

# ESSAY

## INDEPENDENCE AND EXPERIMENTALISM IN THE DEPARTMENT OF JUSTICE

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*This Essay challenges the conventional wisdom that political accountability is sufficient to check abuse of power and lawlessness in the executive branch in the vast areas of executive action that are not regularly subject to judicial review. The Essay studies two examples in the long history of partisan appointment of high-ranking government lawyers (Roger Taney's work for Andrew Jackson in the dispute over the Second National Bank, and the recruitment and work of agency lawyers in the first wave of the New Deal) to demonstrate that lawyers working in the Bush Administration Department of Justice were unique neither in their attitude toward constitutional constraints on the executive, nor in their identification with and desire to promote the Administration's agenda. Nearly exclusive reliance on political accountability invites an ideologically charged approach to the provision of legal advice to the President, particularly in times of national crisis when the President's practical and constitutional powers—his "authority of initiative"—are at their peak. The result is that lawyers charged with exercising independent professional judgment to define and preserve the boundaries of permissible executive branch action often assist the President in moving, manipulating, or simply ignoring these boundaries and hence altering the very framework in which controversial executive action is assessed after the fact. In areas in which transparency ensures the supervision of Congress and the electorate, this "extralegal" approach to law reform is less controversial. But in areas such as national security, where transparency is weak at best, the danger of unchecked lawlessness is acute indeed. The Essay considers structural options to ensure that the Department of Justice provides genuinely independent legal advice.*

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## I. LAW REFORM THROUGH LAWLESSNESS

Legal academic work in general, and legal theory in particular, have lavished attention on judges, the art of judging, and the nature of appellate adjudication. Political scientists, historians, and biographers interested in law have generally followed course, making judges and the courts upon which they sit their primary objects of study. But it is the actions of lawyers, particularly before and in the absence of trial, that has the most pervasive influence on the development of the law. Legislatures and courts intervene interstitially, and on rare occasion quite powerfully, but their pronouncements would be empty without the countless and largely confidential acts of counseling by lawyers. This occurs primarily through private lawyers advising clients about whether and how to comply with law, but also, and at least as importantly, through government lawyers in their decisions about whether and how to enforce the law as well as their advice to agencies and the President on the proper boundaries of executive branch action.

If there was any doubt about the significance of the counseling function of lawyers, particularly government lawyers, the actions of attorneys working in the Department of Justice during the Bush Administration should dispel it. Torture, indefinite detention, extraordinary rendition, targeted killing, profiling of Arab and Muslim men, and warrantless surveillance all occurred with the ex ante approval of government lawyers.<sup>1</sup> Indeed, whatever the wishes of the White House, it is unlikely that lower-level officers would have complied with policies of doubtful legality without Department of Justice approval.<sup>2</sup> There is

1. With respect to torture, see Memorandum from Jay S. Bybee, Assistant Att’y Gen., U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President (August 1, 2002), reprinted in *THE TORTURE PAPERS* 172, 204 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (concluding that interrogators authorized by the President would be immune from prosecution for violating criminal prohibitions on torture). On extraordinary rendition, see DAVID LUBAN, *The Torture Lawyers of Washington*, in *LEGAL ETHICS AND HUMAN DIGNITY* 162, 171 n.26 (2007). See also *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007). On targeted killing, see *infra* note 14. On the profiling of Arab and Muslim men, see *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951-52 (2009). On warrantless surveillance, see 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) (on file with author). See also *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007).

2. See, e.g., 28 U.S.C. § 511 (2006) (regarding authority of Attorney General to give

now litigation in the courts regarding some of these policies, but the actions and their immediate practical, social, and political consequences are in many respects irremediable through ex post litigation.<sup>3</sup>

Perhaps most significantly, our understandings of the constitutional guarantees that might have prevented such lawlessness have been profoundly challenged. This was not just common lawlessness, but lawlessness cutting to foundational promises of liberal democratic governance. Not only is meaningful ex post judicial review unlikely for the Administration's most significant and controversial actions, there was little or no favorable case law ex ante, legislative endorsement was missing, international treaty obligations were brushed aside, domestic positive law was violated, core constitutional rights protecting civil liberties were infringed, and fundamental principles of separation of powers designed to restrain the executive were upended.<sup>4</sup> The claims of executive supre-

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legal advice to the President); *Smith v. Jackson*, 246 U.S. 388, 390-91 (1918) (rebuking executive official who "had no power to refuse to carry out the law and that any doubt which he might have had should have been subordinated, first, to the ruling of the Attorney General," who had provided an opinion on the matter); 28 C.F.R. § 0.25(a) (2010) (delegating advisory power of Attorney General to OLC); Gary J. Edles, *Service on Federal Advisory Committees: A Case Study of OLC's Little-Known Emoluments Clause Jurisprudence*, 58 ADMIN. L. REV. 1, 4 (2006) ("OLC opinions are generally regarded as binding throughout the executive branch."); Sewall Key, *The Legal Work of the Federal Government*, 25 VA. L. REV. 165, 195 (1939) ("[N]o Government official has ever been held liable for acts done pursuant to an opinion of the Attorney General."); Memorandum from David Margolis, Assoc. Deputy Att'y Gen., Office of the Deputy Att'y Gen., Re: Memorandum of Decision Regarding Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of 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 45-46 (Jan. 5, 2010) (on file with author) [hereinafter Deputy's Memo] (discussing CIA request for "declination" of prosecution and OLC guidance on interrogation techniques); see also 8 C.F.R. § 1103.3(c) (2010) (requiring the Department of Homeland Security to get approval by the Attorney General for immigration decisions to have precedential value). Department of Justice lawyers also are required to obtain approval from the Solicitor General's office (which is accountable to the Attorney General) when seeking an appeal from a judgment adverse to the United States in federal district court. See UNITED STATES ATTORNEYS' MANUAL § 2-2.121 (1997). For evidence that OLC opinions regarding the use of torture created immunity from criminal prosecution, see Jess Bravin, *Pentagon Report Set Framework for Use of Torture; Security or Legal Factors Could Trump Restrictions*, *Memo to Rumsfeld Argued*, WALL ST. J., June 7, 2004, at A1. See also Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture; Justice Dept. Gave Advice in 2002*, WASH. POST, June 8, 2004, at A01.

3. See, e.g., *Iqbal*, 129 S. Ct. 1937; *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc). But see *al-Kidd v. Ashcroft*, 580 F.3d 949, 959 (9th Cir. 2009), cert. granted, 79 U.S.L.W. (U.S. Oct. 18, 2010); *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009), appeal pending, No. 09-16478 (9th Cir. argued June 14, 2010); see also *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) (qualified immunity of Attorney General); *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (absolute immunity of President from suits seeking civil damages predicated on his official acts).

4. David Luban ably details the misleading manner in which the lawyers who wrote the torture memos attempted to skirt clear domestic and international legal constraints. See LUBAN, *supra* note 1, at 165-204. On extraordinary rendition, see *id.* at 170. Other commen-

macy were particularly staggering in their breadth. John Yoo's September 25, 2001, memorandum asserted "that the President has the plenary constitutional power to take such military actions as he deems necessary and appropriate to respond to the terrorist attacks upon the United States on September 11, 2001."<sup>5</sup> No statute "can 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."<sup>6</sup> The President, charged with taking care to faithfully execute the laws,<sup>7</sup> is thus made a law unto himself *by his lawyers*.

A later court may ratify new understandings of civil liberties and executive power or attempt to revise them. Future events may confirm their wisdom, tempt us to extend the practices they justified, or provoke a retrenchment. Disquieting political responses are, in any event, already emerging. Even as those of us who found the lawlessness endorsed by the Bush Administration lawyers chillingly undemocratic celebrate the ascendancy of a new administration and its promises of constitutional fidelity and reform, we must take cognizance of more immediate and far less reassuring legislative responses. Congress reacted to the evidence of torture and indefinite detention of enemy combatants by passing the Military Commissions Act.<sup>8</sup> Whatever else may be said about the

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tators avoid the term "lawlessness." They concede that "[e]xtra-[l]egal" executive branch action occurs in response to emergencies on the way to insisting that, under the right circumstances, extralegality can enhance "'long-term' constitutional fidelity." Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1023 (2003). Still others claim that extralegal action by the government is a normatively appropriate, indeed primordial, response to emergencies. *See id.* at 1042 (discussing a strain of political realism). Both positions obscure the critical moment for constitutional democracies in which executive power exceeds preexisting boundaries (the former by taking the long view of what constitutional fidelity means; the latter by rendering law subordinate to security). As importantly, both positions obscure the fact that government lawlessness can reshape the context in which its actions are assessed and that such lawlessness has more than an abstract cost or benefit in relation to law and security. It harms discrete individuals, sometimes irremediably, even if the nation is rendered more secure. Thus the manner in which we describe the moment of executive excess, *especially* in response to emergency, is most significant. Our discourse should not lead us to forget or diminish the very object of analysis. *Cf.* Stephen Holmes, *Is Defiance of Law a Proof of Success? Magical Thinking in the War on Terror*, in *THE TORTURE DEBATE IN AMERICA* 118, 130-31 (Karen J. Greenberg ed., 2006) (Holmes describes the "magical thinking" of defenders of U.S. torture policy: "We can respond to their lawlessness with our own lawlessness. . . . Those who defend torture imply that torture is valuable, even if it does not work, *precisely because it defies the law.*").

5. Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to Timothy Flanigan, Deputy Counsel to the President (Sept. 25, 2001), in *THE TORTURE PAPERS*, *supra* note 1, at 3, 24.

6. *Id.*

7. U.S. CONST. art. II, § 3.

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

merits of this law, it provides legislative endorsement of<sup>9</sup> (and immunity for<sup>10</sup>) a substantial part of the work product of the Bush Administration lawyers. Moreover, neither the new Congress nor the Obama Administration has sought to repeal the most constitutionally suspect provisions of the statute.

It is tempting to blink at Congress's endorsement of the work of the Department of Justice lawyers. And once having blinked, it is easy, a little too easy, to condemn the opinions these lawyers wrote as the product of moral bankruptcy and a professional ideology that encourages lawyers to be willing to do anything for their clients. The villains are easily identifiable (morally corrupt lawyers and equally corrupt standards of law practice), and we can rest secure in the belief that a change of person and party in the White House will rectify matters and eliminate the constitutional threat in the Department of Justice by appointing lawyers of character and integrity.<sup>11</sup>

The alternative account—that lawyers working in the Department of Justice were motivated by sincere intellectual (and moral) affinity with the views of top Bush Administration officials regarding executive supremacy, and that, like the officials they served, these lawyers saw their time in office, particularly after the attacks on September 11, 2001, as an opportunity to vindicate these theories in practice—raises far more complex and troubling questions. Most pressingly, it suggests that law reform, even the reform of fundamental law, can and does occur through lawlessness. Indeed, if the alternative account is true (I have elsewhere argued for its veracity<sup>12</sup>), this is precisely what the lawyers in the Bush Administration attempted and at least partially succeeded in doing.

The long-term constitutional ramifications are too uncertain to define, but the passage and continued vitality of the Military Commissions Act is proof enough of tangible political and legal success. In cultural terms, the effect has been to blur popular understandings of the legal definition of torture, to divide public opinion on its moral and constitutional legitimacy, and to separate public debate from fairly unequivocal expert opinion on its ineffectiveness.<sup>13</sup> A simi-

9. See Military Commissions Act § 6(b) (codified at 18 U.S.C. § 2441 (2006)) (broadening, among others, the substantive definitions of “torture” and “cruel or inhuman treatment” as statutorily defined); Military Commissions Act § 7(a) (codified at 28 U.S.C. § 2241) (purporting to preclude review of claims challenging the conditions of confinement of a detained alien who is determined to be an enemy combatant or is awaiting determination).

10. See Military Commissions Act § 8(b) (codified at 42 U.S.C. § 2000dd-1) (expanding the “protection of personnel” provision in the Detainee Treatment Act of 2005 to include “actions occurring between September 11, 2001, and December 30, 2005”).

11. See, e.g., HAROLD H. BRUFF, *BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR* 288-89 (2009).

12. See generally Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931 (2008).

13. See, e.g., James Franklin, *Evidence Gained from Torture: Wishful Thinking, Checkability, and Extreme Circumstances*, 17 CARDOZO J. INT'L & COMP. L. 281, 282 (2009) (“There is a suspiciously high correlation between the belief that torture is ethical and the belief that torture is effective—those who believe torture is unethical usually believe it is

lar case could be made with respect to the policies of profiling, indefinite detention, warrantless surveillance, targeted killings, and perhaps most importantly, with respect to the underlying theory of executive supremacy from which these policies sprang. What previously was, or at least in principle seemed, constitutionally unthinkable, is done, debated, and then normalized.<sup>14</sup> This is the negative pregnant in Justice Robert Jackson's assurance that, even during crises in national security, "the common sense of the American people will preserve us from all extremes which would destroy our heritage."<sup>15</sup> New extremes may

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ineffective as an interrogation device."); Anne Applebaum, *The Torture Myth*, WASH. POST, Jan. 12, 2005, at A21 (discussing testimony of Army officials describing torture as ineffective); Peter Finn & Joby Warrick, *Detainee's Harsh Treatment Foiled No Plots*, WASH. POST, Mar. 29, 2009, at A01 (reporting on the "enhanced interrogation" techniques used against Abu Zubaida, and noting that "not a single significant plot was foiled as a result of Abu Zubaida's tortured confessions, according to former senior government officials who closely followed the interrogations[;] nearly all of the leads attained through the harsh measures quickly evaporated, while most of the useful information from Abu Zubaida—chiefly names of al-Qaeda members and associates—was obtained before waterboarding was introduced"); Ali Soufan, Op-Ed., *My Tortured Decision*, N.Y. TIMES, Apr. 23, 2009, at A27 (former FBI operative discussing effectiveness of traditional interrogation techniques while contesting effectiveness of torture); see also Holmes, *supra* note 4, at 128 (2006) (discussing the "ticking time bomb parable"); David Luban, *Liberalism, Torture, and the Ticking Bomb*, in *THE TORTURE DEBATE IN AMERICA* 35, 42 (Karen J. Greenberg ed., 2006) (describing distortion of liberal democratic ideals whereby torture "to gather intelligence and save lives seems almost heroic").

14. The escalation of targeted killings in the Obama Administration is one of the more dramatic examples of the normalization of controversial executive branch action. See Helene Cooper & Mark Landler, *Targeted Killing Is New U.S. Focus in Afghanistan*, N.Y. TIMES, Aug. 1, 2010, at A1; Karen DeYoung & Joby Warrick, *Under Obama, More Targeted Killings than Captures in Counterterrorism Efforts*, WASH. POST, Feb. 14, 2010, at A01 ("President Obama has escalated U.S. attacks on the leadership of al-Qaeda and its allies around the globe. The result has been dozens of targeted killings and no reports of high-value detentions."); Spencer S. Hsu, *Dismissal Urged in Suit on Plan to Kill Abroad*, WASH. POST, Sept. 25, 2010, at A05; see also Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SECURITY J. 145 (2010); Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* 21 (Brookings Inst., Georgetown Univ. Law Ctr., & Hoover Inst., Series on Counterterrorism and American Statutory Law, Paper No. 9, 2009), available at [http://www.brookings.edu/papers/2009/0511\\_counterterrorism\\_anderson.aspx](http://www.brookings.edu/papers/2009/0511_counterterrorism_anderson.aspx) (on the increase in targeted killing and the legal questions surrounding the practice); Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, *The Obama Administration and International Law*, Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010) (transcript available at <http://www.state.gov/s/l/releases/remarks/139119.htm>) (discussing the legality of targeted killing); cf. ALFRED CUMMING, CONG. RESEARCH SERV., RL 33715, COVERT ACTION: LEGISLATIVE BACKGROUND AND POSSIBLE POLICY QUESTIONS 1-6 (2009); W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION: PRACTICES, CONTEXTS, AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW 117-19 (1992) (concerning the executive's constitutional and statutory authority to conduct covert operations).

15. Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103, 117 (1951). Repudiation of constitutional deviance is of course possible, but only on terms that will already have altered the frame, the "common sense," within which constitutional innovation and retrenchment may occur.

make for new understandings of what is constitutionally tolerable.

In what follows, I argue that the President's authority of initiative—the power to take actions that have the effect of redefining the legal framework in which those actions will be assessed—has gradually expanded with the support of government lawyers appointed in no small measure because of their ideological affinity with the officials they serve. I begin by briefly describing ambiguity in the way the norm of professional independence is articulated. (Part II.) This ambiguity obscures a powerful underlying structure of political accountability that invites ideologically charged advice to the President. I then survey two critical historical moments in the expansion of presidential power (Jackson's war on the Second Bank of the United States and Roosevelt's New Deal) to indicate how that structure has operated in the past and to reveal its relationship to law reform through lawlessness—a practice that came to full fruition in the counterterrorism policy of the second Bush Administration. (Part III.) I close by suggesting possible reforms to enhance the professional independence of lawyers who advise the President. (Part IV.) A premise common to each possible reform, but discussed in some detail in relation to congressional authority to insulate certain government lawyers from removal, is that the Take Care Clause cannot be read exclusively for what it empowers a President to do. The Clause bespeaks limitation, not merely license, particularly in areas such as national security where secrecy prevents judicial review and accountability to Congress and the electorate from operating. I seek less to endorse any single reform than to show that a number of structural reforms are constitutionally viable and that Congress's persistent acquiescence in the existing structure is a measure of how entrenched the authority of initiative has become. We may desire law reform through lawlessness more than we are willing to admit.

## II. THE AMBIGUITY OF INDEPENDENCE

Even if our traditions of civil disobedience and popular constitutionalism invite and occasionally celebrate lawlessness aimed at law reform, and even if we tolerate the participation of lawyers counseling certain kinds of resistance to law in private practice (a controversial question I address elsewhere<sup>16</sup>), it is not at all clear that we should tolerate it in government practice. We are accustomed to thinking of private counsel as at least open to, if not dominated by, the temptation to press law to the breaking point to vindicate a client's interests. The lawyer who walks her client off the plank of legality may not in fact be serving her client's best interests, so the view that illegality arises from private lawyers' excessively *client*-centered orientation may be too simple. Self-

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16. Norman W. Spaulding, Counseling Resistance to Law, John Hart Ely Lecture on Professional Responsibility, Yale Law School (Nov. 17, 2009) (transcript on file with author).

interest may be the true culprit.<sup>17</sup> But we do not as readily consider government lawyers, whose oath, ethics, and orientation are quite different, to be susceptible to lawlessness in the same way. The discourse around government lawyering, certainly the post-Watergate discourse, reflects an assumption that government lawyers should display a higher degree of “professional independence.”<sup>18</sup>

Independence is a tricky term though, perhaps overdetermined. Generally, it calls to mind the ability of a lawyer—the courage, to be more precise—to say “no” to the client. (A predicate, of course, is that the lawyer has the experience, judgment, and clarity of perspective to see that law or its application to the circumstances require her to say “no.”) But the source of the lawyer’s prohibition, the degree of steadfastness with which she utters it, and most importantly, the circumstances in which she feels at liberty to attempt to convert the prohibition of the law into permission, are considerably less well defined.

On the one hand, one could take the view that professional independence derives from moral rectitude, the force of a lawyer’s conscience, though this will be both under and overinclusive in practical application. Depending on the issue, a lawyer’s conscience may demand that she *prevent* her client from pursuing a perfectly legal course of action that would result in moral harm, or that she *encourage* her client to disregard the law in order to pursue a course of action the lawyer views as morally correct or desirable.<sup>19</sup> And of course, whenever moral standards are as ambiguous or contested as legal standards, independence derived from moral rectitude may not narrow the indeterminacy of professional judgment.

Alternatively, one could see professional independence as deriving from a kind of personal detachment—a lawyer is independent when she does not permit her professional judgment to be clouded by self-interest, or when she privileges fidelity to the rule of law over fidelity to any particular client.<sup>20</sup> We see this concept of independence invoked most often when the lawyer disapproves of the case or the client, or when the prospect of personal or financial gain may distort the lawyer’s judgment. The distortion that can arise from handling cases

17. See Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1 (2003).

18. See Spaulding, *supra* note 12, at 1933-34; see also H.W. Perry, Jr., *United States Attorneys—Whom Shall They Serve?*, 61 LAW & CONTEMP. PROBS. 129, 131 (1998) (“Although arguments for a truly ‘independent’ Justice Department peaked after Watergate, the concept of the apolitical government lawyer remains an often expressed ideal.”).

19. See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988).

20. See BRUFF, *supra* note 11, at 70, 80 (noting Justice Robert Jackson’s stance on professional detachment); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* (1998); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); cf. Major L. Wilson, *The “Country” Versus the “Court”: A Republican Consensus and Party Debate in the Bank War*, 15 J. EARLY REPUBLIC 619, 626 (1995) (noting that President Jackson placed Taney at the head of the Treasury because he—unlike his predecessor—was “totally loyal to the president”).

and clients with which the lawyer is in ideological *agreement* is less often considered, but in government work this is more often the problem.<sup>21</sup>

The point for present purposes is that the conventional discourse of moral condemnation and associated academic and political calls for restoring professional independence to the Department of Justice following a scandal are undermined by the range of meanings we might give the term. Moreover, the history of the Office of the Attorney General suggests an underlying desire to leave the Attorney General and Department of Justice political appointees room to endorse ambitious, sometimes extralegal, executive branch conduct. That desire is reflected in the very structure of the Department (most prominently in the privileged position given to political influence and accountability to the President<sup>22</sup>), and in congressional and Presidential reluctance to modify this structure notwithstanding rather frequent abuses, scandals, and attendant lamentations.

There are, to be sure, civil service protections for rank and file attorneys,<sup>23</sup> the Hatch Act applies to government lawyers,<sup>24</sup> and there are informal norms within divisions of the Department that promote independent professional

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21. There is a broad literature in cognitive psychology confirming the distortion that occurs when personal interests and values are implicated in ethical choices. See Nicholas Epley & Eugene M. Caruso, *Egocentric Ethics*, 17 SOC. JUST. RES. 171, 172 (2004) (“Moral reasoners consistently conclude that self-interested outcomes are not only desirable but morally justifiable, meaning that two people with differing self-interests arrive at very different ethical conclusions. Such self-interested ethics often do not *feel* subjective, and are therefore perceived to be relatively objective.”); Don A. Moore & George Loewenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 SOC. JUST. RES. 189 (2004) (arguing that self-interest dominates ethical and professional obligation to others in situations requiring the exercise of judgment); Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223 (2004); Testimony of George F. Loewenstein, Professor of Econ. & Psychology, Carnegie Mellon Univ., The Challenge of Auditor Independence (July 26, 2000), available at [www.sec.gov/rules/proposed/s71300/testimony/loewen1a.htm](http://www.sec.gov/rules/proposed/s71300/testimony/loewen1a.htm) (commenting on Proposed Rule: S7-13-00 (Revision of the Commission’s Auditor Independence Requirement)). I am grateful to Jared Cohen for pointing me to this literature. The cognitive psychology research supports the claim I pursue in Part IV that the personal character of government lawyers and political accountability are insufficient to ensure independent professional judgment in the Department of Justice. Indeed, the research suggests that politically appointed and politically accountable lawyers will believe they are acting within the very legal boundaries their advice destroys.

22. See 28 U.S.C. § 511 (2006) (“The Attorney General shall give his advice and opinion on questions of law when required by the President.”). On the structure of the Department of Justice generally, see 28 U.S.C. §§ 501-530D.

23. See generally Civil Service Rules, 5 C.F.R. §§ 1.1-10.3 (2010) (defining the scope of civil service protections and the authority and procedures for making claims to the Office of Personnel Management (formerly the Civil Service Commission)).

24. 5 U.S.C. §§ 7321-7326; see also U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, 413 U.S. 548 (1973) (upholding the constitutionality of the Hatch Act). Notably, in 1993 exceptions to the Hatch Act were expanded beyond the version of the statute approved in *Letter Carriers* to permit many federal employees to become involved in partisan political management and partisan political campaigns.

judgment.<sup>25</sup> But the President's appointment and removal powers run deep enough to shape the Department's priorities and control their implementation. The Attorney General is obliged by statute to report to Congress annually,<sup>26</sup> political appointees must be confirmed by the Senate, and the power of the purse ensures some accountability to Congress when it cares to inquire. But this infrequent reporting and haphazard oversight pales in comparison to the depth and breadth of the President's supervisory authority.<sup>27</sup> Finally, although the public acts of the Department are subject to media coverage, interest group pressure, and congressional scrutiny, its secret acts (absent leaks or whistle-blowing), and acts affecting groups incapable of mounting effective political opposition, are well insulated from political accountability.

In short, nothing about a change of person or party in the White House alters the structural framework that allows a President to appoint lawyers to the Department of Justice who share his policy agenda and will be willing to strain the boundaries of law in order to reshape them. A change in office merely shifts the location and direction of the strain and the identity of the people who are made to internalize the costs of law reform through lawlessness.

### III. THE AUTHORITY OF INITIATIVE AND LEGAL EXPERIMENTALISM

The practice of staffing the Department of Justice in this way runs deep in both parties, and the impulse among appointees to approve extralegal policies runs particularly deep in times of national crisis when the need for aggressive executive branch action seems paramount. The work product of lawyers hired into the Office of Legal Counsel (OLC) during the Bush Administration reflects this, but examples can be cited from Democratic administrations going back to Andrew Jackson's appointment of Roger Taney as Attorney General,

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25. See BRUFF, *supra* note 11, at 78-83 (discussing internal culture of independent judgment at OLC).

26. 28 U.S.C. § 529.

27. See generally NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789-1990* (1992) (discussing the history of partisan appointment of Attorneys General); STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008) (arguing that the President's removal power serves as a powerful tool for controlling executive branch employees and ensuring executive branch unitariness); CHARLIE SAVAGE, *TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY*, at ch. 2 (2007); MARTIN S. SHEFFER, *PRESIDENTIAL POWER: CASE STUDIES IN THE USE OF OPINIONS OF THE ATTORNEY GENERAL* (1991) (describing the way Presidents exert pressure on Attorneys General to write opinions of questionable legality and then use those opinions to expand their own power); see *id.* at ix ("Research into the area of presidential actions and the opinions of the Attorney General suggests a specific relationship between the President and his chief partisan advocate: the Attorney General must provide legal justifications for the continual, uninterrupted flow of power to the President, or, by legal manipulation of statutory language, guard against any encroachments upon the presidential power already acquired.").

and then as Secretary of the Treasury, to assist in the President's attack on the Second Bank of the United States.<sup>28</sup> Taney was instrumental in nearly every stage of Jackson's maneuvers,<sup>29</sup> notwithstanding grave conflicts of interest arising from Taney's private representation of a Maryland bank that directly benefited from the shift of government deposits to state banks.<sup>30</sup> The debate about the constitutionality of Jackson's actions,<sup>31</sup> particularly the transfer of

28. I discuss other examples in Spaulding, *supra* note 12, at 1960-62, 1968.

29. Taney assisted in drafting the President's veto of the renewal of the National Bank's charter; he drafted the President's cabinet announcement that he planned to remove the government's deposits from the National Bank; he published a formal opinion affirming the power of the Secretary of the Treasury to remove the government's deposits, place them with state banks, and enter contracts with state banks to receive security for the federal deposits; and, just weeks after publishing that opinion, he gave up his post as Attorney General to become Secretary of the Treasury and effectuate the removal that two prior Secretaries had refused. See *Security on Removal of Deposits*, 2 Op. Att'y Gen. 584 (1833); Frank Otto Gatell, *Secretary Taney and the Baltimore Pets: A Study in Banking and Politics*, 39 BUS. HIST. REV. 205 (1965). Taney had also, just a year before, written a formal opinion affirming the President's power to make recess appointments to vacant offices. See *Power of President to Fill Vacancies*, 2 Op. Att'y Gen. 525 (1832).

On Taney's general support for Jackson and support for Jackson's Bank policy, see Ari Hoogenboom et al., *Levi Woodbury's "Intimate Memoranda" of the Jackson Administration*, 92 PA. MAG. HIST. & BIOGRAPHY 507, 508 (1968) (in Jackson's cabinet, "only Attorney General Roger B. Taney consistently supported [Jackson's] attacks on the Bank"); and Walter George Smith, *Roger Brooke Taney*, 47 AM. L. REG. 201, 217-18 (1899). On Taney's close policy-making role with Jackson, see Richard P. Longaker, *Was Jackson's Kitchen Cabinet a Cabinet?*, 44 MISS. VALLEY HIST. REV. 94, 99 (1957) (describing Taney as in "the innermost ring of the circle" of Jackson's advisors). See also *id.* at 105-06 (describing Taney's role in drafting of Bank veto); Wilson, *supra* note 20, at 624-26 (describing Taney as "[p]ersonally committed" to the policy of removing the government's deposits in the National Bank to the state banks and as "totally loyal to the president"; in fact, Taney "pledged 'to go with [Jackson] through this business, and meet all its consequences'" (internal citations omitted)); *id.* at 628 ("The final version of the paper [advocating removal of the government's deposits] submitted to the cabinet on September 18, 1833, was written by Taney."). On Jackson's use of executive power to resist the Congress and the Supreme Court in the Bank crisis and other areas, see GERARD N. MAGLIOCCA, *ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES* (2007).

30. On the conflict of interest, see Lynn L. Marshall, *The Authorship of Jackson's Bank Veto Message*, 50 MISS. VALLEY HIST. REV. 466, 476 (1963) ("Taney's opposition to the Bank of the United States was connected with his interest in a Maryland state bank, although this may not have accounted for it entirely, and his opposition to the National Bank challenged the Federalist antecedents to which he always paid homage."). See also *id.* at 472 ("Taney, incidentally, got some of his material for the June 27 opinion from a friend and associate in Baltimore, Thomas Ellicott, president of the Union Bank of Maryland."); cf. CARL BRENT SWISHER, *ROGER B. TANEY* (1935) (offering a general survey of Taney's role in the war on the Bank); Gatell, *supra* note 29 (describing the details of the connections between Taney, the Maryland bank, and the removal of deposits from the National Bank); Frank Otto Gatell, *Spoils of the Bank War: Political Bias in the Selection of Pet Banks*, 70 AM. HIST. REV. 35, 37-38 (1964) (discussing Taney's interests in the Union Bank of Maryland).

31. See Marshall, *supra* note 30, at 473 (examining Taney's role in advancing the then-novel constitutional argument that the President had a "coordinate [executive] authority . . . in deciding on the constitutionality of legislation"); cf. ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 89, 98 (1945) (offering a survey of the political issues in the war on

federal deposits from the Bank of the United States to state banks of his choosing, was at least as hot as the debates about the work of Department of Justice lawyers in the Bush Administration. Jackson was censured by the Senate and accused of despotism by Whigs for aggregating all the powers of government into the office of the President.<sup>32</sup> Taney, for his part, was denied confirmation after his recess appointment as Secretary of Treasury, refused a vote in the Senate after his first nomination to the Supreme Court, and was roundly accused of being the President's (and his Maryland banking client's) lackey.<sup>33</sup>

In his final speech on the resolution to censure the President, Senator Henry Clay complained that a President who can use the veto power and the removal and recess appointment powers to demand *ultra vires* action from the Secretary of the Treasury not only controls both "the sword and the purse," but revives the very form of executive power Americans took up arms to throw off in the Revolution.<sup>34</sup> Whig newspapers depicted Jackson alternately as a megalomaniac and as the mere figurehead of a "ministerial conspiracy."<sup>35</sup> In either case, they "pictured him . . . as a tyrant whose usurpations threatened constitutional liberty,"<sup>36</sup> and who was "supported by an army of mercenary office holders and dependents."<sup>37</sup>

On both sides the debate was shot through with claims of constitutional crisis and borrowed heavily from the English civic republican language of Country-Court struggle.<sup>38</sup> Jacksonian Democrats decried the power of the Bank as a "Walpole system of government by bribery and 'monied influence'"<sup>39</sup>—a "monied aristocracy" capable of placing "in a state of dependence the wages, prices, and property values of all citizens."<sup>40</sup> Whigs replied that the people would be reduced to "slavery," "swallowed up in the vortex" of Jackson's executive usurpations.<sup>41</sup>

It would be a mistake, of course, to read the rhetorical flourishes on either

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the Bank and noting Jackson's observation: "The bank, Mr. Van Buren, is trying to kill me, but I will kill it!"

32. See Wilson, *supra* note 20, at 633-34.

33. On the effect on Taney's nominations see Smith, *supra* note 29, at 216-17 (Taney was denied confirmation as Secretary of the Treasury after acting in that role to remove U.S. deposits); *id.* at 218-19 (the Senate indefinitely postponed a vote on Taney's first nomination to the Supreme Court); and *id.* at 219 (Taney was finally confirmed as Chief Justice). On Jackson's problems with his first cabinet, see Longaker, *supra* note 29, at 97 (discussing divided loyalties).

34. Wilson, *supra* note 20, at 633.

35. *Id.* at 620, 634.

36. *Id.* at 632.

37. *Id.* at 620.

38. *Id.*; see also SCHLESINGER, *supra* note 31, at 106-11 (showing that Schlesinger is, in some respects, so enamored of Jackson that he diminishes constitutional objections raised by pro-Bank forces).

39. Wilson, *supra* note 20, at 622.

40. *Id.* at 628.

41. *Id.* at 633 (quoting CONG. GLOBE, 23D CONG., 1ST SESS. 1176-77, 1681).

side as disinterested expressions of constitutional principle. Many of the most outspoken supporters of the Bank were in fact on the dole of Nicholas Biddle; Jackson plainly saw political advantage in using the Bank as an easy target upon which to play out his populist agenda;<sup>42</sup> and the entire debate was powerfully shaped by tensions between agrarian debtor interests and the interests of entrepreneurs and financiers.<sup>43</sup> But it would be equal error to read the rhetorical flourishes as merely quaint strategic manipulations of constitutional argument. The Bank War was a largely extrajudicial contest defined not just by factional interest and political expediency, but by sincerely held views regarding constitutional limits on the power of the executive branch and competing understandings of independence (professional, political, constitutional, and of course, economic) in the fledgling democracy.

Jackson's message explaining his decision to veto the bill extending the charter of the Bank audaciously claimed unilateral authority to interpret the constitutionality of acts of Congress,<sup>44</sup> he brushed aside the Supreme Court's longstanding conclusion that the Bank was constitutionally established,<sup>45</sup> and his success in killing the Bank altered the framework within which executive power was understood and exercised.<sup>46</sup> The framework shifted not because of

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42. It is not at all clear, however, that the political advantage gained produced the intended results. Jackson's war on the Bank and Biddle's vindictive response contributed to a deep recession in the mid-1830s. Moreover, transferring federal deposits to private banks may have actually fed the very kind of inflation and loose credit that hard-money Democrats hoped to avert by attacking the National Bank in the first place. See Bray Hammond, *Jackson, Biddle, and the Bank of the United States*, 7 J. ECON. HIST. 1, 8-9 (1947).

43. See SCHLESINGER, *supra* note 31, ch. 7; *id.* at 84-87 (regarding the tensions between competing interests).

44. The famous passage is:

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. . . . The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.

Andrew Jackson, Veto Message (July 10, 1832), available at [http://avalon.law.yale.edu/19th\\_century/ajveto01.asp](http://avalon.law.yale.edu/19th_century/ajveto01.asp).

45. *McCulloch v. Maryland*, 17 U.S. 316, 424 (1819) ("[It] is the unanimous and decided opinion of this Court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land.").

46. See MAGLIOCCA, *supra* note 29, at 62; see also CALABRESI & YOO, *supra* note 27, at 97 (noting that Jackson's assertion of power had the "net effect" of bringing "together his opponents into a new political party called the 'Whig' party," a name which "was adopted to signify the party's opposition to concentrated power in the hands of the chief executive" (quoting ROBERT V. REMINI, *ANDREW JACKSON AND THE BANK WAR* 129 (1967))); *id.* at 96-97 (noting the link between Jackson's bold assertions of executive authority and status as the only official directly representative of the will of all citizens); PETER M. SHANE & HAROLD H. BRUFF, *THE LAW OF PRESIDENTIAL POWER* 15 (1988) ("Jackson became the first executive

Jackson's broad statements of constitutional principle, but rather because the principle was successfully applied in a series of controversial (that is to say, arguably lawless and hotly contested) tactical moves—moves the Attorney General not only supported, but helped plan and then *personally* implemented. Most prominently, by unilaterally transferring federal deposits from the Bank of the United States to state banks of his choosing, Jackson arrogated powers over the management of the nation's debt, credit, and currency, which the Constitution arguably reserves to Congress to define.<sup>47</sup> No law authorized placing federal deposits in state banks of the President's choosing, and Jackson and Taney transferred the federal deposits in the face of a House resolution concluding after investigation that the government's deposits were safe with the Bank.<sup>48</sup>

Jackson might have prevailed against the Bank without the help of his Attorney General, but it is telling that Taney, who had campaigned for Jackson in Maryland, came into office as a replacement for John Berrien. Berrien had represented a branch of the Bank of the United States in Georgia before taking office, favored the recharter of the Bank, offered an early informal opinion urging the President *not* to challenge the constitutionality of the Bank, and later served in the Senate as a Whig.<sup>49</sup> It is equally telling that Jackson had to transfer Taney to the Treasury in order to complete the *coup de grace* that two prior Secretaries steadfastly would not.<sup>50</sup>

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to appeal to the people over the heads of their legislative representatives. He claimed a role as the sole true representative of the people. . . . [He] found many ways in which to exercise power," and "consistently maintained that he could determine the constitutionality of legislation, regardless of what the Supreme Court ruled."); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 78 (1994) (The Bank dispute "show[s] the first and sharpest conflict between two fundamentally different conceptions of the executive power. For in the debate that follows, we see the end of the presidency as we believe the framers saw it, and the birth of the presidency as we have come to know it.").

47. "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. CONST. art. I, § 9, cl. 7. "Congress shall have power . . . To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures." *Id.* art. I, § 8, cl. 5. In his Veto Message, Jackson flatly denied that this clause empowered Congress to create the Bank. *See* Jackson, *supra* note 44. Biddle's strident position on the complete independence of the Bank from the executive branch was of course equally controversial. *See* SCHLESINGER, *supra* note 31, at 75-76.

48. SCHLESINGER, *supra* note 31, at 98.

49. Thomas P. Govan, *John M. Berrien and the Administration of Andrew Jackson*, 5 J. S. HIST. 447, 450-51 (1939). Govan doubts the significance of Berrien's views on the Bank in his resignation, pointing out that Berrien's appointment had most to do with the affinity between his and Jackson's views on Indian removal in southern states, and that Taney and others favored his retention to save face in the Eaton affair. *See id.* at 456. But Govan concedes that Jackson was firm about Berrien leaving office, and Jackson would surely have been influenced by Berrien's tepid response to his request for an opinion on his anti-Bank policy. *Id.* The significant point, for present purposes, is that after the Eaton affair broke, Jackson took care to appoint an Attorney General who would support him in the Bank war.

50. SCHLESINGER, *supra* note 31, at 65, 100-01 (referring to Taney as the "spearhead of

Jackson's first cabinet famously dissolved under the weight of personal and political disagreements.<sup>51</sup> The inner circle he cultivated in response "was fully compatible with [his] evolving program."<sup>52</sup> Taney was part of this second wave of loyal, ideologically committed "kitchen cabinet" advisers and he eagerly helped design the constitutional arguments underlying both the anti-Bank policy and the principles of executive authority necessary to make it effective.<sup>53</sup>

If the war on the Bank offers a picture of a populist normalizing extralegal executive power in its infancy, the New Deal is the fully developed, modern portrait. The story of constitutional revision in the New Deal is both well known and well documented. Less closely studied is the aggressive role of agency and Department of Justice lawyers who were hired at least in part on the basis of their ideological commitments in order to craft the New Deal in the face of hostile Supreme Court precedent, to staff and guide the newly created agencies charged with implementing New Deal legislation, and to defend the New Deal in court. Jerome Frank, General Counsel at the newly formed Agricultural Adjustment Administration (AAA), gave a speech in 1933 before the Association of American Law Schools in which he was remarkably candid about what he sought in lawyers hired to do the AAA's work.<sup>54</sup> Frank identified the very traits that make possible an interpretive stance that can become constitutive of a new legal order. He began by naming "experimentalism" as the defining attribute of "new deal" lawyers:

These men are critical students of institutions but are committed not to mere detached study but are devoted to action on the basis of their tentative judgments. They are constantly skeptical of their own formulations but not to the point of paralyzed inaction. Especially do they repudiate fixed beliefs as to the eternal validity of any particular means for the accomplishment of desired ends. . . . [T]heir primary regard [is] for the immediate. They begin with the present, make that their constant point of reference, work backward from and forward to it. . . . [They] are . . . primarily interested in seeking the welfare of the great majority of our people and not in merely preserving, unmodified, certain traditions and folkways, regardless of their effect on human beings. . . . They reject the notion that governmental devices must, at all costs to human happiness, jibe with inherited principles of what can or cannot be done by Government for human well-being. When they see that those inherited principles have led to misery, to insecurity, to bread lines and broken lives, they refuse to accept those principles as Molochs to which human beings must

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radicalism in the new cabinet").

51. *Id.* at 47-56.

52. RICHARD B. LATNER, *THE PRESIDENCY OF ANDREW JACKSON* 54 (1979); *id.* at 54-57 (describing Jackson's style of administrative management).

53. Taney would later find himself on the other end of a confrontation over executive power. See *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861).

54. Frank, like many other New Deal Lawyers, was a protégé of Frankfurter. On the influence of Frankfurter in the selection of New Deal lawyers, see PETER H. IRONS, *THE NEW DEAL LAWYERS* 121 (1982); and WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL* 64, 148-49 (1965).

be offered as a sacrifice. Principles are what principles do.<sup>55</sup>

In short, for Frank, a good government lawyer is a legal realist, unconfined by precedent or abstract constitutional principle, and determined to find the means for vindicating progressive social policy. “What is true of the judge,” in legal realism, “is no less true of the lawyer”:

If he is aware of his technique, if he sees clearly that his role is to justify, if possible, what his client desires, he can work with comparative ease and precision. But if he must attitudinize to himself, if he must pretend to himself that he always begins with undeviating fixed legal principles and, by sheer good luck, happens to arrive at a logical deduction from those principles which merely happen to accord with his client's wishes—then he wastes time, proceeds unnecessarily by indirection, and burns up his energies needlessly.

The experimentalist has learned from experience that usually (of course not always, but in most cases), if he starts with his conclusion, he can find satisfactory premises. There are, so to speak, plenty of vacant premises. . . . Notably is this true in the field of what is known as “constitutional law.”<sup>56</sup>

Frank proceeded to praise the “Mr. Try-it” junior lawyer, who, when asked whether a proposed program for relief of the destitute would be lawful, starts with the political desirability of the Administration's goal, and then moves “to construe the statute so as to validate this important program.” Frank conceded in passing that the government lawyer must on occasion say no, but only where “a statute plainly and unmistakably or by clear implication forbids action,” and the action is also “outside the legislative intent.” But he hastened to add that “the experimentalist lawyer is quicker to find avenues of escape from such [legal] impasses when such escapes exist.”<sup>57</sup> Only a truly repugnant administrative goal should cause the lawyer to resign his post.<sup>58</sup>

When Frank delivered this speech, constitutional law and the Hughes Court were, to say the least, hostile to the first phase administrative bodies created by

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55. Jerome N. Frank, Gen. Counsel of the Agric. Adjustment Admin., *Experimental Jurisprudence and the “New Deal,”* Address Before the Association of American Law Schools (Dec. 30, 1933) (on file with author).

56. *Id.*

57. *Id.*

58. *Id.* Frank was equally candid in a letter to the President, where he complained about having to give preference to attorney appointees with preexisting political endorsements, and having to wait for such endorsements for appointees he had identified himself. He emphasized that the department desperately needed lawyers who were “not merely good technicians *but men whose sympathies are completely—and intelligently rather than prejudicially—in accord with the ideals of the ‘new deal.’*” Letter from Jerome Frank, Gen. Counsel, Agric. Adjustment Admin., & Rexford Tugwell, Dir., Agric. Adjustment Admin., to President Franklin D. Roosevelt 1 (Aug. 3, 1933) (emphasis added) (on file with author); *see id.* at 1 (“[T]he ordinary office-seeker is not the desirable type for such work.”). On the subject of repugnant administrative goals, it is worth noting that Frank would eventually be fired from the AAA over sharp disagreements about the distributive effects of New Deal farm policy. *See* IRONS, *supra* note 54, at 177-78, 180; LEUCHTENBURG, *supra* note 54, at 139.

the New Deal.<sup>59</sup> But the Department of Justice and agency lawyers persisted, taking the economic crisis as an emergency that justified a fundamentally new role for the federal government. And in the changing political landscape that New Deal legislation and administrative implementation helped create (along with seven changes in the composition of the Supreme Court), the “new deal” lawyers prevailed.<sup>60</sup>

Frank’s commitment to experimentalism and the nearly indifferent attitude toward legal constraints it implied was shared by high officials in the Roosevelt Administration. As Harry Hopkins advised the National Youth Administration Advisory Committee in a meeting on August 15, 1935: “I want to assure you that we are not afraid of exploring anything within the law, *and we have a lawyer who will declare anything you want to do legal.*”<sup>61</sup> Homer Cummings, Roosevelt’s Attorney General from 1933 to 1939 and the source of his court-

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59. Within two years the Court eviscerated the Administration’s central policy initiatives. See *United States v. Butler*, 297 U.S. 1 (1936) (holding unconstitutional the Agricultural Adjustment Act’s attempt to implement a processing tax); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down industrial code provisions of NIRA); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935) (striking down section 9(c) of the National Industrial Recovery Act (NIRA), which allowed the President to prohibit interstate shipment of surplus oil, as an unconstitutional delegation of power to the executive branch). For background, see ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 72-74 (1941) (describing concept of “judicial supremacy” held by the Hughes Court). See also IRONS, *supra* note 54, at 13-34 (describing conservative domination of the federal judiciary, constitutional concerns with the New Deal, and litigation strategies developed by Department of Justice lawyers). For prior examples of this judicial attitude see *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (declaring unconstitutional a tax upon child labor); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (deeming Child Labor Act unconstitutional); *Lochner v. New York*, 198 U.S. 45 (1905) (striking down on substantive due process grounds a state law limiting the number of hours that bakers could work); and *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (refusing to apply the Sherman Act to divest a sugar refining company of its manufacturing monopoly). Cf. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 444 (1934) (relying on the World War I case *Block v. Hirsh*, 256 U.S. 135 (1921), and affirming the emergency powers doctrine).

60. See *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948) (upholding federal rent control statute based on emergency powers *after* war had ended); *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding the constitutionality of the Department of Agriculture’s acreage restrictions for wheat grown on private property); *United States v. Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act, which regulated labor-management disputes); cf. BRUCE ACKERMAN, *2 WE THE PEOPLE*, at pt. III (1998).

61. LEUCHTENBURG, *supra* note 54, at 340. There were of course sharp divisions among New Dealers over policy and principle. See *id.* (discussing divisions between Brandeisians and new nationalists). On the permissive attitude of administration officials in asking high level government attorneys for convenient opinions see BRUFF, *supra* note 11, at 65 n.11 (“At a cabinet meeting, Secretary of Commerce Jesse Jones approached Jackson and ‘said to me, “Bob, here’s a piece of paper. On it is a question. Here’s another piece of paper and on it is the answer that my solicitor says he thinks the Department of Justice should give to this question. If you can give that answer, I want to ask you for a formal opinion. If you can’t I just want you to let me know and tear up the other paper.”’” (quoting ROBERT H. JACKSON, *THAT MAN* 30 (John Q. Barrett ed., 2003))).

packing plan, put the matter in somewhat more nuanced terms in a 1936 speech before the District of Columbia Bar Association. After ridiculing strict constructionism in constitutional interpretation as a “childish” assumption “that all our problems have been worked out by our forefathers,” and dismissing legal formalism as mere “refinements of logic . . . calculated to render attempts at social reconstruction sterile or abortive,”<sup>62</sup> Cummings chastised lawyers in private practice who represented wealthy corporate opponents of the New Deal for putting personal gain above professional duty.

What is revealing about the speech is not the critique itself, which Brandeis and other progressives had already honed,<sup>63</sup> but the politically charged concept of professional duty upon which it depends. The lawyer in private practice must, he urged, “forget the habits of a strictly individualistic age and attune himself to the fresher outlook which he must ultimately take if he is to survive as a wise counselor and friend.”<sup>64</sup> The “fresher outlook” turns out to require the renunciation of laissez faire ideology, strict constructionism, and robust federalism doctrine, and commitment to the necessity of federal government intervention and planning at the core of the Administration’s reform agenda:

It is something of an anomaly that in the face of great problems we turn our affairs over to public servants who strive to supply the means to answer the public need, while at that very moment many of the most gifted members of our profession exercise their ingenuity and their experience to break down the structure thus created. . . . [I]n many quarters there has been a growing distaste for tactics of obstruction and for the ingenious devices which have been invoked to thwart or circumvent the processes by which Government seeks to attain its legitimate ends. . . . The public is conscious that that which was unplanned or selfishly guided in the past must take its place in an orderly governmental process and that a great cleansing and rebuilding program must go forward. It is impatient with artificial restraints . . . . One of the unfortunate byproducts of this changing point of view is a tendency upon the part of many of our people to be restive under the slow processes of the law and to cease to look upon the structure of our society as the basis of security and prosperity. This is not a wholesome situation and we must make shift to amend it. Lawyers cannot abdicate their great function as statesmen without a tragic loss to America. They must not lose their position as the friends of progress.<sup>65</sup>

62. Homer Cummings, Address at a Meeting of the Bar Association of the District of Columbia: The Right Arm of Statesmanship 1, 6 (Dec. 5, 1936) (transcript on file with author).

63. See, e.g., LOUIS D. BRANDEIS, *The Opportunity in the Law*, in BUSINESS—A PROFESSION 313, 321 (1914) (“Instead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either, able lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people. We hear much of the ‘corporation lawyer,’ and far too little of the ‘people’s lawyer.’ The great opportunity of the American Bar is and will be to stand again as it did in the past, ready to protect also the interests of the people.”).

64. Cummings, *supra* note 62, at 5.

65. *Id.* at 6-7. On the tactics and organization of corporation lawyers challenging the

Public-minded law practice and professionalism are directly tied to progressive ideology, and Cummings calls on lawyers to work not only “in the legislatures, in the Congress, and in executive and judicial positions, but . . . in private practice where . . . they may advise helpfully in those processes of accommodation which are so pathetically essential in these modern days.”<sup>66</sup> The term “processes of accommodation” is most significant as it implies a sympathetic stance to the government-business coordination Roosevelt sought in the first round of New Deal legislation. Cummings thus implies that lawyers in private practice should not be suing the government but sitting down to negotiate with its agency lawyers. The “function” of the true lawyer statesman is to be a “friend of progress” by collaborating with the rising administrative state:

We are not merely the advisors of those who would preserve the status quo at all hazards. We are servants of society . . . . In these great areas of change and progress, would we not be better citizens, better patriots, aye, and better lawyers, if we were a little less concerned with the technicalities which have served so well in many a strategic contest and a little more given to a broader view of that movement of society which seeks to stake out a more advanced frontier of justice?<sup>67</sup>

Lawyers who resist are, by implication, backward, profit-minded obstructionists obsessed with naïve and artificial theories of constitutional limitations, and the technicalities of sharp practice.

Framed in the language of the rightful dues of his generation, Robert Jackson was equally candid about the sense of entitlement he and other lawyers working in the Department of Justice felt about defying the Constitution as the Hughes Court read it. What he and other “liberal minded lawyers . . . demanded for our generation was the right consciously to influence the evolutionary process of constitutional law, as other generations had done.”<sup>68</sup> For a generation of lawyers who worked a constitutional revolution via amendment without resort to Article V, the concession is artfully understated. They won not just the right “consciously to influence,” but the right to reframe, and as no generation other than lawyers in the Civil War and Reconstruction had done.

The essential moment in the New Deal project of constitutional revolution was not judicial, but rather the decision to craft legislation and shape agency action (and public opinion) in the face of contrary precedent knowing all the while that reversals in litigation would come. The Roosevelt Administration was fully two years into its implementation of the New Deal before the “hot

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New Deal, see generally EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY* (1992). See also ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 148 (1935).

66. Cummings, *supra* note 62, at 7.

67. *Id.* at 5. A similar critique of lawyers litigating against the New Deal is leveled in LATNER, *supra* note 52. See generally PURCELL, *supra* note 65 (discussing tactics and coordination of anti-New Deal lawyers).

68. JACKSON, *supra* note 61, at xiv.

oil” cases of 1935 cast a cloud over the National Industrial Recovery Act,<sup>69</sup> suggesting what was to come in cases like *Schechter Poultry* and *Butler*.<sup>70</sup> But enough voters had been won over to give Roosevelt the landslide in 1936 most now assume was responsible for the Court’s constitutional shift. It is tempting to normalize the New Dealers’ resistance to law because it was so successful—and just as tempting to forget how far government lawyers were willing to go if the Court had not relented.<sup>71</sup> We live in the modern regulatory state they created and from that vantage it is difficult to fully credit the constitutional framework their actions superseded (though that has not stopped the Court from attempting something of a revival in recent years).<sup>72</sup> But it was constitutionally revolutionary resistance, and it worked on the authority of initiative—a distinctive attribute of executive branch action.

There are exceedingly important differences between the New Dealers and lawyers working in the Bush Administration, not the least of which is the uncertain success of the expansion of executive authority advocated by the latter,<sup>73</sup> but it would be naïve to dismiss the Bush Administration lawyers as

69. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935).

70. *See United States v. Butler*, 297 U.S. 1, 74 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935).

71. *See JACKSON, supra* note 59, at 51 (discussing Attorney General Homer Cummings’s role in developing and advocating Roosevelt’s Judiciary Reorganization Bill of 1937, otherwise known as the “Court-packing plan”); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 51 (1995) (noting Cumming’s query whether the Court’s ability to rule on constitutional questions might be cabined).

72. *See, e.g., Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82-86 (2000) (holding age discrimination insufficient to abrogate Eleventh Amendment via Fourteenth Amendment enforcement power); *Printz v. United States*, 521 U.S. 898, 922-23 (1997) (holding that the Brady Bill violates Tenth Amendment anticommandeering principles); *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (holding that the Religious Freedom Restoration Act is beyond Section 5 enforcement power of the Fourteenth Amendment); *United States v. Lopez*, 514 U.S. 549, 561 (1995) (holding the Gun-Free School Zones Act unconstitutional on Commerce Clause grounds). For arguments against the constitutional novelty of the New Deal, see generally BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* (1998); and G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000).

73. The work of the New Deal lawyers was, for the most part, public. Indeed, corporations that were powerful opponents of new government regulation were invited to collaborate notwithstanding the objections of trust-busters. *See LEUCHTENBURG, supra* note 54. This allowed the framework of political accountability to operate. (I am grateful to Robert Gordon for raising this point with me.) The Bush Administration and its lawyers, by contrast, operated as much as possible in secret. The New Dealers were also fairly consistent about seeking express, advance legislative approval for their policies, whereas the Bush Administration acted with, at best, implicit congressional support in the AUMF and the Patriot Act. Finally, one could argue that the actions of the New Dealers are simply incommensurable with the actions of the Bush Administration because the New Dealers were animated by nobler purposes, and caused less harm, or did more good than harm. I am sympathetic to the argument, but it is difficult to identify the evidence that would be decisive and perhaps equally difficult to separate political sentiment from the assessment of material consequences.

To give but one example of the profound moral costs associated with the choices of

merely lawless, bereft of moral scruples, or, for that matter, unique. Like the New Deal lawyers, they were appointed at least in part for their ideological affinity with the agenda of the Administration they served. And like the New Deal lawyers, they helped the Administration seize the authority of initiative in an attempt to gain sufficient political support to reshape the legal framework in which their past and future actions would be understood and assessed. The move is at least as old as Jackson's decision to remove the government's deposits from the Bank of the United States three years before its charter was set to expire.<sup>74</sup>

New Deal lawyers, the AAA, over Jerome Frank's strident objection, refused to give a particular interpretation of section 7 of the master Cotton Acreage Contract of 1934-1935. A broad construction of section 7 would have protected poor black and white southern tenants and sharecroppers from being evicted when planter/landlords took federal compensation to withdraw acreage from production (the Administration's hope in entering the acreage contract was that offering subsidies to plow up acreage would reduce massive cotton surpluses and boost prices). As a result of the Agency's narrow construction of section 7, thousands of tenants and sharecroppers were summarily evicted, denied their percentage of federal benefits payments, and harassed, intimidated, and arrested by planters and local law enforcement when they sought to organize opposition to the planters' practices.

Jerome Frank lost his job at the AAA for attempting to broaden the Agency's interpretation to protect tenants and sharecroppers. *See IRONS, supra* note 54, ch. 8. The Administration's decision to court planters, combined with intense lobbying pressure by southern senators, entailed whitewashing both the scope and severity of the evictions (the AAA published a misleading report that minimized the actions of planters). As Irons describes, "no equivalent group suffered more from the privations of the Depression" than sharecroppers and tenant farmers. *Id.* at 157 ("Between 1929 and 1933, the cash income of tenant families dropped from \$735 to \$216 per year; . . . the average sharecropper or tenant had to support an entire family on less than 60 cents a day when Roosevelt took office," and "landlords kept accounts [at company stores], and most tenants were perpetually in debt. Work in the fields was supervised by often brutal 'riding bosses.' Tenants had few legal rights to their jobs and homes . . . and planter-controlled local courts were hostile to those few tenants with the temerity to challenge the terms of their tenancy."); *see also id.* at 180 (quoting one of the lawyers fired as describing the conditions of sharecroppers and tenant farmers as "feudalism" in the opinion of the secretary and "semi-slavery" in the opinion of lawyers who argued for protection under section 7). So the Administration's choice was not only cruel, but inconsistent with its much touted policy of egalitarianism and concern for "men and women, forgotten in the political philosophy of the Government." *The Presidency: The Roosevelt Week*, TIME, July 11, 1932, at 10, 11.

My thesis, in any case, does not turn on the moral superiority (or equivalence) of either administration's policy. I find the actions of the Bush Administration and its lawyers condemnable, but the parallel that matters is the successful creation of a new legal order and the power of extralegal action to normalize what might otherwise be condemned and punished as lawlessness.

74. I have focused on two nonmilitary examples from the history of the office of the Attorney General to emphasize that executive branch lawlessness leading to law reform is not restricted to the domain in which executive power may be said to be at its peak. I have discussed other examples, both military and nonmilitary, in prior work. *See Spaulding, supra* note 12; Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 WM. & MARY L. REV. 2001, 2065-68 (2005) (discussing the role of Attorney General Bates in supporting Lincoln's decision to suspend the writ of habeas corpus). For alternative accounts focused on military examples,

## IV. STRUCTURAL OPTIONS

What should we conclude from this peculiar combination: deep ambiguity in the meaning of a term used to evaluate the work of government lawyers (“professional independence”), deeply ambivalent responses to their fairly consistent authorization of extralegal acts (simultaneously condemnatory and naïvely confident in the probity of new officeholders or laudatory when the actions suit one’s politics), and steadfast refusal to alter the structure of political accountability that invites extralegality in the first place?

First, however often abuse of legal authority in the executive branch has been decried, there appears to be a deeper level of desire to permit government lawyers (or at least the President who appoints them) to reshape the legal order, not just observe and defend its existing constraints. Taking care that the laws be faithfully executed, on this view, includes the power, if not the right,<sup>75</sup> to dis-

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see generally PETER IRONS, *JUSTICE AT WAR* (1983) (discussing the actions of attorneys involved in the Japanese American wartime cases brought after Americans of Japanese ancestry were forced into internment camps); NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL’S OFFICE 1789-1990* (1992); and BRUFF, *supra* note 11 (discussing the unique role of the Attorney General in serving the executive and providing advice about the limits of the law on executive power as well as discussing executive retreat following unilateral executive acts in response to reactions from Congress, the courts, and the public).

75. See U.S. CONST. art. II, § 3, cl. 4. The proposition that the President has the right to defy the law rests on a controversial reading of the Take Care Clause. See *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (referring to the Take Care Clause as a “responsibility” and source of presidential “authority” and emphasizing that it “allows the President to execute the laws, not make them” (emphasis added)). Justice Scalia, on the other hand, has repeatedly emphasized, in the context of citizen standing cases, that the Take Care Clause should be read against any authority in Congress to diminish the right of the President not only to set enforcement priorities, but to refuse to enforce the law. See *FEC v. Akins*, 524 U.S. 11, 36 (1998) (Scalia, J., dissenting) (“A system in which the citizenry at large could sue to compel Executive compliance with the law would be a system in which the courts, rather than the President, are given the primary responsibility to ‘take Care’ that the Laws be faithfully executed.” (citation omitted)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (“To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed.’” (citation omitted)); see also *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, No. 08-861, slip op. at 2 (U.S. June 28, 2010) (“[M]ultilevel protection from removal is contrary to Article II’s vesting of the executive power in the President. The President cannot ‘take Care that the Laws be faithfully executed’ if he cannot oversee the faithfulness of the officers who execute them.”). For scholarly commentary offering a broad reading of the Take Care Clause as textual support for the unitary executive theory, see Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 549 (1994). See also Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 261-62 (1994). But see SHANE & BRUFF, *supra* note 46, at 395 (“Reading the faithful execution clause literally . . . has provided successful arguments for presidential power that are not closely tied to the historical origins of the clause.”); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 212-13

obey. The practice of executive disobedience is, to put it mildly, under-theorized, but having recognized that it exists, that it operates on the authority of initiative, and that it depends upon legal counsel for its effectiveness, we should be reluctant to consider reform proposals that seek to promote professional independence in the Department of Justice without squarely confronting the record of executive disobedience. That record, after all, rather powerfully suggests that we may *not* in fact want more professional independence in the Department of Justice. It is a record of doing without structural guarantees of independence, not one of repeated but failed congressional attempts to impose it. And we should be equally skeptical of proposals that conceal politically motivated reforms in reassuring but vague promises of professional independence as well as promises of professional independence that are obviously open to political manipulation.<sup>76</sup>

What does that leave in the way of alternatives? There are at least four areas in which structural reforms might be effective, depending on the degree of independence and executive disobedience one takes to be desirable and constitutionally permissible.<sup>77</sup>

#### A. *Secrecy—Transparency*

First, the existing structure of accountability in the Department of Justice is primarily political and oriented in the first instance toward the President. There is secondary political accountability to Congress and the public, but only to the extent that Congress and the public know what advice is given. There can be no accountability for the unknown, no public debate, remonstrance, or redress of grievances for actions taken in secret on the basis of advice given in secret.<sup>78</sup> Only the remote, visible consequences of such executive branch action may become the subject of political accountability.

Even assuming there are areas in which some degree of secrecy is impera-

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(1992) (arguing that it is “clear” from both its text and history that “the Take Care Clause confers both a duty and a power,” and the duty “imposes on the President both a responsibility to be faithful to law and an obligation to enforce the law as it has been enacted”).

76. Early drafts of the independent counsel statute were examples of the former; the independent counsel statute, whatever its constitutionality, is an example of the latter. *Compare* Ethics in Government Act of 1978, P.L. 95-521, 92 Stat. 1867 (1978), *with* 28 U.S.C. § 49 (2006).

77. I use the term “structural” to refer to reforms that rely on various forms of inter-branch checks and balances rather than personal character, prudential considerations, or internal norms and regulations designed and enforced exclusively by the executive branch. For an excellent discussion of the latter, see Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010). See also Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006). I focus on structural reforms because, in my view, history belies the effectiveness of these other means.

78. See Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 750 (2005).

tive, the standing presumption of a system built on political accountability must be transparency. And in the limited domains in which secrecy is in fact essential (e.g., national security), the case is strong for other structural guarantees of independence. Congress has nevertheless done little to require transparency,<sup>79</sup> preferring public hearings in the wake of scandal to the imposition of an affirmative duty to report and disclose, the articulation of standards for waiving the duty of confidentiality and privilege doctrines, and the expansion of whistleblower protection.<sup>80</sup>

79. The OLC currently asserts deliberative process, executive privilege, and attorney-client privilege. Attorneys responsible for an opinion may recommend publication, but that decision is subject to review by the OLC Publication Review Committee and consultation with the agency or other official who requested the opinion, as well as the Attorney General and the Office of the Counsel to the President. *See, e.g.*, Memorandum from Stephen Bradbury, Principal Deputy Assistant Att’y Gen., to Attorneys of the Office 4 (May 16, 2005) (on file with author). Senator Feingold’s proposed OLC Reporting Act would require the OLC to disclose certain confidential legal advice to Congress. *See* S. 3501, 110th Cong. (2008); 154 CONG. REC. S8859-62 (daily ed. Sept. 16, 2008) (statement of Sen. Feingold). This Act was stridently opposed as unconstitutional by Attorney General Mukasey and died at the end of the 110th Congress after being reported out of the Judiciary Committee. *See* Constitutionality of the OLC Reporting Act of 2008, 32 Op. Att’y Gen. 1 (2008), available at <http://www.justice.gov/olc/2008/olc-reporting-act.pdf>. A new version of the bill was introduced in the House on January 7, 2009, but no action has been taken since it was referred to the House Judiciary Committee on the same day. *See* H.R. 278, 111th Cong. (2009).

80. On Congress’s halting efforts to enhance whistleblower protections through extended deliberations, *see* S.372—*Whistleblower Protection Enhancement Act of 2009*, OPENCONGRESS, <http://www.opencongress.org/bill/111-s372/show> (last visited Aug. 31, 2010); and *Federal Employee Whistleblower Protection*, NAT’L WHISTLEBLOWERS CENTER, [http://www.whistleblowers.org/index.php?option=com\\_content&task=view&id=840&Itemid=169](http://www.whistleblowers.org/index.php?option=com_content&task=view&id=840&Itemid=169) (last visited Aug. 31, 2010). On related efforts to expand protection to journalists whose confidential sources are government whistleblowers, *see* Free Flow of Information Act of 2009, H.R. 985, 111th Cong. (as passed by House, Mar. 31, 2009); and S. 448, 111th Cong. (as reported by S. Comm. on the Judiciary, Dec. 11, 2009). On the Obama Administration’s shifting position regarding the legislation, compare Walter Pincus, *Senate Weighs New Shield Law: Reporters Would Have to Disclose Information in Special Cases*, WASH. POST, Sept. 12, 2009, at A05, with Letter from Eric H. Holder, Jr., Att’y Gen., & Dennis C. Blair, Dir. of Nat’l Intelligence, to Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary (Nov. 4, 2009). On the expansion of executive privilege, *see* EMILY BERMAN, BRENNAN CTR. FOR JUSTICE, EXECUTIVE PRIVILEGE: A LEGISLATIVE REMEDY 12-23 (2009), available at [http://brennan.3cdn.net/ed3eb0a4b215da3556\\_fzm6ba8ua.pdf](http://brennan.3cdn.net/ed3eb0a4b215da3556_fzm6ba8ua.pdf); MORTON ROSENBERG, CONG. RESEARCH SERV., RL 30319, PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE AND RECENT DEVELOPMENTS (2007), available at <http://www.policyarchive.org/handle/10207/bitstreams/19839.pdf>; MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY AND ACCOUNTABILITY (Univ. Press of Kan., 3d ed., rev. & updated 2010) (1994); TESTING THE LIMITS: GEORGE W. BUSH AND THE IMPERIAL PRESIDENCY 199-218 (Mark J. Rozell & Gleaves Whitney eds., 2009); Mark J. Rozell & Mitchel A. Sollenberger, *Executive Privilege and the Bush Administration*, 24 J.L. & POL. 1 (2008); and Mark J. Rozell, *Executive Privilege Revived?: Secrecy and Conflict During the Bush Presidency*, 52 DUKE L.J. 403 (2002).

B. *Partisan Appointment-Removal—Nonpartisan Appointment-Removal*

The President's powers of appointment and removal are the lynchpin of political accountability. But nothing in the Constitution prevents Congress from altering the structure of appointment for high-level Department of Justice officials.<sup>81</sup> There is some evidence that the Framers did not consider the Attorney General, let alone any subordinates, to be a principal officer subject to appointment exclusively by the President. An early draft contemplated appointment of the Attorney General by the Supreme Court.<sup>82</sup> Whatever the status of the Attorney General, there is no question that Congress could vest the appointment of inferior officers who handle matters as to which there is little transparency in the courts.<sup>83</sup> Thus, attorneys within the OLC assigned to work on matters of national security might be appointed by Article III judges or the FISA court.<sup>84</sup> Congress might also emphasize indicia of independent judgment and non- (or at least bi-) partisan practice experience in legislation setting standards of eligibility for office.

Of course, as experience with the independent counsel statute made painfully clear, appointment by the courts provides no guarantee of political impartiality.<sup>85</sup> But it might at least provide means to separate partisanship in general from direct partisan loyalty to the President. The goal is obviously not the fool's errand of eliminating ideology from the provision of legal advice, but rather increasing the chances that integrity and sound legal judgment prevail over ambition, patronage, and base political motives. Department of Justice attorneys are now frequently active in the campaigns of the Presidents who appoint them.<sup>86</sup> Appointment by the courts would complicate this trajectory of promo-

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81. The Appointments Clause provides: "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. CONST. art. II, § 2.

82. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 108-09 (1923).

83. Though the Court's theory about determining which officers are "inferior" is less than clear, if deemed subordinate, the appointment of these officers could be controlled by Congress. See *Morrison v. Olson*, 487 U.S. 654, 671-72 (1988).

84. *Id.* at 673-76.

85. See *In re Sealed Case*, 192 F.3d 995, 1003 (D.C. Cir. 1999); see also *Olson*, 487 U.S. at 729-30 (Scalia, J., dissenting) (warning of the risk of appointment by judges who are "politically partisan").

86. The Obama Administration is no exception. See, e.g., Press Release, The White House Office of the Press Secretary, President Obama Announces More Key Administration Posts (Mar. 12, 2009), available at <http://www.whitehouse.gov/the-press-office/2010/09/15/president-obama-announces-more-key-administration-posts-0> (announcing the appointment of Ronald Weich, a campaign volunteer, as Assistant Attorney General for Office of Legislative Affairs); Mike Allen, *Dems Sketch Obama Staff, Cabinet*, POLITICO (Oct. 31,

tion to public office. Requiring a supermajority of judges either to concur in the appointment, or to choose the panel of judges making appointments, could further diminish partisanship.<sup>87</sup>

Still, the principal objection to appointment by the courts is the very separation it would create between the President and key Department of Justice lawyers. When the President controls appointment, it is more awkward for him to disregard or disavow advice given.<sup>88</sup> Appointment by others could be manipulated easily for political leverage—allowing the President to blame “lawyers he has not even appointed” for hamstringing core counterterrorism initiatives. If the lawyers were truly nonpartisan, and their judgment sound, the political leverage would be limited, but the risk of manipulation in such a structure is inherent.

Removal restraints, by contrast, do not present the same risk of manipulation. Complaining about the inability to remove lawyers who give sound but inconvenient advice is obviously less salient when the President has chosen them. Unfortunately, the constitutional options with respect to removal are

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2008, 2:54 PM), <http://dyn.politico.com/printstory.cfm?uuid=542710E6-18FE-70B2-A8A346B36828470E> (discussing the intended appointment of Jim Messina, Obama’s campaign chief of staff, as Deputy Chief of Staff in the White House; the appointment of campaign counsel Bob Bauer as White House Senior Counsel; and the appointment of Eric Holder, who led Obama’s search for Vice President, as Attorney General); *Profile of Stuart Delery*, WHORUNSGOV.COM FROM WASH. POST, [http://www.whorunsgov.com/Profiles/Stuart\\_Delery](http://www.whorunsgov.com/Profiles/Stuart_Delery) (last visited Aug. 31, 2010) (discussing the appointment of Stuart Delery, a major donor and early supporter of Obama campaign, as Associate Attorney General); *Profile of Thomas J. Perrelli*, WHORUNSGOV.COM FROM WASH. POST, [http://www.whorunsgov.com/Profiles/Thomas\\_J.Perrelli](http://www.whorunsgov.com/Profiles/Thomas_J.Perrelli) (last visited Aug. 31, 2010) (discussing the appointment of Thomas Perrelli, one of Obama’s biggest campaign fundraisers, as Associate Attorney General). For examples of similar patterns during the appointment phase of the George W. Bush Administration, see Eric Lichtblau, *Report Assails Political Hiring in Justice Dept.*, N.Y. TIMES, June 25, 2008, at A1; and Richard B. Schmitt, *Justice Department Hiring Probe Expands*, L.A. TIMES, May 31, 2007, at A19.

87. One of the defects in the independent counsel statute is that it allowed the Chief Justice of the United States to select the three circuit court judges to serve on the Special Division Court responsible for making appointments. See *Olson*, 487 U.S. at 661 n.3.

88. The deleterious effects of outside appointment on the attorney-client relationship are well known in the context of indigent criminal defense. See *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983) (noting that the Sixth Amendment does not guarantee a defendant counsel with whom he or she has a “meaningful relationship” or “rapport”); *United States v. Mutuc*, 349 F.3d 930, 934 (7th Cir. 2003) (explaining that the Sixth Amendment does not guarantee a right to “a friendly and happy attorney-client relationship” as long as antagonism does not prevent counsel from “zealously defend[ing] his client” (citing *Slappy*, 461 U.S. at 14)); see also Marcus T. Boccaccini & Stanley L. Brodsky, *Characteristics of the Ideal Criminal Defense Attorney from the Client’s Perspective: Empirical Findings and Implications for Legal Practice*, 25 LAW & PSYCHOL. REV. 81, 87 (2001) (discussing studies showing that retained attorneys are viewed more positively than court-appointed attorneys, who are generally not trusted and are perceived as representing the state, inexperienced, and overworked); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1462 (2005) (“For indigent defendants the development of robust communicative relationships with counsel is difficult if not impossible.”).

more difficult to specify because the doctrine is so murky. On the one hand, *Myers* endorses an early version of the theory of the unitary executive and assumes broad presidential authority to remove federal officers;<sup>89</sup> *Humphrey's Executor*, on the other hand, states but does not resolve the tension between the theory of unitary executive authority and congressional authority to prescribe limits on the power to remove.<sup>90</sup> And, of course, presidential removal can itself trigger public scrutiny of previously secret executive action, so it does not necessarily undercut independent judgment in the work of executive officers.

On the analysis of *Humphrey's Executor* and *Olson*, Congress could provide terms of office and insulate legal officers in the Department of Justice by forbidding removal except for cause. A robust approach would specify that refusing to take a legally frivolous position is not cause for termination. A more modest approach would rely on the general for-cause standard approved in *Humphrey's Executor*. In either case, Congress would not be reserving to itself the right to remove, and it would not be legislating the outcome of specific executive decisions on which the advice of counsel is sought.

The Court's recent decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board* is no barrier to removal restrictions of this kind.<sup>91</sup> A bare majority struck down a provision of the Sarbanes-Oxley Act of 2002 that assigned the power to remove members of an accounting industry oversight board to the SEC rather than the President.<sup>92</sup> Since SEC commissioners are themselves insulated from removal by for-cause restrictions, the oversight board members were doubly insulated from accountability to the President. The Court concluded that "such *multilevel* protection from removal is contrary to Article II's vesting of the executive power in the President."<sup>93</sup> There is dicta that can be read to support a unitary theory of the executive,<sup>94</sup> but the case leaves undisturbed the decisions of *United States v. Perkins* and *Olson* which sustained "restrictions on the power of principal executive officers—themselves responsible to the President—to remove their own inferiors."<sup>95</sup> As the Attorney General is "responsible to the President" in this sense, legislating for-cause removal standards for certain inferior legal officers in the Department

89. *Myers v. United States*, 272 U.S. 52, 176 (1926).

90. *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) (upholding for-cause removal restrictions on members of the Federal Trade Commission). *Humphrey's Executor* endorses a function-based balancing test. *See, e.g., Wiener v. United States*, 357 U.S. 349 (1958). And subsequent authority confirms the outer boundary rule from *Myers* that Congress cannot reserve to itself the removal authority. *See Bowsher v. Synar*, 478 U.S. 714 (1986).

91. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, No. 08-861, slip op. at 1 (U.S. June 28, 2010).

92. *Id.* at 5.

93. *Id.* at 2 (emphasis added).

94. *Id.* at 11, 16-17, 20.

95. *Id.* at 2. As Chief Justice Roberts emphasized, "[t]he parties do not ask us to reexamine any of these precedents, and we do not do so." *Id.*

of Justice would not cross the line drawn in *Free Enterprise Fund*.

Even so, analogies from independent agencies to the Department of Justice can be carried only so far. As the Court admonished in *Olson*, “the real question is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.”<sup>96</sup> The opinion function of the Department of Justice is structurally different from, indeed a predicate to, many other forms of executive agency action.<sup>97</sup> Most importantly, only the Department of Justice can fully insulate other executive officials from prosecution.<sup>98</sup> As a “senior Justice Department prosecutor” once explained to Jack Goldsmith, “[i]t is practically impossible to prosecute someone who relied in good faith on an OLC opinion, even if the opinion turns out to be wrong.”<sup>99</sup> It is therefore the entity within the executive branch most directly responsible, at the limit, for ensuring faithful execution of the laws (if, that is, one assumes that the Take Care Clause creates not just a power in the executive, but a duty of fidelity to law).<sup>100</sup> Thus, whatever the status of Congress’s power to create regulatory agencies and insulate their subordinate officers from presidential

96. *Morrison v. Olson*, 487 U.S. 654, 691 (1988).

97. The OLC does not opine on all agency action, but its advice is sought on important questions. See Pillard, *supra* note 78, at 710-17. Moreover, when combined with the Attorney General’s authority to control litigation on behalf of the federal government, see 28 U.S.C. § 518 (2006); *Compromise of Claims*, 38 Op. Att’y Gen. 98, 102 (1934), the OLC exercises influence even when it does not offer an opinion. Agency officials typically have to ask themselves what they think the OLC would opine (and/or whether the Department of Justice will support litigation ex post) for any truly controversial course of action.

98. Ex ante, anyway. The President has the power to pardon ex post. U.S. CONST. art. II, § 2; *Ex parte Garland*, 71 U.S. 333, 380 (1867). But his influence over the exercise of prosecutorial discretion is attenuated. Political appointment of high level Department of Justice lawyers offers no guarantee with respect to specific prosecutions, time can erode any appointment control as attorneys leave office, and rank partisanship in removal can draw prompt criticism. See U.S. DEP’T OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 (2008), available at <http://www.usdoj.gov/oig/special/s0809a/final.pdf>; U.S. DEP’T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008), available at <http://www.usdoj.gov/oig/special/s0807/final.pdf>; U.S. DEP’T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING IN THE DEPARTMENT OF JUSTICE HONORS PROGRAM AND SUMMER LAW INTERN PROGRAM (2008), available at <http://www.usdoj.gov/oig/special/s0806/final.pdf>. There is also a fairly deep tradition of autonomy in field offices. See Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 837-38; Alexa Lawson-Remer, *Rightful Prosecution or Wrongful Persecution? Abuse of Honest Services Fraud for Political Purpose*, 82 S. CAL. L. REV. 1289, 1312 (2009); Spaulding, *supra* note 12, at 1958-59. The President’s inherent power as Commander in Chief to personally order an inferior officer to act and, by virtue of that order, insulate the officer from punishment for compliance is controversial. See JACK GOLDSMITH, *THE TERROR PRESIDENCY* 148 (2007).

99. See GOLDSMITH, *supra* note 98, at 96.

100. See *supra* note 75 (discussing Scalia’s interpretation and Sunstein’s contrary view).

removal—the issue at stake in *Free Enterprise Fund*—its authority to ensure that faithful execution of the laws does not degenerate into law reform via extralegal executive action rests on deeper constitutional moorings.

Justice Holmes put the point succinctly in his *Myers* dissent when he warned that inferences drawn from Article II about executive power can become “spider’s webs inadequate to control the dominant facts” in any case.<sup>101</sup> However we read the Take Care Clause, it cannot mean that the President is free to execute his *will* rather than the laws. “The duty of the President to see that the laws be executed,” Holmes emphasized, “is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.”<sup>102</sup> More than with agencies, partisan appointment and removal in the Department of Justice invite the subordination of the laws to presidential will. And where secrecy precludes meaningful public, congressional, and judicial oversight of executive actions, there is no effective check on this abuse of power. John Stuart Mill once worried that “[t]hings left to take care of themselves inevitably decay.”<sup>103</sup> This explains the need for an executive branch to take care that the laws be faithfully executed. But it also explains the need to insulate those who define the boundaries of executive power from the corruption of judgment by rank partisanship.<sup>104</sup> Decaying boundaries of executive power invite executive supremacy.<sup>105</sup>

101. *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting).

102. *Id.*; see also Sunstein, *supra* note 75, at 212 (arguing that the clause bars the President from enforcing the law “as he would have wished it to be”).

103. JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 31 (Prometheus Books 1991) (1861).

104. *Olson* recognizes that structures designed to ensure the President’s fidelity to law may require interbranch coordination. *Morrison v. Olson*, 487 U.S. 654, 677 (1988) (noting the risk of conflicts of interest “that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers”); *id.* at 692-93 (acknowledging Congress’s judgment that limiting the removal power of the Attorney General over independent counsel “was essential . . . to establish the necessary independence of the office”); see also *Springer v. Gov’t of Phil. Is.*, 277 U.S. 189, 211 (1928) (Holmes, J., dissenting) (“It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever desirable to do so, which I am far from believing that it is, or that the Constitution requires.”). Nevertheless, Justice Kennedy’s absence from *Morrison v. Olson*, Congress’s decision not to renew the independent counsel statute, and significant changes in the Court’s membership have left the holding of *Olson* in some doubt. *Free Enterprise Fund* does not completely remove that doubt. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, No. 08-861, slip op. at 13-14 (U.S. June 28, 2010). Both Justice Kennedy and Justice Scalia, who wrote a vigorous dissent in *Olson*, see 487 U.S. at 697-734 (Scalia, J., dissenting), joined the majority in *Free Enterprise Fund*. If support for *Olson* and *Humphrey’s Executor* was a condition of securing Justice Kennedy’s vote in *Free Enterprise Fund*, these precedents are safe for the time being. But there is no knowing Justice Kennedy’s mind until a case squarely presents the question, and Chief Justice Roberts, Justice Alito, and Justice Thomas are very likely to support converting Scalia’s *Olson* dissent into law.

105. See BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC

*C. Centralization—Decentralization*

For much of the nineteenth century, the legal work of the federal government was highly decentralized. There was no Department of Justice before 1870. The Attorney General had a clerk and an assistant, but was in most respects a solo practitioner responsible for representing the government before the Supreme Court and advising the President. The Attorney General was also a part-time employee until the 1850s, free to maintain a private practice, and had almost no control over field U.S. Attorneys or the legal opinions given by Solicitors working in other executive branch departments.<sup>106</sup>

Some degree of independence was ensured by this decentralized structure—legal advice to the President and department heads could come from many different sources, and the Attorney General was not wholly dependent on the office for income. But these were precisely the features removed in the bill that established the Department of Justice in 1870.<sup>107</sup> The Attorney General was given centralized authority over the legal work of the federal government. Combined with the appointment and removal power, this cemented the President's authority not only to superintend but to control the legal work of the federal government.

Surprisingly, this shift occurred at the apogee of constitutional defiance by a President convinced that his powers as commander in chief and unitary head of the executive branch provided authority to defy Reconstruction Amendments and the enforcing legislation passed by Congress.<sup>108</sup> The full powers of centralization would not be implemented until Roosevelt took office and appointed Attorney General Homer Cummings,<sup>109</sup> but the basic framework was set in place in 1870 by a Congress perhaps too confident that the election of Ulysses Grant to replace Andrew Johnson, and the election of a supermajority of Republican legislators friendly to the new President's agenda, diminished any risks associated with centralized control.

Still, nothing prevents Congress from restoring decentralization where it might aid the exercise of independent judgment. In matters of national security, requiring concurrence (or at least consultation) among OLC staff and attorneys in the State Department and the Department of Defense might enhance the independence of opinions authorizing controversial, covert actions.<sup>110</sup> In other areas, concurrence with other agency counsel might be required in circum-

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(2010).

106. See BAKER, *supra* note 27, at 55-60; Spaulding, *supra* note 12, at 1937.

107. See Spaulding, *supra* note 12, at 1957-68.

108. See *id.*

109. See IRONS, *supra* note 54, at 40-41.

110. The constitutionality of Congress requiring interagency concurrence turns on the same arguments about separation of powers addressed above in relation to the Take Care Clause. Still, congressionally mandated and time-bound consultation is not new. See Endangered Species Act of 1973 § 7, 16 U.S.C. § 1536 (2006).

tances where political accountability to the public and Congress is likely to be weak. The drawback, of course, is that concurrence and even consultation, could reduce the speed with which the executive responds to exigent circumstances. But not all counterterrorism initiatives present exigent circumstances.<sup>111</sup>

On the other hand, there may be instances in which greater centralization would enhance independence. Defining by statute the jurisdiction of the White House Counsel's Office would prevent the President from circumventing advice given by the Department of Justice.<sup>112</sup>

#### D. *Political Accountability—Professional Accountability*

In the private sector, lawyers preserve their professional independence mainly by maintaining a broad client base—ideally no one client becomes so important that the lawyer cannot withdraw if the client insists on pursuing an illegal course of action. Lawyer and firm must be willing to lose a client, but in a properly structured practice, the cost should be lower than the benefits attendant on maintaining professional integrity.<sup>113</sup> Failing that, there is the threat of professional sanction, contempt, and malpractice liability for authorizing lawlessness.

In the public sector, the client base is decidedly narrower,<sup>114</sup> and immunity doctrines screen lawyers (and the client) from liability that would otherwise

111. See Luban, *supra* note 13, at 47 (Unlike the imagined ticking bomb scenarios in which counterterrorism policy is sometimes discussed, "in the real world of interrogations, decisions are not made one-off. The real world is a world of policies, guidelines, and directives. It is a world of *practices*, not of ad hoc emergency measures."). On the timetables involved in decisions on targeted killing, see *supra* note 14.

112. The White House Counsel's Office has no statutory footing, and it is not clear that opinions issued by the Counsel's Office would, or should, bind Department of Justice decisions about prosecution, so its ability to truly displace the OLC is doubtful. See Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, 56 LAW & CONTEMP. PROBS. 63, 63-64 (1993). Although the Office has increased in size and authority, see Borrelli et al., *The White House Counsel's Office*, 31 PRESIDENTIAL STUD. Q. 561, 563 (2001), it is an outgrowth of President Roosevelt's effort to create an internal advisory function for his speechwriter, friend, and then-sitting judge in New York, Samuel Rosenman. Michael Ruby, *The Last White House Counsel?*, U.S. NEWS & WORLD REP., Mar. 21, 1994, at 98; Darby A. Morrisroe, *The White House Counsel and Presidential Politics: 1943-1960*, at 2-3 (Sept. 2, 2004) (unpublished manuscript), available at [http://www.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/0/6/0/3/2/pages60321/p60321-1.php](http://www.allacademic.com/meta/p_mla_apa_research_citation/0/6/0/3/2/pages60321/p60321-1.php).

113. This of course assumes an industry in which clients are largely law-abiding.

114. Roger C. Crampton lists five possible clients: "(1) the public (2) the government as a whole (3) the branch of government in which the lawyer is employed (4) the particular agency or department in which the lawyer works and (5) the responsible officers who make decisions for the agency." *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 296 (1991). See generally Robert P. Lawry, *Who Is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 FED. B.J. 61, 63-66 (1978).

force them to internalize the costs of misguided advice.<sup>115</sup> There is an ambitiously named division of the Department of Justice called the Office of Professional Responsibility (OPR), but it was created and is staffed and organized to deal with prosecutorial misconduct. Moreover, it has no authority to act against the Attorney General, no power to compel testimony from anyone other than Department of Justice employees, no power to subpoena documents outside the possession of the Department of Justice, and no power to enforce its findings of misconduct—it merely issues recommendations to the supervisors of any lawyers found to have committed misconduct.<sup>116</sup> Delay in the Office’s investigation of Bush Administration lawyers who authorized torture (the OPR report was issued seven years after the first OLC memo regarding torture, well into the first term of an entirely new administration, and five years after the OPR launched its investigation) is reason enough to doubt its capacity to deter serious, nonprosecutorial misconduct.<sup>117</sup>

The embarrassingly facile memorandum of the Deputy Attorney General summarily reversing the OPR’s recommendation to refer John Yoo and Jay Bybee to the bar for professional discipline confirms the doubt.<sup>118</sup> The Deputy’s Memo contradicts the views of a wide array of experts in the field of professional responsibility who have commented on the torture memos,<sup>119</sup> and it

115. See *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009); *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *Burns v. Reed*, 500 U.S. 478, 481 (1991). But see John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90-91 (1999) (exploring broader problems in remedies for violation of constitutional rights); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347-48 (2000) (questioning the link between officer liability and cost internalization).

116. See 28 C.F.R. § 0.39a(a) (2010); OFFICE OF PROF’L RESPONSIBILITY, 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 12-13 (2009) [hereinafter OPR REPORT].

117. See OPR REPORT, *supra* note 116, at 251, 255-57 (concluding that John Yoo intentionally violated his duty to exercise independent legal judgment and “failed to provide a thorough, objective, and candid interpretation of the law,” and that Bybee recklessly disregarded the same duty). *The New York Times* has documented the timeline, memo by memo. See *A Guide to the Memos on Torture*, N.Y. TIMES, <http://www.nytimes.com/ref/international/24MEMO-GUIDE.html> (last visited Oct. 10, 2010); see also OPR REPORT, *supra* note 116, attachment A; *id.* at 5 (discussing initiation of OPR investigation).

118. Deputy’s Memo, *supra* note 2, at 68 (concluding that OPR applied the Department’s internal “high expectation” rather than the “somewhat lower standards imposed by applicable Rules of Professional Conduct,” and that Yoo and Bybee “did not violate a clear obligation or standard” but did fail “to provide a more balanced analysis of the issues” by writing memoranda “devoid of nuance” which “overstate[d] the certainty of [their] conclusions”); *id.* at 52 (“Among the difficulties in assessing these memos now over seven years after their issuance is that the context is lost.”).

119. See Spaulding, *supra* note 12, at 1969-78 nn.204-34 (gathering sources); see also OPR REPORT, *supra* note 116, at 2-4 (summarizing editorial commentary on the Bybee memo by scholars). Tellingly, the Deputy’s Memo makes no reference to independent expert opinion and relies heavily on the input of former Bush Administration lawyers. See Deputy’s

endorses the dangerous proposition that because Department of Justice lawyers are expected to meet a *higher* standard of professionalism than the bar requires of private counsel, the Department should not find misconduct or refer attorneys for bar sanctions when that higher standard is not met.<sup>120</sup> In all other areas of professional responsibility, lawyers are judged by a standard of competence defined by what reasonably competent lawyers *in the field*, and in the jurisdiction, would do under the circumstances.<sup>121</sup> Professional misconduct is precisely the failure to meet such a standard.<sup>122</sup>

The most troubling aspect of the Deputy's Memo is its conclusion that OLC lawyers are entitled to a defense parallel to qualified immunity—the doc-

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Memo, *supra* note 2, at 16-21 (quoting and relying on testimony of Attorney General Michael Mukasey, Deputy Attorney General Mark Filip, Assistant Attorney General for OLC Steven Bradbury, Assistant Attorney General for OLC Jack Goldsmith, and Deputy Assistant Attorney General for OLC Pat Philbin); *cf. id.* at 27 (conceding that he exclusively considered the testimony of “officials who served in the prior administration” because that was the “testimony available” and purporting to have “considered what biases they may have brought to the interview”).

120. See Deputy's Memo, *supra* note 2, at 12-13, 25-26 (evaluating OLC lawyers according to D.C. Rules of Professional Conduct (D.C. RPC)).

121. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(1) (2000) (providing that for purposes of liability for malpractice and/or breach of fiduciary duty, “a lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers *in similar circumstances*” (emphasis added)); *see also id.* at cmt. (b) (“The professional community whose practices and standards are relevant in applying this duty of competence is ordinarily that of lawyers undertaking similar matters in the relevant jurisdiction . . . .”); *cf. id.* (noting that there are areas in which national standards exist because the practice is now national). Comment 1 of ABA Model Rules of Professional Conduct 1.1 explains that:

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, *the lawyer's training and experience in the field in question*, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 1 (2002) (emphasis added). The comment adds that “[i]n an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required,” but such “assistance should be limited to that reasonably necessary in the circumstances.” *Id.* And significantly, Yoo has repeatedly emphasized that he felt no undue time pressure, or any pressure whatsoever, from the Administration. The Deputy's Memo nevertheless chastises the OPR for failing to adequately weigh the pressure created by the national security crisis of September 11, 2001, and the fact that the Bush Administration was insistent about receiving wide latitude from the OLC. See Deputy's Memo, *supra* note 2, at 16-21.

122. The Deputy's Memo emphasizes that state bar officials are free to proceed against Yoo and Bybee, but they will be sure to waive the Deputy's Memo in their defense in any state bar proceeding. Indeed, the Department's refusal to declare their actions professional misconduct will be cited to establish that they met the relevant standards of lawyers *in their specific field*. It is equally troubling for an institution charged with prosecuting obstruction of justice by others that the Department of Justice apparently destroyed emails sent by and to John Yoo and other lawyers working on the crucial 2002 torture memos. Eric Lichtblau, *More E-mail Files on Torture Are Missing*, N.Y. TIMES, Feb. 27, 2010, at A11.

trine that insulates ordinary state actors from civil liability for violation of unclear law. Guidelines limiting the OPR's authority provide that it may find misconduct only "when [an attorney] intentionally violates or acts in reckless disregard of an obligation or standard imposed by law, applicable rule of professional conduct, or Department regulation or policy."<sup>123</sup> Read broadly (so that ambiguity at any level of legal analysis or professional responsibility triggers the defense) the guidelines hobble the OPR, preventing it from intervening in all but the most blatant instances of lawlessness. The OPR's subject matter jurisdiction is minimized and the room for excusable attorney "error"—room to strain and even break the law to meet presidential policy objectives—is maximized.<sup>124</sup>

A broad reading of the guidelines might be defensible as applied to the actions of rank and file prosecutors who work in settings where others (adversaries and Article III judges) consistently review their legal positions and monitor professionalism. But most of the OLC's work occurs in an accountability vacuum, well outside the adversary system and other supervised fora.<sup>125</sup> Robust OPR review is thus one of the few structural means of ensuring professional conduct. If the guidelines are read to provide broad qualified immunity to OLC lawyers, however, that structural constraint is defeated. OLC lawyers offering opinions in response to a national security crisis will be immune from sanction whenever novelty produces any ambiguity in the relevant law.

The Deputy's Memo nevertheless insists that the guidelines be so read.<sup>126</sup> The Deputy repeatedly criticizes the OPR for failing to attend to "context,"<sup>127</sup>

123. U.S. DEP'T OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY ANALYTICAL FRAMEWORK 1 (2005), <http://www.justice.gov/opr/framework.pdf>.

124. The authority of supervisors to make decisions on promotion, job assignments, and retention, based on performance evaluation, is obviously irrelevant for lawyers who have already left the Department.

125. In its discussion of the rules of professional responsibility that apply to all lawyers the Deputy's Memo repeats the error of conflating litigation practice and the counseling role. The memo reads a provision addressed specifically to lawyers in their counseling role and requiring genuinely independent judgment (D.C. RPC 2.1) as if it must be narrowly construed for consistency with a more general rule (D.C. RPC 1.2(e)) addressed to litigators whose clients wish "to make a good faith effort to determine the validity, scope, meaning, or application of law." Deputy's Memo, *supra* note 2, at 22. Determining the validity, scope, meaning, or application of law contemplates judicial review, so the natural reading of the rules is that lawyers have more freedom to press the boundaries of legal interpretation in litigation, *less* where litigation or external review is unlikely. The Deputy's Memo turns this reading on its head, reasoning that D.C. RPC 1.2(e) "can be reconciled with Rule 2.1 only if Rule 2.1's obligation of candor and exercise of independent professional judgment prohibit a lawyer from providing advice to the client that the lawyer knows to be wrong or that is issued in bad faith." *Id.*, at 22-23; *see also id.* at 26 ("It seems likely that an attorney's duty of candor toward his client as an advisor would be no higher than his duty of candor to the court, and therefore the requirement of candor in Rule 2.1 at most prohibits an attorney from knowingly or recklessly making a false statement of material fact or law to the client.").

126. *Id.* at 25-27; *see also id.* at 31 (relying on *Bell v. Cone*, 535 U.S. 685 (2002)).

127. *Id.* at 6.

emphasizing that each legal conclusion of the torture memos must be read in light of the “unprecedented” national security emergency presented by the September 11, 2001, attacks, the pressure all felt to prevent new attacks, the time constraints faced by the OLC lawyers asked to comment on the interrogation of CIA detainees, and the small, legally sophisticated circle of government officials to whom the memos were addressed.<sup>128</sup> Against this backdrop the Deputy’s Memo forgives nearly every legal error made in the torture memos (as “debatable,” “confusing,” “not help[ful],” “strained,” “flawed,” “one-sided,” “conclusory,” “poorly drafted,” etc., but *not* incompetent) and finds none sufficient to warrant referral for bar sanctions.<sup>129</sup>

The result is not inevitable. To begin with, the considerations animating the Supreme Court’s extension of qualified immunity to ordinary state actors from civil liability apply awkwardly at best to an agency’s internally generated procedures and substantive norms. The cost of internal investigation pales in comparison to civil trial, internally generated procedures can be tailored to minimize the disruption of work, and the risk of interference with executive discretion by the judiciary is altogether absent. Most importantly, unlike ordinary officers, government lawyers are hired for their expertise in the law, and they are professionally obliged to understand and adhere to the law governing lawyers.<sup>130</sup> They should not be heard to complain, or be protected from professional sanction, for making errors a reasonably competent lawyer would avoid.

Contextual elements stressed in the Deputy’s Memo (time, threat level, gravity of threat, legal savvy of audience) are plainly relevant both to the policy makers and lawyers involved in counseling on counterterrorism. But, tellingly, the Deputy’s Memo flatly refuses to consider the most significant element of the *legal* context in which the torture memos were written—the element most relevant to assessing the independence of professional judgment exercised by the OLC lawyers, *qua* lawyers. The OLC was asked to opine on the boundaries

128. *Id.* at 2, 16, 17, 25, 36, 45, 65.

129. *Id.* at 33 (“confusing”); *id.* (“These qualifiers do not help much and could have been clearer . . .”); *id.* at 38 (memos’ characterization of torture case law was “debatable”); *id.* at 43 (analysis of *PCATI v. Israel* is “flawed” and “strained,” representing a “serious deficiency”); *id.* at 45 (commander in chief analysis “decidedly one-sided and conclusory”); *id.* at 60 (analysis suggesting available defense to charges for torture in interrogation “seems wrong”); *id.* at 63 (analysis of waterboarding “poorly drafted”); *see also id.* at 64-67 (discussing the conclusion that Yoo and Bybee exercised poor judgment but did not commit misconduct).

130. Lawyers in private practice are regularly sanctioned and exposed to malpractice liability for failing to remember and meet professional obligations set out in the rules of professional conduct. Bar misconduct standards provide no “ambiguity” exception—if a reasonable lawyer would have acted differently in the face of an ambiguous provision of law or professional responsibility, the lawyer will be sanctioned. *See* MODEL RULES OF PROFESSIONAL CONDUCT R. 8.4 (2002). And lawyers in private and public practice are required by the bar to certify their efforts each year to sustain their general legal knowledge; in many jurisdictions, they must separately certify efforts to sustain their knowledge of the rules of professional conduct.

of a fundamental right in both domestic and international law in order to set the legal limits of pain inflicted by the state to induce detainees to speak. The Administration's interrogation strategy also implicated structural constitutional constraints on executive power. Thus, while the national security threat may have been grave, the legal stakes were at least as grave.

As the OPR's report quite reasonably determined: "Department attorneys considering the possible abrogation or derogation of a *jus cogens* norm such as the prohibition against torture must be held to the highest standards of professional conduct."<sup>131</sup> The OPR's report thus inquired whether the torture memos reflected "the minimum standards of independent professional judgment, candid advice, thoroughness, and care commensurate with the complexity and sensitivity of the issues confronting them"<sup>132</sup> and found them wanting. A *jus cogens* norm, all the more so one running to the basic right to life and bodily integrity, unambiguously requires deference in legal interpretation. The torture memos instead treated the prohibition with all the deference of a trivial contract provision between private parties. Moreover, the torture memos manufactured ambiguity where none colorably existed beforehand.<sup>133</sup>

The Deputy's Memo takes that manufactured ambiguity in the law of torture at face value. It then relies exclusively on the self-serving testimony of OLC lawyers who served during the Bush Administration to find that the OLC had no clear standards of practice regarding the provision of independent advice before September 11, 2001, to which Yoo and Bybee could be held by the OPR.<sup>134</sup> The OPR's requirement of thoroughness, candor, and objectivity is, on this view, "not unambiguously established by law, policy, rule, or the record and fails to distinguish between the Department's expectations of its attorneys and the less stringent minimal requirements established by Rules of Professional Conduct."<sup>135</sup> The ambiguity of independence here becomes explicit license for the exploitation of law by the executive. But if the OLC is not in fact in the business of providing thorough, candid, and objective advice, if that basic professional commitment is not unambiguous for this elite group of lawyers, its opinions should have no legal effect. Federal officers should enjoy no insulation from prosecution for crimes resulting from advice given by lawyers who make no genuine claim to disinterest. The Deputy's Memo blinks at this fundamental problem, revealing instead greater concern about allowing the OPR to become a *censor perpetuus* on the OLC's work.

Congress might expand the budget, staff, and jurisdiction of the OPR, or

131. OPR REPORT, *supra* note 116, at 25. This determination was quoted and criticized in the Deputy's Memo. *See* Deputy's Memo, *supra* note 2, at 12.

132. Deputy's Memo, *supra* note 2, at 24.

133. For analysis of the "mad logic" and manufactured ambiguity of otherwise clear law, see LUBAN, *supra* note 1, at 176. *See also* Luban, *supra* note 13, at 55-68.

134. *See* Deputy's Memo, *supra* note 2, at 17-26.

135. *Id.* at 26. The Memo finds no misconduct under the "minimal requirements established by Rules of Professional Conduct" either. *Id.*

harden its standard of review, but congressional prerogatives here run up against the same ambiguities in the doctrine of removal power that could frustrate attempts to provide job security to lawyers who refuse to sanction extralegal policies.<sup>136</sup> The hurdles are not insuperable, as I have argued above. In the end, however, there is some contradiction in relying upon *ex post* professional accountability if the worry is that extralegal advice will reshape the legal order in which an administration's actions are understood and assessed. The exercise could quickly become quixotic, particularly when the use of the authority of initiative succeeds. Hence the importance of structural reforms that would operate *ex ante*.

### CONCLUSION

The current structure of the counseling function of the Department of Justice spurns transparency, decentralization, nonpartisan appointment and removal, and professional accountability. Indeed, the structure tilts so heavily in favor of secrecy, centralized control, partisan appointment and removal, and political accountability that there is almost no support for even the most modest and uncontroversial form of professional independence—not moral rectitude, not civic republican defense of the rule of law, but simply telling the client that her intended course of action is illegal or of doubtful legality. If this kind of advice is nevertheless given on occasion, it is because lawyers working in the Department of Justice happen to have the personal integrity candor requires, the financial means, professional prospects, or political clout to threaten resignation, or the courage to whistleblow. These are slender reeds, particularly given that the President is free to appoint lawyers whose courage, personal integrity, and ideology will incline them to find loopholes in legal constraints on the administration's policy agenda.

Overall, the effect of this structure is to promote precisely the kind of executive branch experimentation and flexibility in response to perceived needs that Jerome Frank celebrated. If that is quite often salutary, and if the harms it causes are quite often redressed through political accountability, it also invites abuse, and there are plainly harms that political accountability cannot redress. More than that, there are irremediable harms that ought never to occur in the first place. Torture belongs in that category.

To be sure, complete independence would invite other abuses, most prominently, rendering initiative in response to emergency impossible and subordinating policymakers to lawyers. And there is no agreement on what a robust concept of professional independence should require of lawyers anyway. Finally, one could take the view that, on balance, the costs of executive branch law-

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136. Cf. Pillard, *supra* note 78, at 756-58 (discussing the role of the Offices of Inspectors General in investigating claims of civil rights and civil liberties violations arising from PATRIOT Act enforcement).

lessness are worth the gains—our history at least suggests that we place enough value on the perceived gains to counsel forbearance in reform.<sup>137</sup> But none of this counsels forbearance in reforms that would provide structural support for the lawyer's prohibition when political accountability cannot effectively check an administration's extralegal action. The means are available: statutorily prescribed presumptions in favor of transparency, dislocating removal, if not appointment, from partisanship for those providing secret advice, requiring strategically decentralized sources of advice for controversial, covert actions, and prompt professional investigation and sanction (or reduced barriers to civil liability). What has been wanting is congressional will and a President willing to use the authority of initiative in the name of self-restraint.

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137. It is likely that reform has not occurred at least in part because it would require either a veto-proof Congress or a sympathetic President—one willing to restrain his own lawyers and perhaps thereby his own agenda simply because the previous administration had erred. The temptation to blame prior officeholders not the structure of their office must be strong indeed. The very tardiness of political accountability may thus inhibit reforms any disinterested observer would support. It is perhaps no accident that the most significant reforms in the Department of Justice have come during our most significant constitutional upheavals—the Department was founded in Reconstruction and it took the New Deal to realize fully centralized control.