan environment, however, only underscores the importance of restructuring OLC. In a polarized age in which even routine appointments become a source of political warfare, policymakers should welcome innovations to make the government's operation more stable and objective. Reforming the Office of Legal Counsel would be one such step in the right direction.

[71] Ruth Marcus, *Advise and Stall: Senate Republicans Are Holding Up Key Nominees*, WASH. POST, Oct. 7, 2009, at A25.